1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

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FRAUD UPDATE

SHARING OUR SUCCESSES

Welcome to the inaugural edition of TGC Fraud Update, a new publication from the fraud team at Temple Garden Chambers containing a number of articles on legal matters relevant to insurance fraud practitioners and a digest of recent noteworthy cases in which Members of Chambers have been involved.

This area of law has rapidly developed and evolved over the last few years and Temple Garden Chambers has long been at the forefront of finding innovative ways to tackle the problems that it presents. The need for innovation has come about largely as a result of needing to stay 'one step ahead' of the perpetrators of fraud in all of its many forms. Whilst the government have assisted the fight by enhancing the tools at a defendant's disposal (e.g. much of the subject matter in this issue relates to 'fundamental dishonesty'), new approaches to claims invariably give rise to new questions of tactics, which in turn have to be viewed against the backdrop of the prevailing judicial attitudes.

One of the main drives behind the creation of this publication is a desire to facilitate the sharing of information within the industry. Whilst of course it is acknowledged that the Defendant side of fraud litigation benefits from healthy competition between participating organisations, it is nevertheless the case that we are all working towards the common goal of fighting and reducing fraud. The exchange of information about legal issues, evidence, tactics and the like has numerous benefits: much can be learned from successes and, indeed, failures in decided cases; a more unified approach from Defendants is likely to result in new concepts filtering through to the judiciary more quickly and in a consistent fashion.

Please do contact a member of the TGC fraud team 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.

I do hope that the contents of this newsletter are both interesting and useful; I would welcome any feedback from our readers.

ANTHONY JOHNSON
aj@tgchambers.com
Editor

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"It smells, but it doesn't stink"

Marshalling legal and evidential burdens when dishonesty is pleaded.

Marcus Grant

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

How often have we had cases where there is an unpleasant odour of skulduggery but no unassailable evidence of fraud? All too often we are instructed to settle them on a commercial basis. This article signposts the road map for an alternative litigation strategy.

A Claimant is never relieved of discharging the legal and evidential burdens of proving his or her case, regardless of what positive case is pleaded by a Defendant. Too often, Judges wrongly are led into error by equating a Defendant's failure to discharge the onerous evidential burden of proving fraud against a Claimant to acceptance of the Claimant's case.

When a Defendant launches an assault against a Claimant's *bona fides* clearly in its pleadings, the Court needs to consider the Court of Appeal *dicta* in *Francis et al v. Wells* [2007] EWCA Civ 1350, *Nulty v. Milton Keynes CC* [2013] EWCA Civ 15 and *Hussain v. Hussain & Aviva Insurance* [2012] EWCA 1367.

In *Francis* Lloyd LJ said @ §§ 25-26:

> 25. *He should have looked at it as a whole and considered whether the combined effect of the striking coincidence of three incidents involving Mr Reeves and Mr Senghore, and all the difficulties and inconsistencies in the evidence of the four witnesses, was sufficient, as a whole, to satisfy him that the claim was not genuine, or at least to show that the claimants' cases were not proved on the balance of probability. In so doing he should also have addressed expressly the question of what facts he found to have been made out by the evidence. As I see it, his conclusion in favour of the claimants is the result of reasoning and analysis rather than of assessment in the light of the content and the manner of their evidence. He did not at any point step back from the detail of the evidence and review the impression that it left on him as a whole.*
>
> …
>
> 26. *I also consider, with respect, that the judge was wrong to proceed straight from the proposition that the defendant had not made out its claim of an invented accident to the conclusion that the claimants had proved their claims on the balance of probability. This may be only a theoretical distinction but, even if the case was not one of fabrication, it remained for the claimants to make out their case of negligence, and damage resulting from it, and in the absence of findings of fact which show the basis on which the judge found in favour of the claimants it is not clear how he reached that conclusion.*

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In *Nulty* Toulson LJ said @ § 37:

In deciding a question of past fact the court will, of course, give the answer which it believes is more likely to be (more probably) the right answer than the wrong answer, but it arrives at its conclusion by considering on an overall assessment of the evidence (i.e. on a preponderance of the evidence) whether the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen).

In *Hussain* @ §§ 33-39 Davies LJ reiterated that there is no burden on a Claimant to displace an inference that might arise from coincidental or circumstantial evidence. Specifically the Court emphasised that that there is no principle of 'follow the money' in cases where an Insurer's Insured (invariably named as First Defendant) is clearly a rogue, but where there is no evidence linking the Insured to the Claimant.

These cases bestow on an Insurer all it needs to challenge cases where there is cogent prima facie evidence of dishonesty that is circumstantial rather than incontrovertible. In such cases, the Insurer must plead its positive case of dishonesty, and then in the alternative put the Claimant to proof of his or her claim.

If the Court is not satisfied that the positive case of dishonesty is made out, that does not equate with the Claimant's case being accepted. Often, the Court will be quite satisfied that there is a sufficient doubt cast on the Claimant's case (usually from the material placed before the Court by virtue of the dishonesty pleading), that it will reject the Claimant's account, dismissing his or her claim in the process.

This is the correct legal analysis, and one that many Judges find more palatable to making findings of dishonesty. If run competently, it has the potential to save Insurers large sums of money. In a QOCS era, once a Judge has rejected a Claimant's case on the burden of proof against a backdrop of a dishonesty pleading, the Insurer still has a good chance of securing a costs order it is favour.

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Hussain v Amin – lessons learned?

James Henry

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

Before the decision in *Hussain v Amin (1) Charters Insurance* [2012] EWCA Civ 1456 insurers and their legal teams had grown used to identifying and pleading lists of 'concerns' with claims, or features of evidence 'consistent with a staged or contrived accident' without making a positive pleading of fraud. The *obiter dicta* of Davis LJ in *Hussain v Amin* made clear that such pleadings were not to be tolerated, and that where they amounted to insinuation rather than allegation they could constitute an abuse.

Those observations gave rise to a spate of applications to strike out elements of defences that, it was said, amounted to pleadings of fraud in everything but name. Some were successful and for a period there were inconsistent approaches to the issue in different County Courts. In fact, the rules and authorities relating to pleadings are well established (e.g. *Kearsley v Klarfeld* [2005] EWCA Civ 1510; *Francis v Wells* [2007] EWCA Civ 1350). Defendants are entitled to require a claimant to strictly prove his case and set out facts from which the court would be asked to find that he had not done so.

In February 2015 the issue came before the High Court in *Ahmed v Lalik (1) Co-operative Insurance (2)* [2015] EWHC 651. Cranston J held that the *obiter* remarks of Davis LJ in *Hussain v Amin* should not be read as casting doubt on well-established authorities such as *Kearsley and Francis v Wells*, which establish that in cases involving minor road traffic accidents it is not necessary for the defence to make a substantive allegation of fraud or fabrication, but it is sufficient to set out the detailed facts from which the court would be invited to draw the inference that the claimant has not suffered the injuries or damage alleged (see paragraph 24 of the Judgment).

The decision in *Ahmed v Lalik* now seems to have settled the position. Useful guidance is also found in the Judgment of HHJ Jeremy Richardson in *Yasin v Peshraw (1) Sabre Insurance (2)* (Kingston-Upon-Hull CC, 17.04.15, LTL 18.06.15), an appeal against the decision of a Deputy District Judge to strike out of elements of the insurer's defence on the basis that it amounted to a pleading of fraud in all but name. The Judgment recognised the procedural and ethical restrictions legitimately placed on solicitors and counsel pleading fraud, and went on to differentiate between allegations falling within the 'fraud category' and those that fell into the 'sub-fraud' or 'inference' category. HHJ Richardson emphasised that in this day and age it is necessary for parties to place on the table, by way of express pleading, the ammunition and artillery that is in their possession. The insurer had done just that and was entitled to say that the information presented cast real doubt on whether a genuine accident occurred.

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While the law in relation pleadings of fraud seems to have been clarified, similar considerations now feature in cases where findings of fundamental dishonesty are sought. Is it necessary to plead fundamental dishonesty or fraud in order to secure such a finding? Many courts are now making findings of fundamental dishonesty in cases where no such pleading has been made, and the claimant has not had a positive case of dishonesty put to him during cross-examination. It is surely just a matter of time before that issue is ventilated before an appellate court.

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1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

Nama v Elite Courier Company

A contextual and purposive approach to fundamental dishonesty

Tim Sharpe

The claim arose from a road traffic collision that took place on a roundabout involving the Claimant's car and the Defendants' lorry. In essence, each driver accused the other of failing to stay in their own lane, causing the collision. The Claimant said that the collision was witnessed by a pedestrian, who provided a statement but did not attend trial. The Defendant's driver said that this man was present at the scene but that he was in fact a passenger in the Claimant's car at the time of the collision, and not a pedestrian. The Claimant denied knowing the witness. The Defendant relied on evidence that the Claimant and the witness were friends on Facebook since before the accident.

At the trial of the matter which took place before DDJ Lindwood at the County Court at Central London on 05.03.14, the court accepted the Defendant's evidence as to the circumstances of the collision. The court also found that the witness had emerged from the Claimant's car after the collision and was not a pedestrian. The claim failed and the Defendant sought a finding of fundamental dishonesty. The court considered the judgment of HHJ Moloney QC in *Gosling v (1) Hailo & (2) Screwfix* [2014] and in particular para 43 which states:

> *"The corollary term to "fundamental" would be a word with some such meaning as "incidental" or "collateral". Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."*

In the light of these comments, the Defendant made two submissions (referred to as the "two limbs" in the Judgment): *(a)* that the Claimant had been fundamentally dishonest in relation to her evidence about the passenger/pedestrian and that this of itself was sufficient to warrant QOCS protection being lifted; and *(b)* that if *(a)* did not suffice for fundamental dishonesty to be made out, the court should consider again the rejection of the Claimant's evidence on liability in the light of the findings about the passenger, and conclude that she had been fundamentally dishonest about the circumstances of the collision. The Court found that the Claimant could not have been mistaken about the occupancy of the witness and that this was sufficient to warrant a finding of fundamental dishonesty. As to the second argument, the court found that while there were numerous inconsistencies, they did not satisfy the definition of fundamental dishonesty.

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There are few reported decisions on "fundamental dishonesty." While a county court case, this decision is of some importance. The Claimant argued that the issue of the witness was a collateral matter and not such as to attract a finding of fundamental dishonesty, relying on the passage above from *Gosling*. The court agreed that the "core of the evidence was not dishonest" yet still found that the exception was made out given the dishonesty as to the alleged independence of the witness. This robust decision, it is submitted, reflects the "purposive and contextual" interpretation that HHJ Moloney referred to in *Gosling* at para 42:

> *"This is, of course, the determination of whether the claimant is "deserving", as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability."*

It is argued that this Claimant was not deserving of costs protection even if she was honest (but mistaken) about how the actual collision occurred. Independent witness evidence holds an important place in civil liability. Indeed, it can often be of fundamental importance in resolving a dispute, whether before or at trial. As Moses LJ and Dobbs J said in *South Wales Fire & Rescue v Smith* [2011] EWHC 1749 (Admin) in relation to an application for committal for contempt of court:

> *"Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability."*

The decision can be said to reflect the willingness of the court to consider QOCS purposively, and to disapply QOCS when a Claimant is not deserving of the protection it brings to honest Claimants.

The transcript of the Judgment in this case can be found on Lawtel (document no. AC0146951).

Circumstantial Evidence Alone

Alex Glassbrook

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

In May 2015 Alex Glassbrook, instructed by Keoghs, secured the dismissal of a contrived road accident claim on the basis of fraud, with indemnity costs and an order for an immediate payment on account of costs by the dishonest Claimant of £50,000.

The unusual part of the case was that the insurer's submission that the claim was fraudulent rested solely upon circumstantial evidence.

A 3-year insurer's investigation had uncovered no direct connection between the Claimant and fraudulent behaviour. But it had revealed a great deal of other, circumstantial evidence of dishonesty, albeit by another party: the absent First Defendant driver. That evidence linked 17 "accidents" which had resulted in claims. The material accident was the fifth of the 17.

An analysis of the 17 accidents showed 10 recurring similar features (particular cars, individuals, locations etc.) The Claimant's accident showed 9 of those 10 features. That alone was a striking coincidence. But the Claimant did not appear himself in any of the other accidents: there was no direct link to him. A web of dishonesty surrounded him, but at no point did it touch him directly.

The question for the Court was whether the Claimant was also a fraudster, purely on the basis of that circumstantial evidence.

The Judge, directing himself that all rested upon the Claimant's performance under cross examination, found the claimant on the evidence to be complicit in the fraud and a dishonest witness, dismissed the claim.

The case reminds us that the Courts will decide cases on the basis of circumstantial evidence, and on that evidence alone. If a party cannot adequately explain the coincidences under cross examination, his credibility and case will be damaged. The point has occasionally been overlooked. The belief has spread into some County Courts that an allegation of fraud can only properly be pleaded if there is "direct" evidence, directly implicating the Claimant in a fraud.

That is an outdated idea. It is no longer the case that a party can only adduce "the utmost evidence that the nature of the fact is capable of" (otherwise known as "the Best Evidence rule"). That rule would, for example, have excluded circumstantial evidence if direct evidence could have been obtained. It would have required the production of "smoking gun" evidence in every case and required the settlement of cases in which only circumstantial evidence was available.

It is not the habit of most offenders to leave a smoking gun. Consequently the Best Evidence rule no longer applies. It is, as *Phipson on Evidence* puts it, "an evidentiary ghost". Its only residue is in the Court's capacity to draw adverse inferences if a relevant original document is available in the hands of a party but is not produced.

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But otherwise all admissible evidence (circumstantial evidence included) is generally equally accepted. As Lord Bingham said, when holding that similar fact evidence is admissible in civil cases solely on the basis of relevance to the pleaded issues:

> *"To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it"*
>
> and
>
> *"it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters."*
>
> (*O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, 540-541)

So the admissibility of circumstantial evidence is an important aid to the judge, based upon a realistic, common-sense approach. It would be odd if that were not the case, as it is precisely that approach that the Judge is asked to adopt when assessing the evidence of a witness under cross-examination.

And, as the American attorney Francis Wellman prefaced his 1903 work "The Art of Cross-Examination":

> *"Cross-examination, – the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate… It has always been deemed the surest test of truth and a better security than the oath."*

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Saunderson v. Sonae Industria *[2015] EWHC 2264*

A Cautionary Tale

Emily Wilsdon

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

A fire at the Defendant's manufacturing plant sparked 16,626 claims for personal injury. After a Group Litigation Order, 20 test cases proceeded to trial in the High Court. The trial was before Mr Justice Jay, previously Robert Jay of Leveson Inquiry fame.

The case has been widely reported for the light that it has shed on the practices of the Claimants' solicitors. Two firms were referred to the SRA by the Judge.

It also demonstrates the value of carefully probing the evidence of suggestible claimants. How did they come to make a claim? Does their account of the accident (here the fire and smoke plume) match the available evidence? Are their accounts of their symptoms given at different times consistent? Did they go to their GP and link their symptoms to the accident? Did they in fact have any pre-existing conditions that could explain the symptoms? Does a social media search turn up anything that undermines the claim? All of these questions led to fruitful answers in the Sonae litigation.

There were a variety of ways in which Claimants had been persuaded to make a claim. One Claimant was *"not a dishonest witness but she has persuaded herself into believing, some considerable time after the relevant events, that the fire caused her asthma attack"*. She said that "*that Camps (or their agents) knocked on her door to recruit her to this litigation"*. One was *"vulnerable, compliant and suggestible"*. She *"was recruited to this group when she was out shopping and saw a sign "were you affected by the fire?"* For another Claimant *"It was not until he saw an advert in a newspaper that other people had apparently suffered similarly that he made the link between his symptoms and the fire"*. One was involved in an exchange on Twitter where the litigation had been mentioned on the radio. He said *"I'm getting involved I reckon, pays for the summer holiday if it goes thru"* and then referred to previous whiplash claims.

Many of the test Claimants had been inconsistent in their evidence about the smoke they had witnessed, and the progression of their symptoms. Some had pre-existing conditions.

More disturbingly, Mr Glascott, one of the Claimants, had written to the Defendant to say that he had been cold called on the doorstep and after having said that he had not been affected by the fire, was persuaded to answer questions about his health and sign the 'questionnaire'. He was then called about a Statement of Truth, and explained he did not wish to make a claim. He was told that he would have to pay costs if he withdrew his claim.

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The signature on Mr Glascott's statement of truth looked nothing like his signature elsewhere, and the Judge was not satisfied that it was his. Mr White gave evidence for the solicitor's firm, and was found to be *"a poor, rather self-important witness who was acting in what he thought were the interests of his firm rather than those of his client"*. The firm was referred to the SRA.

Finally, there were two questionnaires in existence for Mr Woolvine, the first completed and signed by him, the second (on his evidence) completed and signed by someone else. Again, this firm was referred to the SRA.

There were serious weaknesses in the claims. Only one of the 20 test Claimants had attended their GP and actually complained about the fire or linked their complaint to the fire. There was no contemporaneous evidence that over 16,000 people had suffered symptoms, such as increased GP attendance or letters to local newspapers. The questionnaires used by the Claimants' solicitors asked leading questions – which led to exaggerated responses. They had been recruited by the use of pop up shops and cold calling. Interestingly, on the scientific evidence a maximum of 250 people lived within the area that would have had sufficient exposure to trigger inflammation – a tiny number compared to the 16,626 Claimants.

Jay J. concluded that the smoke had caused only irritation, below the actionable level for personal injury. Very mild symptoms had lasted at most a week. Much later, *"lawyers arrived on the scene and sensed the opening of a business opportunity"*. The Claimants' legal team had not investigated whether the claim 'stacked up' based on the scientific evidence. They seemed to hope it would settle, or believed the judge would not be that interested in the science, or placed undue faith in the lay evidence.

The 16,626 claims were comprehensively defeated. The Defendant did not need to rely on a pleading of fraud (though it was pleaded, successfully in relation to the Claimant on Twitter, and also in relation to Mr Glascott's claim). A forensic approach to the scientific evidence and to the Claimants' evidence led to the judge's conclusion that *"The legal process preyed on human susceptibility and vulnerability, and the rest is history"*.

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Click here for the next page.

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

Pursuing Fundamental Dishonesty Following a Discontinuance

A Cautionary Tale

Anthony Johnson

I recently acted in the case of *(1)Coles (2)State v. LV Insurance* (Derby CC, 25.08.15), instructed by Maria Franchetti of Keoghs, where the Defendant was not only able to secure costs against the First Claimant who had brought his case to trial and been found to be dishonest, but also against the Second Claimant who had previously discontinued his claim. As far as I am aware, this is one of the first claims that has reached trial involving a fraudster who has elected to 'bat on' after their co-conspirator decided 'enough was enough', and so the decision is likely to be of interest to any reader who finds themselves in a similar situation.

Proceedings were issued separately by the two Claimants against the Defendant, which had no problem indemnifying its driver, a 76-year-old lady who had suffered absolutely no injury in a relatively minor collision. A Consolidated Defence was filed which put the Claimants to strict proof, but also raised some troubling matters, not least that the Second Claimant had spoken to a representative of the Defendant some nine days after the accident, when his symptoms were supposedly at their most acute, and told them that neither he (as the driver) nor his passenger were injured.

After the Claimants' solicitors (Hogarth Law) made an unsuccessful attempt to exclude the transcript of the telephone call from the evidence, the Second Claimant filed a Notice of Discontinuance and his solicitors came off the record as acting for him shortly afterwards. The First Claimant, however, elected to pursue the matter all the way to trial. It transpired that the case put forward by his representatives was that the Second Claimant was a mere acquaintance of his and did not have knowledge of whether or not he had actually been injured.

After trial, where the First Claimant wholly failed to deal with numerous discrepancies in the medical records and other evidence in addition to the aforementioned telephone call, District Judge Stark made a positive finding that neither Claimant had been injured in the accident and that both were fundamentally dishonest. Costs were awarded against them on the indemnity basis, and an order was made that the exception to QOCS applied and that those costs could be enforced.

The Defendant's Application against the Second Claimant was made pursuant to CPR 44 PD 12.4(c) which states, *"where the claimant has served a Notice of Discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to CPR 38.4.""where the claimant has served a Notice of Discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to CPR 38.4."* This provision is ideally suited to a situation where one claimant

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continues in the absence of others, as the Court is extremely likely to grant such an Application in a matter that has had to go to a full day's hearing in any event.

In order to be able to make a successful Application under this provision, it is of paramount importance that notice is given to the discontinued party at all stages (assuming, as in this case, that they are unlikely to attend the hearing or play any further active role in the process). In this case, following the discontinuance an Amended Consolidated Defence was filed which pleaded a positive allegation of fraud; a copy was sent to the Second Claimant at his home address. A formal Application was made pursuant to CPR 23 to ask for the issue to be dealt with at the trial; notice was again given to the Second Claimant. Correspondence was forwarded to him throughout, and he was even called the day before the trial to tell him that the venue had been switched from another Court.

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Recent Noteworthy Cases

1 Harcourt Buildings
Temple
London EC4Y 9DA

T: 020 7583 1315
E: clerks@tgchambers.com

@tgchambers
#tgcfraud

Hamid v. (1) Sheikh Khalid (2) Co-Operative Insurance (Manchester CC and Court of Appeal, February and July 2015)

Paul McGrath (instructed by Catherine Goodwin of Weightmans) represented the Second Defendant insurance company in a claim for personal injury and compensation arising out of an alleged accident. The Second Defendant alleged fraud but after a three-day trial in February 2015, Ms. Recorder Howells accepted the Claimant's and First Defendant's evidence and gave judgment in their favour. The Second Defendant has appealed on various grounds, including that the Judge misevaluated the significance of the contradictions of their evidence, ignored the weight of the expert evidence (which was given concurrently, in what is often referred to as 'hot tubbing'), and erred in refusing to draw adverse inferences from the non-attendance of key witnesses. On 29.07.15, the Court of Appeal gave permission to appeal and ordered a stay of execution. A full appeal is expected in Autumn 2016 and is expected to provide guidance to the hearing of such cases.

Peerbux v. (1) Dytow (2) Churchill Insurance; Gjeci v. (1) Glowacki (2) UK Insurance Limited (Central London CC, 09.07.15)

Marcus Grant (instructed by Nicola Wise of Keoghs) appeared for Direct Line in two separate claims listed for trial back-to-back before HHJ Freeland QC. Direct Line deployed similar fact evidence, cross examination of the Claimants and their witnesses and deployment of principles governing burdens of proof in claims where fraud is alleged (see article above).

The Court found that whilst Direct Line had failed 'by a narrow margin' to demonstrate that the Claimants were part of a conspiracy to defraud motor insurers, nevertheless the Claimants had failed 'by a wide margin' to establish that there had been accidents as they had alleged. Obiter, the Court found that the credit hire charges, incurred through an accident management company, DAML, were 'exorbitant'. Had the Claimants established liability, their claims for c.£66,000 and c.£77,000 would have been assessed in the sums of £3,650 and £1,718 respectively. The Court held that 'impecuniosity is not to be regarded as a blank cheque'.

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Ahmed v. (1) Muhamed (2) AIG (Bow CC, 25.06.15)

Julia Smyth (instructed by Clare Senior of Clyde & Co) successfully represented the insurer in this case, in which the District Judge accepted that the Claimant had not proven that an accident occurred as alleged; the Judge went on to find that even if she had accepted that an accident had occurred as a result of the First Defendant's negligence, she would have rejected the Claimant's claim that he had been injured. It was found that the Claimant's evidence as to his alleged injuries, previous accidents, medical history and the accident itself was inconsistent and lacked credibility. This case is a good example of why it often pays to go to trial when an insurer has misgivings about a case, even where there is no 'smoking gun', particularly under the new regime.

Hanen v Moss (Watford CC, 10.07.15)

Matt Waszak (instructed by Stacey Bell of Plexus Law) secured a finding of fundamental dishonesty on behalf of the Defendant against a Claimant who had discontinued his claim the day before trial.

The Claimant had sought damages for an 8-10 month whiplash injury sustained in a road traffic accident in which he alleged that the Defendant had driven into the rear of his car. The Defendant's account of the accident was that the Claimant had mistakenly reversed into his car. Curiously, no discernible damage had been sustained to the Defendant's car.

The Claimant served a notice of discontinuance the day before trial. In response, the Defendant's solicitors wrote to the Claimant's solicitors to put them on notice that an order would be sought under CPR 44.16 to disapply the Claimant's QOCS protection on the basis that the claim was fundamentally dishonest. Reference was made in their letter to CPR 44 PD 12.4(c) (see article above). No response was ever received from the Claimant's solicitors. The trial remained in the Court list.

In the absence of such a response, DDJ Gill determined that it was proportionate to determine the allegation in respect of fundamental dishonesty without ordering a further hearing. After considering the evidence on paper, and highlighting that it was hard to reconcile the last minute discontinuance with a claim that had been brought honestly, he found the Claimant to have been fundamentally dishonest. The Defendant's costs were summarily assessed and held to be enforceable against the Claimant. The Claimant has sought permission to appeal.

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(1) Majid (2) Muraadi (3) Majid v. (1) Mitcia (2) Aviva
(Central London CC, 29.06.15)

Emma-Jane Hobbs (instructed by Hannah Lowe of Keoghs) represented the Second Defendant in a case where the claims were struck out by HHJ Mitchell on the first day of a three-day trial. The Second Defendant had pleaded fraud on the basis that an accident had not occurred as alleged. The Second Claimant's claim had already been struck out for non-compliance with a Court Order and she had left the country. The remaining Claimants had failed to disclose certain documentation, as ordered by the Court. Neither Claimant had provided up-to-date medical records. The First Claimant had also failed to disclose the V5 vehicle registration certificate, MOT documentation, insurance certificate, any evidence that his vehicle had been repaired or any documents in support of impecuniosity. He had not served a witness statement to explain why he hadn't been able to disclose those documents, in accordance with the Court's order.

Although the Judge recognised that the Third Claimant's claim could, potentially, continue in isolation, he struck out both claims on the basis that they were inextricably linked and the First Claimant had not provided documentation which was central to both of their cases. In his judgment he said that there was a public policy element to his decision. Orders in Central London CC were pages long because of the amount of fraud being perpetrated up and down the country, and District Judges were doing their best to ensure that relevant documentation was disclosed. The Court needed to send a message to Solicitors that, particularly where fraud is pleaded, non-compliance with orders is unacceptable. The Judge dismissed the Claimants' application for Relief from Sanctions as the documents had still not been disclosed by the date of the trial and the Claimants remained in breach of the original Order.

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Churchill Insurance Company Limited v. (1) Shajahan (2) Hussain (Birmingham CC, 11.09.15)

Paul McGrath (instructed by Hamida Khatun of Keoghs) represented the Claimant insurance company in their successful stand-alone action for compensatory and exemplary damages in the tort of deceit. The Claimant was successful in recovering the payments that had previously been made as well as compensation to reflect additional administrative resources deployed in investigating the fraud (40 hours at £30 per hour, making an award for this aspect of £1,200) which the Judge (Recorder Tidbury) described as entirely reasonable and in line with the cases in the area. The Judge also made an award of £7,500 exemplary damages after a careful review of the authorities in the area and considering each of the eight factors set out in McGregor on Damages. He accepted that the award ought to be significant and that it should be enforceable against the participants jointly.

Pedro v. Buchanans Motors (Edmonton CC, 28.08.15)

David R White (instructed by Joanne Dewhurst of Keoghs) successfully represented the Defendant in this matter in which the Claimant conceded the case after his evidence had been tested under cross- examination.

The Claimant claimed for personal injury, along with vehicle repairs, credit hire and related matters, following a rear-end shunt from a vehicle driven by the Defendant's employee. The Defendant's case was that the accident occurred at such a low speed that injury could not have been sustained.

The Claimant's credibility crumbled under cross examination, and he presented extremely inconsistent and unconvincing evidence about his alleged injuries in particular. The high point of the cross examination revealed that the Claimant had previously served a prison sentence for fraud.

Although the Claimant could arguably have pursued the costs of repairs to his vehicle and the related losses, he was persuaded to withdraw and pay the Defendant's costs.

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Jalota v Gill (Clerkenwell & Shoreditch CC, 08.09.15)

Tim Sharpe (instructed by BLM) represented the Defendant in this claim arising out of an RTA on a roundabout. The versions of events on liability from the Claimant and the Defendant were diametrically opposed, each claiming to have been stationary at the time of the accident.

DDJ Cridge found that the Claimant's version of events was inherently impossible and not supported by the damage or her own assessor's report. The court noted that if the Claimant's evidence had stopped there, he would have found her to be simply confused, in contrast to the clear and consistent evidence from the Defendant. However, the Claimant also claimed that there were two independent witnesses who stopped, assisted her at the scene and provided their details. The Defendant denied the presence of these individuals. The first alleged witness provided no evidence and did not attend court. The second alleged witness had provided a signed witness questionnaire and an unsigned witness statement. The Claimant said in evidence that this man had towed her from the scene, charged her for storage (despite her own engineer's report questioning these charges as the car was, at inspection, parked on the public highway outside a residential address with no workshop facilities) and later repaired her car. He did not attend Court. It was found that his evidence was riddled with inconsistencies and was a fabrication. The Court found that the Claimant had not been assisted by these individuals at the scene and that she had made up the greater part of her evidence to bring the claim and defend the counter-claim. The claim was fundamentally dishonest such that the Claimant would pay the Defendant's costs unrestricted by the fixed costs regime (CPR 45.29F(10)) and without the protection of QOCS.

Carman v (1) Hill & (2) Aviva (Brighton CC, 07.04.15)

Richard Boyle (instructed by Joseph Dodman of Silverbeck Rymer) successfully represented the First Defendant in this case in which HHJ Simpkiss made a finding of fundamental dishonesty against the Claimant, pursuant to CPR 44.16. The parties had given very different versions of events however neither side had pleaded fraud or fundamental dishonesty. The Claimant stated that the Defendant had been in the lane next to him and had cut across him as they entered the roundabout, causing the collision. The Defendant stated that she had been stationary, waiting to enter the roundabout, when the Defendant had run in to the back of her from the same lane.

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The Judge found that the damage did not support the Claimant's version of events and that it was not plausible that the accident could have happened in the location he had suggested. The Defendant's evidence had been that the Claimant had accepted liability for the accident at the scene and had attempted to have the Defendant's vehicle repaired outside of insurance. The judge found that the Claimant was not telling the truth and had made up his version of events after it became clear that it would not be possible to settle the case without going through insurance.

After considering Gosling v Screwfix (see above), the judge found the dishonesty to be fundamental because, if believed, it would have led to the Claimant's claim succeeding rather than the Defendant's. He found that this was well beyond a case in which one person's evidence was preferred over the evidence of another.

Gogar & ors. v. Ipparragirre & ors. (Central London CC, 03.08.15)

George Davies (instructed by Keoghs) recently acted for three insurance companies and their policyholders in a five-day trial. The four claimant drivers were all seeking damages for personal injury and credit hire charges arising out of four seemingly unrelated road traffic accidents. The claimants' total costs and damages were estimated at more than £400k. The defendants' position was that the four claims were fraudulent because all four collisions had been deliberately induced for the purpose of financial gain. The defendants' case was that the claims all shared a similar modus operandi of sudden braking by the claimant drivers and the involvement of unidentified 'stooge' vehicles which supposedly caused them to brake. Further, the claimants had all used the same companies after the collisions. In addition, the same locus appeared in two of the claims and the same passenger featured in two of them. Because of these links, the defendants had ensured that all four claims were heard consecutively before the same trial Judge (HHJ Judge Freeland QC). All four claimants decided to discontinue their actions after evidence was heard in only three of the claims. The usual costs orders flowed from the claimants' decision to discontinue.

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