EDITOR: **Anthony Johnson**
ASSOCIATE EDITORS: **Marcus Grant, James Henry**
Issue IV November 2016

TGC Fraud Update

The Newsletter of the TGC Fraud Team

LONDON
1 Harcourt Buildings
Temple, London, EC4Y 9DA
T +44 (0)20 7583 1315

THE HAGUE
Molenstraat 14, 2513 BK
The Hague, Netherlands
T +31 70 221 06 50

E clerks@tgchambers.com
W tgchambers.com
DX 382 London Chancery Lane

Index

New frontiers in fraud litigation

By Anthony Johnson ajohnson@tgchambers.com

When compiling the material for this latest issue of TGC Fraud Update, I was struck by the sheer diversity of the subject matters that are raised within its contents – ranging from a Court of Appeal decision applying Article 6 of the European Convention on Human Rights to the Supreme Court's characterisation of the landscape of fraudulent claims to discussions of the sometimes complex costs considerations that have to be navigated in this area of litigation.

Articles about a Contempt of Court being pursued against a medico-legal expert, pursuing multiple claimants in the tort of deceit and an application for Wasted Costs against an errant firm of claimant solicitors show further examples of new ground being broken in the constant battle to seek to stay one step ahead of the other side. George Davies' article on discontinuance will be of particular interest to many readers, providing helpful guidance on avoiding the thorny situation that is becoming all too prevalent where claimants seek to exploit the new provisions of the CPR to escape from bogus claims 'scot free' with no finding of fraud against them or other adverse consequences.

The fact that this publication has now reached its fourth issue and is still dealing with topics that have not been touched upon previously illustrates the sheer scale of the 'live' arguments in this sphere of litigation. As has been dealt with previously on these pages, one of the main drivers behind the creation of this publication was a desire to facilitate the sharing of information within the industry. The common goal of fighting fraud is better achieved by sharing successes and, where appropriate, learning from mistakes.

Whilst I have sought throughout my time as editor to create a useful resource for those of us who are involved in defending motor insurance claims rather than an 'advertorial', it would be remiss of me not to mention the recognition of the TGC fraud team in Chambers and Partners 2017 as the only Chambers to be recognised in the newly included category of 'Motor Insurance Fraud'. Particular congratulations are due to James Laughland, Marcus Grant, Alex Glassbrook, George Davies and Tim Sharpe who are ranked individually, all of whom have been frequent contributors to this newsletter. It is a source of some immense pride that TGC's extensive efforts to apply and advance the law in this field have been recognised by an independent directory.

As always, the TGC fraud team are more than happy for you to contact them if you have any queries about any of the items dealt with in this issue, or indeed about any other issues relating to insurance fraud and related matters.

In out. In out. Shake it all about.

James Laughland

When, if ever, is it appropriate to request that a party be kept out of court whilst another party gives their evidence? That was the principal issue at large in the Court of Appeal's decision of *Da Costa & Da Silva v. (1) Sargaco & (2) Liverpool Victoria Insurance Company [2016] EWCA Civ 764*. James Laughland acted for the insurers on the appeal, but had not done so at the original trial.

Two Claimants sued the driver of a car. They alleged that whilst reversing he had knocked over their parked and unattended motorcycles, padlocked together outside their home. Neither of them claimed to have witnessed the accident but had had it reported to them moments later. At the start of trial, Counsel for the insurers had requested that one Claimant wait outside court whilst the other gave his evidence and was cross-examined. Counsel for the Claimants objected but was overruled by Her Honour Judge Baucher at the County Court at Central London.

Cross-examination certainly exposed how unreliable the two Claimants were. They had difficulty giving a consistent story as to which room they occupied in the house; for how long they had lived there for; to whom the accident had first been reported and the circumstances in which they had each acquired and then disposed of their motorcycles. In her judgment, the trial judge found the Claimants' accounts "so inconsistent to be implausible" and held they had not proven their claims. She went on to consider separately whether the insurers had established their allegation of fraud and held they had done so.

The Claimants appealed challenging their exclusion from court, arguing that such had rendered the trial unfair contrary to their Article 6 rights, and also against the finding of fraud, which they argued was not justified on the evidence presented.

The Court of Appeal was not persuaded to hold that for a party to have a fair trial there is an absolute requirement that he or she has the opportunity to be present throughout the entirety of the hearing. Nevertheless, they were satisfied that the starting point must always be that a party is entitled to be present throughout the hearing of a civil trial.

On the facts of the instant case, it was held that the trial judge ought not to have made the order she did. The fundamental problem was that she had not taken as her starting point, nor it seemed given any weight to, the Claimants' entitlement to be present throughout the trial. Her reasoning had been sparse and gave little clue to her thinking as to how precisely the order would assist matters. The Court held that it was extremely difficult to contemplate there being any sufficient reason for taking this course in a case such as this. At the very least, it was likely to leave the excluded Claimant with a sense of injustice and it risked the entire trial being impugned on the basis that that exclusion had rendered it unfair.

However, despite holding that this had been the wrong order to make, the Court was not persuaded that the exclusion of one Claimant was automatically fatal to the entire trial. Fairness of the hearing depends upon the proceedings as a whole. The Court held that the trial had still been fair. Both Claimants had been represented by the same Counsel throughout and the excluded party had only missed one part of the trial,

his co-Claimant's evidence. Moreover, no examples could be given of how, in fact, the excluded party had been disadvantaged on this particular occasion.

So, although the trial was nonetheless fair, the Court of Appeal has stated that they could see very few, if any, circumstances in which it would be appropriate to exclude a party from Court against their will. It should be borne in mind that the issue here was the exclusion of a party, not a witness. Applying to exclude a witness is far less controversial. Also, there is nothing to stop a party volunteering to wait outside as such might be thought to give their evidence more credibility if it cannot be said to have been influenced by hearing what another witness had said first.

The Court of Appeal also set aside the Judge's finding of fraud on the basis that she had not made sufficient findings nor provided sufficient reasoning to substantiate that conclusion. Fortuitously, her finding that the Claimants had lacked credibility and had not proved their case remained unassailable and, despite the changes made by the Court of Appeal, the appeal still failed to turn a loss for the Claimants into a win.

Discontinuance in a post QOCS landscape

George Davies

Under the Qualified One-Way Costs Shifting (QOCS) regime, a claimant who discontinues a claim under CPR 38.3 is still liable for costs pursuant to CPR 38.6, but those costs cannot be enforced by the defendant because of the protection offered to claimants under CPR 44.14.

As a result of the QOCS costs protection, defendant insurers are increasingly on the receiving end of Notices to Discontinue in cases involving issues of credibility and/or expressly pleaded fraud. Defendants are then left unable to recoup their costs of the action and there is no disincentive for claimants in running an unmeritorious claim to the door of the Court.

One way for a defendant to get round a claimant's apparent new found impunity to discontinue, is to rely upon Paragraph 12.4 of PD 44 and seek a hearing at which the issue of fundamental dishonesty can be determined – either by way of the Court hearing oral evidence or the matter being decided on paper. The latter course was the one adopted by HHJ Maloney QC in the widely reported case of *Gosling v (1) Hailo (2) Screwfix Direct* (CC at Cambridge, 29.04.14).

However, what is to be done where fundamental dishonesty is unlikely to be proved or can't be advanced by a defendant (either because the state of the evidence makes it so or because no express allegations of dishonesty have been pleaded)?

CPR 38.4 has always given a party the ability to set aside a Notice of Discontinuance.

38.4 – Right to apply to have notice of discontinuance set aside
(1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside.
(2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him.

However, the Notes to the 2016 White Book at 38.4.1 are unhelpful. They do not offer any real guidance as to the test which is to be applied by a Court (whether in the world of QOCS or elsewhere). Indeed, the Notes give the impression that a Notice can only be set aside if the discontinuance amounts to an abuse of process:

Effect of rule – 38.4.1
The rule provides a procedure and time limit for a defendant to apply to have a notice of discontinuance set aside. A court may set aside a notice of discontinuance as an abuse of the process of the court (Ernst and Young v. Butte Mining plc [1996] 1 W.L.R. 1605; Fakih Bros v. Moller (Copenhagen) [1994] 1 Lloyd's Rep. 103). A defendant who would have opposed an application for permission must invoke r.38.4 and apply to have the notice of discontinuance set aside within 28 days of service of the notice upon them.

However, there is actually some more up-to-date (post CPR) authority which makes it clear that the Court actually has a wide discretion under CPR 38.4 and it is **not** necessary for the applicant to show that the discontinuance is an abuse of process.

In *The High Commissioner for Pakistan v. National Westminster Bank Plc & Others [2015] EWHC 55 (Ch)*, Henderson J. considered the grounds for setting aside a Notice under CPR 38.4. At paragraphs 40–47, he reviewed and summarised the relevant authorities in this area and at paragraph 46 he held:

"Thus I consider that the court should approach an application to set aside a notice of discontinuance under rule 38.4(1) on the basis that the court has a discretion which it should exercise with the aim of giving effect to the overriding objective of dealing with the case justly and at proportionate cost. If the facts disclose an abuse of the court's process, that will no doubt continue to be a powerful factor in favour of granting the application; but it would in my view be wrong to treat abuse of process as either a necessary or an exclusive criterion which has to be satisfied if the application is to succeed."

He concluded at paragraph 78 that he would set aside the Notice on the basis that:

"...it becomes clear, to my mind, that in serving the Notice of Discontinuance Pakistan was abusing the process of the court. The abuse lay in seeking to achieve a tactical advantage which would place Pakistan in a better position than that to which it had already voluntarily submitted by bringing its action against the Bank. This is just the kind of attempt to achieve a collateral tactical advantage which has led the court in pre-CPR cases to set aside a notice of discontinuance as an abuse of process; and, as such, it must be equally amenable to the broader jurisdiction now expressly conferred on the court by CPR rule 38.4(1)."

The language of *"collateral tactical advantage"* had been gleaned by Henderson J. from some of the earlier pre-CPR cases which he had reviewed and found to be of persuasive assistance.

Another useful case for a defendant to deploy is the decision of HHJ Birss QC in *Media C.A.T. Limited v Adams & Others* [2011] EWPCC 006. In that case, the Judge also reviewed some of the earlier case law later cited by Henderson J. in The High Commissioner for Pakistan case and then framed this question at paragraph 89:

"In my judgment the question is whether there is an unwarranted advantage to be gained from the intrinsic effect of the notices of discontinuance which bring judicial scrutiny of the cases to a close."

He went on to hold that the notices were an abuse because they would have the effect of allowing the claimants to avoid the *"judicial scrutiny"* which their conduct deserved.

In my experience, it is proving possible for defendants to apply the principles set out in these two cases to the world of QOCS. Clearly not every Notice of Discontinuance will be open to challenge. However, it is arguable that a late and unexplained discontinuance by a claimant (who has questions to answer and whose conduct has caused the defendant unnecessary costs) amounts to an unwarranted *'collateral tactical advantage'* – i.e. by avoiding deserved costs consequences and/or other likely sanctions.

Further, if a defendant can also submit (where the facts permit) that a claimant by discontinuing is in reality seeking to avoid the Court's deserved scrutiny, then that provides another reason why the Notice should be set aside. An example (based on my own experience) would be where a claimant was either on the receiving end of (or about to be on the receiving end) a strike-out application. By discontinuing in such a scenario, the defendant can submit that the claimant is attempting to avoid judicial scrutiny of his claim not only to escape the sanction of a strike out but also the exceptional costs sanction under CPR 44.15 that comes with it. Once the Notice is set aside, the defendant can then proceed with its application to strike the claim out and obtain an enforceable costs order against the claimant.

Therefore, whilst we await some directly applicable High Court authority on discontinuance in the world of QOCS, it is, in the meantime, worthwhile for defendants to consider the use to which these two cases can be put.

Burying their heads in the sand?

Anthony Johnson

One of the most frustrating aspects of defending suspected fraudulent claims is when one is presented with an opponent who behaves like the proverbial ostrich and buries their head in the sand – failing to engage with the Defendant's case and ignoring the allegations that have been made against their client(s). It is sadly an all too familiar experience, particularly when faced with a firm on the other side which adopts a 'sausage factory' approach to litigation and does not give each individual claim the care and attention that they would be expected to.

There are numerous negative consequences for a Defendant that can arise in such a situation. It makes it extremely difficult to judge how actively the Claimant actually is in pursuing his case and whether any omissions have occurred because they have no answer to the questions posed, rather than because they have simply not been asked to provide an answer. This can lead to unnecessary costs being incurred when cases settle much later than they ought to have otherwise done. Cases can be pursued all the way to trial by the Defendant, only to find that the case is put by the Claimant in an entirely different way to what had been anticipated. Perhaps most frustrating of all is when the claim reaches trial and the Claimant offers little or no defence (something that invariably should have been apparent from the outset).

In this latter scenario, one form of recourse that may be open to the Defendant in appropriate cases is to seek Wasted Costs from the Claimant's solicitors personally pursuant to section 51 of the Senior Courts Act 1981, as set out in CPR 46.8. The procedure is for the Court to make a 'Show Cause' Order, which it will do where there is a prima facie case for the Claimant's solicitors to answer in relation to Wasted Costs and requiring them to provide evidence containing an explanation in the event that they dispute their liability to pay the costs. It is clear from the leading authorities that the test is a high one – something akin to true negligence rather than mere 'run of the mill' incompetence or inadvertence. In *Medcalf v. Mardell* [2002] UKHL 27, the House of Lords emphasised that Wasted Costs should be confined to matters that are apt for summary disposal by the Court, rather than risking it becoming a new and costly form of satellite litigation.

Defendants are often able to rely upon the decision of HHJ Collender QC in *Rasoul v. (1) Linkevicius (2) Groupama* (CC at Central London, 05.10.12), which although a non-binding first instance decision is persuasively reasoned and often followed, particularly by District Judges. In that case, the Second Defendant gave the clearest possible warning that the claim was fraudulent and/or could not be proven in writing, and reiterated the same in its Defence. It was held that the course of the trial had demonstrated the weakness, if not the inappropriate nature, of the claim and well supported the defendant's assertion that a solicitor's proper competent work would have ensured that the case collapsed long before the trial took place.

I was recently involved (instructed by NFU Mutual and Abigail Lewis of Keoghs) in the case of *Wenham v. G Bridgland Ltd.* (CC at Tunbridge Wells, 28.10.16) where Deputy District Judge Horrocks was prepared to make a Show Cause Order on the basis that it appeared to her that the Claimant's solicitors should be jointly and severally liable for the costs awarded against him on the indemnity basis.

The Defendant's case was that the Claimant had not been present in his vehicle at the point that the collision occurred. The defence was a strong one: four eye-witnesses gave evidence that they saw the Claimant arrive at the accident scene from a local café after the incident occurred, the Claimant spoke to the Defendant's insurers in the immediate aftermath of the incident and confirmed that he had not been in the vehicle at the time and had not been injured. There was absolutely no corroborative evidence that the Claimant had sustained any injury, neither lay witnesses of fact nor any documentary evidence such as medical records, loss of earnings information etc.

The Claimant failed to attend the trial, despite it being relayed to the Court by his Counsel that he had apparently spoken to his solicitors half an hour before the trial was due to start and confirmed that he was on his way. The Judge rejected an application to adjourn the trial, following which the Claimant's Counsel had to withdraw from the case due to a lack of instructions. Rather than strike out the claim due to the Claimant's non-attendance, the Judge elected to go ahead with the trial in his absence. Unsurprisingly given the facts referred to above, the claim was rejected and a finding was made that the Claimant was fundamentally dishonesty, with the usual consequences following from that.

In dealing with the Wasted Costs aspect of her judgment, the Judge held that the Claimant's solicitors were fully aware of the allegations that had been raised in the Defence and should have thoroughly investigated them. If they were unable to provide relevant information in support of the claim then they should have seriously considered whether it should have been continued. She commented that it appeared to be yet another example of the tremendous pressure on those involved in road traffic accidents to make unnecessary, exaggerated personal injury claims.

The Claimant's Counsel (technically ex-Counsel by that point) perhaps ill-advisedly asked the Judge to give further reasons for her decision on Wasted Costs. She stated that the solicitors' first duty was to the Court and that they had not met that by failing to establish in their own minds the veracity of their client's case. There were so many inconsistencies and no corroborative evidence, despite there being 'endless ways' that the claim could have been corroborated if it were genuine. The solicitors' response showed blatant disregard for Orders of the Court (they had never disclosed their client's GP records despite an explicit Order having been made in that regard following an Application by the Defendant), which was bordering on a Contempt of Court in itself.

It remains to be seen whether the Claimant's solicitors will seek to justify their conduct in the face of such a damning appraisal of the impact of their conduct upon the case.

An allegation of dishonesty against a medical expert

Tim Sharpe

In *Liverpool Victoria Insurance Company Limited v Asef Zafar & Others* (CC at Central London, 21.06.16), Her Honour Judge Walden-Smith made her decision against the background of a relatively unusual set of facts.

The Claimant insurance company sought permission to bring Contempt of Court proceedings against a number of individuals, including one Dr. Asef Zafar, a medico-legal expert. In brief, a Claimant in a personal injury action relied on a medical report from this expert which described symptoms in the neck, shoulder and wrist that had not improved as at the date of his examination which took place over two months after the index road traffic accident. It gave a prognosis of 6–8 months. However, an alternative version of this report of the same date found its way into the trial bundle (prepared by the Claimant's solicitors). This report said that there were symptoms in the neck and back (only) and that these had resolved within a week of the index accident.

The trial was adjourned in view of the obvious discrepancies between the reports, and the insurers sent an enquiry agent to visit Dr. Zafar. During the course of the interview with the agent, Dr. Zafar made and signed a witness statement containing a Statement of Truth. He explained that the report had been changed by the medical agency without his consent. In his affidavit for the permission hearing, Dr. Zafar asserted that he had been busy and confused when interviewed by the enquiry agent and that he had not recalled that he had in fact made the changes to the report. In further evidence, he said that the first report was a mistake and only represented the period of acute symptoms. Emails were exhibited, in which the solicitors for the personal injury Claimant noted that they had received a report with a recovery period of one week but stated that the client remained in pain in the neck, shoulders and also in the wrist and asking whether he might recover within 6–8 months and whether any physiotherapy was needed.

There then followed a short chain of Emails between the expert and his personal secretary, and an amended repot was produced. The Judge noted that the limited chain of emails provided suggested on its face that Dr. Zafar was *"willing to sanction his personal secretary to alter both the prognosis in the medical report and the details of the examination without there being any further medical examination or enquiry."* This, and Dr. Zafar's attempt to rely on a letter from the solicitors purporting to instruct him to make the amendment (despite analysis of that letter showing that it was seemingly not written until months after it was supposed to have been sent), caused the Judge to conclude that there was strong *prima facie* evidence that Dr. Zafar was attempting to obscure what had in fact happened and how two different medical reports were created.

The Judge also noted with concern that the explanations being put forward by the expert and the solicitors for the Claimant were at odds with the seemingly credible evidence of the actual injured Claimant who said that his symptoms resolved within 2–3 days, felt that the report stating that his symptoms lasted a week over-stated matters, did not inform his solicitors that he was still in pain and did not ask for an amended report. He also said that he was told to follow the contents of the report and to tell the court that the symptoms had lasted for eight months.

In opposing the application, Dr Zafar relied on various matters including his good character, the volume of reports he produced (5,000 per year) and the lack of any motive. The Court held that the insurer did not need to establish a particular motive in order to obtain permission to bring the proceedings, and that further

good character did not go anywhere near answering the allegations (noting that *"good character is unlikely to be unusual in circumstances such as these"*). The Court also refused to accept that it was sufficient for a professional person to put forward an explanation that it was a mere error or misunderstanding and that matters should be taken no further, stating that *"The court has an obligation to scrutinise, and to allow others to scrutinise, evidence being presented to the court where on the face of the documents there are inconsistencies and contradictions that are difficult to explain by reason of error."* The Court concluded that there was strong evidence that requires explanation, and an Order for permission was granted. The Judge noted that had the trial proceeded with only the amended report, which did not on its face accurately reflect the examination of the Claimant, this would *"strike at the very heart of how the civil justice system works."* Permission to bring Committal proceedings was granted.

It is perhaps quite rare for an insurer to have sufficiently strong evidence against a medical expert to bring matters this far. Indeed, in this case the existence of two reports only appears to have become apparent by the inclusion of the earlier report in the trial bundle by the solicitors for the personal injury Claimant (one can only assume that this was done in error). The matter is, therefore, set for a full hearing on the Contempt, but regardless of the outcome of this specific case, the strong criticism of the court over the informality of making very significant amendments ought to send out a clear warning message to experts, and in particular to those engaged in the production of reports in this sort of volume (this expert must have been dealing with some twenty patients a day aside from any actual work as a practitioner) that the Court will not tolerate experts who fail to obey their duties to the Court and to provide honest independent opinion evidence.

Exemplary damages ordered against the participants in a fraud ring

Marcus Grant

I appeared for Direct Line Insurance, the successful Claimant in the High Court proceedings in *Direct Line v. Akramzadeh & 28 Others* (reported on Lawtel on 3rd October 2016). The claim was a tort of deceit action against 29 Defendants, all of whom had intimated or facilitated claims arising from nine separate fictitious accidents in an attempt to defraud the insurer.

Each Defendant used one of the accident management companies linked to one or more of the addresses: 44–46 Victoria Road, EN4 9PF, 162B Ballards Lane, N2 8EN and 41 Leicester Road, EN5 5EW namely: (Accident Claims Experts, B&T Recovery Limited, Celebrity Car Hire, UK Crystal Car Hire). The 29th Defendant was a Director of Accident Claims Experts.

Direct Line paid out some damages to three of the Defendants which it reclaimed, it expended money investigating the claims and sought recovery by way of damages for its in-house overhead costs in doing so. It also claimed an award of exemplary damages to punish the Defendants and to act as a deterrent to other prospective fraudsters considering involving themselves in a crash for cash scam. The Court acceded to all three heads of claim.

The claim for exemplary damages was unusual because it is an exceptional order that is out of the norm in tort claims. The Court was satisfied that the tort of deceit was proven in each of the cases, that the facts satisfied the second limb of Lord Devlin's threshold test for recovery of exemplary damages in *Rookes v. Barnard* [1964] AC 1129 (namely: *"where the defendant's conduct has been calculated to make a profit for himself"*) and Lord Nicholl's test in *Kuddus v. Chief Constable of Leicestershire* [2002] 2 AC 122 (namely: *"conduct which was an outrageous disregard to the Claimant's rights"*).

Flaux J. held that the award for exemplary damages should not exceed the penalty that would have been imposed had there been a criminal prosecution. However, in the instant case, criminal convictions would almost certainly have resulted in custodial sentences rather than fines. It was difficult to assess whether any particular award of exemplary damages would exceed such a punishment. Therefore, whilst moderation was to be borne in mind, it would not be appropriate to reduce what would otherwise be regarded as an appropriate award by reference to what might have happened on a criminal conviction. An award of exemplary damages was not to exceed what a Defendant could afford. However, none of the Defendants had attended the trial and there was no evidence of their means. Where Defendants had chosen not to participate in the proceedings, the absence of such evidence was not to be taken as a restricting factor in making the award: *Tasneem v. Morley* (Lawtel 28.01.14) considered.

The Court considered that an award of exemplary damages of £2,500 per Defendant (one Defendant participated in two of the fictitious accidents), equivalent to the sum that each might spend on a second hand car, was an appropriate level to create a deterrent. In addition to awarding the other heads of damages claimed, the Court also awarded the Claimant c. £82,000 of costs on an indemnity basis.

As each of the Defendants had conspired with the same accident management company to perpetrate a fraud, there was joint and several liability for the consequences of the conspiracy; whilst several of the Defendants were impecunious, not all were.
(Continues on page 13)

Exemplary damages ordered against the participants in a fraud ring (continued...)

Marcus Grant

The case was useful in that it brought a High Court Judge's approval of the rarely applied law on exemplary damages to the arena of motor insurance fraud and it confirmed that the legal analysis adopted by insurers is sound. It was also useful in defining with greater clarity the principles underpinning the quantification of exemplary damages in such cases.

Gilded lillies and fraudulent claims

James Yapp

In *Versloot Dredging BV and another (Appellants) v HDI Gerling Industrie Versicherung AG and others (Respondents)* [2016] UKSC 45, the Supreme Court considered the question of what actually constitutes a fraudulent insurance claim?

Their Lordships identified three categories that will no doubt be familiar to many readers of this newsletter:

(1) the whole claim is fabricated;
(2) a genuine claim is dishonestly exaggerated; or
(3) the entire claim is justified but the information given in support of the claim has been dishonestly embellished.

This final category has traditionally been referred to as *"fraudulent devices"*, although the Supreme Court preferred the term *"collateral lies"*.

Versloot concerned a claim on a marine insurance policy. The vessel was incapacitated by seawater flood damage. The ship owner had stated that the crew heard a bilge alarm but failed to investigate because they attributed it to the rolling of the vessel in heavy weather. This representation was untrue but it transpired that this falsehood was irrelevant to the merits of the claim.

The Judge at first instance reluctantly found that the claim was forfeited because it had been supported by a collateral lie. The Court of Appeal upheld this decision and emphasised the importance of deterring insurance fraud of any kind.

The Decision

The majority of the Supreme Court held that 'collateral lies' were distinct from 'dishonest exaggerations'. In the latter situation, the policy of deterring fraud demanded that the genuine element of the claim should be forfeited. In the case of a collateral lie, the application of the fraudulent claim rule was disproportionate; the insured gained nothing by telling the lie and the insurer lost nothing by meeting a liability it always had.

While such a lie might be material to how the insurer dealt with the claim, it could not be material to his liability to meet the claim which arose when the loss was suffered. To preclude recovery, the lie must at least go to the recoverability of the claim.

Lord Mance, dissenting, considered that looking retrospectively at whether a lie was, in fact, 'collateral' was to misunderstand the nature of the insurance industry. Collateral lies distorted the claims process by taking advantage of the trust which an insurer must repose in its insured, particularly if it is to avoid the expense of investigating every claim. Further, the dishonest claimant should not be put in a position where he can lie with virtual impunity.

Comfort for Insurers?

The decision is unlikely to be welcomed by insurers, particularly as the Supreme Court noted that the law applies in the same way to any domestic or commercial insurance policy.

However, Lord Hughes did identify some adverse consequences for the dishonest claimant: he will commit a criminal offence; he may be liable in damages to his insurer (perhaps under the tort of deceit); his credibility will be adversely affected if the claim proceeds to trial; he may be penalised in costs; the policy may be terminated prospectively; or he may be refused future insurance.

Lord Mance's closing remarks are also of interest. He contemplated the inclusion of express terms within policies providing that claims will be forfeited if they are promoted by collateral lies. Insurers will no doubt look to guard themselves against claimants who 'gild the lily' in this way.

What makes admitted dishonesty amount to 'fundamental' dishonesty?

Ellen Robertson

The Court addressed the question of what makes dishonesty 'fundamental' to the Claimant's claim in the case of Martin v. Monks of Bulphan (CC at Southend, 15.09.16), in which I appeared for the Defendant, instructed by Adrian Rowland of DAC Beachcroft.

Facts

The Claimant brought a claim for injuries suffered following a fall during the course of her employment at the Defendant's premises, which was her place of work. The Claimant alleged that there had been liquid on steps causing her to slip and injure her knee. It was admitted that the Claimant had fallen on steps and sustained injury, but the Defendant denied that there had been any liquid on the steps. It was accepted by the Claimant that the steps were safe and suitable save for the allegation of liquid being present.

The Claimant's witness statement as typed claimed that the Defendant's Head Chef had seen liquid on the stairs. However, the statement also contained a handwritten amendment stating that it had been the Kitchen Porter, not the Chef who had seen the liquid, and that the Kitchen Porter had wiped it up with a cloth. The Claimant confirmed the handwritten amendment as being correct at the beginning of her evidence in Court. In her evidence, she stated that she had personally not seen any liquid.

However, under cross-examination, the Claimant altered her account again, returning to her original assertion that the Head Chef had seen and wiped up the liquid on the stairs. She claimed that she had altered her statement as she was concerned about getting the Head Chef into trouble. She accepted that she had known that her statement was incorrect when she signed the Statement of Truth, and when she had initially confirmed her evidence on oath in Court.

Fundamental dishonesty

This was, therefore, an unusual way for an allegation of fundamental dishonesty to arise. The question of fundamental dishonesty arose without any such allegation of dishonesty being raised in the pleadings, as the first time that the matter could have properly been raised by the Defendant was during the Claimant's evidence at trial. The Judge unsurprisingly dismissed the claim, and found that the Claimant's evidence amounted to perjury, indicating that he would consider a referral to the police.

The Judge's finding was that the Claimant had lied about the identity of the person who she claimed had wiped the floor, rather than as to whether there was any liquid. There was no finding by the judge that the Claimant's motive in lying was to strengthen her claim. The Claimant sought to argue that the dishonesty was not fundamental within the meaning of CPR 44.16.

The Judge rejected the argument that the dishonesty was not fundamental to the claim. The claim turned upon the question of whether there was liquid which she had not seen, and so the identity of whom she claimed had cleared up the liquid was fundamental. A finding of fundamental dishonesty did not require a finding that she had lied about the presence or absence of liquid.

Assessment of Costs

A final issue in this claim was that the Claimant's dishonesty was not an issue in the case until the Claimant admitted lying in the course of cross-examination. At all stages in the preparation of the case, the matter had appeared to fall squarely within the QOCS regime, and thus, the Defendant had not incurred the costs of preparing a Schedule of Costs. The Judge accepted that the Defendant was not in a position to know that QOCS might be dis-applied until the Claimant gave evidence and, therefore, awarded the Defendant costs to be assessed if not agreed. It is worth noting that the Judge rejected the argument that it was unfair to the Claimant to deal with costs at a later date as she might not be represented by that stage of the proceedings.

The recovery of multiple advocacy fees in the fast-track

Tim Sharpe

In *Neary & Neary v. Bedspace Resource Ltd.* (CC at Chester, 04.12.15), in a claim proceeding on the Fast Track, and to which the Fixed Costs provisions of section IIIA of CPR Part 45 applied, an issue arose as to the correct way to calculate fixed costs in a case where there were two Claimants.

The Claimant contended that in respect of each Claimant they were entitled to the £2,655 and an advocacy fee. The Defendant by contrast contended that the claim had to be seen as a whole such that one fixed sum of £2,655 and one advocacy fee applied. In each scenario it was accepted that the Claimants were also entitled to a further 20% of damages, but this would be the same figure.

Regrettably, and perhaps somewhat surprisingly, the CPR does not address this question directly, so the Court had to interpret the provisions by looking at Table 6B to CPR 45.29C. This refers to the position *"where a claim no longer continues under the RTA protocol."* Under that Protocol, it is not possible to include more than one person on a Claim Notification Form. HHJ Pearce held that it is not possible to interpret the costs of the claim in any more broad sense than that contemplated by the Protocol, such that each Claimant was entitled to recover the fixed fee and the advocacy fee.

Each side had submitted in argument that the other side was seeking a windfall gain. Indeed, one can imagine various scenarios where this would seem to be the case – Counsel representing six passengers from an MPV at a trial where their driver and another driver are separately represented and are contesting liability, may well be seen as having a relatively simple task. If the damages were sufficiently substantial, that advocate could earn £10,230 (6 x £1,705) for that one trial where the harder tasks fall to the other two advocates. That said, that same advocate may find themselves on the next trial representing just one Claimant and cross examining multiple witnesses for the Defendant all day (after lengthy preparation), and earning the fixed £500. As the Judge noted in this case *"unfortunately this is the nature of fixed costs regime – the amount of costs is inevitably a broad estimate of what is reasonable rather than a reflection of the actual time involved in preparing or presenting a case."*

The logic of the decision appears hard to criticise and it remains to be seen whether this point will be taken any higher in subsequent cases. There has been some understanding by some insurers that in a case with multiple Claimants, the successful solicitors for the Claimants will recover multiple sets of fixed costs. If this is correct, it is hard to find any reason why advocacy fees can be treated in any different way. Some consideration may also need to be given to the appropriate fees to be claimed in respect of advocacy fees for the Defendant in these situations as well – in the example above, would the recoverable advocacy fees for the other two parties be the same in the event of their success? CPR 45.29F(2) provides some discretion as the court 'will have regard to' the costs that the Claimant would have recovered in the event of success (although the costs allowed will not exceed that sum). However, if one applies the 'swings and roundabouts' logic of a fixed costs regime, it may be hard for the court not to award multiple advocacy fees (although the practical relevance of this may be limited due to QOCS). As with other issues in this evolving area of costs law, there will doubtless be further supporting and contradictory decisions before some higher resolution is achieved.

Arguing over costs with a dishonest claimant whose claim was partially successful

Anthony Johnson

A situation that can commonly arise at trial is where the judge's findings of fact are such that the claimant is found to be entitled to recover some damages, albeit that they have been wholly or substantially defeated in relation to other heads of claim due to either failing to prove certain aspects of the claim (typically the personal injury element which claimants often struggle to prove in the absence of any contemporaneous record of injury) and/or are found to have been untruthful in relation to some or all heads of claim.

I was involved in a claim where just such a situation arose in the case of Dariah v. Sharma (instructed by Carys Clarke of BLM) in which DJ Wright in the County Court at Romford handed down a judgment that was highly favourable to the Defendant on 30.09.16. The most strikingly unusual feature about the case was that although it remained allocated to the Fast-Track throughout, the hearing ended up being dealt with over three days. The Judge initially heard the evidence and submissions on 11.02.16, but reserved his judgment. When he handed judgment down on 06.07.16 he was somewhat overwhelmed by the extent of submissions about costs on both sides (which the Court had not allocated sufficient time for), and therefore elected to adjourn the matter a second time for written submissions to be filed in advance. As a consequence, the issue of costs was considered in much more detail than is typically the case, with costs often being dealt with in a cursory fashion at the end of a long day in Court.

At the original trial, the Judge found that the Claimant was not present in his vehicle at the time of the accident, and therefore dismissed his personal injury claim in its entirety. He accepted that the Claimant's vehicle was actually damaged in the accident, albeit that it was parked and unattended at the time, resulting in a judgment for £1,998 in respect of vehicle repairs, which represented approximately one fifth of the total figure sought. He dismissed the Claimant's credit hire claim on the basis that the evidence showed that he could have repaired or replaced his vehicle from his own funds without hiring, but made clear in his judgment that the dismissal of the hire claim was not premised upon the Claimant's lack of credibility (i.e. his evidence in relation to hire was effectively accepted).

The Judge did not have any trouble with finding that the Claimant was 'flagrant and fundamentally dishonest'. He rejected the Claimant's Counsel's somewhat ambitious submissions that the dishonesty was not fundamental and that the Claimant should recover the full level of fixed costs on the basis that the Defendant had not taken the opportunity to protect its position with a Part 36 offer. He said that on the basis of the Claimant's dishonesty, it would be unjust for him to recover any net costs at all, commenting that he was lucky to have been awarded any damages at all, which had only come about because the claim pre-dated section 57 of the Criminal Justice and Courts Act 2015 coming into force. Any costs awarded to the Defendant should be on the indemnity basis, as it was difficult to conceive of behaviour that was more 'unreasonable' than bringing a dishonest claim.

When weighing up the law, he reminded himself of *Fox v. Foundation Piling* [2011] EWCA Civ 790 where the Court of Appeal held that in assessing success, one of the primary considerations must be who has been ordered to pay whom money. However, he also had to consider whether there were any reasons to depart from this ordinary rule on the facts of the present case, and noted that authorities suggested

that this had to be determined on the facts of the case. He referred in particular to the decision in *Widlake v. BAA* [2009] EWCA Civ 1256 where the claimant was found to have lied to both parties' medical experts. There the Court of Appeal commented that the dishonesty must be penalised, and that consideration of how reprehensible the conduct was should include whether the claim was 'concocted' or 'exaggerated'.

The Judge in the instant case held that although his starting point would be that the Claimant had been successful, he would immediately consider the appropriate departure from the general rule. He was satisfied that the claim would not have reached trial if the Claimant had been truthful; his conduct had needlessly led to an increase in costs for both parties. A significant amount of costs had been incurred dealing with the personal injury claim, although it was difficult to commute precisely how much. He felt that the Claimant was entitled to a share of the common costs, as well as the substantive issues that he had succeeded upon.

In the circumstances, on a broad brush basis, he held that the fairest outcome would be if the Claimant were awarded 30% of his costs of the trial but the Defendant were awarded 70% of its costs. He then allowed the Defendant all of its costs of dealing with the costs issues in full, which were substantial as it was these issues that had turned a one-day trial into a three-day trial. The Judge set-off both the Claimant's damages and costs against the Defendant's costs, which resulted in a very favourable outcome for the Defendant as the Claimant was ordered to pay it a net sum of almost £5,000.

Incidentally, the Judge rejected the Defendant's argument that any costs awarded to the Claimant should be limited to fixed Small Claims Track costs because those were the only costs that he would have been entitled to if he had issued for the sum that he actually ultimately recovered; he considered that the same would amount to a 'retrospective reallocation'. However, this is certainly an argument that is worth pursuing in other cases, as I would suggest that there are many judges who would have not been at all concerned about penalising a dishonest Claimant in this way. The Claimant may have been saved this greater punishment by the fact that the largest overall head of claim by some distance was credit hire, which although dismissed was expressly found to not have been dishonest.

It is hoped that the above account will be of assistance in considering the various costs permutations (fundamental dishonesty; indemnity vs. standard cost; fixed vs. indemnity costs; Fast vs. Small Claims Track cost; set-offs etc.) that can arise in situations where a dishonest Claimant is partially successful. In most cases, these issues will have to be dealt with immediately at the conclusion of the trial without the benefit of written submissions and a detailed judgment as in the case of *Dariah*. It will clearly be of assistance to have prepared for all likely outcomes in advance; there will be many cases where the Defendant's position can be further strengthened by advancing the arguments to the Claimant's representatives in correspondence.

Recent Noteworthy Cases

Stanmore Quality Surfacing Ltd. v. Kartel (High Court, Nottingham District Registry, 21.07.16)

Fraud – Committal – Sentence

Edward Hutchin (instructed by Andrew Thomson of DAC Beachcroft on behalf of Allianz insurance) successfully represented the insured company in this case, in which orders for Committal for Contempt of Court were made against four dishonest claimants, who were sentenced to six months' imprisonment each.

All four claimants made claims for compensation following a road traffic collision. A defence was filed alleging that the collision was deliberately induced. Following a trial in the CC at Nottingham in 2015, HHJ Godsmark QC dismissed the claims, finding that they formed part of a fraud ring involved in arranging false road traffic collision claims. The claims were dismissed, with indemnity costs in favour of the Defendant.

The insured, in conjunction with its insurers, was not content to let the matter rest there. An application was therefore made against all four claimants for their Committal for Contempt of Court. In particular it was alleged that they had all dishonestly stated that one of the claimants was present at the time of the collision, and that the witness evidence of the insured to this effect was supported by photographs taken at the scene which showed another unidentified individual in the car. The claimants opposed the application, and challenged the authenticity of the photographic evidence showing the bogus passenger.

After a two-day hearing in the Nottingham District Registry, at which all four of the original claimants gave evidence, and the Court considered expert computing evidence obtained by both parties, HHJ Godsmark QC, sitting as a High Court Judge, found all four litigants guilty of Contempt of Court. Although they advanced mitigation including ill health and the advanced pregnancy of one of the participants, the Judge held that only an immediate custodial sentence was appropriate and sentenced each of them to six months' imprisonment.

The case illustrates the benefits of persistence in combatting fraud. Cases suitable for Committal proceedings require careful selection, but in an appropriate case with cogent evidence to prove the fraud to the required standard, a successful Committal application can send a clear message to potential fraudsters that there is a personal cost to their misconduct – not only in the costs of the proceedings (and the Committal application) which can be enforced against any assets, but in the potential loss of their liberty for significant periods of imprisonment.

UK Insurance Ltd. v. Gentry (High Court, 15.07.16)

Contempt of Court – Relief from Sanctions

Marcus Grant (instructed by Keoghs LLP) appeared for UKI in its pursuit of Mr. Gentry for dishonesty in the presentation of his claim that culminated in the Court of Appeal refusing to grant Relief from Sanctions to an insurer who was late in applying to set aside a Default Judgment on the ground that the judgment was obtained on a claim that was likely to be fraudulent see: Gentry v. Miller & UKI Limited [2016] EWCA Civ 141.

The Court of Appeal, however, acceded to an application by UKI to stay execution on the Default Judgment and all of the costs of and occasioned by the appeals pending the outcome of any tort of deceit action seeking recovery for the consequences of Mr. Gentry's alleged deceit. The action arose out of an alleged road accident in March 2012 that gave rise to a default judgment for £75,089 and a judgment on costs of £12,975. UKI discovered cogent evidence linking Mr. Gentry to its insured, Mr. Miller before the alleged accident. Mr. Gentry filed a statement verified with a Statement of Truth saying that they only became friends after the alleged accident. UKI obtained compelling evidence to demonstrate that statement was untrue.

Following the Court of Appeal judgment on 09.03.16, UKI commenced tort of deceit proceedings in the High Court and, within those proceedings, sought permission to commence Committal proceedings against Mr Gentry for his Contempt of Court in signing a Statement of Truth to a witness statement containing material statements of fact he knew to be untrue. At the permission hearing before HHJ Simpkiss, sitting as a Judge of the High Court, Mr. Gentry admitted the Contempt. Sentencing will take place later this year. The tort of deceit action remains contested.

Nazir v. (1) Nagshbandi (2) UK Insurance Ltd. (CC at Central London, 12.05.16) (CC at Central London, 12.05.16)

Appeal – Finding of Fraud – Balancing Exercise – Adverse Inferences – Abandonment of Related Claims

Paul McGrath (instructed by Courtney Skitterall of Keoghs) acted for the Defendant in this matter where its positive case of fraud had been rejected at first instance and it had been found that the accident had been proven on the balance of probabilities. The trial judge, in doing so, considered the fact that claims had been discontinued and abandoned, and that witnesses who were relevant had not been called, but determined that without more evidence this could not assist him one way or another and then went on to balance the competing cases. When performing this balancing exercise, the judge did not expressly deal with the Second Defendant's evidence on the position of the First Defendant and related policies and claims.

The Defendant appealed, arguing that the judge ought to have considered and/or drawn an adverse inference from the non-calling of witnesses and abandoned claims, and that he had failed to properly weigh the Second Defendant's evidence in the scales and failed to take a step back and form an overall view.

At the final appeal hearing, HHJ Hand QC found that the trial judge may have been justified in treating the absence of relevant witnesses as neutral where an explanation had been proffered for their not being called (*Wisniewski v. Central Manchester H.A* [1998] EWCA Civ 596, [1998] PIQR P324; *Jaffray v. Society for Lloyds* [2002] EWCA Civ 1101, *Secretary of State for Health v. C* [2003] EWCA Civ 10 considered), but the fact that multiple claims were abandoned without explanation was not a neutral matter and required being put into the scales (*Secretary of State for Health v. C* [2003] EWCA Civ 10). Further, the judge had failed to adequately deal with the Second Defendant's evidence on the First Defendant, related policies and other matters and impermissibly relied solely on the credibility of the Claimant. The judge ought to have considered all relevant evidence, taken a step back and viewed the matter as a whole. The judgment would be set aside and the matter listed for retrial.

Cicek v. (1) Kokas and (2) Aviva Insurance Ltd. (CC at Central London, 24.10.16)

Fraud ring – Bogus Claims – Fundamental Dishonesty

Charles Curtis (instructed by Courtney Skitterall and Cara Spendlove of Keoghs) acted for Aviva Insurance in the three-day trial before HHJ Baucher. Aviva contended that the Claimant's claim was one of a number of bogus claims which had been made against a series of linked insurance policies, taken out with Aviva. The policies were variously linked by the IP address used to incept the policy, by the telephone number used to report the 'collision' and by named drivers and vehicle keepers appearing on more than one policy.

By the start of the trial on 24.10.16, only one claim remained, the other seven having been struck out or discontinued. The Claimant and his two passengers (who had claims for personal injury waiting in the wings) gave evidence, insisting they had been involved in a genuine collision.

HHJ Baucher rejected the evidence of the Claimant and his passengers. She was persuaded by the similarities in respect of each of the linked claims (each collision occurring shortly after the policy was incepted, a false address given on inception of each policy, the inability to trace the insured driver, the use by the parties of old vehicles and multiple claimants in each collision) that the insurance policies (including that of Kokas) were taken out for fraudulent purposes and that the Claimant was complicit in a fraudulent claim, the collision having been stage managed or not having occurred at all.

Having concluded that the claim was fraudulent, the Judge went on to conclude that the claim was fundamentally dishonest and so disapplied QOCS Protection.

21 personal injury claims were intimated to Aviva against the linked policies. All have now been successfully defended.

Khokar v. Jetwa (CC at Luton, 02.09.16)

Appeal – Slam On Fraud – Perversity – Insufficient Reasons

Marcus Grant (instructed by Keoghs LLP) appeared for the Defendant Appellant in this appeal against a decision of DJ White in a suspected slam-on case. The Defendant pleaded a detailed fraud Defence that included allegations of bogus passenger claims, a suspicious claims history and inconsistencies between the pleaded case and that intimated in the Claim Notification Forms from the three alleged occupants in the Claimant's car.

The Claimant turned up at trial with an interpreter, having given no prior indication that he had not read or understood the seven documents appended with his Statement of Truth. The Court permitted him time to have each document translated to him by the interpreter before the trial commenced. In a short ex tempore judgment the judge indicated that he was not satisfied that the collision was a staged accident because there was insufficient evidence of any conspiracy between the Claimant and the alleged decoy car driver. In summary, the judge stated that he preferred the Claimant's evidence to that of the Defendant, whom he found gave his evidence in a didactic way.

HHJ Clark allowed the appeal, finding that it was unclear to her from the reasoning of the judgment why the Defendant had lost. The District Judge had failed to address the critical evidential issues in the Defendant's case and make findings on them, before concluding that he preferred the Claimant's evidence to the Defendant's evidence. In the context of a clear pleading of fraud, properly put to the Claimant in cross-examination, the Court could not duck making findings on the critical issues, and could not make findings on burdens of proof until sufficient findings on those issues had been made. Accordingly, the appeal was allowed and the matter remitted to be reheard by a different Judge.

Mohamed & Ahmed v. (1) Cernaj (2) Aviva Insurance Ltd. (CC at Central London)

Third Party Costs – Credit Hire – CPR 44.16(2)(3)

Paul McGrath (instructed by Cara Spendlove of Keoghs) acted for the Second Defendant in this matter where the First Claimant's claim included a claim for credit hire in the sum of c. £25,000. The First Claimant had alleged that his car had been damaged in a road traffic accident and that he had been injured and that he was forced to hire a substitute vehicle. The Second Defendant pleaded fraud and alleged that the alleged accident was either contrived or was stage managed. The First and Third Claimants pursued their claims to trial. After the First Claimant had been cross-examined, HHJ Baucher gave an indication that the First Claimant's evidence had been incredible. The Claimants decided to discontinue their claims. The Judge found that the claims had been fundamentally dishonest and set aside the QOCS protection. The Second Defendant applied for its costs against the credit hire company and they were joined, and the matter adjourned, for this purpose.

The Judge considered the evidence filed and concluded that *(i)* the test under s51(3) of the Senior Courts Act 1981 ordinarily required exceptionality. However, in deciding whether a case was exceptional within the meaning of the established authorities (e.g. *Dymocks Franchise Systems (NSW) Pty v. Todd* [2004] UKPC 39; [2004] 1 WLR 2807), the Court was entitled to take into account that the Practice Direction had specifically identified credit hire as an appropriate case to make an Order for a non-party to pay costs; *(ii)* the evidence showed that the credit hire company exercised a good degree of control and influence in the litigation and whilst they were not in any way connected to the fraud aspects, they were aware for a good period that fraud was alleged and yet continued to ask for their loss to be included in the proceedings; and *(iii)* overall it was 'just' to order the credit hire company to pay towards the costs of the Second Defendant, but in the circumstances of this particular case the appropriate percentage was 85% of the costs of the First Claimant's action.

Yasar & 3 others v. (1) Karas (2) Aviva Insurance Ltd. (CC at Mayors & City of London, 20.09.16)

Whether PH Existed – Delivery of Insurance Certificate – Fundamental Dishonesty

Shaman Kapoor (instructed by Kirsty Taylor and Cara Spendlove of Keoghs) appeared in this case arising from an alleged collision. The First Defendant did not participate and the Second Defendant's enquiries led it to withdraw indemnity and claim the policy was void. D2 argued that delivery of the Insurance Certificate could not be proven so that it was not the Road Traffic Act insurer. D2 alleged that the claims had been fraudulent. The Court heard the evidence of three Claimants. The Fourth Claimant (a family member) did not appear. The Court found that the Claimants' evidence *"...was unreliable; not deviant or patently dishonest, but [they] were unable to explain a number of discrepancies..."* The Court did not find that the Claimants were deliberately seeking to mislead the Court, but that they were unreliable in their evidence. The Court found that what had been reported to the medical expert was 'misreported', such as to render all of their evidence under severe suspicion generally. D2's evidence demonstrated (vis-à-vis D1) circumstances that could be said to bear all the hallmarks of fraud from inception to trial, but the Court was not satisfied that D1 did not in fact exist. D2's attempts to locate D1 had not gone far enough, and thus the very serious finding of fraud could not be made. Consequently, as D2 bore the burden of proving that D1 did not exist in order to absolve itself from the application of the Road Traffic Act, the Court could not find that D2 was absolved from its statutory liability.

However, the Court found that the evidence on the part of all of the Claimants was so highly questionable that it could not find that any of the Claimants had proven their case. On the balance of probabilities, the Court found *"...the evidence of injuries to the Claimants to be wholly unreliable... [whilst] not inherently devious but they all stood behind an exaggerated claim. I hold them responsible for it."*

The Court was asked to consider a finding of 'fundamental dishonesty' in order that QOCS protection be disapplied. The Court held: *"...The claims were exaggerated throughout... so much of the case was dishonest, the word fundamental can be used."* The Court held that the exception to the application of QOCS did apply but not on the basis of fraud. The Court made an issue based costs order in favour of D2 for 75% of its costs (given the failure on the statutory liability point).

Askarnia & Khorzanian v. (1) Field (2)Groarke (CC at Central London, 13.10.16)

Fraud – Slam On – Costs

Edward Hutchin (instructed by Hannah Lowe of Keoghs) represented the successful First Defendant and her insurers in this major fraud case. Two related Claimants claimed damages for following a road traffic collision involving a multi-car shunt. The claim was defended on behalf of the First Defendant on the basis that it was a deliberately induced 'slam-on' and that the Claimants' evidence about the accident and their injuries and losses could not be believed.

After a trial in the County Court at Central London spread over four days before HHJ Wulwik, involving oral evidence from witnesses, including a witness from the hire and storage company allegedly used by the Claimants, the claims were rejected. The Judge held that both Claimants were knowing participants in a fraudulent road traffic collision, and commented that their claims for damages would, in any event, have been dismissed because of their unreliable evidence.

The claims were dismissed with indemnity costs in favour of the Defendants. The Judge disapplied QOCS on the basis that the claims were fundamentally dishonest, and gave permission for the costs to be enforced to their full extent.

Small v. (1) Aviva Insurance Ltd. (2) Mr. Pitter Smith (CC at Central London)

Finding of genuine accident – whether insured sufficiently identified for judgment and s151

Paul McGrath (instructed by Cara Spendlove of Keoghs) acted for the First Defendant in this matter where HHJ Bailey accepted the Claimant's evidence that she had been involved in a genuine road traffic accident. The Judge then considered the status of the Second Defendant (the named policyholder). The Second Defendant did not live at the reported risk address (which the person who had effected the insurance had probably misused) and could not be traced. The Judge therefore accepted that the person on the scene of the accident was not someone by the name of Mr. Pitter Smith as had been alleged. The parties disagreed about whether a judgment could be secured against the Second Defendant and therefore whether liability could be enforced against the First Defendant via s151 Road Traffic Act 1988 (in its form prior to its amendment by the Deregulation Act 2015).

It was submitted on behalf of the Claimant that as long as he identified that another driver was involved in the accident and that the other driver was using the vehicle insured, then this would be sufficient to entitle him to judgment against the named Second Defendant (whether he could be identified with any more specificity or not) and hence this could found a claim under s151 Road Traffic Act 1988.

The First Defendant (Aviva) submitted that unless the Court could be satisfied, on the balance of probabilities, that the person involved in the accident was indeed either the named Second Defendant or that he was an identifiable person using an alias of 'Mr. Pitter Smith', then judgment could not be entered against him and that this was a claim that ought to have been pursued under the Untraced Driver's Agreement. On the facts of the case where there were multiple rogues who may have been driving and the driver was not capable of identification (save by his role as 'driver'), judgment could not be entered against him and therefore s151 would not be engaged.

The Judge held that the individual presenting himself at the accident scene was the person who had effected the policy of insurance in the fake name of Mr. Pitter Smith (which was an alias). Whilst the Judge was not able to identify the real person behind the alias, it was sufficient identification for a judgment to be entered against him and accordingly, if unsatisfied, s151 would be engaged.

Pardbuck v Azadeen & UK Insurance Ltd (CC at Leicester, 20.10.16)

Slam On – Fraud Alleged – Fundamental Dishonesty

Julia Smyth (instructed by Hannah Lowe at Keoghs) appeared for the Defendants, who alleged that the Claimant had deliberately slammed on his brakes to induce a collision. The Court heard evidence from the Claimant, as well as the First Defendant and his passenger. Noting that there had been a 'devastating' period of cross-examination of the Claimant and accepting that the Claimant's evidence had been deliberately misleading in a number of key respects, the Judge (Mr Recorder Male QC) made an express finding that the Claimant had engaged in 'cash for crash' and dismissed the claim.

In the alternative, the Judge found that the Claimant could not prove his claims for personal injury (the medical expert having been 'seriously misled') nor repair costs. A claim for hire was withdrawn in the light of the Claimant's oral evidence, it having become clear that he had a number of other vehicles available to him. The Claimant was ordered to pay the Defendants' costs assessed in the sum of £32,500 and QOCS protection was lifted on the ground that the claim was fundamentally dishonest.

Mirza & Green v. Rix (CC at Leeds)

Taxi Claim – Genuine Passenger – Fixed Costs

David R. White (instructed by Alexandra Janikiewicz of Horwich Farrelly) represented the Defendant in this LVI case, brought by both the driver and the passenger in a taxi.

Whilst, on the papers, there were some concerns over the driver's case, there was little material against the passenger. Ultimately, the passenger did in fact prove to be a very straightforward witness, who persuaded the Judge (HHJ Gosnell) of her minor injury. The driver, however, was a very poor witness, whom the Judge noted as one of the worst he had seen in 2016.

Had the passenger's case been presented alone, it may well have been one to settle. Indeed, the nature of the passenger's claim might have been enough to persuade some to settle both cases presented from this vehicle. However, this was a lesson that two claims from one vehicle, particularly a taxi, do not necessarily stand and fall together.

Whilst clearly there will be cases where it will be appropriate to fight some occupants whilst settling with others, under the fixed costs regime it can be worth simply fighting all presented claims if there is doubt about any of them. In this case, for example, whilst the Defendant was liable for the passenger's fixed costs, he also recovered his own costs of the claim versus the driver on the indemnity basis following a finding of fundamental dishonesty. The client had, therefore, had the opportunity to test both cases at trial, and still left with what was overall a beneficial outcome on costs.

Nathanmanna v. UK Insurance Ltd. (CC at Central London)

QOCS – Costs following Strike Out pursuant to Unless Order – set off – enforceability

Paul McGrath represented the Defendant, UK Insurance, in this matter where the Claimant's claim had been struck out following his failure to comply with an Unless Order. The Claimant applied for Relief from sanctions but failed. The Claimant was ordered to pay the costs of the action and of the application for Relief from Sanctions.

The Defendant applied for a declaration that the costs were enforceable pursuant to CPR 44.15(1)(c). District Judge Avent decided that because the wording in CPR 44.15(1)(c) only permitted enforcement where the 'proceedings **have been** struck out' on the ground that the conduct was likely to obstruct the just disposal of proceedings and that because the proceedings had actually been struck out following an unless Order premised on the wording of CPR 3(4)(2)(c) (which made no reference to obstructing the just disposal of proceedings), the costs were not enforceable. The declaring Court was not entitled to revisit and re-categorise the original Order. Accordingly, the Defendant's application for a declaration was dismissed and the Claimant was awarded his costs of that application.

Accordingly, the Claimant was liable for the Defendant's costs of the action and the application for Relief from Sanctions (although these costs could not be enforced), but the Defendant was liable for the Claimant's costs of the application for a declaration. The Defendant submitted that the correct costs order was to set off one costs liability against another with the effect that the Defendant had nothing to pay, and the Claimant had a reduced costs liability (after set off) but that this could not be enforced. In short, neither would pay each other any costs. The Claimant submitted that the Order for set off would be unfair and that the QOCS provisions demanded that he receive his costs but his own costs liability could not be enforced against him. The Judge considered the authority of *Vava v. Anglo American South Africa* [2013] EWCA 2326 (QB); [2013] 5 Costs LR 805, the discussion at page 189 of the Costs & Funding Supplement to the 2016 White Book and the position with publically funded work, e.g. *Lockley v. National Blood Transfusion Service* [1992] 1 WLR 492 and R. *(Burkett) v. London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342.

He held that the decision of *Vava* should be distinguished on the basis that it was not a QOCS case and there was an express agreement between the parties that any such costs would not be enforced. Here there was no such agreement, but it was the operation of the CPR rules that was in question. The proper way to look at the bar on enforcement under CPR 44.14 was that it was engaged after costs had been assessed (see CPR 44.14(2)). Therefore, the better way to look at the position was to come to a concluded view about what costs remain owing first and only then did the restriction on enforcement bite. Accordingly, the Court decided that the Claimant's costs liability was best determined by ordering a set off of the awards for costs pursuant to CPR 44.12. The balance owing by the Claimant was then subject to the restriction on enforcement.

Given the developing jurisprudence in this area, the Judge gave permission to appeal on both aspects of his decision to the Defendant and Claimant respectively.