Neutral Citation Number: [2016] EWCA Civ 764

Case No: B2/2014/2411

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE BAUCHER
2IR12518

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2016

Before :

LADY JUSTICE BLACK
LORD JUSTICE FLOYD
and
MR JUSTICE MOYLAN

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Between :

DA COSTA & ANR	**Appellant**
- and -	
SARGACO & ANR	**Respondent**

- -
- -

Mr Andrew Hogan (instructed by **Armstrongs Solicitors Ltd**) for the **Appellants**
Mr James Laughland (instructed by **Keoghs LLP**) for the **Respondents**

Hearing date: 9th March 2016

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Approved Judgment

Lady Justice Black:

1. This is an appeal against the order of HHJ Baucher sitting in the Central London County Court on 25 June 2014. The appellants were the claimants in the proceedings before Judge Baucher and I will continue to refer to them as such in this judgment. Their case was that they each owned a motorcycle and that, on 20 July 2011, when the motorcycles were parked together outside the house where the claimants lived, a car driven negligently by the first defendant ran into them and damaged them. Each claimant claimed damages, including the pre-accident value of the motorcycle and the cost of hiring alternative transport.

2. The second defendant in the proceedings had provided insurance for the car in the name of the first defendant and was obliged to discharge any judgment obtained by the claimants against the first defendant. The first defendant not having been traced, it was the second defendant (hereafter "the insurance company") which actively contested the claimants' claims. It contended that the claims were fraudulent.

3. The judge found the accounts of the claimants "so inconsistent as to be implausible" and found that they had not proved their cases. She also found their claims to be "manufactured or fraudulent". She therefore dismissed them and ordered the claimants to pay the insurance company's costs on an indemnity basis.

4. The claimants appealed on a number of grounds. One of these related to a decision taken by the judge on 23 June 2014 at the outset of the trial. On the application of the insurance company, made on the basis that fraud was alleged and the credibility of both claimants was in issue, she ordered that each claimant be excluded from court whilst the other was giving evidence. In so doing, she considered whether this would prevent them from having a fair trial in accordance with Article 6 ECHR but decided that it would not and that her order represented a fair balance of all the parties' interests. She concluded her short judgment on the point with the following observation:

> "Accordingly, they will be so excluded and, in due course, if anything arises from it, any prejudice, if there is such prejudice, which I do not find there is, can be remedied by the fact that they can apply for a transcript."

5. The claimants argue that it was not open to the judge to make this decision and that, as each claimant was not only a witness in the proceedings but also a party to them, he had a right, at common law and pursuant to Article 6, to be present for the whole of the trial of the claim.

6. The judge's finding of fraud is challenged on the basis that she relied on various features of the evidence which she was not entitled to interpret as she did or which did not bear the weight she put on them.

7. The judge is also criticised for declining to hear argument on the burden and standard of proof and for failing to have regard to *Hussain v Hussain and Aviva* [2012] EWCA Civ 1367 (hereafter "the *Hussain* case") which the claimants argue is a key authority on the drawing of inferences of fraud. She directed herself, they argue, in accordance with authorities on the burden and standard of proof which had not been cited to her

and upon which she did not give counsel the chance to address her. Furthermore, it is said, she repeatedly interrupted the claimants' closing submissions and gave the impression of having predetermined the result of the trial.

The judgment on the claim

8. The judge commenced her judgment with a statement of the law as she understood it to be, noting that it was for the claimants to prove their case that there had been an accident caused by the negligence of the first defendant and that they had suffered damage, and that a substantial evidential burden arose on the insurance company as a result of its allegation of fraud. She took it that fraud had to be established to the civil standard of proof. She cited a passage from *Francis and Others v Wales and Churchill Insurance* [2007] EWCA Civ 135 which stressed the need, when considering a fraud allegation, to stand back and view the evidence as a whole.

9. The judge set out the accounts that the claimants, Mr Andre Da Costa and Mr Da Silva, both Brazilians, had given in writing and in oral evidence. The judgment recounts features of the cross-examination of the claimants, during the course of which various inconsistencies in their cases were explored with them. However, for present purposes I will confine myself to the accounts which the judge distilled from elsewhere.

10. Mr Da Costa's account was that he had bought his motorcycle from a cousin, Mr Alex Da Costa, three weeks before the accident and was still paying for it by instalments. He had not yet transferred the registration certificate into his own name. He parked his motorcycle outside 43 Conway Road and was subsequently told that a vehicle had knocked over both his motorcycle and the motorcycle belonging to Mr Da Silva. He said that he went up to the driver of the vehicle, whom he did not already know. The driver gave no explanation but did identify himself as Mr Sargaco. Mr Da Costa said that he had been involved in three other accidents, none of them involving the motorcycle that had been in the accident with Mr Sargaco. He had sold that motorcycle on to a man named Jean shortly after it was repaired following the accident, but he had not retained Jean's contact details.

11. Mr Da Silva said that he purchased his motorcycle from a man named Lemar, though the registration certificate showed the owner as Mr Gile Silva. Mr Da Silva had not yet contacted the DVLA to change the name on it. He parked his motorcycle outside 43 Conway Road secured to Mr Da Costa's. He said that he was in his room later on when Mr Da Costa came to tell him about the accident. He went out and saw the motorcycles lying on the road and Mr Da Costa speaking to the driver.

12. The claimants relied on a witness, Mr Alan Melim, whose evidence was admitted in writing because he was overseas. The judge set out his account of the incident, which was that he had looked out of 43 Conway Road to see the motorcycles on the ground with the car stopped over them, and went to Mr Da Costa's room to tell him, whereupon Mr Da Costa went to Mr Da Silva's room to tell him and all three of them went outside, where the driver confirmed that he had hit the motorcycles and gave his name and address.

13. The defence case was entirely hearsay evidence. The judge referred to the statement obtained by an investigator from Ms Pereira who said, amongst other things, that to

the best of her knowledge Mr Sargaco, who she described as an "ex-friend" of hers, never owned any car.

14. The judge found both claimants to be unreliable witnesses. At paragraph 26 of the judgment, she turned to consider their case about the accident, commencing:

> "Well firstly, did the accident happen? I found their respective accounts so inconsistent as to be implausible."

15. In the following paragraphs, she identified deficiencies in those accounts which were divergent and/or incredible as to the timing of the accident, whether they shared a room at 43 Conway Road or had separate rooms, where they were when they were told of the accident by Mr Melim, where Mr Melim's room was in 43 Conway Road, who came outside at what point in the aftermath, and whether the driver offered any explanation. She also identified the impossibility of the motorcycles being chained together as the claimants said they were, given the timing of their respective arrivals home. This all led the judge to the following conclusion which she set out at the end of paragraph 28 of the judgment:

> "I find that the accounts are so inconsistent the claimants have not proved their case".

16. At paragraph 29 of the judgment, the judge went on to consider the fraud allegation, which she introduced with the words "I also find the claim was manufactured or fraudulent upon the following basis". I will set out the six matters to which the judge then referred, using her own words:

i) "I do not accept that the claimants were sharing a room at 43 Conway Road. The first time they said so was in live evidence and it is contrary to Mr Melim's statement…..The evidence of the claimants is therefore inconsistent in that regard from one of their own witnesses."

ii) "I simply do not accept Mr Da Costa's evidence that he was living at 43 Conway Road." The judge supported this finding with reference to other documents in which Mr Da Costa's address was given as a property in Lansdowne Road and then, from 27 July 2011, Norman House.

iii) "[W]hilst multiple hearsay Ms Pereira stated that Mr Sargaco, the first defendant was her friend and had never owned a car or a bike."

iv) "Mr Da Costa said in his statement that he had seen the first defendant in the area but he had not spoken to him yet in evidence he said he had not. In short, in my view he was seeking to distance himself from the first defendant."

v) "[Mr Da Costa's] moped … has been involved in another road traffic accident on the 22nd November 2011 involving another member of the Brazilian community. It may be a coincidence but it is a factor I am entitled to weigh up standing back as I do and looking at the evidence overall as I am required to do."

vi) "I have also taken note of the fact that Mr Da Costa notwithstanding that he has only been in the country since at the earliest the middle of 2010 and his

> witness statement is dated November 2013, has had another three road traffic accidents in addition to this claim. Whilst he may be a very unlucky individual that is quite a remarkable number of accidents".

17. The judge concluded her judgment by stating that even if she was wrong in her other findings, neither claimant had proved their loss. The basis for this appears to have been that they had not established that they owned the motorcycles. In this context, although she accepted that there was insurance in place for the vehicles, she commented upon the claimants' failure to produce any documentation with regard to the purchase of the motorcycles or to call oral evidence from Mr Lemar or Mr Alex Da Costa who were said to be the former owners.

The grounds of appeal

Curtailing and interrupting closing submissions/pre-determination of the result

18. Having read the transcript of the closing submissions made by the claimants' counsel, I am not persuaded that there is anything in the complaints made about the judge's handling of this stage of the proceedings. She did indeed keep counsel moving briskly through his submissions but not, it seems to me, to an extent which was unfair. She did not think it necessary to hear submissions about the burden and standard of proof and on the *Hussain* case because she considered herself familiar with this material. If her judgment bears that out, then there is no valid complaint to make; if it does not, then the focus of the complaint should be the judgment itself, in my view, not the judge's handling of counsel's submissions. As for the suggestion that the judge had pre-determined the case by the time of the final submissions, any views that she had formed did not prevent her from listening to counsel's points and, in the light of what he had said about the potentially serious impact that findings of fraud would have for the claimants, adjourning from 3.25 p.m. until 2 p.m. the following day in order to give attention to her judgment.

Reference to extra authorities in the judgment

19. I do not think that the judge's citation of two authorities, *Francis and Others v Wales and Churchill Insurance* and *Re B (Children)* [2008] UKHL 35, in her judgment without first inviting submissions from counsel about them, constituted a material error in this case. The claimants do not point to any misstatement by the judge of the law that she extracted from these two cases.

The Hussain case

20. The *Hussain* case concerned a claim for damages arising out of a road traffic accident. Aviva, the insurers of the defendant motorist, alleged that the claim was fraudulent, averring that the purported accident was staged with a view to setting up a dishonest insurance claim. At the end of the trial, the judge found that there was an attempted fraud to which the claimant was party. The claimant appealed.

21. The judgment of Davis LJ, with whom the other members of the court agreed, is of interest because it exemplifies how a fraud allegation of this type should be approached. It is also worth noting that it commences with a reminder of the advantage that a trial judge has in making findings of fact, compared with the Court of

Appeal, and of the implications that this has for an appeal against findings of fact. I need not reiterate here what has been said on this subject so many times already, but it is important to keep it in mind.

22. I am not, however, convinced that the *Hussain* case establishes, as the claimants submit in their skeleton argument in support of the appeal, "the parameters of appropriate inferences that can be drawn in a case where fraud is alleged, but there is no direct evidence connecting the parties alleged to be in a fraudulent conspiracy". What inferences are appropriate depends entirely on the particular facts of the particular case. I turn therefore to the arguments about that aspect of the appeal.

The judge's approach to the allegation of fraud on the particular facts of this case

23. The claimants submit that the judge drew impermissible inferences from the primary facts in the case, ignored key documents, and wrongly found that the claimants' general unreliability as witnesses permitted her to characterise their claims as fraudulent.

24. The fraud case was pleaded fully in the insurance company's defence and counter-schedule, as amended. It was there alleged that the claimants and the first defendant had all used the 43 Conway Road address as an address for processing compensation claims and that they knew each other, directly or indirectly, and had conspired to use Mr Sargaco's insurance policy to process dishonest claims. It was asserted that "a single controlling mind is orchestrating these claims to facilitate insurance fraud". Supplementary matters pleaded included:

    i) the naming of Ms Pereira as a named driver on Mr Sargaco's insurance policy and her denial of any knowledge of the vehicle in question or the insurance policy;

    ii) the use of a number of different addresses by the claimants;

    iii) the existence of DVLA records which did not show the claimants as the registered keepers of the motorcycles;

    iv) a denial that the alleged accident would have rendered the motorcycles uneconomical to repair and that replacement vehicles were hired;

    v) the transfer of the motorcycles to new owners after the alleged accident, suggesting that they were not damaged beyond economic repair;

    vi) the involvement of the first claimant's motorcycle in a further accident in November 2011 when, after ownership of it had been transferred to someone else, it was parked in a supermarket car park and knocked over and written off by a car.

25. The claimants' pleaded response to this was largely one of denial and, in certain instances, a challenge to the relevance of the matters raised by the insurance company. In the circumstances, it was incumbent on the judge to make clear findings on such matters as she considered were relevant to the fraud issue and to explain how they informed her decision as to whether fraud was established. In fact, the judge's findings were by no means comprehensive and, in so far as she did make findings,

they were not set out in any detail or reasoned through. It would be inappropriate to ask too much of a judgment given in a busy county court and they might yet be sufficient. Accordingly, it is necessary to look in more depth at what the judge said, in the light of the claimants' challenge to her approach.

26. The starting point for a consideration of this line of argument is the judge's list of the factors that were influential in her thinking, which I have set out above at paragraph 16. The two initial factors relate to whether the claimants were sharing a room at 43 Conway Road and whether Mr Da Costa was living there at all. Mr Hogan, who appeared for the claimants both at first instance and on appeal, complains that in relying on the documentation which gave alternative addresses for the claimants, the judge did not refer to the explanatory evidence given by both of them that although they lived at 43 Conway Road, because the property was rented accommodation in multiple occupation, they used the addresses of friends and family for their mail for reasons of security. There is something in this complaint, in my view, although I think it may be a matter of form rather than of substance. If she was not impressed by the claimants' accounts of their mail arrangements, the judge would have been entitled to place some reliance on the varied addresses and her only failing may have been in not explicitly referring to her consideration of the claimants' explanations about them.

27. Mr Hogan also criticises the judge's reliance on Ms Pereira's evidence. He submits that as there was, in fact, nothing to link the claimants with Mr Sargaco and to suggest that they were in a fraudulent conspiracy, Mr Sargaco's position was irrelevant. Moreover, he argues, the weight placed by the judge on Ms Pereira's statement was unjustified.

28. In my view, this criticism begins to expose one of the real difficulties in the judge's approach to the fraud allegation. It will be recalled that the insurance company's pleaded case was that a "single controlling mind" was orchestrating the claims and that the claimants knew Mr Sargaco and had conspired with him. The judge never made any findings about these matters which were important elements in the fraud allegation. The nearest that she got was her finding that Mr Da Costa was seeking to distance himself from Mr Sargaco, which I set out at paragraph 16(iv) above. I think it requires too great a leap to get from this limited finding to a finding that Mr Da Costa and Mr Sargaco knew each other and were engaged jointly in fraud; additional findings and/or further reasoning was required to substantiate such a conclusion, if that is what the judge had indeed concluded.

29. Furthermore, I am persuaded that there is merit in Mr Hogan's criticisms of the judge's treatment of Ms Pereira's evidence. Although not explicitly a finding that Mr Sargaco never owned a car, I think that what the judge said about Ms Pereira's evidence (set out at paragraph 16(iii) above) might nonetheless amount to a finding to that effect, based upon it. Even if the judge did not intend to go that far, there is no doubt that Ms Pereira's assertion was influential in her wider evaluation of the fraud case. I am doubtful as to what reliance could properly be placed on what Ms Pereira said given all the circumstances of her evidence but, at the very least, it was incumbent on the judge to deal with the difficulties attendant on this material in order to explain why, nonetheless, she did feel able to rely upon it.

30. In order to explain why I say this, Ms Pereira's position needs a little more explanation. She was linked to events in two ways. First, the insurance company

admitted that Mr Sargaco had insured the vehicle which was involved in the alleged accident and she was a named driver on that policy. Secondly, a DVLA history of the vehicle showed it registered in her name on 26 June 2011 and disposed of on 18 July 2011, two days before the alleged accident. Her evidence was hearsay, in the form of a statement taken by the insurance company's investigator on 7 January 2013. She made her statement under the impression that she was thought to have been driving the vehicle at the time of the accident (see answer 33 on page 115 of the bundle). She said she had no knowledge of the vehicle and she did not know about being a named driver on the insurance policy. She said that she met her "ex-friend" Mr Sargaco "about 4 years ago" and last spoke to him in August 2011 and that in the time she knew him, to the best of her knowledge he never owned any car or bike.

31. There were a number of puzzles about Ms Pereira's evidence. The documents suggested that there *had* been a car, registered in *her name* until just before the accident, and that Mr Sargaco had indeed insured that car, with her as a named driver. How did this square with Ms Pereira's sequence of denials? And did it necessarily follow from what she said that Mr Sargaco did not own a car? It seems that their friendship had faltered by 2011 and, in due course, she described him as her "ex-friend". She last saw him in May 2011, and she said she last spoke to him in August 2011 when their exchange might, it seems, have been less than cordial ("I last spoke to him in August 2011 when I was pregnant and stated to him that I don't want anything coming through to the address with his name on it"). Would she therefore have had knowledge of his vehicle ownership during mid 2011? It is the absence of a close examination of matters such as this that undermines such reliance as the judge placed on Ms Pereira.

32. The judge relied on the involvement of Mr Da Costa's moped in a later accident involving another member of the Brazilian community. Without considerable further explanation, I do not consider that this fact alone contributed to a picture of fraud. Expanded further, with more details of the circumstances, it might have done, but not as baldly set out by the judge. Similarly, the fact that Mr Da Costa had had three other road traffic accidents is not enough on its own to indicate involvement in fraud. Again, it might have served as a pointer in that direction, but a great deal more would first need to be known about the circumstances.

33. It seems likely that the judge intended, in dealing with the fraud allegation at paragraphs 29 and 30 of her judgment, to build upon her reasoning in paragraphs 26 to 28 as to why the claimants had not proved their case, even though she appeared to deal with the two issues separately. I have therefore considered whether this extra material cures the deficiencies that I perceive there to be in paragraphs 29 and 30.

34. The starting point for this is to consider the integrity of the reasoning and conclusions in paragraphs 26 to 28. I think it is fair to say that Mr Hogan's focus is upon the fraud finding rather than upon the failure of the claimants' claim for other, more routine, reasons, except in so far as his attack upon the fairness of the hearing has the potential to undermine the entirety of the judge's determination. However, I have scrutinised the judge's basic decision about the claimants' failure to establish their cases as well as her conclusions about fraud. Leaving the question of fairness to be considered separately later, I would not interfere with the judge's rejection of the claimants' cases as not proved. She had the opportunity to consider the claimants' reliability as witnesses in the course of their oral evidence and she set out in the judgment her

impressions of them and the notable inconsistencies in their evidence. The points that she made at paragraphs 26 to 28 have not been significantly undermined in argument before us and are, in my view, a tenable basis for the judge's conclusion on this score. However, I do not consider that the reasoning/findings in paragraphs 26 to 28 in fact materially bolsters/bolster the matters relied upon by the judge in paragraph 29 and 30 as the basis for her finding that the claim was manufactured or fraudulent.

35. The first thing to say is that a finding of fraud does not inevitably follow from a rejection of an accident claim as not proved. There may be many reasons why the claim is not proved other than that it has been fraudulently manufactured. Furthermore, a claimant's *failure to establish* that a particular defendant negligently drove a car which collided with the claimant's vehicle and caused damage is not the same, as a matter of law and logic, as it *being established* that the claimant made a fraudulent claim.

36. Looking at paragraphs 26 to 28, it seems to me that what might potentially have been influential in relation to fraud would have been a positive finding that the accident did not occur at all, although even that would not necessarily lead to a finding of fraud. However, although the judge commenced paragraph 26 by asking herself whether the accident happened, it is not entirely clear that she answered her question in the negative or, if she did, that she was making a finding that it did not occur as opposed to a finding that it had not been established that it did. Had she intended a finding that it did not occur, it seems to me that she would have had to spell it out very clearly and, in so doing, would have had to deal with the documentary evidence which suggested that the motorcycles had indeed been damaged somehow. This included invoices for recovery and storage of the vehicles and, in each case, an engineer's assessment of the damage.

37. The existence of the inconsistencies that the judge identified, without a clear and reasoned finding that the accident did not happen at all, adds relatively little to the fraud case and it is for that reason that I have concluded that the deficiencies in the judge's approach to the question of fraud in paragraphs 29 and 30 are not overcome by anything contained in paragraphs 26 to 28 of the judgment. Put shortly, the judge did not make sufficient findings or provide sufficient reasoning to substantiate the fraud finding that she made against the claimants and I would therefore set that finding aside in the case of each claimant, although (subject to the question of the overall fairness of the trial, to which I will come next) not the judge's conclusion that they had failed to establish their claim for damages.

The exclusion of the first claimant whilst the second claimant gave his evidence

38. The claimants argue that they had a right at common law and pursuant to Article 6 of the ECHR to be present throughout the trial of their claims. Although the judge ordered that each was to be out of court whilst the other gave his evidence, in the event, the second claimant (who in fact gave evidence first) was allowed to stay in court whilst the first claimant was in the witness box. This ground of appeal really centres, therefore, upon the first claimant's position.

39. Mr Hogan is unable to give particular examples of how either of the claimants was actually prejudiced by the first claimant being kept out of court whilst the second claimant was giving evidence. However, he relies upon the fact that the first claimant

was deprived of the opportunity to give instructions to his counsel on the evidence as it unfolded, which would have enabled points which arose to be dealt with contemporaneously. He also submits that the first claimant would have been disadvantaged by not being in court to see the second claimant give evidence and therefore having to give his own evidence "in a vacuum" or "cold", as Mr Hogan puts it. In response to our query during the hearing as to whether he could point to any passages in the transcript of the second claimant's evidence where, had he had immediate instructions from the first claimant, he might have been able to recover a deteriorating position, Mr Hogan said that he could not. However, in his submission, it is not necessary to do that because the point is one of principle, that is that a party should not be deprived of the right to be present throughout the hearing unless there is a good reason, and there was no good reason here.

40. As initially presented, the authorities upon which we were invited to place reliance were all decisions on Article 6. At the hearing of the appeal, we asked the parties to deal also with the domestic authorities and are grateful to them for having done so subsequently in writing. We thus received submissions on authorities including *The Attorney General of Zambia v Meer Care & Desai (a firm) and others* [2006] EWCA Civ 390, *Al Rawi and others v The Security Service and others* [2011] UKSC 34, [2012] 1 AC 531 and *R (Osborn) v Parole Board* [2013] UKSC 61.

41. It seems to me appropriate to commence my consideration of this issue with the domestic cases in view of what Lord Reed JSC said in *R (Osborn)*, which included the following:

> "55.The guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law. That is true in the United Kingdom as in other contracting states. For example, the guarantee of a fair trial, under article 6, is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid….
>
> 56. The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific [sic] to provide the guidance which is necessary in a state governed by the rule of law….
>
> 57. …. The importance of the [Human Rights] Act [1998] is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."

(1) The domestic cases: Al Rawi

42. The starting point as far as the domestic law is concerned is *Al Rawi* (supra). The litigation in that case arose in a very different context from the present case. The question was whether the closed material procedure could be imported by the courts into a civil trial for damages. The answer of the Supreme Court, by a majority, was that Parliament alone could introduce such a procedure. The judgments examine the essential features of a common law trial. Lord Dyson gave the fullest judgment explaining the majority result, although there were judgments from others of the majority as well. Lord Clarke dissented as to the result and gave his own judgment explaining why.

43. For present purposes, the importance of the case lies in such general statements as it contains as to the attributes of a fair trial in the eyes of the common law. However, those statements must, I think, be read keeping in mind that the court was not being asked to consider the question that arises in the instant case, namely whether a party could ever be excluded from a discrete part of a civil hearing. The closed material procedure involves a markedly more radical departure from the norm than that. As Lord Dyson said at paragraph 35 of the case:

> "The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it."

Furthermore, although the special advocate system could mitigate these flaws, it could not cure them all, as he explained in the following paragraph.

44. Mr Hogan invites us to look not only at what the Supreme Court said in *Al Rawi* but also at the judgment of the Court of Appeal in that case, so it will be convenient to start there. Mr Hogan invites attention amongst other passages to paragraph 14, where the Master of the Rolls, Lord Neuberger, giving the judgment of the court, said:

> "Under the common law a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*)."

and to paragraph 30 where the Master of the Rolls said:

> "In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary

> civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial."

45. In the Supreme Court, in a passage headed "The essential features of a common law trial" and running from paragraph 10 to paragraph 17 of his judgment, Lord Dyson said that there were "certain features of a common law trial which are fundamental to our system of justice (both civil and criminal)." He referred first to the principle that, "subject to certain established and limited exceptions, trials should be conducted and judgments given in public." This he said was not a mere procedural rule but a fundamental common law principle. Secondly, he said that trials are conducted on the basis of the principle of natural justice and that there were a number of strands to this. He identified the following strands: (1) a party has the right to know the case against him and the evidence on which it is based (2) he is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side (3) the parties should be given an opportunity to call their own witnesses and (4) they should also have the opportunity to cross-examine the opposing witnesses. He pointed out, at paragraph 14, that a closed material procedure involved a departure from both the open justice and the natural justice principles.

46. He then went on, commencing at paragraph 18, to consider the limits of the court's inherent power to regulate its own procedure. This power is not unlimited, he said, giving the following examples of what is not permissible:

> "22. For example, it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the parties) or hold a hearing from which one of the parties is excluded."

47. He returned to this at paragraph 27 in the context of a submission that the court has power to adopt the closed material procedure in exceptional cases, where it is necessary in the interests of justice. Counsel had derived the proposed "necessity test" from the case of *Scott v Scott* [1913] AC 417. That case was, as Lord Dyson said at paragraph 26, "addressing the very important principle that justice should be administered in public and recognised that there may be a departure from that principle where that is necessary in the interests of justice." But, said Lord Dyson, continuing at paragraph 27:

> "It is one thing to say that the open justice principle may be abrogated if justice cannot otherwise be achieved. As Lord Bingham of Cornhill said in *R v Davis* [2008] UKHL 36, [2008] AC 1128 at para 28, the rights of a litigating party are the same whether a trial is conducted in camera or in open court and whether or not the course of the proceedings may be reported in the media. It is quite a different matter to say that

> the court may sanction a departure from the natural justice principle (including the right to be present at and participate in the whole or part of a trial). *Scott v Scott* is no authority for such a proposition. How can such a step ever satisfy the requirements of justice? And if the court does have the power to deny a litigant this fundamental common law right, in what circumstances is it appropriate to exercise it? These are the questions that lie at the heart of this appeal."

48. At paragraph 47, deciding the central issue in the case, Lord Dyson gave his view that it was not open to the courts to extend the closed material procedure, which involves "an invasion of the fundamental common law principles" as to a fair trial, beyond the boundaries which Parliament had chosen to draw for its use thus far. However, in a section of the judgment starting at paragraph 62 headed "Ordinary civil claims", he acknowledged the existence of certain classes of case where a departure from "the normal rule" may be justified for special reasons in the interests of justice ("special cases" is what he called them at paragraph 39). One such type of case was where the whole object of the proceedings was to protect and promote the best interests of the child and disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise (paragraph 63). Another category of case was where the whole object of the proceedings was to protect a commercial interest and full disclosure would render the proceedings futile (paragraph 64). Lord Dyson categorised these cases as "two narrowly defined categories of case where a departure from the usual rules of procedure has been held to be justified." (paragraph 65).

(2) The domestic cases: The Attorney General of Zambia v Meer Care & Desai

49. I turn next to *The Attorney General of Zambia v Meer Care & Desai*. As far as I can tell, this case was not cited in *Al Rawi*, although it would have been known to Lord Clarke who sat in both cases. That perhaps underlines the difference between the rather extreme circumstances with which the court was concerned in *Al Rawi* and an ordinary civil case such as the *Zambia* case. The *Zambia* case concerned an action brought in England by the Attorney General of Zambia against multiple defendants for the recovery of government money which was said to have been misappropriated by them. Some of the defendants were subject to criminal proceedings in Zambia and were unable to leave that country. They sought a stay of the English proceedings, one ground for this being that they would not have a fair trial, contrary to Article 6 and the ordinary principles of common law, as they could not travel to England for the proceedings. It was established, however, that there were available the alternatives of a judge travelling to Zambia to take the evidence of the defendants concerned and/or the defendants attending the hearing by video link, with matters that arose being dealt with by the giving of instructions overnight. I find it difficult to be sure from the report precisely what the arrangements were for the defendants' participation by video link, and in particular whether they would in fact see all of the trial by that means. However, the reference to giving instructions overnight shows that it was not contemplated that participation by video link would enable the defendants to participate as fully as if they had been physically present at court.

50. Sir Anthony Clarke MR said:

> "43. …Was the judge justified in holding that the appellants would each receive a fair trial on the basis proposed in his judgment? In my opinion, he was. It is submitted that a defendant in a civil trial is entitled to attend the trial so as to be able, if he wishes, to give evidence and to give instructions. Other things being equal, I would accept that submission, but that is not an absolute right.
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> 44. The irreducible minimum is that every party is entitled to a fair trial, both under Article 6 of the Convention and at common law. The question in any case is whether, viewed as a whole, the trial process is fair. I am not persuaded that a party to civil proceedings has a right to be physically present throughout. No authority has been cited to us in support of such a proposition."

51. He then went on to consider whether *Muyldermans v Belgium* (1991) 15 EHRR 204 was authority for that proposition but thought not. What emerged from *Muyldermans* in his view was that each party must know what the case against him is and be able fully and properly to answer it, as the defendants would be able to do, being afforded reasonable time in which to give instructions to their counsel or solicitors where necessary, even though they could not give instructions in person. Lord Justice May gave a short judgment agreeing, in his own terms, and Lord Justice Jacob agreed with both judgments.

(3) The parties' submissions on the domestic cases

52. Mr Hogan invites us to note particularly the expectation of the Court of Appeal in *Al Rawi* that *both* the party and his lawyer see and hear *all* the evidence seen and heard by the court (see paragraph 14 of the judgment of the Court of Appeal, set out at my paragraph 44 above). Building on this, and the passage from paragraph 30 of the judgment (also set out at paragraph 44 above), he submits that the litigant has a fundamental right to see and hear all of the evidence and infringement of that right is a serious procedural irregularity. It is no answer, in his submission, that notwithstanding the irregularity, the judge appears to have reached the "right" answer or that no specific prejudice can be identified. In Mr Hogan's submission, therefore, the second claimant having been deprived of the opportunity to see and hear a portion of the evidence in this case, a retrial has to take place.

53. Whilst the Supreme Court did not echo, in terms, the Court of Appeal's reference to the fundamental right of the litigant to see and hear all the evidence, Mr Hogan submits that it spoke in terms which were congruent with what the Court of Appeal had said and therefore also supportive of his argument.

54. Mr Hogan would ask us to put the *Zambia* case to one side because, he submits, it was not concerned with the point that arises in the present case, not being concerned with the exclusion of a party from the trial or his inability to see and hear all the evidence but with whether the party had a right to be physically present in the court room.

55. Mr Laughland, who appears on the appeal for the insurance company but did not appear below, submits that the *Al Rawi* case does not establish an absolute right for a

party to be present in court for the entirety of civil proceedings. Furthermore, he points out that what was said in *Al Rawi* was said in very different circumstances, markedly further removed from the norm than the present case. It is important to recall, he says, that the first claimant in the present case was not excluded from the whole hearing, was represented by counsel throughout, and had the opportunity later to make submissions on the evidence adduced during his absence. He relies on the *Zambia* case as supporting his submission that departures from the ideal of a party being present in court throughout can be permitted in appropriate circumstances.

(4) The ECHR cases

56. I turn briefly to the cases dealing with Article 6. Reliance was placed by Mr Hogan particularly upon *Muyldermans v Belgium* (supra), *Goc v Turkey* [2002] 35 EHRR 6, *Stoichkov v Bulgaria* [2007] 44 EHRR 14 and *Hermi v Italy* [2008] 46 EHRR 46. Mr Laughland responds by referring us to *Dombo Beheer BV v The Netherlands* [1994] 18 EHRR 213.

57. None of these authorities, in my view, carries the claimants' case any further than the domestic authorities. It is worth, perhaps, saying a little more about *Muyldermans v Belgium*, which I have already mentioned in connection with the *Zambia* case. It was, in fact, a decision of the Commission, the parties having subsequently reached a settlement and the court having struck the case out of the list because it was not necessary for it to make a decision on the merits. The facts were quite marked in that the applicant was an accountant in the Belgian Post Office and the Post Office authorities determined, in an administrative, non-adversarial and closed procedure in her absence, that she should reimburse the Post Office for monies which disappeared from a cashier's desk over which she had charge. The Commission found there had been a violation of Article 6. Mr Hogan relies upon the Commission's observations recorded at paragraphs 58 to 64. I do not, however, read the decision as imposing an absolute requirement that a party should be physically present throughout proceedings. It is particularly worth noting paragraph 62, which brings out the importance of considering the proceedings as a whole in order to determine whether there has been a fair hearing:

> *"*The Commission first of all recalls that the question whether court proceedings satisfy the requirements of Article 6(1) must be considered on the basis of the particular circumstances of each case and can only be determined by examining the proceedings as a whole, that is to say only once they have been concluded. One cannot rule out the possibility, however, that a particular element could be so decisive in itself that the fairness of the trial could be determined at an earlier stage."

58. This direction to look at the whole of the proceedings is an echo of the approach taken by the European Court of Human Rights in *Dombo Beheer BV* (supra) where it said that its task was to "ascertain whether the proceedings in their entirety….were 'fair' within the meaning of Article 6 para 1" (paragraph 31).

(3) Discussion

59. I do not read *Al Rawi* as authority for the proposition that in order for a party to have a fair trial, there is an absolute requirement that he or she has the opportunity to be present personally throughout the entirety of the hearing. In so far as anything said in *Al Rawi* does suggest that, it must be remembered that the context was a very particular one, involving a process which would have restricted the participation of a party to a far greater extent than occurred in the present case. Moreover, an absolute rule would be difficult to square with Lord Dyson's express acknowledgement that there are classes of case where a departure from the norm may be justified for special reasons in the interests of justice. It is of note also that in the two examples that Lord Dyson gave of such cases (see my paragraph 48 above), a party was being wholly excluded from access to some of the evidence, not just excluded from the court room whilst a certain limited portion of the evidence was given but with an entitlement to be told of the evidence thereafter and, of course, to have his representative present whilst the evidence in question was given. Nevertheless, whilst there may not be an absolute rule, it is clear from both *Al Rawi* and the *Zambia* case that the starting point must always be that a party is entitled to be present throughout the hearing of a civil trial.

60. It is not difficult to contemplate situations in which it might possibly be necessary and permissible to proceed with a hearing without a party being present in court. I do not wish to attempt a catalogue of them. A not uncommon example is where a party is refused an adjournment and then simply fails to attend the hearing. Other examples may range from the litigant who disrupts the hearing by unruly behaviour and has to be excluded to allow any progress to be made, to the sort of practical problem that arises where a party has to leave for personal reasons just before the end of the evidence of a witness whose evidence cannot be held over to another time. Having said that, Judge Baucher's order excluding the first claimant from part of the hearing in this case was, in my view, an order that should not have been made.

61. The fundamental problem was that the judge did not take as her starting point that the claimants were entitled to be present throughout the trial or, indeed, give any weight to this at all in her decision. Had she done so, it is difficult to see how she could have justified making an order excluding them against their will. Her reasoning was sparse and gives little clue to her thinking as to how precisely the order would assist matters. It might have been, for example, that she made it in order to improve the prospects of effective cross-examination by the insurance company or to avoid there being any suggestion that one claimant's evidence had been tailored to what he had heard the other claimant say in the witness box. However, for myself, I find it extremely difficult to contemplate there being *any* sufficient reason for taking this course in a case such as the present one. At the very least, it was likely to leave the first claimant with a sense of injustice, and it risked the entire trial being impugned on the basis that the exclusion of the claimant had rendered it unfair. In short, it was a wrong order.

62. However, I do not see the exclusion of the claimant as automatically fatal to the entire trial. It seems to me that the fairness of the hearing depends upon the proceedings as a whole. This is the approach of the European cases and the *Zambia* case seems to me to be saying much the same thing in the domestic context (see particularly paragraph 44 cited above at my paragraph 50). It does mean, however, that the proceedings as a whole have to be scrutinised very carefully in order to ascertain whether the hearing was unfair in the light of what occurred.

63. I do not think that it was. This was not a case of a claimant being excluded from court whilst an *opposing* party or an opposing party's witness gave evidence; both claimants were represented by the same counsel and were telling essentially the same story, the elements of which they knew from the witness statements each had filed. The first claimant did lose the opportunity to learn from observing the second claimant giving evidence what to expect when it came to his turn, but then someone had to go first in any event and a claimant will not usually have the opportunity to observe before giving evidence. In addition, as Mr Hogan submits, he lost the opportunity to give instant instructions that might have shaped Mr Hogan's response to points that arose in the course of the cross-examination, and to do so spontaneously if Mr Hogan did not have the personal knowledge of events that would have enabled him to recognise that there was a point on which he might need instructions. However, in the context of a simple accident claim such as the present one, where witness statements had been provided, it seems to me unlikely that material points would have arisen without Mr Hogan recognising that he needed to take instructions from the first claimant about them. He made no application at the end of the cross-examination of the second claimant or at the conclusion of his evidence to be allowed to take instructions from the first claimant. No doubt, if he had, the judge would have given careful consideration to such an application, given that she did not appear to intend that the first claimant should be in ignorance of what the second claimant said in oral evidence; it can be seen from the conclusion of her short judgment on the subject that she envisaged the claimants applying for a transcript of the evidence if they felt there was prejudice to them from the course she had taken. Furthermore, it is very important in my view that, even with the benefit of hindsight and the opportunity to discuss matters with the first claimant in the light of the transcript, Mr Hogan does not point to any part of the transcript where things would, or even might, have been different had the first claimant been in court during the second claimant's evidence.

64. Mr Hogan does make the specific complaint that, as can be seen from the transcript, he asked for five minutes to explain the significance of the decision to his client, but was only allowed to take a short time to explain it in the court room whilst the judge remained in court. There was, however, a five minute break not long after that for the interpreter and, in due course, a lunch break whilst the second claimant was still being cross-examined. Mr Hogan could have asked to take advantage of those breaks to discuss matters further with the first claimant if he had felt he needed to do so. Accordingly, I am not persuaded that unfairness arose from this.

65. Reviewing this particular trial as a whole, therefore, I have not been persuaded that it was rendered unfair by the judge's decision to exclude the first claimant from court whilst the second claimant gave evidence.

Conclusions

66. In the light of my conclusions about the various grounds of appeal, I would allow the appeal in relation to the findings of fraud against the claimants but otherwise dismiss it. In fact, this would not necessitate any alteration of the judge's order in respect of the substance of the claim. She dismissed it and, if Lord Justice Floyd and Mr Justice Moylan agree with me, it would remain dismissed as her conclusion that the claimants had not proved their case would stand. Paragraph 2 of her order should however be amended to provide that the payment of costs will be on a standard basis rather than an indemnity basis and paragraph 5 is set aside.

Lord Justice Floyd:

67. I agree.

Mr Justice Moylan:

68. I also agree.