EDITOR: **James Henry**
ASSOCIATE EDITOR: **Tim Sharpe**
Issue XI August 2020

TGC Fraud Update

The Newsletter of the TGC Fraud Team

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

THE HAGUE
Lange Voorhout 82, 2514 EJ
The Hague, Netherlands
T +31 70 221 06 50

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

Editorial

By James Henry jdh@tgchambers.com

Welcome to the latest instalment of the TGC Fraud Update.

These have been difficult times, both personally and professionally, for a lot of us. Litigants of all types, their representatives and Judges have been faced with significant delays (at best), last-minute adjournments, and the frustration of a civil justice system not built to operate via any remote video application (let alone 4 different applications depending on the court in which your case proceeds). There have been teething problems. Things are still a long way from normal (or whatever the 'new normal' may be), but through enormous efforts from all concerned, more cases are being heard, whether in person or remotely, and feet are being found in the context of remote hearings.

Experience in chambers (as some of our case reports indicate) has generally been that once the participants to a trial are able to attend on a remote platform, the hearings proceed in a perfectly acceptable way. Witnesses can be effectively cross-examined, and there is just as much opportunity for them to present as credible individuals or be exposed as liars.

History suggests that in times of recession and economic hardship, fraud will nearly always increase. Those who have been involved in insurance fraud injury work for long enough will remember the significant increase in fraudulent claims (and the detection of fraudulent claims) that followed the economic crisis dating from 2007. How the anticipated rise in fraud in 2020 will interplay with the 'whiplash reforms' package of legislation remains to be seen, but the potent combination of a rise in fraudulent claims together with more litigants in person, a greater involvement of accident management companies, and less oversight of claims from solicitors acting for fraudulent litigants, means that now is not the time to ease up on suspected fraud. It is more important than ever to use the tools at our disposal to combat fraud and defeat fraudulent claims.

To that end, TGC is pleased to be able to communicate some of our thoughts and experiences through a selection of articles touching on all aspects of the latest developments in the field.

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.

Index

Are credit cards really evil? Lessons from financial non-disclosure in *Mansur Haider v DSM Demolition Limited* [2019] EWHC 2712 (QB)

Scarlett Milligan

Introduction

***Mansur Haider v DSM Demolition Limited* [2019] EWHC 2712 (QB) is the latest instalment of High Court case law on what amounts to fundamental dishonesty.** In *Haider*, Knowles J found that deliberate non-disclosure of financial means in the context of a credit hire claim can amount to fundamental dishonesty. This article explains how that judgment was reached, possible distinguishing factors, and commentary on how this decision will affect the landscape of credit hire litigation (as well as the tactics of claimant and defendant representatives).

The legal background

The last few years have brought a string of High Court and Court of Appeal judgments going some way to clarify the parameters of 'fundamental dishonesty' in personal injury litigation. As readers of this publication will be aware, such a finding is often of great importance to defendants, given that it removes a claimant's Qualified One Way Costs Shifting (QOCS) entitlement (see CPR 44.16), and may lead to other elements of a claim (or indeed another claimant's claim), being dismissed in full (see Section 57 of the Criminal Justice and Courts Act 2015, "**s.57 CJCA**"). Three of the most seminal cases are worth setting out summarily as a backdrop to our consideration of *Haider*.

Gosling v Hailo (1) and Screwfix (2), unreported, Cambridge County Court, 29 April 2014, is typically viewed as the first 'key' decision on fundamental dishonesty. In determining whether dishonesty was 'fundamental', HHJ Moloney QC held (at paragraph 45 of his judgment) that if *"...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."* This was to be distinguished from dishonesty which might be regarded as *"incidental"* or *"collateral"* to the claim.

In *Howlett and Howlett v Davies (1) and Ageas Insurance Limited (2)* [2017] EWCA Civ 1696 the Court of Appeal approved HHJ Moloney QC's approach as *"being common sense"* (see paragraph 17 of Newey LJ's judgment). The judgment also clarified that defendants to personal injury litigation were not required to expressly allege fundamental dishonesty, as is the case when alleging fraud. Instead, the *"key question… would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence"* (see paragraphs 31-32).

The final element of our foundational trio is *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield* [2018] EWHC 51 (QB), in which James Laughland and Mark James (both of Temple Garden Chambers) acted for the Appellant and Respondent respectively. This judgment gave further guidance on demonstrating the 'fundamental' nature of any dishonesty: a defendant will need to prove, on the balance of probabilities, that the claimant's dishonesty *"…substantially affected the presentation of his case, either in respects of liability or quantum, 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"*. Knowles J went on to clarify that the phrase *"substantially affected"* conveys *"…the same idea as the expressions 'going to the root' or 'going to the heart' of the claim"* (see paragraphs 62-63 of his judgment). In that case, the defendant had been adversely affected in that it *"…might have been willing to settle the case at or near the dishonestly claimed figure of damages"* (see paragraph 85 of the judgment).

The facts and findings in *Haider v DSM*

Haider started off like many of the low-value road traffic accidents with which readers of this publication will be familiar. The claimant alleged that he was the victim of a rear-end shunt caused by the defendant's negligence. He brought proceedings for personal injury, damage to his car, and for the costs of obtaining a replacement vehicle pursuant to a credit hire contract. Whilst liability and the parties' accounts were very much in dispute, those aspects of the case are not relevant to this article, and will not be explored further.

The claimant's credit hire claim was founded on an assertion that he was impecunious: he could not have afforded to pay for hire charges upfront, and thus had to hire a car on credit, resulting in increased hire charges. During cross examination it came to light that the claimant had access to two credit cards and a second bank account, none of which had been disclosed. Notably, the claimant had previously answered Part 18 questions, including a request that he list his credit cards and provide credit card and bank statements. His response stated: *"I did not have any credit card accounts"*. At trial, the claimant's explanation for this non-disclosure, as summarised by Knowles J on appeal, was that the credit card *"…was 'closed'; that he did not have any access to credit on it; and that he had defaulted on his repayments"* (paragraph 54). Ultimately, the claimant accepted that he ought to have disclosed the existence of the credit card, even if it showed that there was no credit available to him. As for the second bank account, the claimant's explanation was that his bank had opened two accounts in error, and he only used one.

The judge at first instance dismissed the defendant's argument that the claimant's account of the accident was fundamentally dishonest. He also dismissed the allegations of fundamental dishonesty in respect of the financial non-disclosures, concluding (again summarised by Knowles J) that *"…there had not been particularly good disclosure; but that none of it had given him the impression that the Claimant had been dishonest. The judge said that his inconsistencies were explicable on the basis he was trying to recall events four years ago and that he was 'basically an honest man'"* (paragraph 56).

This dismissal was challenged on appeal. Knowles J cited the relevant case law on fundamental dishonesty, including the cases cited earlier in this article, as well as the principle set out in *Ivey v Genting Casinos (UK) Limited* [2017] UKSC 67, namely that the honesty or dishonesty of conduct is to be judged objectively. He went on to conclude that the trial judge's findings on fundamental dishonesty were not *"reasonably open"* to him. He held that non-disclosure of the credit cards and the second bank account was *"plainly dishonest"*, bearing in mind that the claimant had the luxury of time when considering his disclosure and his answers to the Part 18 requests, and that he was legally represented and therefore able to ask questions of his legal advisers if he was in any way unsure. None of this could be explained away, as the trial judge had sought to do, by the passage of four years between the accident and the trial date.

In asking himself whether this dishonesty was 'fundamental', Knowles J was satisfied that it was, on the basis that the non-disclosure went to the heart of the credit hire claim (which was a substantial part of the claimant's proceedings). The judgment also emphasised the *"importance of the Claimant giving proper disclosure about his financial circumstances"*, and of signing a statement of truth to that effect. The failures on these fronts prevented the Court and the defendant from properly assessing the claimant's impecuniosity, which *"skewed and distorted the presentation of his claim in a way that can only be termed fundamentally dishonest."*

Observations

For readers who are frequently involved in the bringing or defending of credit hire claims, this decision may come as somewhat of a surprise. It is not uncommon to encounter non-disclosure of key financial documents, and to see claimants being debarred from relying on assertions of impecuniosity as a result. But the jump from debarring impecuniosity evidence to finding the whole claim to be fundamentally dishonest (and thereby disallowing QOCS protection) will strike many as somewhat harsh on claimants, and perhaps out of touch with the realities of low-value, high-volume credit hire litigation.

It is important to recognise that one pivotal factor in *Haider* was the claimant's own evidence that he knew of the accounts and credit cards, but had *chosen* not to disclose them because he did not deem them relevant. That is to be contrasted with a case where a claimant genuinely forgets about an account or source of income, or if there is some other explanation for the non-disclosure (for example, a failure on the part of the claimant's legal representatives). Another important factor in *Haider* was the claimant's answer to the Part 18 questions, signed by a statement of truth, that the credit cards and statements did not exist. Such statements (whether in a witness statement or a Part 18 response) will actively compound a failure to disclosure, and are likely to assist in persuading a judge that the non-disclosure was objectively dishonest (in line with the *Ivey v Genting Casinos* ruling).

This author recently acted for defendants (instructed by Vicki Odhiambo of AXA Insurance) in a credit hire claim presenting strikingly similar non-disclosures *(Srivasan v Palmer (1) and AXA Insurance (2), unreported, Brentford County Court, 29 October 2019)*. During cross examination the claimant taxi driver admitted that he held a savings account, but that it had not been disclosed owing to the fact that it was empty. Furthermore, he admitted to having a fare records book which he filled on a daily basis for accounting purposes, which again had not been disclosed. As in *Haider*, the claimant had been asked Part 18 questions on this topic: when asked to disclose 'booking and fare records', he stated that he did not keep booking records. At trial, the claimant sought to argue that this was not dishonest and was, in fact, accurate, as the book he had referred to only contained 'fare records'. District Judge Jarzabkowski firmly rejected this, noting that both 'booking and fare records' had been requested in the Part 18 questions. She had no hesitation in finding the claimant to be fundamentally dishonest in light of the *Haider* judgment, which also resulted in her dismissal of the claimant's other heads of loss under s.57 CJCA. The defendants were awarded their costs on the indemnity basis, and the claimant's QOCS protection was removed.

Going forward and take away lessons

Since the introduction of s.57 CJCA, anecdotal evidence suggests that some County Court judges have been reluctant to make findings of fundamental dishonesty. This may be attributable to them importing their general understandable reluctance to find parties to be fraudulent absent compelling evidence and an unequivocal pleading of fraud. However, as the High Court and Court of Appeal case law on fundamental dishonesty continues to expand, it appears that the willingness of County Court judges to make such findings is also expanding, albeit at a slower rate.

Defendants to credit hire claims clearly have a lot to gain from this expansion, and specifically from the *Haider* decision: deliberate non-disclosure of financial means is now another opportunity to set aside QOCS protection and recover costs from an unsuccessful claimant. However, defendant representatives need to remind themselves of the importance of establishing *wilful* non-disclosure; effective cross-examination on the reasons behind the non-disclosure will be essential, and thought should be given to the use of Part 18 questions to expose the claimant's case in circumstances where their witness statement is vague on such matters.

On the flip side of the coin, claimant representatives will increasingly need to do their due diligence on their clients' claims of impecuniosity. This comes at a time when the fixed costs regime might render this an unprofitable exercise. However, *Haider* serves as a strong reminder of the potential consequences of failing to quiz one's clients thoroughly about the funds and resources that were available to them (and on any associated documentation). To this end, firms might find the implementation of a checklist to be the most cost efficient and effective way of undertaking such checks, which may need to be carried out at the time of pleading impecuniosity, and again at the disclosure and inspection stage. Errors, where identified, should be rectified swiftly and, if appropriate, assertions of impecuniosity should be withdrawn.

Whilst this will no doubt increase the time and cost spent by claimant representatives on low-value claims, the forceful counter-argument is that a failure to conduct these checks results in defendants being required to incur the costs of investigating such issues at trial, rather than resolving them at an early stage of the litigation. In the event that those queries result in straightforward and reasonable explanations at trial, defendants cannot recoup their additional costs outlay due to a claimant's QOCS protection. A failure to properly disclose financial information at an early stage may also, as alluded to in the fundamental dishonesty case law set out earlier, prevent the early settlement of credit hire claims, which is likely to be in both parties' interests (as well as that of their representatives).

These observations should not surprise any reader, and should be par for the course in any litigation. But if claimant representatives no longer find it profitable to properly investigate their clients' claims, and defendants also suffer an unrecoverable loss in pressing for answers to quite proper questions, we are left asking the question: is either side served well by the current system of fixed costs and QOCS protection?

Offering the unofferable: when is a part 36 offer not an offer?

Anthony Johnson

I have been involved in a costs dispute arising from what initially appeared to be a straightforward, run-of-the-mill, low-end Fast-Track causation case. *Seabrook v. Adam* was a case in which the Defendant admitted breach of duty fairly shortly after the accident, but put the Claimant to proof as to the causation of his alleged injuries, relying upon various inconsistencies in the evidence upon which he relied. The Defendant made no formal allegation of fraud. The matter came before DDJ Buss in the County Court at Huntingdon on 10.10.18, who found that the Claimant had proven an 8-week neck injury but had not come up to proof in relation to a 32-month back injury that he had allegedly suffered. He was awarded just over £1,500 against a claim in which he was seeking just under £10,000.

The complicating feature in the case was two purported Part 36 offers by the Claimant which it was alleged had nevertheless been beaten, notwithstanding that the Defendant was largely successful at trial. This raised fundamental questions about when a purported Part 36 offer should be considered a valid Part 36 offer. Can you make an offer on liability when liability has been formally conceded by the defendant and only causation is disputed? If so, what constitutes 'success' in relation to whether or not judgment is at least as 'advantageous' as that offer for the purposes of CPR 36.17?

Perhaps unsurprisingly in the light of the previous paragraph, DDJ Buss adjourned off the costs issues arising from his judgment to another date due to a lack of Court time. It was this hearing that came before DJ Reeves, a Regional Costs Judge, in the County Court at Norwich on 22.01.19 where I represented the Defendant (instructed by Key Claims via Keoghs Solicitors). That judgment was upheld on appeal by the Designated Civil Judge, HHJ Walden-Smith, in the County Court at Cambridge on 06.11.19.

The background to the costs dispute is that the Claimant's Claim Notification Form was served on 23.02.16 in the usual fashion. The very next day, on 24.02.16, the Defendant's representatives admitted liability in a letter which stated, *"We confirm primary liability is not an issue but reserve our position on causation as per the case Kearsley v. Klarfeld (2005)."* The liability admission was reiterated by the Defendant on numerous occasions in subsequent correspondence. However, under cover of a letter dated 09.03.18, the Claimant's solicitors sent two purported Part 36 Notices, one of which stated, *"To agree the issue of liability on the basis the Claimant will accept 90(Ninety)% of the claim for damages and interest to be assessed"* and the other, *"To accept, on condition that liability is admitted by the offeree, 90(Ninety)% of the claim for damages and interest to be assessed."* There were no issues to be taken with the form of the offers (i.e. if the wording were found to be acceptable then it was not contended that there were any other deficiencies with the offers).

The Claimant's position was that both of the offers had been beaten on the basis that he had gone to trial and recovered 100% of his claim for damages, whereas if the Defendant had accepted the offer then he would have only recovered 90% of the same damages. It was asserted that if the offer had been accepted then the matter could have been dealt with at a Disposal Hearing, as the need for a trial would have been obviated. Counsel for the Claimant argued that it was important to separate out the three elements of the tort of negligence, i.e. duty, breach, and damage - where causation is in dispute, it cannot be said that there is a true admission of liability because the damages element remains in dispute.

I set out that the Defendant's response in relation to the offers was three-fold. Firstly, an offer cannot be valid if it is expressly made in relation to an issue that is not in dispute between the parties. Secondly, even if the offers were valid then it could not be said that they represented a genuine attempt to settle the dispute between the parties. Thirdly, even if the offers were found to survive the first two criticisms, the Defendant could truly be said to have beaten the Claimant's offers because the Claimant recovered significantly less than 90% of the amount that was originally being sought. A trial had clearly been necessary in any event because issues of consistency and reliability of witness evidence were unsuitable for a short Disposal Hearing.

The Claimant relied upon a number of well-known authorities in support of the proposition that an offer that makes only a nominal concession on liability that does not reflect a genuine appraisal of the risk profile of the case can nevertheless be a valid Part 36 offer: *Huck v. Robson* [2002] EWCA Civ 398; *Jockey Club Racecourse v. Willmott Dixon Construction* [2016] EWHC 167; and *JMX v. Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185. The Defendant argued that the position was akin to *AB v. CD* [2011] EWHC 602 and R *(on the application of MVN) v. Greenwich LBC* [2015] EWHC 2663, i.e. that the Part 36 offer did not actually make any meaningful concession on the part of the Claimant.

In giving the original judgment in the Defendant's favour, DJ Reeves declined to draw any distinction between the wording of the two offers, holding that the offers could not be considered a genuine attempt to settle within the ordinary, common understanding of English language. He felt that the key consideration was how can there be a genuine attempt to settle when a party is invited to concede something that they have already admitted? The wording of the offer was circular in that it still required assessment by judgment or some other means as to what the claimant should receive. Neither offer had the effect of being capable of compromising any of the issues between the parties in the proceedings on any construction.

HHJ Walden-Smith rejected the Claimant's appeal against the decision and found that the District Judge had not erred in his interpretation of the offer. She felt that the determinative factor was that the judgment for the Claimant was not 'at least as advantageous' as his Part 36 proposal for the purposes of CPR 36.17. Given that the existence of the duty of care and breach of duty had been conceded by the Defendant in the Defence, accepting the offer would have to be construed as conceding the final constituent element of the tort of negligence, i.e. that the Defendant caused the Claimant some loss. Accordingly. if the Defendant had accepted the offer then it would not have been open to him to continue to challenge causation, the issue upon which he was eventually largely successful.

Further, any award of damages at all would have to be construed as a discount on the offer because a 10% discount will always be better than 100% of the same thing. If the Claimant's interpretation of the offer was correct, then claimants could use such offers to place defendants in an impossible position in all cases where causation was challenged in order to prevent them from continuing to defend claims against the background of any award to the Claimant leading to punitive costs consequences. She commented that whilst she accepted that the purpose of Part 36 is to limit claims and encourage settlement, it is not a system that is designed to prevent a realistic possibility of a party arguing fundamental principles.

DJ Reeves awarded the Defendant its costs of dealing with the costs issues, and made a finding that these could be considered 'exceptional' pursuant to CPR 45.29J, i.e. that they were not subject to the fixed costs regime. This decision was upheld on appeal. HHJ Walden-Smith emphasised that the fact that costs were dealt with on a separate day to the Fast-Track trial does not in itself give rise to a finding of exceptionality. However, the case was exceptional because the Claimant's representatives had not had in mind the Overriding Objective pursuant to CPR 1 to decide cases proportionality because they had approached the case excessively by virtue of the factual and legal issues that they had raised.

It remains to be seen whether the appeal will represent the final word on this issue. Although the Claimant's representatives initially stated that they would definitely take the matter to the Court of Appeal, it does not appear that any Notice of Appeal was ever actually filed within the time allowed. However, it is assumed that the vigour with which this matter was pursued by the Claimant's solicitors is indicative that offers with the same wording have been made in numerous other cases, which suggests that this may well not be the last time that this somewhat thorny issue comes before the Courts.

Exaggerate at your own expense: *Brian John Morrow v Shrewsbury Rugby Union Football Club Ltd* [2020] EWHC 999 (QB)

Harriet Wakeman

Overview

In *Brian John Morrow v Shrewsbury Rugby Union Football Club Ltd* [2020] EWHC 999 (QB), Mrs Justice Farbey considered the question of whether the costs payable by the losing party should be reduced where the Claimant was found to have exaggerated his claim, although he had not done so dishonestly.

The key issues for the Court to determine were:

i. Whether there were any reasons for departing from the general rule that costs follow the event; and

ii. If so, the extent of the deduction that the Court should make.

Factual background

The Claimant was watching a rugby match at the Defendant's pitch when he was struck on the head and injured by a rugby post. Liability was not disputed. The Claimant argued that as a result of the accident he could no longer work as an independent financial advisor and that he would only ever be capable of a minimum wage role. He advanced a claim for future loss of earnings in the sum of £946,097.28. At trial, Farbey J found that the Claimant had exaggerated his future loss of earnings claim, although he had not done so dishonestly. It was noted that he had a number of pre-existing conditions which would have affected his ability to work. Indeed, in the 5 years leading up to the accident he had seen his GP and other doctors about a range of problems including fatigue, insomnia, stress, anxiety, palpitations and migraines, which were noted to be the sorts of factors which the Claimant said would prevent him from working in the future. In this case, the Claimant had made a Part 36 offer in October 2019 of £800,000 and the Defendant had made a Part 36 offer in June 2018 in the sum of £110,000.

The Claimant was awarded £285,658.08 in respect of his claim, significantly less than the claimed sum. The Court then considered the appropriate order as to costs.

Relevant CPR provisions

The Court noted that the general rule is that costs follow the event (CPR 44.2(2)(a)). However, the Court can make a different order (CPR 44.2(2)(b)). In deciding what order to make as to costs, the Court had to consider all the circumstances of the case, including the factors set out in CPR 44.2(4), which included the conduct of all parties.

The conduct of the parties was noted to include, pursuant to CPR 44.2(5)"

"***(a)*** *conduct before as well as during the proceedings;*

(b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

(c) *the manner in which a party has pursued or defended the case or a particular allegation or issue; and*

(d) *whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*"

It was noted, that the primary protection for defendants facing paying the costs of exaggerated claims is CPR Part 36, since a defendant is able to make a Part 36 offer that takes into account the exaggeration and reflects the value of the claim likely to be accepted by the Court.

Decision

It was not in dispute that the Court should make an order for costs in favour of the Claimant, who was the successful party and who had beaten the Defendant's Part 36 offer by a considerable margin.

The Court appears to have placed weight on the following factors when considering the appropriate order for costs:

i. Whilst the Defendant's Part 36 offer proved too low, it was significantly closer to the damages awarded than the Claimant's offer.

ii. The Defendant chose to contest almost every allegation and almost every issue relating to quantum.

iii. Although the Claimant's exaggeration was not the sort that deserved a punitive costs order in itself, it was a relevant factor when determining whether a deduction to the costs payable should be awarded.

iv. The Claimant's Part 36 offer was multiple times higher than the award of damages.

Having considered these factors, the Court concluded that the Claimant's conduct was a cause of unnecessary expense. The Court stated:

"The claimant's exaggeration prolonged the trial and prolonged the cross-examination of multiple witnesses, including the psychological and psychiatric witnesses as well as those who gave evidence relating to the quantification of loss of earnings... In my judgment, a deduction of 15% is broadly appropriate to mark the additional costs caused by the claimant's exaggerated case."

As such, the Defendant was ordered to pay 85% of the Claimant's costs.

Comment

This case illustrates that, whilst each case will turn on its own facts, in cases where the Claimant's exaggeration has been entrenched in the claim such that it has prolonged the trial and caused unnecessary costs to be incurred, there is a risk that a deduction will be made to the payable costs, even where the claim has ultimately been successful.

This case should serve as a reminder to those representing claimants of the importance of taking a pragmatic approach when assessing the quantum of a claim. Equally, those representing defendants should be mindful of the need to review Part 36 offers regularly as the case and evidence progresses.

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

Ellen Robertson

Previous editions of this newsletter have examined the various routes leading to enforceable costs orders that may provide a useful alternative argument to insurers where arguments of fundamental dishonesty are unsuccessful (see Ellen's article in Issue X: https://tgchambers.com/wp-content/uploads/2019/10/TGC056_Newsletter_Fraud_issue10_v3b.pdf).

One such route is through CPR r.44.16(2), which states as follows;

(2) *Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –*

(a) *the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or*

(b) *a claim is made for the benefit of the claimant other than a claim to which this Section applies.*

This provision provides for an exception to QOCS where the claim includes a claim, other than for personal injury, for the benefit of the claimant or of another. This route is of particular relevance for personal injury claims that include large sums for credit hire of an alternative vehicle.

Following several High Court decisions on the matter, discussed in previous editions (including *Jeffreys v Commissioner of Police of the Metropolis* [2017] EWHC 1505 (QB) and *Siddiqui v University of Oxford* [2018] EWHC 536 (QB)), we now have a Court of Appeal judgment on the application of r.44.16(2).

In *Andrea Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724, the Court of Appeal held that claimants cannot automatically avoid QOCS in mixed claims, considering that it would be wrong to allow claimants to benefit from the mixed nature of their claim by QOCS protection that extended beyond personal injury.

Of particular assistance to those dealing with claims arising out of road traffic accidents, the Court in *Brown* expressly considered the effect of the provision on "ordinary" claims for personal injuries. Coulson LJ, giving the judgment of the Court, noted that personal injury claims commonly include property damage, giving the example of claims for vehicle repairs or hire in claims arising out of road traffic collisions, and took the view that such cases fell within the "mixed" claims where QOCS protection was not automatic.

However, establishing that a claim is a "mixed" claim within CPR r.44.16(2) is not the end of the matter, as the permission of the Court is required to enforce an order *"to the extent that [the Court] considers just"*.

The judgment suggests that in run-of-the-mill road traffic accident claims including sums for credit hire or repairs, the starting position is likely to be that QOCS protection should be left in place.

Coulson LJ noted as follows *"I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply."*

In order to achieve an enforceable costs order where fundamental dishonesty is not made out, the Court will therefore want to see exceptional features of the non-PI elements of the claim. The example given by the Court of gross exaggeration of the credit hire claim may be of relevance in cases where the Court has identified serious concerns with the hire claim but has not made a finding of fundamental dishonesty. Given that one would expect gross exaggeration of a hire claim to be fundamentally dishonest in many cases, use of this section may be fairly limited.

Defendants that do seek to pursue this section will need to assist the Court with the question of the extent to which any costs order can be enforced. Separate costs schedules dealing with the time spent on the non-PI element of the claim will be of use to the Court both in determining whether to give permission to enforce, and in determining the extent of any such permission.

Credit hire taxi cases – *Hussein v Eui* [2019] EWHC 2647. 'Will the exceptions swallow the rule?'

Tim Sharpe

The High Court has given welcome clarification of the principles that apply to the assessment of damages where the Claimant has hired a replacement plated vehicle. However, all sides to such disputes need to be aware of the nature and scope of the exceptions to the principle.

The facts of the claim were unremarkable - the Claimant was a self-employed taxi driver who owned a BMW 3 series. The car was worth £7,450 and it sustained modest damage leading to repairs of £1,527, but a hire bill of £6,596 over 18 days.

The Claimant recovered just £423 at trial before HHJ Wall in the County Court at Birmingham. The Judge found that the taxi was a "profit earning chattel in a true sense". It was not the only family car, as the family also had a Toyota Yaris that the judge noted was "sufficient for four people to use". The Claimant said in his statement that the damaged car was used for family trips as well as work, but the judge noted there was no evidence of any long trips planned. The court held that the Claimant had not proven that he needed to hire a second car for social and domestic use. His need was for a vehicle for business use and the measure of loss was the loss of profit, the court finding that it was unreasonable to spend more in mitigation than the profit itself (and indeed where the cost was around the Claimant's annual profit). The Claimant's accounts showed a profit of £141 per week, so 3 working weeks brought a recoverable loss of £423. The Claimant appealed, contending (i) that the court's approach to "need" was too exacting and that the evidence of the domestic/social need ought to have been accepted, and (ii) that limiting damages to loss of profit was wrong.

Pepperall J set out the following principles that apply to claims for financial losses suffered by self-employed drivers when their vehicles are off the road pending repair or replacement:

1. The starting point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement;

2. If the Claimant in fact hires a replacement vehicle so they can keep trading, those costs may be recoverable if they are a reasonable attempt to mitigate the loss. If the costs of the hire vehicle are lower than the loss of profit that would otherwise have occurred, then the costs of hire are likely to be recovered;

3. Where the costs of hire are around the same as the anticipated loss of profit, the court will not "count the pennies", and will probably allow the claim. However, where the costs of hire is significantly in excess of the avoided loss of profit, the claim will be limited to the loss of profit;

4. Even where the cost of hire significantly exceeds the avoided loss of profit, the Claimant may still recover hire charges if they acted reasonably. Particular examples of when the court might allow a claim for hire charges significantly in excess of the likely loss of profits are:

a. where the Claimant needed to keep providing the service to retain business (such as regular customers) or to avoid losing future work (e.g. being dropped by a taxi company for not being available for work) and to avoid making a future loss of profit;

b. where the Claimant had a need for the hire vehicle for private and family use;

c. where the Claimant simply could not afford to stop working – the impecunious Claimant cannot be expected to cease work and rely on loss of profits being determined months down the line.

On the facts of the case, the decision of the trial judge was upheld (not least as the Claimant had not addressed the issue of impecuniosity in his evidence at all).

The clarification of the principles is welcome. However, this is far from the end of large claims for credit hire plated vehicles. Indeed, the breadth of the exceptions, when applied to the reality of the self-employed taxi driver, may well engulf the principle. The judgment was only looking at self-employed drivers (and not other businesses with profit earning chattels such as machinery). In reality, many such individuals will fall into one or more of the exceptions. By way of example, it is comparatively rare to find a self-employed driver Claimant who uses their vehicle purely for work purposes and has no social or domestic use of the vehicle.

The exceptions are of course subject to the evidence, and here Claimants often fall short. Those acting for the Claimant would be well advised to ensure that any exception relied on by the Claimant is pleaded and addressed by way of disclosure and statements. The social/domestic use is the simplest and most obvious exceptions for a Claimant to develop in evidence, although the judgment may well cause courts to consider such claims rather more forensically than before, rather than just accepting need without enquiry. For their part, insurers may wish to continue to explore whether the Claimant had access to other vehicles to rebut the contention that the Claimant was reasonable in hiring (the court in Mr Hussain's case finding that the family could have used the obviously smaller Toyota Yaris for 3 weeks for family matters, rather than hiring a vehicle like a BMW 3 Series) and may well invite the court to consider the significant sums claimed in contrast to the alleged need, in an effort to persuade the court that the Claimant has not been reasonable.

As to any contention that the Claimant would sustain a future loss of income if not available for work, this is likely to be harder to evidence than other categories as it may well require witness evidence from other people. Customers may well not be inclined to give evidence to support the Claimant's claim (save perhaps where the Claimant works for a limited number of individuals such as a chauffeur) and it might be a bold taxi operator who committed to a witness statement a claim that they would refuse work to someone who did not have car due to no fault of their own.

As to impecuniosity, this is often not raised by Claimants in fairly short term hire claims given the well known difficulties for the Defendant in obtaining Basic Hire Rates for plated vehicles. However, if the Claimant wishes to bring themselves within the 3rd exception above, they will need to both plead and prove this (and the failure to do so was the downfall of Mr Hussain in this case) and will be open to the usual scrutiny from the insurers and the courts.

The insurers however should now receive some benefit in these regards from the recent changes to CPR PD 16. The Claimant is required to expressly plead in the Particulars of Claim matters such as the need for a replacement vehicle and impecuniosity, as well as stating relevant facts relating to these issues. The Defendant ought now to be better placed than before to assess such claims well ahead of trial and either settle, or make protective offers. The failure to properly set out the claim could lead, in serious cases, to the strike out of the claim.

Do you have a fraudulent food poisoning claim that hasn't been issued? Porridge may be the answer

James Henry

The Court of Appeal has determined that committal proceedings for contempt of court may be brought in respect of false statements made before proceedings have been issued, and even though proceedings were never issued. The decision in *Jet 2 Holidays v Hughes* [2019] EWCA Civ 1858 is a powerful reminder to litigants that the Court (and those defending false claims) will not tolerate the 'have a go' attitude that has permeated fraudulent low value injury claims.

Facts

Mr and Mrs Hughes ("the Respondents") had been on an all-inclusive 10-day holiday to Lanzarote with Jet2. When they got back, they submitted claims alleging that they had suffered food poisoning as a result of eating contaminated food or swimming in the hotel pool. In support of the claims, they submitted witness statements setting out their allegations, including that they were acutely ill for most of the holiday with diarrhoea, stomach pains and vomiting. The statements were in substantially the same format as would be served if proceedings had been issued. Both statements were verified with signed statements of truth.

Jet2's social media searches found pictures and comments on Facebook and Twitter, and a YouTube video, indicating the Respondents were perfectly well and enjoyed their holiday. The claims were successfully repudiated and proceedings for damages were never issued.

Committal proceedings

Jet2, clearly not content with the Respondents simply abandoning their claims, sought permission to commence committal proceedings on the basis of false statements verified by a statement of truth, made in each of the original witness statements. It was contended that there was a strong prima facie case of contempt, and that it would be in the public interest for permission to be given. In the course of the permission proceedings, the Respondents filed further witness statements endorsing the truth of the original (pre-action) statements. His Honour Judge Godsmark QC, sitting as High Court Judge, recorded by consent that permission be given to Jet2 to commence committal proceedings against the Respondents.

At a CMC in the course of the contempt proceedings, His Honour Judge Owen QC, sitting as High Court Judge, raised the question whether the court had jurisdiction to entertain committal proceedings in the circumstances, in view of the fact that the witness statements had been made otherwise than in connection with the extant proceedings, and no proceedings for damages had ever been commenced.

To safeguard against a finding that the Court lacked jurisdiction, Jet 2 also made an application to add additional grounds for contempt arising from the further statements (made in the course of the contempt proceedings) which endorsed the truth of the original statements.

On the issue of jurisdiction Judge Owen found that the basis of Jet2's committal application was that the pre-action statements were statements within CPR 32.14, which provides that proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. He held it was clear that any such

witness statement would have to be served within actual proceedings which had been started within the meaning of CPR 7. As a consequence the contempt proceedings were dismissed.

Court of Appeal

The Court of Appeal agreed with Judge Owen that jurisdiction to bring committal proceedings was not conferred by way of CPR 32.14. Witness statements made before the commencement of proceedings do not fall within that rule.

However, the court has an inherent power to commit for contempt (which is expressly recognised in CPR 81.2(3) and PD81 paragraph 5.7). The test at common law is whether the conduct in question involved any interference with the due administration of justice, either in a particular case or more generally as a continuing process. The Court agreed with the following words of Sir John Donaldson MR in *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333:

"The law of contempt is based on the broadest of principles, namely, that the courts cannot and will not permit interference with the due administration of justice. Its application is universal".

In the context of Jet2's case, it was observed that the Respondents plainly used the pre-action witness statements to give the impression to Jet2 of greater weight and conviction than might otherwise be the case. They used the statements to indicate the oral evidence they would give in proceedings and the verification of truth gave solemnity to that indication. Such a witness statement was capable of interfering with the administration of justice, because Pre-Action Protocols are now an integral and highly important part of litigation. The appeal was therefore allowed.

Further points of note:

- The Court of Appeal held that strictly speaking, the application for permission to bring proceedings for contempt should have been made in the Administrative Court, because the alleged contempt was committed 'otherwise than in connection with any proceedings'. The Court commented that it would be highly desirable if that unsatisfactory position (along with the unsatisfactory position that pre-action statements fall outside CPR 32.14) should be addressed by the CPR and a Practice Direction. Watch this space.
- During the course of the hearing, the issue of what documents or representations could form the basis of allegations of contempt was canvassed. For example, could a representation in a letter that purported to give a truthful response to a pre-action query form the basis for contempt proceedings? The Court decided that it was not necessary or appropriate to address that issue in the Jet2 case, but recognised there could be widely varying factual situations where the point may arise. In this context, courts have already indicated a robust approach to pre-action representations in the context of CNFs (in *LV= v Yavuz* [2017] EWHC 3088 (QB) and *Richards v Morris* [2018] EWHC 1289 (QB)). That is perhaps even more important in RTA and EL/PL claims, where it is not the norm to serve a pre-action witness statement.

The decision is a welcome one in the context of holiday illness claims, where recent experience suggests there does seem to be an even greater proportion of potential claimants willing to 'go along' with a false claim or just 'have a go', but also has equal application to RTA and EL/PL fraud, where the same culture has existed for much longer. The case also provides a useful indication to any court determining the weight to be attributed to pre-action statements, allegations and representations. The message is that they should be taken seriously, with the inevitable consequence that inconsistencies with other documents, statements or oral evidence may demonstrate a lack of credibility.

Jason Roberts v (1) Alan Kesson (2) Tesco Underwriting Ltd [2020] EWHC 521 (QB)

Olivia Rosenstrom

Following a road traffic accident, the Claimant brought a claim for general damages, the pre-accident value of his vehicle, storage of his vehicle at the garage of his brother-in-law, and hire charges for a replacement vehicle. Mr Recorder Kelbrick found that the accident had occurred as a result of the first Defendant's driving. The Claimant's schedule of loss and first witness statement both claimed that the vehicle had been written off and been sold for salvage. The Claimant stated that he had used the salvage value to hire a replacement taxi to continue his work as a taxi driver.

The Second Defendant, the insurer of the First Defendant, discovered that the vehicle in question had passed its MOT on the day before the Claimant signed off his first witness statement. The Second Defendant also found Facebook entries where the Claimant advertised his vehicle for sale, seemingly 8 months after the accident, in a roadworthy condition for £7,000. When these findings were presented to the Claimant, he filed a second witness statement where he stated that his first statement was accurate "save for one small detail". That detail was the disposal of his vehicle, which had in fact been repaired by his brother-in-law and returned to the Claimant.

At trial the Claimant accepted that his first statement was untrue. In relation to his hire charges, the Claimant stated, contrary to his previous statement regarding his use of the salvage value, that he had been unable to hire at a more commercial rate because he was impecunious. Subsequently, the Second Defendant submitted that whether or not the Claimant's claim for damages had been substantiated, the entirety of the claim was so infected by dishonesty that section 57 of the Criminal Justice and Courts Act 2015 was triggered.

Recorder Kelbrick found for the Claimant on liability. Whilst he did not address s.57 directly, Recorder Kelbrick considered that the Claimant had not persisted with his dishonesty in his oral evidence, but had accepted that his first statement was dishonest in part. The Recorder rejected the pre-accident value claim on the basis that there was insufficient evidence in support of the claim. He also rejected the claim for storage on the basis that the Claimant had not satisfied him that the storage invoice was a true document. As to the hire claim, Recorder Kelbrick found that the Claimant had not proved that he was impecunious. The Claimant was awarded general damages for PSLA together with interest and costs.

The Second Defendant appealed Recorder Kelbrick's judgment, arguing that the Recorder's judgment was seriously deficient in relation to s.57 and that several aspects of the Claimant's claim had been dishonest. The Claimant submitted that Recorder Kelbrick had dealt with s.57 appropriately.

On appeal, Mr Justice Jay found that Recorder Kelbrick had failed properly to address the issue of fundamental dishonesty, which was at the forefront of the Second Defendant's case. He considered that the Recorder had been entitled to the findings made in relation to the storage invoice and the hire charges. However, he was not satisfied that the judge had applied s.57 correctly in relation to the Claimant's first witness statement. Jay J consider that the language of s.57 was important. The question was whether the Claimant "has been" fundamentally dishonest, rather than whether he has persisted in his dishonesty. The only permissible conclusion on the evidence was that the Claimant had been fundamentally dishonest in advancing a false claim in a schedule of loss as well as his first witness statement. There had been no proper explanation for

the falsities, and the fact that the Claimant's mother had passed away around the time of signing his statement was not a proper explanation. The instructions for the content of his statement had been given earlier. In the instant case, there was no need for a re-trial, as the direct evidence, and the inferences that could be drawn from it, were sufficiently strong to enable Jay J to determine the issue. He went on to consider whether the dishonesty went to the root of the claim, and was therefore, fundamental. Jay J considered that "what is required is a global assessment in the light of the claim as advanced in its entirety, but also in view of the saliency and importance of the particular claim under consideration." Applying this holistic approach, he was satisfied that the dishonesty did go to the root of the claim, and was not minor or peripheral. The appeal was therefore allowed, the Claimant having been found fundamentally dishonest.

To the Supreme Court, and beyond?

James Yapp

In this latest chapter of the *Lai Ho v Adelekun*[1] saga the Court of Appeal reluctantly allowed the defendant in a QOCS case to set off a costs order in its favour against a costs order in favour of the claimant.

This case grapples with what constitutes 'enforcement' of a costs order in a QOCS case.

More fundamentally, the Court of Appeal questioned the nature of the QOCS regime itself: is it an adjunct to the usual costs rules or a self-contained code?

Background

The underlying appeal concerned a dispute over whether the Claimant was limited to fixed costs after she had accepted the Defendant's Part 36 offer[2]. The Court of Appeal decided that she was. The parties agreed that the Defendant should have its costs of that appeal.

The interesting issue in dispute was whether the Defendant could set off the costs order in its favour against the costs it owed to the Claimant.

This seems to have been important as the claim settled by acceptance of a Part 36 offer. Per Coulson LJ in *Cartwright v Venduct Engineering Ltd*[3], the settlement would be *"outside the words of rule 44.14(1)"* so QOCS barred enforcement of the order against the Claimant herself.

The rules

CPR 44.12 appears within Section I of Part 44 CPR, which is headed "General":

"***(1)*** *Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and...*

(a) *set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance..."*

Section II of Part 44 contains the QOCS rules. CPR 44.14(1) provides that, subject to the exceptions at CPR 44.15 and 44.16, orders for costs against a claimant can be enforced without permission *"but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant"*.

The arguments

The Defendant argued that the Court of Appeal should not depart from its previous decision in *Howe v MIB* (unreported, 6th July 2017). In *Howe* Lewison LJ (in an unreserved judgment) held that CPR 44.14 does not preclude setting off costs against costs because:

i) set-off is not a species of enforcement; and

ii) CPR 44.14 deals with enforcement without the permission of the court, whereas an order for set-off under CPR 44.12 requires the court's permission.

Moreover, in his judgment, ordering such a set-off would not go against the thrust of Jackson LJ's recommendations.

While the Court of Appeal is usually bound by its own previous decisions, the Claimant's case was that the decision in *Howe* was given *per incuriam*.

She contended that the court did not have jurisdiction to order such a set-off in a QOCS case. Section II of CPR Part 44 is a self-contained code which provides a claimant with costs protection other than in the circumstances specified in that Section. This regime precluded setting off costs against costs, there being no equivalent to CPR 44.12.

Moreover, she argued that *Howe* undermined access to justice as claimants may be left with a liability to pay their own solicitors' costs without the fund from which that liability would usually be settled.

On this point the Defendant argued that while QOCS was intended prevent a claimant from having to make a net payment to the defendant unless an exception applies, it can never have been expected to remove any risk of a claimant owing more to his solicitor than he had received from the defendant.

Decision

Newey LJ delivered the lead judgment. He refused to depart from the decision in *Howe*. Whilst it might have been decided differently with the benefit of fuller argument, it had not been given *per incuriam*.

Once the issue of principle was determined, Newey LJ saw no reason not to exercise the court's discretion to allow the set-off[4].

Here's what they would have done

Newey LJ said that were there no authority on the issue, he would have been inclined to accept that *"where QOCS applies, the Court has no jurisdiction to order costs liabilities to be set off against each other..."* and that *"Section II of CPR Part 44 represents a self-contained code [limiting a defendant to] set-off against damages and interest under CPR 44.14"*.

In his view there were compelling reasons to conclude that "enforced" in the context of CPR 44.14 (unlike in other contexts) extended to set-off. Defendants will commonly "enforce" costs orders against a successful Claimant's damages by way of set-off, a practice that those drafting the QOCS regime surely intended. Given that CPR 44.14 does not expressly provide for a set-off against damages, the power to so order must arise from CPR 44.14.

Males LJ said there was a *"powerful case"* for calling the decision in Howe into question. Whether or not it was correctly decided, there were *"powerful arguments on each side of the issue as to what the law should be"*. Both Newey LJ and Males LJ recommended consideration by the Rules Committee.

The future?

Permission to appeal to the Supreme Court has been granted and I understand the CPRC has decided to await the outcome of that appeal before taking action.

For now, defendants will be heartened by the preservation of the status quo. The decision of the Supreme Court is awaited with interest.

(James' article previously appeared in the TGC Costs Newsletter from July 2020, which can be found using the following link: https://tgchambers.com/wp-content/uploads/2020/07/TGC061_Costs_Newsletter_Vol_VI_v3.pdf)

1. [2020] EWCA Civ 517

2. See previous TGC Costs Update

3. [2018] EWCA Civ 1654

4. c.f. *Faulkner v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 296 (QB). Turner J held that he was bound by Howe. He refused to exercise his discretion to allow the Defendant to set off the costs of the action (the Claimant having discontinued) against a costs order made in Claimant's favour on Defendant's 'very weak' application to reinstate and strike out.

Recent Noteworthy Cases

Chowdhry v Skyfire Insurance Co Ltd (27.9.19, Manchester County Court, HHJ Sephton QC)

Witness consistency – damage consistency – fundamental dishonesty

Richard Boyle (instructed by Georgia Talbot of Horwich Farrelly) appeared in this case arising out of a road traffic accident. The judge preferred the evidence of the Defendant's witness and, on that basis, concluded that the damage seen to the Claimant's vehicle was not caused by the index accident.

It was the Claimant's case that he came to a halt and the Defendant hit the rear of his vehicle. It was the Defendant's case that he was stationary in the junction and the Claimant reversed in to him. The judge noted that a judicial eyebrow was raised in respect of defences such as this because they were inherently improbable. However, he held that the Defendant's witness had come to assist the court. The judge noted that the witness frankly admitted to matters that he could not remember or did not know. On the other hand, he found the Claimant's evidence troubling. He noted that:

- the witness statement and medical report wrongly stated that the Claimant had not been in any previous accidents;
- the medical report did not declare the Claimant's pre-existing medical history which was in the same areas as those reported after the index accident; and
- the Claimant's statement said that he did not undertake physiotherapy because he did not have time. This was surprising given that the Claimant was unemployed. The Claimant's answer at trial, that he did not have physiotherapy because he was feeling better, was inconsistent with this account.

Most importantly, the judge accepted the Defendant's evidence that there was no damage to the Claimant's vehicle at the scene. He noted that the Claimant's witness statement originally said that he had taken photographs of the damage to both cars at the scene. He inferred that this was the account given to the Claimant's solicitors but this had subsequently been altered to say that photographs were taken only of the Defendant's car. The judge turned to the damage and accepted he should not act as an expert when considering consistency. Instead, he relied on the fact that he accepted the Defendant's evidence, held that the Claimant had sought to attribute other damage to the index accident and found the Claimant to be fundamentally dishonest.

Katinas v AXA Insurance UK Plc, 31.10.19, Romford CC, DDJ Harrison

Opportunistic claim – Exaggeration – Fundamental Dishonesty

Robert Riddell (instructed by Mason Mott-Roberts of Horwich Farrelly) represented the successful motor insurer.

What started as a straightforward liability dispute between two drivers ended with the Judge dismissing the Claimant's claim and finding him to be fundamentally dishonest.

The Claimant claimed for multiple personal injuries (with a prognosis of between 6-9 months) arising from a road traffic accident in 2016 involving the Defendant's insured. Both drivers blamed the other for transgressing into each other's lanes as they were manoeuvring around a corner. In these circumstances, the Claimant's Part 36 offer for sharing liability on a 50:50 basis put the Defendant at some risk; but the Defendant had identified sufficient weaknesses with the Claimant's case to proceed to trial.

The Claimant failed to persuade the Judge that his account of the accident was the more likely version. But his evidence started to unravel into what the Judge described as a "fearful muddle" when he sought to explain the nature of his injuries and the progression of his symptoms. He provided times for the onset of pain which were wholly inconsistent with what he had informed his medicolegal expert; and, when challenged, made an unconvincing attempt to blame inaccurate reporting. He exaggerated the extent of his domestic restrictions, stating for the first time that the pain had rendered him unable to carry out some home decorating and roofing repairs for which he had needed to obtain professional services (but for which he had not claimed). He struggled to explain why he had never sought medical attention despite being in severe and constant pain, or how he failed to adopt a recommendation for a course of physiotherapy at any time.

Against this evidential background, the Judge considered two questions as to whether the Claimant had proved causation: (a) whether the accident was likely to have caused injury; and (b) whether the Claimant had in fact been injured.

In respect of (a), the Judge noted that the vehicles were travelling at a relatively low speed and that the Claimant had accepted the impact was just a glancing blow. The Judge found the Claimant's account of the force of the collision in his witness statement to be inherently improbable in the circumstances, and, further, that it was inherently improbable that anyone would have sustained any injury at all.

As to (b), on the basis of the multiple inconsistencies in the Claimant's evidence, the Judge found that the Claimant had brought a claim for injuries which he knew he did not sustain. Accordingly, while dismissing the claim on the basis that the Claimant had failed to prove that the accident was caused by the Defendant's negligence, he also found the claim to be fundamentally dishonest, leaving the Claimant to face the consequences of an enforceable costs order made against him in the Defendant's favour.

Hussain v Shakir (1) AICL (2) (Bradford CC, 01.11.19, DDJ Dawson)

Fundamental Dishonesty – s.57 CJCA 2015

James Henry (instructed by Susan Lane of Horwich Farrelly) appeared in this case where, although the Second Defendant did not formally admit that an accident happened, there was no real dispute that it had and that the Claimant had probably been injured to at least some extent.

The Claimant maintained that the had lost consciousness and reported the same to paramedic at the scene. Neither the paramedic's clinical notes nor the Police report made reference to any head injury or loss of consciousness. Following cross-examination DDJ Dawson found that it was unlikely that if the Claimant had lost consciousness it would not have been recorded. The Claimant had also given evidence about a missed holiday (which was characterised as nonsensical, and 'a work of utter fiction') and had been inconsistent about the onset of his pain, the nature of injuries and time off work.

The Judge found that the Claimant sustained genuine injuries worth £1,500, but had been fundamentally dishonest in relation the claim, with the consequence that the entire claim was dismissed pursuant to s.57 of the Criminal Justice and Courts Act 2015.

LV= v Hall (Rowena Collins-Rice, sitting as a Deputy High Court Judge, QB, 21.11.19)

Contempt of Court – sentencing

Paul McGrath and James Henry, instructed by Benjamin Leech of Keoghs LLP, secured a committal order of immediate imprisonment for 5 months for contempt of court against Mr Robert Hall. Paul McGrath appeared in the committal hearing, and James Henry acted at sentencing stage.

Rowena Collins-Rice sitting as a Deputy High Court Judge found Mr Hall guilty of contempt of court for making false statements on three documents verified by statements of truth. In addition to the five month custodial sentence, Mr Hall was ordered to pay the full amount of LV's costs of the committal proceedings, which came to over £21,000.

Mr Hall had claimed for whiplash injuries which he had allegedly suffered as a passenger in his grandmother's car on 28 February 2016. However, he was not in the car at the time and therefore did not suffer any such injuries.

Mr Hall approached solicitors who, with his authority, submitted a C laim Notification Form, a Claim Form and Particulars of Claim, each verified by a statement of truth signed on his behalf. These three documents falsely alleged that he was a passenger in the car and suffered the injuries claimed, with a total value of no more than £5,000. After LV issued a defence alleging that his claim was dishonest and that he was not in the car, Mr Hall stopped actively pursuing the claim, but did not discontinue it either. After a year and a half, and with multiple orders made in the meantime, the court was required to strike out the claim. Following on from this decision, LV commenced these successful committal proceedings against Mr Hall.

During sentencing, Rowena Collins-Rice emphasised the seriousness of insurance fraud, which results in ordinary people paying higher car insurance premiums. She noted the gravity of drawing in the justice system by making false assertions in documents backed by statements of truth, which wastes court resources and negatively impacts genuine litigants.

Rowatt v. Advantage Insurance (Brighton CC, 13.01.20)

Causation – Fundamental Dishonesty – Section 57

Anthony Johnson (instructed by Jenna Gay of Keoghs and Lloyd Weston of Advantage) represented the Defendant in this causation dispute arising from a minor, low speed road traffic collision. The Judge (DJ Harper) found that the Claimant, a Bank Manager, had failed to establish that she had been injured, and then went a stage further and dismissed her claim in its entirety pursuant to section 57 of the CJCA 2015 on the basis that she had been fundamentally dishonest.

The Judge explained that the reasoning behind his decision was that the Defendant had pointed him to a 'litany of errors' in the Claimant's case, which he said ultimately led him to an 'inescapable' conclusion that she must have been dishonest when she claimed to have suffered the injuries that she had allegedly sustained. Whilst he no doubt gave particularly careful consideration to his conclusion given the Claimant's occupation, he emphasised that whilst one or a small number of errors could have been explained away, and he accepted that mistakes can sometimes happen with all types of paperwork, the sheer number of errors and the lack of any credible explanation for them could not have come about due to anything other than dishonesty.

The Judge also commented on a couple of matters that had been raised on the Claimant's behalf in submissions. It had been suggested that the Defendant should have put the various inconsistencies and discrepancies to the Claimant's medical expert in Part 35 Questions. The Judge disagreed strongly with this, holding that the inaccuracies in the report could easily have been amended by the Claimant if there had been a good explanation for them, and that it was inconceivable that she would not have gone back to the expert if her evidence about the contents of his report being factually wrong was true. Insofar as it was suggested that the fault for some of the inconsistencies may lay with the Claimant's solicitors, the Judge emphasised the importance of pleadings, witness statements, Claim Notification Forms and medical reports being accurate. He said that the Claimant's solicitors must be aware that documents of that nature are very important and that Defendants and Judges will rely upon their contents: he commented that *"every solicitor knows the importance of getting the information accurate."*

The Defendant was awarded its costs of the action on the indemnity basis, subject to a deduction pursuant to section 57(5) in relation to the 'honest' elements of the claim, i.e. those that were not tainted by fundamental dishonesty. The Judge confirmed that in the absence of her dishonesty, he would have rejected her claims for injury, physiotherapy charges and miscellaneous expenses, but that he would have allowed her vehicle repairs in full and £656.92 in respect of credit hire charges (this was less than 11% of the amount that she was seeking to claim for hire).

Lynn v. Esure (Walsall CC, 14.01.20)

Discontinuance – Fundamental Dishonesty – Disapplication of QOCS

Anthony Johnson (instructed by Imran Fazal of Horwich Farrelly) represented the Defendant in this successful Application pursuant to CPR 44 PD12.4(c) for a declaration that the Claimant who had discontinued his claim was fundamentally dishonest and that, therefore, an enforceable Costs Order should be made against him.

The Claimant alleged that he was seated in the driver's seat of his stationary works vehicle when the Defendant's insured driver reversed into it at low speed. The Defendant's insured confirmed that the Claimant was not present at the material time, and her neighbour gave evidence that the Claimant had told her that he had not even been aware of the collision until he had been told about it. The most damning piece of evidence against the Claimant was a transcript of a conversation with a representative of the Defendant in which he said on two separate occasions that he had not been present in his vehicle at the material time. After the Defendant's case had been revealed to the Claimant, his claim was discontinued and his solicitors came off the record.

DJ Lynn found that, on the balance of probabilities, the Claimant had not been present in the vehicle at the material time. He held that, applying the *Sinfield* test, there was no question that the Claimant was fundamentally dishonest- it is difficult to conceive of anything more fundamentally dishonest in a personal injury claim than saying that you were injured in a collision when you were not actually present in the vehicle. He said that there was no need to draw an adverse inference from the Claimant's discontinuance and his failure to file a witness statement because there was more than enough evidence upon which to base the decision.

Hussain and Miah v Skyfire Insurance Clerkenwell and Shoreditch County Court, 16.1.20, DJ Manners

Key word? – Key word? – Key word?

Ellen Robertson (instructed by Shannon Cottam of Horwich Farrelly, now at DWF Law) appeared for the Defendant in this case involving two fraudulent "phantom passenger" claims for personal injury, arising out of an accident on 10 November 2016.

Both Claimants, a father and adult son, had claimed to be passengers in a car driven by their son/brother, when they allegedly sustained injury during a reversing accident, for which breach of duty had been admitted. The Defendant challenged the claims on the basis that neither Claimant was in the vehicle at the time of the incident.

In cross-examination, neither Claimant could give an explanation as to why their statements contained errors about the exact location of the collision, despite the collision happening on the street they lived on. The second Claimant attributed all errors in his medical report to the fact that his adult son, who was fluent in English, had assisted in interpreting at the medical examination.

District Judge Manners rejected the argument that the numerous mistakes made in the medical report could properly be explained by failures of communication between a father and a son who lived together. She found that the Defendant's witness was a straightforward witness who was very clear that there were no passengers in the car at the time of the collision.

Both Claimants were found fundamentally dishonest, on the basis that neither was in the car at the time of the collision, and on the basis that they were not injured. They were ordered to pay the Defendant's costs and witness expenses of £8,138. Permission was given to enforce the costs in full.

Jones v TUI (Portsmouth CC, 17.01.20)

Personal injury – expert evidence

Anthony Johnson appeared in this appeal rising from a holiday sickness claim. Although the case started life towards the bottom end of the Fast-Track, it was treated by both sides as a 'test case' on the admissibility of expert evidence in personal injury litigation. The Judge (DJ Ball) had the benefit of very detailed Skeleton Arguments from both sides and heard a full day of submissions, eventually handing down a reserved judgment at a subsequent hearing.

The matter concerned a holiday sickness claim where the Defendant had applied to strike out the Claimant's medical evidence on the basis that his expert did not have the requisite expertise to opine upon the illness that the Claimant claimed he had suffered. A barrage of criticisms were levelled at the expert by the Defendant.

The Judge ultimately accepted the Claimant's position that issues of the type that had been raised by the Defendant go to the weight that could be attached to the expert's evidence, rather than it being a question of admissibility; the Defendant can properly deal with its criticisms of the expert's methodology and expertise in submissions at the subsequent Trial. He found that the 'expert' could properly be considered to be such based upon his clinical experience and research. His evidence was admissible as it complied with the test set out by the Supreme Court in *Kennedy v. Cordia* [2016] UKSC 6.

Oliveira v Corey – 13.2.20, Central London CC

Liability – costs – enforceability

Edward Hutchin, (instructed by Kirsty Taylor of Keoghs), represented the successful Defendant insurers in this case in which the Defendant succeeded on liability, and obtained a fully enforceable costs order in accordance with the principles in *Brown v MPC*.

The Claimant claimed damages for personal injuries and other losses, including over £55,000 of credit hire charges, arising out of a road traffic collision involving his motorcycle. Liability, causation and damages were denied.

Following a fully contested trial, the judge dismissed his claims, noting the numerous inconsistencies in his account in cross-examination, and preferring the evidence of the Defendant and his wife, who stated that the Claimant had undertaken them when unsafe to do so. Judgment was therefore entered for the Defendant on his counterclaim.

Significantly, the judge then went on to make a fully enforceable costs order against the Claimant. Applying the principles in *Brown v MPC*, the judge held that the case fell within the mixed claim exception to QOCS, with a very substantial (and disputed) hire claim, and also noted that the Defendant had succeeded on the counterclaim (which did not include personal injuries). The judge therefore assessed costs, making some allowance for the personal injury element of the claim, awarding the Defendant a substantial costs order, as well as ordering the Claimant to repay an interim payment in respect of the pre-accident value of his motorcycle.

The case illustrates the importance of remaining alert to different routes to recovering costs: even where no finding of fundamental dishonesty is made, in appropriate cases (in particular those featuring inflated hire claims), it may be possible to obtain enforceable costs orders against Claimants in any event. Experience suggests that some judges may not be aware of recent case law on this issue confirming that such costs orders may be made.

Miah & Others v Uddin & Probus – 4.3.20, Central London CC

Fundamental dishonesty – QOCS

Edward Hutchin (instructed by Rachael Tyrer of Keoghs), represented the successful Defendant insurers in this case in which the parties were found to have staged a collision.

The Claimants claimed damages arising out of an alleged road traffic accident. Liability, causation and damages were denied. The Defendant's insurers were joined as Second Defendant after declining indemnity to the First Defendant.

At trial the Defendant insurers adduced expert forensic engineering evidence concluding that the damage was not consistent with the alleged accident circumstances. In cross-examination, numerous inconsistencies in the Claimants' accounts were explored; they also failed to disclose their full medical and accident history. In addition there were a number of concerns relating to the First Defendant, who took no active part in the proceedings.

The judge dismissed the claim, and expressly found fundamental dishonesty. She noted the discrepancies in the Claimants' evidence and rejected their explanations for them. She went on to make an express finding that the collision was staged, and made findings of fundamental dishonesty as a result, with an indemnity costs order in the Second Defendant's favour, and permission to enforce the costs under CPR 44.16(1). The Claimants were ordered to repay an interim payment, and to pay £30,000 on account of costs pending detailed assessment.

Ferris v. Martin (Southend CC, 5.3.20)

Induced Collision – Fundamental Dishonesty – Absence of Telematics

Anthony Johnson (instructed by Shannon Cottam of Horwich Farrelly) represented the Defendant at a Fast-Track Trial in the above matter where Recorder Genn accepted that the index collision had been deliberately induced by the Claimant and found, therefore, that he was fundamentally dishonest.

In a detailed judgment, the Judge set out that although she had given very careful thought to whether there was any alternate explanation for why the Claimant might have stopped his vehicle, and had also taken into account his youth and inexperience as a driver, ultimately she could not reach any other conclusion than that the Claimant had sought to deliberately effect a collision. She agreed with the Defendant's position that in light of the extent of the inconsistencies in the Claimant's claim and a number of incredible elements in his evidence, it was inevitable that she had to reach the conclusion that she did.

One interesting feature of the case was that the Claimant's vehicle had a telematics box fitted at the material time, but he did not disclose the data from it despite requests from the Defendant's representatives. The Judge held that she was entitled to draw an adverse inference from his failure to produce the evidence- any individual who had been accused of fraud and knew that there was data that would provide a whole or at least a partial answer to the allegation would have 'anxiously' sought to rely upon it and to 'marshal' sufficient evidence to defeat the claim. She also held that she was not willing to rely upon the Claimant's evidence as to the speed of the vehicle, force of braking and location of the incident when it could have been corroborated by the telematics evidence but was not.

Benedek v Sirat, Edmonton CC, 10.3.20, DJ Davies

Fundamental dishonesty – 44.16(1)

James Henry (instructed by Remi Wilkinson of Horwich Farrelly) represented the Defendant in this matter at the trial of this fundamentally dishonest injury claim.

The Judge gave five clear reasons for dismissing the claim and finding that the Claimant's evidence was 'riddled with inconsistencies and lies'.

Firstly, although the Claimant said that he took 3 days off work as a minicab driver, that was plainly untrue in light of the job log records that showed he had worked. He finally admitted the lie. Secondly, the Claimant described 'severe' pain without improvement at a level of 8/10 for a period of 2 months. That was found to be a gross-exaggeration, even accounting for the subjective nature of pain and a language barrier. Thirdly, the Claimant had seen his GP and reported his symptoms, but only after submitting his CNF. The Judge had no doubt the Claimant had already received advice on how to best process the claim from an accident management company. Fourthly, the suggestion that the Claimant, a full-time taxi driver, had significant travel anxiety was 'absolute nonsense'. Fifthly and finally, the Claimant gave evidence about having sought physiotherapy treatment in Hungary. He was so tied up in knots over his evidence on the point that the Judge found that he could not arrive at any other conclusion other than that the Claimant was saying whatever came into his he ad to get through the next few minutes of cross-examination.

As a result the Judge had no hesitation in making a finding of fundamental dishonesty in addition to dismissing the claim.

Alysson Nestoret v MS Amlin Corporate Member Limited – Croydon County Court, DJ Rowland, 13.3.20

Fundamental dishonesty – 44.16(1)

Ellen Robertson, instructed by Hannah Lawton of DWF Law, appeared for the Defendant resisting a dishonest claim for personal injuries arising out of a collision on 16 February 2017. The Defendant had admitted breach of duty and alleged that the collision was too minor to have caused injury. At trial, the Defendant's driver failed to attend. In those circumstances, District Judge Rowland considered he was not in a position to find that the Claimant could not have been injured in the collision without hearing from the Defendant's driver.

However, the judge found that the Claimant did not give good oral evidence, and had failed to explain her failure to disclose pre-existing injuries to her back and neck to the medicolegal expert. The judge also found that the Claimant had given contradictory answers about her pre-existing pain in evidence, at one point claiming the accident had exacerbated her pre-existing pain but at another point in her evidence claiming it was irrelevant to the accident related symptoms.

District Judge Rowland also noted that she had failed to mention a second accident to her medicolegal expert despite it occurring very shortly before examination. The judge rejected her explanation that she considered the question only to relate to accidents prior to the index accident, finding that her claims *"stretches her credibility to and beyond the breaking point"*.

The judge found that the Claimant had been dishonest in her account to her expert and her account in court, and found that the Defendant had proven fundamental dishonesty. He accepted the appropriate basis for assessing costs was the indemnity basis, and therefore awarded the Defendant its costs in the sum of £2,794.01, to be enforceable pursuant to CPR r.44.16(1).

Karuiru & Others v Mbayo & XL Catlin Insurance & Churchill Insurance – 21.5.20, Milton Keynes CC

Strike out – insurance

Edward Hutchin (instructed by Lisa Morley of Clyde & Co), represented the successful Defendant insurers, XL Catlin, in this case in which the Claimants' claims were struck out at an interlocutory stage before trial.

The Claimants claimed that they were at home when a car driven by the First Defendant crashed through the wall of their house, causing multiple injuries and losses.

Proceedings were issued against the insurers of the driver, XL Catlin, as well as the insurers of the vehicle and its owner, Churchill. XL Catlin filed a defence denying the claims, and more specifically denying that there was any cause of action against them, because they had issued a learner policy covering the First Defendant only when driving under supervision, and the First Defendant had been driving unsupervised when the accident occurred.

Despite this defence the Claimant continued the proceedings against both insurers. Prior to trial XL Catlin therefore made an application to strike out the claims against them, and for a declaration that they had no liability to meet any unsatisfied judgment (under the RTA or MIB schemes).

The application was successful, despite being contested by the Claimants and Churchill Insurance. The judge held that, having considered the witness evidence, police report and insurance policy terms, the Claimants' prospects of establishing a claim against XL Catlin were fanciful, and he therefore struck out the claim against them in advance of trial. He also made a declaration that XL Catlin would not be liable to meet any judgment, so removing the need for them to attend any subsequent trial. The Claimants and Churchill were ordered to pay XL Catlin's costs on a joint and several basis, given they had both unsuccessfully opposed the application.

The case illustrates the benefits of a proactive approach: although no witnesses gave evidence, the judge was able to determine on a summary basis that the prospects of the Claimants proving their claim against the insurers were fanciful at best, and having considered the policy wording and the terms of the RTA and MIB schemes, to dismiss the claim at an interlocutory stage, saving the insurers the very considerable costs of attending a contested trial.

Khan v Allianz – 9.6.20, Luton CC (remote video)

Causation – fundamental dishonesty – remote hearings

Edward Hutchin (instructed by Lauren Smith of Keoghs), represented the successful Defendant insurers in this case.

The Claimant claimed damages arising out of a road traffic accident. Liability was not in issue, but causation of injury and loss were actively challenged. In particular, the Defendant relied on inconsistencies in the account of his injuries given by the Claimant, and the contrasting contents of his medical records. The Claimant gave evidence that he was in such excruciating pain that his first medico-legal examination had to be stopped. Despite this, the Claimant had failed to mention any accident-related injuries to his GP, despite attending for unrelated minor medical issues; he had visited his gym despite the debilitating pain reported to the medical expert; and he had failed to mention to the first medical expert the psychological symptoms reported to the second expert.

At trial the judge heard evidence from the Claimant by video link. The judge then delivered a judgment dismissing the claim, finding that the Claimant had failed to prove his case. Although the judge expressed concern about the Claimant's unreliable evidence, she did not make a finding of fundamental dishonesty, instead finding that his alleged injuries were not caused as a result of the index accident. All claims were dismissed, resulting in a substantial saving for the Defendant insurers.

The case is most notable procedurally: very few trials have been proceeding since March, in part due to guidance suggesting that cases involving issues of credibility and fundamental dishonesty are not suitable for remote hearing. This case illustrates that it is possible to deal with such cases remotely – although it remains to be seen whether judges will be less inclined to make findings of fundamental dishonesty after remote hearings than would have been made at attended trials.

Botea v McCallum – Guildford CC, 03.07.20, DJ Murphy (remote video)

Fundamental Dishonesty – remote hearing

James Henry (instructed Ryan Curley of Horwich Farrelly) acted for the Defendant in this trial that proceeded by a remote video hearing. The Defendant had been keen for the trial to proceed, notwithstanding that it would have to be heard by remote video, on the understanding that the Court could properly assess the Defendant's allegations of fundamental dishonesty through that medium.

The substantive claim involved an injury allegedly arising from an RTA on 13 December 2015. On 14 December 2015 the Defendant recorded a telephone call with the Claimant, during which he said that he had not suffered from injury. Various explanations were put forward by the Claimant, including the fact that English was not his first language, he had only recently moved to the UK, he was not sure who he was speaking to at the time of the telephone call, and that he thought the caller may have been referring to 'real injury' such as broken bones, or cuts and bruises.

The Judge found the telephone call was compelling evidence of the absence of injury, and having taken into account all of the excuses proffered by the Claimant, found the claim to be fundamentally dishonest.

Of particular relevance to those with forthcoming video hearings (or facing adjournments unless the hearing can proceed by video link) is the fact that the Judge was perfectly well able to assess the Claimant's character and demeanour, and see through the lies being told, via video link. While the connection was not the smoothest encountered, it was perfectly sufficient to allow a focus on the Claimant candour, demeanour, tone and body language. There could be no sensible suggestion that the Judge had not 'seen the whites of the Claimant's eyes' before reaching her decision.

Hultoana v Antalis Ltd – 17.7.20, Clerkenwell & Shoreditch CC (remote video)

Causation – fundamental dishonesty – s.57 CJCA – remote hearing

Edward Hutchin (instructed by Kirsty Taylor of Keoghs on behalf of Allianz), represented the successful Defendant in this case.

The Claimant claimed damages for personal injuries, credit hire, recovery and storage, and treatment costs. Liability was not in issue, but causation of injury and loss were in dispute.

The Defendant relied on inconsistencies in the Claimant's evidence about his injuries, contrasting with the contents of his medical records. There were also discrepancies in relation to the special damages documentation.

The trial was heard remotely using Cloud Video Platform (CVP). The Claimant was cross-examined in detail on all aspects of his claims. The judge then delivered a judgment dismissing the claims. He found that the Claimant was debarred from claiming impecuniosity due to disclosure failures, and went on to dismiss the hire, storage and recovery claims in full, finding that there was no need to incur the charges claimed. He held that the Claimant had suffered minor injuries, but that these had overlapped with symptoms from a previous accident, and in any event the Claimant had grossly exaggerated the severity and duration of his injuries.

The judge therefore dismissed the claims in full, making a finding of fundamental dishonesty and applying s.57 CJCA 2015. A costs order was made in the Defendant's favour, enforceable under CPR 44.16, and applying s.57 to deduct the modest damages which would have been awarded for the minor injuries in fact suffered.

This case was one of the first to be heard using CVP following the re-opening of the court: it demonstrates that, in appropriate cases, it is possible to achieve findings of fundamental dishonesty, and to navigate the provisions of s.57 CJCA 2015, remotely. The judge commented that he took account of the remote nature of the hearing, but his findings depended not only on demeanour but also the content of the evidence as a whole, and he was prepared on the evidence.