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TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Editorial

By James Henry jdh@tgchambers.com

Welcome to the latest instalment of the TGC Fraud Update.

No doubt our readers will have been glued to their screens to see the recent excitement in the Supreme Court unfurl. Who can forget where they were when the Court reaffirmed the principle that fraud is a deception not only on a litigant's opponent and the court, but on the rule of law? I speak, of course, of the decision in *Takhar v Gracefield Developments Ltd*, which has been analysed by Lionel Stride in our first article.

Also in this issue:

- Lionel Stride and Anthony Johnson examine the Court of Appeal decision in *Zurich v Romaine*, giving renewed confidence to those applying for permission to commence contempt proceedings.
- James Laughland and Elizabeth Gallagher question whether a claimant ever has a 'right to silence' and, if so, what are the consequences?
- Harriet Wakeman considers the effect of s.57 in complex cases involving questions of capacity, dishonesty and the role of a litigation friend following the recent decision in *Patel v Aviva (1) Zurich (2)*.
- Ellen Robertson shows that there is more than one way to 'skin a cat' in her article exploring alternative routes to enforceable costs orders.

As always, these articles are accompanied by summaries and interesting practice points taken from a host of recent decisions in the types of cases that we all deal with on a daily basis.

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

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Takhar v Gracefield Developments Ltd & Ors [2019] UKSC 13

Lionel Stride

The appeal in *Takhar v Gracefield Developments Ltd* was, in the words of Lord Briggs, 'the outcome of a bare-knuckle fight between two important and long-established principles of public policy': the first being that 'fraud unravels all', and the second that there must come an end to litigation. In *Takhar* the former principle prevailed on grounds that it would be fundamentally unjust for a fraudulent party to benefit from their fraudulent actions, with fraud being a 'deception not only on their opponent and the court, but on the rule of law'. Accordingly, a party who makes an application to set aside an earlier judgment on the basis of fraud need no longer show that such evidence could not have been obtained ahead of trial with the exercise of 'reasonable diligence'.

The proceedings in *Takhar* arose from a transfer of the legal title to properties owned by Mrs Takhar, to the newly formed Gracefield Developments Ltd of which she and 'the Krishans' (her cousin and her cousin's husband) were shareholders and directors. Legal proceedings were brought by Mrs Takhar, who alleged that the properties had been transferred as a result of undue influence or 'other unconscionable conduct' on the part of the Krishans; she claimed that it had been agreed between the parties that the properties would be renovated and then let, whilst she remained the beneficial owner; the Krishans instead averred that under a joint venture agreement between the parties it was agreed that the properties were to be sold after they had been renovated, with any profit divided equally. Mrs Takhar denied signing the agreement and sought permission to obtain evidence from a handwriting expert to prove it was not her signature; this permission was denied and her claim was then dismissed.

Mrs Takhar later obtained evidence from an expert that confirmed her signature had in fact been transposed onto the agreement from another document. Mrs Takhar initiated proceedings to have the initial judgment set aside on the basis of fraud; although successful at first instance (with Mr Justice Newey holding that the claim was not an abuse of process because it was not necessary to demonstrate that the fraud could not have been discovered earlier with the exercise of reasonable diligence), the Court of Appeal disagreed: They emphasized that:-

- The leading case of *Henderson v Henderson* [1843-60] All ER Rep 378, establishes the general principle that parties must normally advance their total case 'in the first bout of litigation'; it is only in the most exceptional circumstances that parties will be permitted to reopen decided issues in fresh litigation which ought to have been considered earlier (namely, by the date of the first trial) but for 'negligence, inadvertence, or even accident'. It was held that this principle applied to *'every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'.*
- It is not in the interests of justice for a party to be permitted to reopen litigation after being unsuccessful, in order to re-litigate upon the same facts (and possibly reach the same outcome) simply by virtue of an additional allegation of fraud; this would be particularly unacceptable when the allegation of fraud was well within that party's knowledge at the time of the first trial – or ought to have been.

- Mrs Takhar would therefore have to show that any fresh evidence of fraud obtained following judgment would not have been available at the time of the first trial, or could not have been discovered by her if exercising all due or 'reasonable' diligence.

Accordingly, the case was remitted to the High Court to determine whether Mrs Takhar would be able to establish that she could not have discovered the alleged fraud by exercising reasonable diligence ahead of trial. However, Mrs Takhar appealed successfully to the Supreme Court. Lord Kerr (delivering the leading opinion in *Takhar* at [55]) identified two matters arising from the present case that were not addressed adequately in the precedent set by *Henderson*. First, the issue on appeal was not one that had been in issue at the first trial; the allegation of fraud had not in fact been raised or pursued at the original trial (because no permission had been granted to adduce evidence from a handwriting expert). Second, it was held that the legal authorities cited against Mrs Takhar should not be construed to impose a strict test of 'reasonable diligence' when examining whether the fraud could or should have been identified and pursued at an earlier time.

The Supreme Court highlighted that Mrs Takhar had first brought her claim on the basis that the agreement was void by virtue of undue influence and unconscionability on the part of the Defendants. By contrast, on appeal, the key issue was the validity of the agreement in its written form, in light of the evidence of forgery. It was accepted that the Appellant had in fact suspected fraud and had sought to instruct a handwriting expert, but she had been refused permission by the court to proceed with those investigations. Consequently, this was not therefore a case in which fraud had been strongly suspected in advance of the first trial but where Mrs Takhar had nevertheless made a deliberate decision not to investigate that possibility; had it been, she would not have access to the proposed remedy of setting aside the judgment.

In the premises, it was held that there was no requirement for the Claimant to show that she had acted with reasonable diligence because the law did not expect people "to arrange their affairs on the basis that others may commit fraud". In delivering his opinion, Lord Kerr considered that 'the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming' [53].

As to general application, the Supreme Court held that ***'it ought now to be recognised that where it can be shown that a judgment had been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment'*** [54]. This is nevertheless qualified by two factors that would allow a court to exercise its discretion to reject an application to set aside judgment: where fraud has in fact been expressly raised but dismissed at the original trial (even where new evidence comes to light); and where a party makes a deliberate decision not to investigate the possibility of fraud.

It follows that *Takhar* is clear authority for the proposition that a losing party can re-open litigation that has concluded at trial in order to challenge a judgment that was obtained by fraud (provided that issue has not already been determined at trial; or it can be shown that a deliberate decision was made not to investigate the possibility of fraud). The applicant will still face the same strict requirements in order to set aside the judgment obtained by fraud; per *RBS v Highland Financial Partners lp* [2013] 1 CLC 596, it must be proven that there was 'conscious and deliberate dishonesty', of which the concealment was 'material' (i.e. an operative cause of the court's earlier decision, by reference to the impact on the evidence supporting the decision). However, he/she should not have to bear the additional 'rigorous requirement' of disproving that it should reasonably have discovered the fraud before the trial. This draws the law on re-opening judgments in line with the law on re-opening settlements: in *Hayward v Zurich Insurance Co PLC* [2016] UKSC 48, the Supreme Court also set a lower threshold test on grounds of public policy in holding that, when seeking to set aside a settlement on the basis of fraudulent misrepresentation, insurers do not have to prove that they settled because they believed that those misrepresentations were true; they merely have to show that they had been *influenced* by the misrepresentations. Both the cases of *Takhar* and *Hayward* demonstrate the desire of the Supreme Court to ensure that deception must not be allowed to prevail, even if this comes at the expense of the principle of, and need for, finality in litigation.

Zurich Insurance PLC v David Romaine (2019): committal where the die has already been cast

Lionel Stride & Anthony Johnson

The Court of Appeal's recent decision in *Zurich Insurance v Romaine* [2019] EWCA Civ 851 is essential reading for any party contemplating pursuing a fraudulent litigant for Committal for Contempt of Court. Further, it acts as an unequivocal warning to would-be claimants tempted into bringing their own fraudulent claims in the expectation that they could discontinue without consequence if later uncovered: the Court held that *'dishonest claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim'*. The result of this judgment, which rejected as erroneous two considerations that weighed heavily upon the mind of the first-instance Judge, is that a party can in appropriate cases pursue an application with a renewed level of confidence.

The appeal in *Romaine* arose from a claim for noise-induced hearing loss (NIHL), which had allegedly been sustained in the course of Mr Romaine's employment as an engineer with the defendant's insured, in the 1970s and 1980s. In support of his claim, three documents were served and each were verified by a signed Statement of Truth: the Particulars of Claim with an appended medico-legal report from an ENT Consultant, which specifically stated that the claimant did not have any noisy hobbies; the Part 18 Response that stated he did not perform with a live band but rather that he very occasionally played the acoustic guitar 'for soft music'; and Mr Romaine's witness statement. Taken together, the effect of these documents was that Mr Romaine averred there were no other possible sources of excessive noise exposure that could have been responsible for his mild hearing loss and tinnitus.

Mr Romaine's case unravelled when an investigator instructed by the Defendantinsurer examined his Facebook page and discovered that he was the lead singer of 'The 501's', a three-piece rock 'n' roll and rockabilly band, for whom he also played the electric guitar; it was clear that the band performed regularly at pubs, clubs and larger events, presumably which he also had to practice for. He also claimed that he was interested in 'fast motorcycles', and had pictures of himself riding them. Zurich Insurance served its investigative evidence along with notice that an application to strike out would be made. Perhaps unsurprisingly, a Notice of Discontinuance was received in fairly short order. Also unsuprisingly, the insurer did not wish for that to be the end of the matter.

Zurich Insurance subsequently sought permission under CPR r.81.18(3)(a) to bring committal proceedings against Mr Romaine for contempt of court. At first instance, the application was rejected on the papers by Goose J. The matter then came before the same Judge, where the application was considered afresh but rejected again on the basis that whilst there was a *prima facie* case of dishonestly made false statements, Mr Romaine had not been warned that he may have committed a contempt (as such there was not a sufficiently strong case, bearing in mind the need for caution before granting permission). Further, it was held not to be in the public interest to commit where the purported contemnor had discontinued his claim at a relatively early stage of proceedings, as Mr Romaine had done swiftly after receiving the investigative evidence. Finally, Goose J noted that that the Particulars of Claim had not been signed by Mr Romaine himself, but rather his solicitor who had been authorised to do so by the claimant.

On appeal, the Court considered the principles from the well-known Court of Appeal decision in *Barnes v Seabrook* [2010] C P Rep 42 (itself setting out principles derived from the earlier case of *KJM Superbikes v Hinton* [2009] 1 WLR 2406). To summarise, in granting permission to an application for committal proceedings: –

1. the statement must be false;
2. the person making the statement must have known it was false when he made it;
3. it must be in the public interest for proceedings to be brought, with consideration to:
    i. whether the case against the alleged contemnor is a strong case;
    ii. whether the false statement was significant in the proceedings; and
    iii. whether the contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings.

In *Barnes* it was held that the court should take into account a failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt. Previous case law also advocated caution when granting permission to bring proceedings; in *KJM Superbikes* Moore-Bick LJ held that the court *'should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it. All other relevant factors … will then have to be taken into account in making the final decision'*. In such applications, the strength of the evidence as to whether the alleged contempt had been committed would be the starting point, followed by matters of public interest and proportionality.

In *Romaine*, Haddon-Cave LJ set out the principles that he felt could be derived from *KJM Superbikes* (at paragraph 27 of the judgment): he emphasised that ultimately the "only question" to consider was whether it was in the public interest for contempt proceedings to be brought; and he opined that the Court should also consider whether proceedings would justify the resources which would have been devoted to them and would further the overriding objective, with the potential penalty that might be attracted playing a part in assessing the overriding public interest in bringing proceedings. Haddon-Cave LJ further noted (at paragraph 54) how insurers find themselves in a particularly vulnerable position defending NIHL claims due to the asymmetry of information that exists between the parties; the authors consider that this reasoning could just as easily be applied to other types of fraudulent claims, for example in a suspected staged collision where there will often be no supportive written records and no objective proof that any collision occurred at all.

The Court of Appeal held that the Judge at first instance had erred in refusing permission to bring committal proceedings. First, the Judge was mistaken to have placed such weight on the failure to warn Mr Romaine that he may have committed a contempt of court: in considering the absence of a warning as a relevant factor in some cases, Haddon-Cave LJ distinguished this case from *KJM Superbikes*, which concerned a false witness statement made in support of a strike out application. On the facts of *Romaine*, the alleged contemnor had himself commenced the claim – it was not reasonable to expect the insurers to have given any warnings at that early stage. By the time that the scope of the dishonesty became clear when the investigator's report was received, in the words of Hadden-Cave LJ, *'the die was already cast'*. Accordingly, the Court of Appeal held that the absence of a warning (presumably contained in a pleading or covering letter) was unlikely to be of any relevance where the alleged contemnor was himself the claimant in a personal injury claim and where the false statements were contained in his court documents.

The Judge's reasoning in relation to discontinuance of the claim was even more emphatic: the fact that Mr Romaine had discontinued proceedings immediately after being confronted with the accusations of falsity was likely to be a relevant factor to be taken in to account in most cases; however, this could also be a positive factor in favour of permission being granted for committal proceedings. Though the Judge at first instance was right to observe that early discontinuance did not preclude permission being granted to bring committal proceedings, the Court of Appeal held that he had erred by not having full regard to the 'very real mischief that the stratagem of early discontinuance represents'. Hadden-Cave LJ held (at paragraphs 49-51 of the judgment):

49. *The fact that a claimant or applicant discontinues proceedings or an application immediately or shortly after being confronted with evidence or an accusation of falsity is likely to be a relevant factor to be taken into account in most cases. This is because the claimant who discontinues immediately upon realising*

that 'the game is up' is naturally, and appropriately, to be contrasted with the claimant who contumaciously presses on nevertheless, wasting everyone's time and costs in the process. However, the analysis goes deeper than this. The stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct. It is clear that the modus operandi of some of those involved in fraudulent insurance claims has been to issue tranches of deliberately low-value claims (sometimes on an industrial scale) for e.g. whiplash, slips and trips etc and when confronted with resistance or evidence of falsity, simply then to drop those particular claims, in anticipation that it would probably not be worth the candle for insurers to pursue the matter further, particularly since recovery of costs can itself be time-consuming and costly and nominal claimants may be impecunious. The problem has become even more acute in recent times because of one-way cost shifting ("QOCS") and the costs of proving "fundamental dishonesty" under CPR 44.16 (and c.f. section 57 of Criminal Justice and Court Act 2015).

***50.** Thus, whilst the Judge was right to observe that early discontinuance was not a "bar" to permission to bring committal proceedings, in my view, he erred because he should also have had regard to the very real mischief that the stratagem of early discontinuance represents in this arena as one of the tactics of unscrupulous claimants and lawyers who engage in the practice of low-value wide-scale insurance fraud, particularly in the field of e.g. NIHL claims.*

***51.** It is axiomatic that the court should be astute to protect the court processes being used as an instrument of, or aid to, fraud in any way. Further, false statements in court documents are public wrongs which offend the proper administration of justice. They are not necessarily addressed by a private remedy, such as costs. They should, in appropriate cases, be marked by the public remedy of committal proceedings.*

Finally, while the Judge at first instance had correctly found that there was strong evidence that false statements had been dishonestly made (passing the first threshold test above), he had erred in concluding that the committal proceedings would not be proportionate or in the public interest, given that the NIHL alleged was not in dispute and the claim had been discontinued at an early stage. The Court of Appeal concluded that, having exercised the discretion under CPR r.81.13(3)(a) afresh, the public interest in the case clearly mitigated in favour of committal proceedings being brought. Further, the Court held that the claim being limited to £5,000 did not render committal proceedings disproportionate, as almost all NIHL claims would be dealt with at the lower end of the Fast-Track (where there is limited costs exposure for claimants and less opportunity to investigate the merits of a claim). Whilst the Court acknowledged that it ought to proceed with caution in relation the permission stage, a proper consideration of all relevant matters came down in favour of committal.

Hadden-Cave LJ concluded by giving a direct and unequivocal warning ***'to those who might be tempted to bring – or lend their names to – fraudulent claims: that dishonest claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim'*** (paragraph 60). The authors suspect that the term 'lend their names to' was used intentionally to deal with the fact that Mr Romaine did not personally verify the Particulars of Claim. This was touched upon further in the supplementary judgment of Davis LJ at paragraph 63, which provide useful affirmative guidance for the lower courts: if the Particulars of Claim have been signed by a solicitor, this still carries the connotations set out in CPR Practice Direction 22 paragraph 3.9 – it is difficult to consider how personal statements could be derived from any source other the claimant and he/she ought not to need express legal advice to tell the truth when providing such information.

As recognised by the Court of Appeal in *Romaine*, claims for personal injury rely heavily on the veracity of claimants; this was set against a backdrop of whole tranches of low-value fraudulent insurances claims being dropped when faced with accusations of fraud, in the knowledge that it would not be cost-effective for insurers to pursue such matters further. The Court of Appeal emphasised how seriously the courts regard false claims; quoting from *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749, false claims undermine the system of compensation by imposing a burden upon honest claimants and defendants, as well as vitiating the 'openness, transparency and above all honesty' upon which the adversarial justice system depends.

This judgement also serves as a useful reminder of the significance of the verification of the Statement of Truth on a pleading; this judgment can be read alongside the oft-cited words of Spencer J in *Richard v Morris* [2018] EWHC 1289: *'where the statement of truth is signed by a claims manager on the claimants' behalf, as here, the insurer trusts the claims manager and, through him or her, the firm of solicitors to have taken proper instructions and to have verified the accuracy of the contents of the document'*.

It follows that *Romaine* effectively seals the 'escape exit' created by early discontinuance against committal proceedings for contempt of court; and should act as a health warning to any claimant who is seeking to profit from deception in support of his claim for injury. Such proceedings can be brought whether or not a warning has been given – particularly in the early stages of proceedings when the 'die has already been cast' – and whether or not the claim is low value.

Does the Claimant have the right to remain silent in court?

James Laughland & Elizabeth Gallagher

The 'right to remain silent' is a phrase which calls to mind TV courtroom dramas and the Fifth Amendment of the United States Constitution. It is not necessarily an issue that one expects to come up in the course of County Court proceedings. Nonetheless, James was instructed on behalf of the Defendant in a recent case in which the "right to remain silent" – or (to give it its proper name) the privilege against self-incrimination – was considered.

The Claimant had claimed the value of a particular motorcycle jacket as part of his claim for special damages. However, the photo of the allegedly damaged jacket did not correspond to the photo taken at the scene of the collision, in that there was some embroidery on the rear of the allegedly damaged jacket that did not appear on the back of the jacket he was wearing at the time. During the course of cross-examination, the Claimant admitted that he had been persuaded by a work colleague to photograph another jacket, which did have a ripped sleeve, in order to make a false claim. At this point, Counsel for the Claimant rose to his feet and submitted to the judge that he should now warn the Claimant that he was not obliged to answer any further questions, as by doing so he might 'incriminate' himself. The Judge agreed with this proposal and gave the Claimant such a warning.

Considering that the purpose of cross-examination was to try and get the Claimant to incriminate himself, all the more so as the main defence was that this had been an induced collision, was the judge right to do so? In short, yes.

The privilege against self-incrimination is derived from common law. The classic statement of the principle is taken from the judgment of Goddard LJ in *Blunt v Park Lane Hotel* [1942] 2 KB 253 at 257: '[...] no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for [...]'. The privilege is also recognised in statute *viz.* Section 14 of the Civil Evidence Act 1968 ('the Act'):

14. — Privilege against incrimination of self [...]

1. The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—

a shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and

b shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the [spouse or civil partner] of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

It has been held that the word 'penalty' in Section 14 covers civil contempt (i.e. committal proceedings) even though this is not a criminal offence: *Memory Corp v Siddhu (No. 2)* [2000] Ch. 645; *Cobra Golf Inc. v Rata (No. 2)* [1998] Ch. 109. There must be a 'real and appreciable' risk; a remote or insubstantial risk is insufficient, but it is not necessary to show that proceedings are likely: per Roskill LJ in *Rio Tinto Zinc v Westinghouse Electric Co* [1978] AC 547 at 574. It would appear that a witness does not abrogate the privilege by choosing to give evidence: see, for example, *Clydesdale Bank plc. v Stoke Palace Hotel Limited*

& Ors [2017] EWHC 181 (Ch.), in which the Second Defendant gave evidence but declined to answer certain questions.

Therefore, whilst we are not aware of any direct authority on the point, having considered the general principles and case law, we have concluded that a witness in civil proceedings is probably entitled to refuse to answer certain questions in court, where to do so would tend to expose him or her to the risk of subsequent committal proceedings. In a case which raises issues of fraud and/or fundamental dishonesty, we think that a judge would be likely to conclude that there was a real and appreciable risk of committal proceedings, especially in the current climate. As the transcript could be admitted as evidence in any subsequent committal proceedings, answers given in the course of cross examination at trial may tend to incriminate the Claimant.

If a Claimant (or, indeed any other witness) were to choose to exercise the privilege against self-incrimination, the key issue would then be what, if any, inference the judge could draw. How valuable is the 'right' if by exercising it a Claimant is thereby damaging his or her interests in the underlying litigation?

Traditionally, it was said that no inference could be drawn from the taking of the privilege: see *Wentworth v Lloyd* [861] 10 HLC 598, approved in *Ex p. Symes* 11 Ves p.523. A number of more modern statements suggest that the court can have regard to the exercise of the privilege: *Rank Film Distributors v Video Information Centre* [1982] AC 380; *Den Norske Bank v Antonatos* [1999] QB 271; *R (o/a Binyan Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin). However, there are also other cases in which the court has taken the opposite view: *Sociedade Nacional de Combistatives de Angola v Lunquist* [1991] 2 QB 310; *Clydesdale Bank plc. v Stoke Palace Hotel Limited & Ors*. This is an area of the common law which is ripe for clarification, particularly in light of developments in criminal law. We note, for example, that if the Defendant declines to give evidence at a criminal trial, the jury is permitted to draw such inferences as appear proper (see Section 35 of the Criminal Justice and Public Order Act 1994).

However, at the very least, the cases seem to suggest that the court may draw an inference from the lack of an explanation/answer to the matters raised. It was put by Nugee J in the following terms in the Clydesdale Bank case: '[…] a non-answer is not evidence of anything and to draw an adverse inference might tend to undermine the privilege. On the other hand, the result of his invoking the privilege is that I have no evidence from him on these questions. That means that I have nothing to set against the inferences to be drawn from such other evidence as there is. […] [T]he result of him declining to answer is inevitably that I have no explanation from him in relation to such matters.'

In our view, therefore, if the Claimant in a fraud/fundamental dishonesty case were to choose to exercise the privilege against self-incrimination – something that we think would be an unlikely occurrence in any event (as we suspect that the majority of Claimants would prefer to take their chance) – this would not prevent the judge from drawing inferences from the rest of the evidence in the usual way. Indeed, the lack of an explanation from the Claimant in relation to (for example) discrepancies or inconsistences in the documentary evidence is likely to increase the appearance of dishonesty, thereby strengthening the Defendant's case and, as a general rule, in fact making a finding of fundamental dishonesty more likely.

Guidance on Section 57 Applications: Sudhirkumar Patel v (1) Aviva Midlands Limited (2) Zurich Insurance PLC [2019] EWHC 1216 (QB)

Harriet Wakeman

The case of *Sudhirkumar Patel v (1) Aviva Midlands Limited (2) Zurich Insurance PLC [2019] EWHC 1216 (QB)* concerned an application under s.57 of the Criminal Justice and Courts Act 2015. It provides a useful insight for PI practitioners into the application of s.57, particularly in cases involving protected parties.

Factual background

The claim arose from a road traffic accident which took place in January 2013, in which a collision occurred between a bus owned by the First Defendant and a pedestrian, the Claimant. The Claimant sustained a brain haemorrhage and a cardiac arrest. His pleaded case was that he additionally sustained a severe conversion disorder as a result of the accident. The Claimant instructed Dr Fleminger, a Consultant Neuropsychiatrist, who examined the Claimant and concluded that he was almost entirely unresponsive and without movement in his hands, arms or legs. The Claimant's son, Chirag Patel, who acted as his litigation friend, told the expert that the Claimant did not communicate and required complete care. Although Dr Fleminger could find no neurological reason for the Claimant's condition, he diagnosed the Claimant as having a severe conversion disorder and assessed the Claimant as lacking capacity to litigate. The Defendants instructed Dr Schady, a Consultant Neurologist. Dr Schady, agreed that there was no neurological reason for the Claimant's condition. He was unable, however, to determine whether the Claimant was feigning his disability or had a subconscious conversion disorder.

However, the Defendants had obtained surveillance evidence of the Claimant. The surveillance footage showed the Claimant walking unaided, without difficulty and with a seemingly normal gait; getting into and out of a front passenger seat of a car on multiple occasions, unaided and without difficulty; walking around tyre suppliers and through car parks without difficulty; and talking to his son and participating in conversations with various workers at the tyre shops. Following receipt of this footage, Dr Schady concluded that a diagnosis of a conversion disorder was no longer tenable and that Mr Patel's disability was feigned.

A trial on liability took place in October 2017 and judgment was given in favour of the Claimant but with a contributory negligence finding of 40%.

The Defendants applied under Section 57 of the Criminal Justice and Courts Act 2015 for the claim to be dismissed as being fundamentally dishonest. Following the Defendants' application, the Claimant served witness statements from his friends and family, including a witness statement from his son and litigation friend. These statements essentially supported a "good days/bad days" argument. The Claimant did not adduce any further medical evidence but sought to rely on a letter from his treating consultant neurologist to his GP. However, HHJ Clarke noted that this treating doctor was not called to give evidence; he was not an expert in the case; the court had no information about his expertise in conversion disorders; and there was no evidence about whether his view would change if he was shown the surveillance evidence. Equally, the Claimant had not sought to adduce any further medical evidence to consider this letter, the expert reports and/or the surveillance evidence.

Timing of the section 57 application

The Claimant argued that the application had been made too early by the Defendants. The Claimant argued that the application should not be determined until all matters relating to the quantification of the claim had been tested and findings were made at a quantum trial. HHJ Clarke concluded that a s.57 application may be determined at any time after a claimant's entitlement to damages is established; and whether, in a particular case, it should be determined before a quantum trial has taken place will depend on whether the application can be determined justly at that time.

Capacity

When considering the application, HHJ Clarke also considered whether the Claimant had a capacity to litigate. She concluded that the Claimant did have capacity to litigate. She stated:

*"**63**. I am satisfied on the balance of probabilities that Dr Fleminger's capacity assessment was made on the basis of incorrect information gleaned from the Claimant's presentation and from what he was told by Chirag Patel of the Claimant's disabilities, namely that the Claimant was unable to communicate any decision he has made. This cannot be correct in the light of: (i) the witness evidence of the Claimant's witnesses which describe that the Claimant is able to communicate, although say he is often unresponsive. In particular Anita Patel says "sometimes he does chat" and Sushil Taylor says "occasionally he does talk"; and (ii) the evidence of the surveillance footage, which appears to show the Claimant talking to his son and others, and reading documents. In those circumstances, in my judgment Dr Fleminger's capacity assessment cannot establish a lack of capacity pursuant to section 1(1) MCA, and the Claimant must be presumed to have capacity unless it is later established, on the basis of a full and true understanding of the Claimant's condition and abilities, that he lacks it.*

***64.** In addition, Dr Fleminger's capacity assessment ties the Claimant's capacity to the outcome of his conversion disorder. If I were to accept Dr Schady's post-surveillance opinion that there is no conversion disorder, I am satisfied that Dr Fleminger's assessment of the Claimant's lack of capacity could not stand."*

Fundamental dishonesty

HHJ Clarke went on to find that the Claimant had feigned his disability and he had presented, with his son and litigation friend Chirag Patel, an *"egregiously untrue picture of the Claimant's disabilities to the experts"* in the case. She had no doubt in finding that the Claimant's conduct was, by the objective standard of ordinary decent people, dishonest.

Having made this finding, HHJ Clarke went on to consider whether the Claimant's conduct was fundamentally dishonest for the purposes of s.57. Citing *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB), HHJ Clarke considered the key question: had the Claimant *"substantially affected the presentation of his case… in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation"?*

HHJ Clarke found that the Claimant had been fundamentally dishonest. The Claimant's dishonest presentation had led to a diagnosis of severe conversion disorder, which HHJ Clarke found was not tenable. Having found the Claimant to be fundamentally dishonest, HHJ Clarke was obliged to dismiss the entirety of the claim, including the honest part, unless she was satisfied that the Claimant would suffer substantial injustice in so doing.

The Claimant submitted that a court could not, without substantial injustice, dismiss the claim of a protected party because of the dishonest conduct of his litigation friend. HHJ Clarke concluded, at paragraph 97 that:

"In my judgment that submission cannot succeed in the circumstances of this case as I have found them to be. Firstly, I have found that the Claimant himself has been fundamentally dishonest in relation to his claim. He has done so by his presentation alone, as well as by not correcting the false impression of the Claimant's disabilities given by his litigation friend to the doctors or his solicitors at any time during the course of these proceedings. Secondly, I have found that the Claimant must be presumed to have capacity in this case."

The genuine element of the Claimant's claim was valued by the Court to be £5,750 for general damages. Special damages could not be assessed due to defects within the schedule of loss. However, the Court was satisfied that there would be no substantial injustice in dismissing the entirety of the claim, including this genuine element, and the claim was dismissed pursuant to s.57.

Conclusion

This case will be of interest to practitioners involved in s.57 applications for two key reasons. Firstly, it provides a useful indication of the approach courts are likely to take where a claimant brings the claim as a protected party and there are allegations of fundamental dishonesty. Secondly, it confirms that defendants can make an application under s.57 before a quantum trial has taken place, avoiding the need for a potentially costly trial on quantum if that application is successful.

Thinking outside the "fundamental dishonesty" box – other routes to enforceable costs orders

Ellen Robertson

When insurers are presented with a personal injury claim that gives rise to concerns, the first thought will be the likelihood of a finding of fundamental dishonesty. However, it is worth remembering that fundamental dishonesty is just one of several exceptions to Qualified One-Way Costs Shifting, and that there is often another argument that can be pursued alongside the argument seeking a finding of fundamental dishonesty.

Strike out – CPR r.44.15

CPR r.44.15(1) is probably the most common route to an enforceable costs order. Costs orders will be enforceable in full without the Court's permission where the proceedings have been struck out on the grounds that the claimant has disclosed no reasonable grounds for bringing proceedings, that the proceedings are an abuse of process, or that the conduct of a claimant or someone acting with the claimant's knowledge on their behalf is likely to obstruct the just disposal of proceedings.

The final of those three reasons is often deployed where a claim is struck out following a claimant failing to engage with their claim and comply with court directions – a situation in my experience which is usually considered to satisfy the test to disapply QOCS. It also has its uses where a claimant fails to attend on the day of trial. Judges can need some persuasion that this amounts to conduct likely to obstruct the just disposal of proceedings. Pointing out that the claimant's failure has cost the defendant an opportunity of proving its case on fundamental dishonesty is often sufficient where a *prima face* case for fundamental dishonesty is made out on the papers.

An important factor to bear in mind is ATE insurance. ATE insurers are more likely to withdraw cover where a finding of fundamental dishonesty is made, and so in a situation where a defendant is presented with the option to pursue either (such as a claimant failing to attend the trial, where there is strong evidence of fundamental dishonesty on the papers), it will often be sensible to first pursue strike out under CPR r.44.15.

CPR r.44.16(2) – "mixed" PI and non-PI claims

CPR r.44.16(2) provides an exception to QOCS where the claim includes a claim, other than for personal injury, for the benefit of the claimant or of another. The Courts have considered this provision in the judgment of Morris J *Jeffreys v Commissioner of Police of the Metropolis* [2017] EWHC 1505 (QB) and of Foskett J in *Siddiqui v University of Oxford* [2018] EWHC 536 (QB). The judgment of Morris J is particularly useful to defendants facing RTA claims, noting that the discretion would apply to a standard RTA claim for vehicle damage and personal injury, although noting that factors such as the relative sums claimed for injuries and other losses would go to whether to exercise the discretion.

Defendants in cases where there is, for example, a relatively modest personal injury claim and a large claim for credit hire should consider the preparation of costs schedules showing the costs of defending the non-PI elements of the claim.

Wasted costs

A common situation in low value personal injury cases is a claim riddled with errors, in which the claimant successfully argues that the various contradictions have arisen because they have been poorly served by their solicitors, leading to a judge being unwilling to make a finding of fundamental dishonesty. It may be appropriate to seek a show cause order where the contradictions appear to have arisen from the solicitor's negligence and those contradictions have led to the claim being defended. Depending on the circumstances, this is often something to be pursued even in cases with a fundamental dishonesty finding, if there are concerns about the claimant's means to satisfy an award of costs.

Recent Noteworthy Cases

Rehman (2) Rahman v Skyfire Insurance (7 January 2019, Bradford County Court, DDJ Lingard)

Ellen Robertson (instructed by Shannon Cottam of Horwich Farrelly) appeared for the Defendant in this case involving fraudulent claims for personal injury arising out of a low-speed impact on 17 July 2016.

The Claimants alleged to have sustained personal injury in a rear-end collision with the Defendant's Insured. DDJ Lingard considered that there were so many inconsistencies in the reporting of their injuries by both Claimants, that they had attempted to embellish and exaggerate their evidence, and that both had been fundamentally dishonest. In particular, he rejected the allegation by both Claimants that the Defendant's insured had been drunk at the scene of the collision, finding that the Defendant's insured had been honest and straightforward and that the allegation was dishonestly fabricated. The judge accepted the evidence of the Defendant's insured and the Defendant's collision investigator that this was a minor collision.

The judge held that both medical reports were of little use. The First Claimant's medical report failed to give any real detail regarding a second collision that the First Claimant had been involved in only a few days after the index collision, leading to the judge describing it as *"one of the most useless reports I have seen where someone has been involved in two accidents"*. The Second Claimant's medical expert confirmed in Part 35 questions that the medical examination had been conducted in Urdu, yet in evidence the Second Claimant denied that he could speak more than basic Urdu.

The claims were dismissed, and QOCS was disapplied. Both Claimants were ordered to pay the Defendant's costs of £8,747.

The judge found that a great deal of time had been wasted during the course of the trial and during previous hearings due to a lack of care on the part of the Claimant's solicitors. The Claimants' solicitor was ordered to lodge an affidavit explaining inconsistencies in the multiple accounts she had provided to the Court about the manner in which the Second Claimant's witness statement was taken and translated.

Ayres v NFU Mutual (1.3.19, Bath County Court, DDJ Whiteley) LVI – Exaggeration – No Order for Costs

Richard Boyle (instructed by Lucy Armstrong of Keoghs) appeared in this case arising out of an RTA in a car park. The judge found that the Claimant had exaggerated and shown a lack of candour in some respects but that she had been truthful in relation to the core of her injury. He declined to find the claim fundamentally dishonest but instead made no order as to costs.

The Claimant claimed damages for personal injury arising out of an accident in a railway station car park. The Defendant's case was that this was a low velocity impact and that the Claimant either was not injured or she was exaggerating her injuries.
The judge concluded that the Claimant had been less than frank and painted an exaggerated picture of her symptoms in relation to the pain radiating to her shoulders, headaches, restriction on movement and sleep disturbance. He also found that the Claimant had exhibited a lack of candour in relation to whether she was wearing a seatbelt and whether her vehicle had passed its MoT. However, he considered that the Claimant's report of neck pain was supported by the medical records and a consistent account.
He concluded that this aspect of the Claimant's claim was not infected by her lack of candour in other respects and therefore that the Claimant was telling the truth in this respect. He awarded a sum for the neck injury.

The judge went on to consider costs. He concluded that the dishonesty went to ancillary matters rather than the fundamental root of the claim. As a result of the award for the neck injury, the Claimant had beaten two of her Part 36 offers. After hearing submissions, the judge noted that s.51 of the Senior Courts Act gave him a broad discretion in relation to costs. CPR Part 44 obliged him to have regard to all the circumstances including the conduct of the parties when determining costs. He noted that he should not award Part 36 costs if it would be unjust to do so. He then noted the Claimant's dishonesty as set out above. He stated that the Defendant should have been able to rely on statements made by the Claimant verified by a statement of truth and that the court should discourage dishonesty. He stated that, but for the Part 36 offers, he might have awarded the Defendant its costs, albeit subject to QOWCS. Given the offers, he decided no order as to costs was appropriate.

The decision gives rise to a useful practice point. Defendants should not throw in the towel on costs when a judge has concluded that the dishonesty was not fundamental. Although the award of damages was unwelcome, no order as to costs resulted in a reasonable saving. In practical terms, it is likely to mean that the Claimant's damages are swallowed by the costs bill from her solicitors so the Claimant was penalised as a result.

Mahmud & Others v Murgulet & Aviva, Clerkenwell & Shoreditch CC, 11.4.19

Causation – fundamental dishonesty – QOCS

Edward Hutchin, instructed by Jo Boardman of Keoghs, represented the successful Defendant insurers in this case which raised issues relating the identity of the driver of the Defendant's vehicle.

The Claimant claimed damages arising out of a road traffic accident. Liability, causation and damages were denied. The Defendant insurers were joined as Second Defendant after declining indemnity to the First Defendant, and in their Defence did not accept that he was driving the vehicle at the time of the alleged accident.

At trial the Defendant insurers adduced evidence showing that the First Defendant was not the registered keeper of the insured vehicle, and suggesting that the policy in the First Defendant's name was taken out, a few days before the alleged collision, using a false address, which in turn linked to other suspect policies and claims. In cross-examination further discrepancies were exposed, relating to the Claimant's account of the accident, and how he had identified the First Defendant. He was also taken to evidence showing that he had been suffering from pre-existing symptoms following a previous accident, and to an entry in his GP notes in which the GP recorded expressly that he had no injuries, and had attended the appointment to report the accident only.

The judge dismissed the claim, and expressly found fundamental dishonesty. He held that the Claimant had failed to prove the named First Defendant was driving the insured vehicle, and expressed doubt about the veracity of the note allegedly taken at the scene confirming his details. Although sufficient in itself to dismiss the claim, the judge went on to confirm that he would have dismissed the claim in any event, due to the flaws in the Claimant's evidence about his injuries and losses. The judge commented that he could not really be satisfied with any of the Claimant's evidence, and made a finding of fundamental dishonesty accordingly, with a costs order in the Defendant's favour, and permission to enforce the costs under CPR 44.16(1).

The case illustrates the importance of not only carrying out thorough investigations, but also, crucially, then evidencing the results in an accessible manner, so that the judge can grasp easily the nature of the fraud. In this case the evidence showing that the policy was fraudulently incepted and the First Defendant was not involved in the alleged collision (and might well not exist) was set out in a comprehensive statement with exhibits, giving a firm platform for dismissal of the claim, on which the discrepancies in the Claimant's account could then be built up to support a finding of fundamental dishonesty.

Bux v. Skyfire Insurance (Guildford CC, 02.05.19)

Fundamental Dishonesty – Application of Section 57

Anthony Johnson (instructed by Matthew Wheeler of Keoghs) represented the successful Defendant in this low value Fast-Track Trial which ended up being heard by HHJ Simpkiss, the Designated Civil Judge for Sussex and Kent, due to a listing clash meaning that no District Judges were available. Despite the fact that the Defendant's insured driver was not co-operative with the defence of the claim, it maintained a Low Velocity Impact defence and focussed upon the Claimant's inability to be able to prove his claim.

Over the course of a detailed cross-examination, the inconsistencies in the Claimant's account came to the fore. He claimed to have gone straight from the scene to the Walk-In Centre which had no record of his attendance, and then on to the police who recorded a no injury collision. He initially claimed to have made a full recovery from his symptoms prior to the date of the medico-legal examination before backtracking considerably. He had no explanation for the lack of any contemporaneous record of his injuries, nor for his failure to mention them when he attended upon a GP in relation to an unrelated condition.

The Judge gave a detailed judgment in which he concluded that this was an opportunistic attempt by the Claimant to recover monies as a result of a very minor collision. He found as a fact that the forces that were involved in the collision would have been incapable of causing injury to anyone, and that the Claimant had deliberately misled his solicitors and the expert when he had said that they had. He felt that the Claimant was an unsatisfactory and unreliable witness who was undermined by the sheer number of discrepancies and inconsistencies in his claim.

The upshot of the Judge's finding was that the entire case was dismissed pursuant to section 57 and the Defendant was allowed to recover its costs in full (assessed on the indemnity basis), which were deemed enforceable due to CPR 44.16. The only remaining issue was determining the genuine element of the Claimant's claim for vehicle damage, which section 57(5) requires the Court to set-off against the costs recovered by the Defendant so that the Claimant doesn't get a double punishment. The Judge accepted the lower valuation of the repair claim in the Defendant's engineering evidence, as the Claimant's engineering basis had been presented on the erroneous basis that his vehicle was not fit for use a taxi when it transpired that it had continually been used for that purpose throughout.

Gul-Rahman & 2 Ors v Insurer, Clerkenwell & Shoreditch CC, 17.05.19, DJ Manners

Improper translation – fundamental dishonesty

James Henry, instructed by Rob Wardle of Horwich Farrelly, represented the successful insurer in this case involving 3 alleged injury claims arising from an RTA.

Neither C1 nor C3 could understand or read English, and they did not read their own language either. The claims were driven by C2, who had communicated on behalf of C1 and C3 throughout the claims, including at the medical examinations. Understandably, the Judge had serious worries about how on earth their statements were prepared. It was plain that neither C1 nor C3's statements reflected the evidence they wished to give in Court.

All 3 claims ultimately failed for want of proof, but the Judge was faced with a difficult situation when asked to make findings of FD against C1 and C3. She was not satisfied that any of the evidence of the witness statements had come from them, or that they had any understanding of the claims process. In those circumstances, how could they be said to be fundamentally dishonest? The Defendant submitted that the Court could put the statements and all other written evidence to one side and infer dishonesty solely from the oral evidence of C1 and C3, when contrasted with their medical records. Both C1 and C3 maintained that they suffered serious injuries and had no relevant medical histories. Their medical records showed those assertions to be dishonest. The Court did not need to rely on any assertions made in the witness statements; it was sufficient that C1 and C3 had given sworn evidence oath that was shown to be untrue when compared with the records. The Judge accepted the Defendant's submissions and made findings of fundamental dishonesty against all 3 Claimants.

Cooper v Rodgers, Nottingham CC, 29.05.19, HHJ Owen QC

Fundamental dishonesty – s.57

James Henry, instructed by Shannon Cottam of Horwich Farrelly, represented the successful Defendant in this PI and damage claim arising from a minor RTA.

This case was a low speed impact in its most typical form. The circumstances involved the Defendant reversing in a car park int the Claimant, who went on to allege that he sustained whiplash injury. What was more unusual was that the Defendant had decided not to pay any of the cost of repairs (in spite of admitted breach of duty) or made any offer in respect of the repairs. His insurer was confident that, notwithstanding the inevitability of judgment in favour of the Claimant on the cost of repairs, it could apply to have the whole of the claim dismissed pursuant to s.57 on the basis of fundamental dishonesty in relation to the injury claim. This tactic is becoming increasingly popular, though it remains risky.

On this occasion the risk paid dividends. The Judge dismissed the PI claim, finding that the Claimant had dishonestly exaggerated the force of the impact and fact of his alleged injuries, entered judgment for the Claimant on the cost of repairs, but then dismissed the whole claim following an application pursuant to s.57. The Claimant was ordered to pay the Defendant's costs on the indemnity basis.

Mroz v The Markfield Project Ltd, Edmonton CC, 18.06.19, DDJ Harris

LSI – Fundamental dishonesty – disparity of vehicle weight

James Henry, instructed by Kate O'Neill of Horwich Farrelly, acted for the successful Defendant in this fundamentally dishonest injury claim advanced by a Claimant whose car was hit by the Defendant's bus.

Defending LSI collisions where the claimant was an occupant of a relatively small vehicle, whereas the Defendant was driving or operating a much larger vehicle (in this case a bus) have always proved a challenge. An understandable presumption arises that the driver of the at-fault large vehicle will have no proper perception of the speed or force of the impact that the Claimant will have felt.

In this case, the deciding factor was the Claimant's propensity to exaggerate. His evidence was that the bus was travelling at 20mph, when there was relatively little damage. He alleged that he suffered from dreadful, horrible, intense pain for a period of at least 3 months, but failed to act on the recommendation of his medico-legal expert to undertake a course of physiotherapy. The Judge found that he had gone to extensive lengths to exaggerate his injury and 'play the system'. The claim was dismissed with a finding of FD.

Riaz & 2 Ors v Tradewise, Clerkenwell & Shoreditch CC, 21.06.19, DJ Bell

Alternative routes to enforceable costs order – 44.16(1) – 44.15(1)(c)

James Henry, instructed by Katie Islip of Horwich Farrelly, acted for the successful Defendant insurer in securing enforceable costs orders against all 3 claimants.

Caudation of these injury claims was disputed from the outset. All 3 claimants proceeded to trial. C1 and C3 gave evidence that was inconsistent and exaggerated. They were both find to be fundamentally dishonest and enforceable costs orders were made against them.

C2, however, had not given any oral evidence. When she arrived at Court for trial it transpired that she could not speak, read or write English, contrary to all of her previously filed and served documents (and contrary to the impression given in her witness statement). Her claim was struck out before the trial started. It was therefore not possible to put to her that she had been fundamentally dishonest. Nevertheless, her conduct was held to have obstructed the just disposal of the proceedings and the costs order was enforceable against her without the permission of the Court, pursuant to CPR r.44.15(1)(c).

Taylor v Charlesworth & Covea Insurance, Romford CC, 03.07.19

Causation – fundamental dishonesty – QOCS

Edward Hutchin, instructed by Carl Atherton of Keoghs, represented the successful Defendant and his insurers in this fraud case.

The Claimant claimed damages arising out of a road traffic accident. Liability was not disputed, but causation, injury and loss were all challenged. In particular, evidence was adduced from the Claimant's own insurers to prove that when he first reported the incident to them, about 2 weeks post-accident, he had expressly confirmed that he had not suffered any injuries. This was contrary to the account given to the medical expert, and that set out in his statements of case. In addition, the Claimant had failed to mention any accident-related injuries to his GP, despite attending numerous appointments for unrelated medical issues. In Part 35 responses the medical expert had conceded that his conclusions were dependant on the veracity of the Claimant's account of his injuries and medical history, although (as so often is the case) without conceding expressly that his conclusions were in fact unreliable given the discrepancies in the Claimant's account.

At trial the judge heard evidence from the Claimant, who accepted in cross-examination that he had been suffering from a long-term musculo-skeletal condition which he had not mentioned to the medical expert because not 'relevant', and had been involved in 5 other accidents which he had also failed to mention to the medical expert.

The judge delivered a judgment dismissing the claim, and made an express finding of fundamental dishonesty. He held that it was likely that the Claimant had received a 'cold-call' some time after the event, which explained the late presentation of the claim, and decided to embellish his pre-existing condition with some allegedly accident-related symptoms in order to make a false compensation claim.

A costs order was made in the Defendant's favour on the indemnity basis, assessed in the full sum claimed, and the judge granted permission to enforce the costs under CPR 44.16(1).

Some practice points arise:

- In late presentation claims, evidence to highlight the contrast between the Claimant's contemporaneous account and his later claims is crucial – this can sometimes be found in the medical records (or lack of them), but in this case the call records of the Claimant's call to his own insurers shortly after the accident provided forceful evidence that his claim was false.
- Any attempt to limit disclosure of medical records to redacted or edited copies should if possible be resisted – the fact that a Claimant did not mention symptoms after an accident can provide evidence of fraud every bit as compelling as the mention of inconsistent symptoms.

Watts & Kato v. First Beeline Buses (Slough CC, 04.07.19)

Causation – Fundamental Dishonesty – Analyst Attendance at Trial

Anthony Johnson (instructed by Alex Korotchenko of Horwich Farrelly and Darren Bray of Transportation Claims Ltd.) represented the Defendant in this LVI and causation matter involving a glancing contact between the First Claimant's car and the Defendant's bus. The Second Claimant was a customer in the First Claimant's vehicle that was being used as a taxi at the time.

The Judge (DJ Wilson-Williams) rejected the Defendant's primary case that the collision had been too minor to have been capable of causing injury to any occupants of the First Claimant's vehicle. Accordingly, it was accepted that the Second Claimant had suffered injury and could recover compensation.

However, the First Claimant's claim was dismissed in its entirety pursuant to section 57 of the CJCA 2015 on the basis that he had been fundamentally dishonest in the way that he had presented his personal injury claim. The Judge was particularly concerned about the fact that he had not declared an extensive history of spinal pain and multiple road traffic accidents to either the medical expert in the index claim, nor the medical expert instructed in a claim arising from another accident that he had allegedly been involved in three months earlier. The Judge felt that the First Claimant was an 'eloquent and understanding' individual, who would not have accidentally omitted to provide the obviously relevant information to the experts.

The Court also dealt with costs in relation to the Claimants' representatives having compelled the Defendant's solicitor's analyst to trial to give oral evidence. The Judge accepted the Defendant's points that the evidence was purely factual and could have been dealt with in writing, and that there had been no real basis to call the witness' credibility into question. The Claimants were ordered to pay the costs associated with their Application for him to attend, the Defendant's Application setting aside a previous ex parte order requiring him to attend and the costs of him travelling to and from Court on two separate occasions (the trial having previously been adjourned).

Sergeon v Northridge (1) Markerstudy (2), Croydon CC, 04.07.19, DJ Keating

Fundamental dishonesty – Inaccurate prognosis

James Henry, instructed by Katie Islip of Horwich Farrelly, acted for the Defendant insurer in this fundamentally dishonest claim for injury arising from a low speed road RTA.

The Claimant was found to be FD due to inconsistencies and exaggeration in both the account of the accident circumstances and the injuries he allegedly sustained. One feature in particular is worthy of mention. The Claimant was given a prognosis of 10 months for a full recovery. In his statement he said that recovery was shorter than 10 months. At trial he argued that he should be given credit for that concession. He asked (presumably rhetorically): would an dishonest person really truncate their period of recovery? He was cross-examined in detail on the exact recovery period and ended up giving evidence that he had recovered a few weeks before he was medically examined. The problem for the Claimant was, of course, that when he was examined he told the expert that he continued to suffer from accident-related symptoms. The claim was dismissed with an order for indemnity costs.

Akhtar v (1) Toth (2) Sabre Insurance (17 July 2019, Preston County Court, HHJ Beech)

Ellen Robertson (instructed by Karen Mann of Horwich Farrelly) appeared for the Second Defendant in this case involving a fraudulent claims for personal injury, credit hire and other losses arising out of a staged accident on 29 November 2016.

The Claimant claimed that he had sustained personal injury in a rear-end collision with the First Defendant, who played no part in the proceedings. The Second Defendant obtained evidence that the First Defendant's insurance policy was taken out only a few days prior to the collision, and was void due to misrepresentations. HHJ Beech noted that none of the occupants of either vehicle was able to describe the weather or road conditions, that no other occupant of the vehicle had attended to give evidence, that the Claimant's alleged passengers had made 14 and 17 previous personal injury claims respectively.

HHJ Beech also found that the Claimant had given contradictory accounts during his alleged injury period about which shoulder he had injured. His explanation that this was due to his poor command of English was *"simply nonsense"* given that he had been examined on each occasion. She rejected the Claimant's explanations in oral evidence for contradictory accounts of previous injuries, finding that *"he was simply making his evidence up as he went along."*

HHJ Beech found that if any collision did occur, it was staged for the purposes of compensation and a claim for credit hire, and therefore found that the claim was fundamentally dishonest. The claim was dismissed and the Claimant was ordered to pay the Second Defendant's costs of £11,000.

White v NFU Mutual (27.8.19, Dartford County Court, DJ Wilkinson)

LVI – call transcripts – fundamental dishonesty

Richard Boyle (instructed by Lucy Armstrong of Keoghs) appeared in this case which arose out of a low speed RTA. The Defendant disclosed a transcript of the Claimant's telephone call with her accident management company. The Claimant denied any significant injuries in that call but went on to claim for soft tissue injuries. The judge held that the Claimant had been fundamentally dishonest in her account of her injuries and disapplied QOWCS.

The Claimant had hit the Defendant's insured who was driving a tractor. It was agreed that the impact had happened at low speed as the tractor passed the Claimant's vehicle on a country lane. The Claimant discontinued her claim after the Defendant disclosed transcripts from calls with her insurers and her accident management company. However, the Defendant applied for a finding of fundamental dishonesty. The Claimant failed to attend the application hearing. The judge was concerned that the Claimant had notice of the application and was reassured by correspondence to the Claimant from the Defendant's solicitors which set out the hearing date and a detailed explanation of what the Defendant was seeking. The judge therefore determined the matter on the papers.

The Defendant had expert engineering evidence which stated that the impact would not have caused any forces of notable magnitude to be passed to the Claimant's vehicle. The judge noted, in contrast, that the Claimant had given accounts of the impact which got more severe as the claim progressed. There was a transcript of the Claimant's call with her insurers on the day of the accident in which the Claimant denied injury. The Claimant stated that her injuries had come on the next day. However, the Defendant had also obtained a transcript of the call between the Claimant and the accident management company instructed by the Claimant's insurers. The Claimant reported headaches only in that call but was nevertheless referred to solicitors. Twenty-one days later, a Claim Notification Form was produced by solicitors alleging a number of soft tissue injuries. Furthermore, the Claimant's GP records showed that she had attended for a fall but not mentioned the accident. The judge concluded that the Claimant had been dishonest and had not suffered injuries to her neck, shoulders or arm as claimed. She concluded that this dishonesty was fundamental because this was the most valuable head of loss and the core of the claim.

Smith & Pickett v. (1) Nolan (2) LV (Romford CC, 27.09.19)

Fundamental Dishonesty – Application of Section 57 – QOCS

Anthony Johnson (instructed by Laura Maher of Keoghs) represented the successful Second Defendant in this Fast-Track Trial. In a judgment that was reserved due to lack of Court time, DDJ Boon found that the First and Second Claimants had lied about the present of the Third Claimant, a young child, in the rear of their vehicle at the material time and, therefore, that their claims were fundamentally dishonest for the purposes of section 57 of the CJCA 2015. She found that the First and Second Claimants' personal injury claims were not dishonest, but that they had nevertheless failed to prove that they had suffered the alleged injuries.

The Judge's analysis was complicated by the fact that the First Defendant (who was separately represented and pursued a Counterclaim that he abandoned on the morning of trial) was also found to be an unreliable and untruthful witness. However, she ultimately concluded that whilst the Claimants' evidence was wholly unreliable, the First Defendant's evidence in relation to occupancy was persuasive, compelling and entirely consistent with what he had said throughout. Whilst the presence of the Counterclaim gave him a motive to change and exaggerate his evidence in relation to the issue of liability, he had nothing to gain by falsely alleging that there were no children in the car.

The Second Defendant was awarded its costs in full, assessed on the indemnity basis, with permission for those costs to be enforced jointly and severally against the two adult Claimants. The damages that the Claimants would have otherwise been awarded to were set-off pursuant to section 57, although this consisted of only 50% of the Pre-Accident Value of their vehicle given the Judge's view that she would have split liability 50:50 on the basis that both drivers had lied about the circumstances, and that she would have dismissed all personal injury-related heads of claim.