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# TGC Fraud Update

The Newsletter of the TGC Fraud Team

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# Stemming the tide of the fraud

**By Anthony Johnson** ajohnson@tgchambers.com

**When considering the articles and case reports that were submitted by my colleagues in the TGC Fraud Team for this third edition of our Fraud Update, I was struck by three main points: (i) the battle against motor insurance fraud continues to be fought strongly on many different fronts; (ii) the law in this field is very fast developing (which was one of the original stated reasons behind the creation of this publication); and (iii) it seems that in many ways, through a great deal of hard work and ingenuity, Defendants are finally starting to 'stem the tide' of fraudulent claims, certainly in some of the major trial centres such as the Central London Civil Justice Centre, from which the rest of the country will surely take their lead.**

It has always been my firmly held belief that this is a field in which it is crucially important to keep abreast of the latest developments in order to remain at the 'cutting edge'. In this regard, the leading article in this issue has been devoted to the case of *Qader v. Esure* which (unless successfully appealed) offers Defendants a significant costs saving in cases that are allocated to the Multi-Track for reasons other than value.

One of the main recurring themes in this edition is the question of what course of action a Judge should take in a situation where a Claimant has discontinued but the Defendant nevertheless wishes to press on to get their finding of 'fundamental dishonesty' and ensure that QOCS is disapplied. Sadly there is, as yet, no right answer to this tricky question, with judicial opinion seemingly varying in a spectrum between 'these issues should never be dealt with on paper' to 'these issues should only ever be dealt with on paper' inclusive. Surely in due course this is a matter that will need to be resolved by the higher appellate courts, but in the meantime it is hoped that readers will be aided by the sharing of arguments and experiences.

Finally, I'm sure that many of our readers share the view of HHJ Boucher in the case of *Saat & Khiveh v. Sicak & Tesco Insurance* (reported in the digest below) that firm action from the Director of Public Prosecutions is required to prevent fraudulent litigants from 'clogging up' the Courts with bogus claims that have the effect of delaying and denying access to justice to the genuinely needy.

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

# QADER v ESURE: Limiting Claimants to Fixed Recoverable Costs

**Matt Waszak**

**Can claimants who bring low value claims for personal injury arising from road traffic accidents, which start life in the RTA Protocol but then proceed in the multi track, be limited to recovering fixed recoverable costs?**

Yes, said His Honour Judge Grant in *Qader v Esure* (Appeal No BM50112A, Case No A14YP549) handed down in the Technology and Construction Court at Birmingham on 15 October 2015.

## History of the Proceedings

Proceedings arose from a road traffic accident. Claims were brought by three claimants. The Statement of Value in their Claim Form provided for the recovery of damages exceeding £5,000 but not exceeding £15,000. The defendant alleged that the claims were fraudulent, arising from a deliberately-induced collision. The case was allocated to the Multi-Track, with the matter listed for a costs and case management hearing. Trial, at which the allegation of fraud would be explored, was anticipated to last for two days.

Despite budgets being exchanged, District Judge Salmon dispensed with costs management at a hearing on 3 June 2015 listed for the purposes of a Costs and Case Management hearing. He held that CPR 45.29A fixed costs applied.

He refused permission to appeal that Direction on the grounds that: (a) the determining factor in the application of the fixed costs regime is the value of the case and not its track; (b) CPR 45.29J allowed the Court to depart from the fixed costs regime where exceptional circumstances made it appropriate to do so, a two-day fraud trial being one such case; and (c) it fell within the ambit of CPR 3.12 that fixed costs could apply to Multi-Track cases.

## The Appeal

The direction that the fixed costs regime applied to the case, and that costs management should be dispensed with, was appealed. The case came before His Honour Judge Grant in the Technology and Construction Court sitting at Birmingham.

The key issue raised in the appeal was whether, on a proper construction of the relevant provisions of the CPR, the fixed recoverable costs regime applies to low value personal injury claims arising out of road traffic accidents, which start under the RTA Protocol but no longer continue under that protocol or the Stage 3 procedure, and proceed instead on the Multi-Track.

HHJ Grant gave permission to appeal and continued to hear the three grounds of appeal advanced:

- First, that the District Judge erred in law by concluding that fixed recoverable costs applied to multi-track cases that started in the RTA Protocol, by failing to interpret CPR 45.29A against the backdrop of the *Jackson Reforms*. It was argued that had the Judge interpreted CPR 45.29A in that way, *"there [was] no room whatever for doubt that the fixed recoverable costs scheme was implemented only in relation to the fast track"*.
- Second, that the District Judge failed to interpret CPR 45.29A in accordance with the Overriding Objective.
- Third, that the District Judge had, in applying the fixed costs regime under CPR 45.29A to multi-track cases that started in the RTA Protocol, breached section 3 of the Human Rights Act 1988 and Article 6 of the European Convention of Human Rights.

## The law

Section IIIA, entitled *"Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols- Fixed Recoverable Costs"*, was inserted into CPR Part 45 on 5 July 2013, and came into force on 31 July 2013.

CPR 45.29A defines the scope of the section as applying *"where a claim is started under- (a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol"); or (b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol"), but no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B"*.

One effect of CPR 45.29A is that where a low value personal injury claim arising from an RTA starts life in the RTA Protocol, but drops out of the protocol or Part 8 Stage 3 Procedure, the claim is framed by a regime of fixed recoverable costs.

The fixed costs which apply in that situation are defined in CPR 45.29C. Where the claim is disposed of at trial, the solicitors are entitled to the recovery of £2655, 20% of the damages awarded and the recovery of the relevant trial advocacy fee (for which there are four levels depending upon the value of the claim). VAT can also be recovered on those costs as well as disbursements.

A crucial feature of this case was the fact that CPR 45.29A does not consider expressly whether the section applies to low value personal injury claims which drop out of the Protocol/Stage 3 Procedure and proceed on the Multi-Track.

Though the key issue therefore in Qader was the scope of the fixed costs regime under CPR 45.29A, considered equally was the scope of costs management under CPR 3.12. Importantly, CPR 3.12 expressly considers the possibility of multi-track cases which are subject to fixed or scale costs. CPR 3.12(1) states that: *"This Section and Practice Direction 3E apply to all Part 7 multi-track cases, expect-...where the proceedings are the subject of fixed or scale costs"*.

## HHJ Grant's Decision

HHJ Grant dismissed all three grounds of appeal. Crucially, he found that the fixed recoverable costs regime under Section IIIA of CPR Part 45 applies to low value personal injury claims which start under the RTA Protocol but proceed on the Multi-Track. In reaching that conclusion, he observed the following key points:

- The text of CPR rule 45.29A is clear: it states that Section IIIA of CPR Part 45 will apply when a claim is started under the RTA Protocol, but no longer continues under that Protocol or the Stage 3 Procedure set out in Practice Direction 8B.
- RTA Protocol does not state that the Protocol only applies to claims proceeding on the Fast-Track. Similarly, it does not state that the Protocol will not apply where claims proceed on the multi-track.
- The text of CPR 3.12 is clear that the rule expressly contemplates the existence of proceedings on the Multi-Track which are subject to fixed recoverable costs.
- The heading of the table of the fixed costs that apply under Section IIIA of CPR Part 45 is *"Fixed costs where a claim no longer continues under the RTA Protocol"*. It does not state that such fixed costs are to be confined to claims proceeding on the Fast- Track. The fact that this table of fixed recoverable costs under Section IIIA of CPR Part 45 exists, in addition to table 9 under CPR Part 45 which is expressly stated to apply to Fast-Track trial costs, indicates that it is to be used in proceedings other than those on the Fast-Track.

## Conclusion

For the time being, HHJ Grant has settled the issue that the scope of the fixed recoverable costs regime under CPR 45.29A does extend to apply to low value personal injury cases arising from RTAs which start life under the RTA Protocol but drop out and proceed on the Multi-Track.

It therefore follows that claimants, with low value PI claims arising from RTAs (and which have been started under the RTA Protocol), can be limited to the recovery of fixed recoverable costs even if, for one reason or another, their cases ultimately proceed on the Multi-Track. That includes claimants whose cases are placed onto the Multi-Track because fraud has been raised by the defendant.

It is however very important that the effect of *Qader* is not misconstrued. What the judgment does not provide, as seems to have been misinterpreted in certain contexts, is that a claimant who recovers less than £25,000 at a Multi-Track trial will automatically be limited to the recovery of fixed recoverable costs- though it can certainly be argued on the back of *Qader* that where this situation does arise, a claimant should be limited in this way.

Furthermore, the judgment does not provide that every low value RTA PI claim which starts in the RTA Protocol but proceeds in the Multi-Track will be framed by the fixed recoverable costs regime. Each case has to be interpreted on a subjective case-by-case basis.

Two obvious points can be taken away by those involved in defending claims.

First (but being aware of the caveat highlighted above), where in a low value PI RTA case claimants have inflated the value of their claims to exceed the multi track threshold of £25,000, perhaps with a significant hire claim, but recover less than £25,000 at trial, the argument should be made that they should be limited to fixed recoverable costs; and

Second, where a low value PI RTA case is elevated into the Multi-Track because of a fraud defence or due to some other factor (e.g. if the claimant seeks to call a large number of witnesses), defendant insurers should seek to limit the claimant's case to fixed recoverable costs at the CMC stage (as was done in *Qader*), or indeed at the conclusion of trial.

Though there is no doubt that HHJ Grant's decision is a hammer blow to the claimant PI industry, the importance of the decision should not be overstated, not least because as a County Court judgment, it is not binding in other County Court cases. It is also important to stress the fact that the decision has been appealed, and that the appeal, in which the Personal Injury Bar Association (PIBA) will be intervening, will proceed before the Court of Appeal on either 25 or 26 October 2016.

# Tipping the balance in a 'swearing match'

George Davies

**Allegations of fraud are not an infrequent occurrence in the world of motor insurance. Quite often trials are won or lost by defendant insurers on the basis that the claimant is hopelessly inconsistent in the witness box or it becomes apparent that the defendant's initially adamant protestations of fraud are more likely to be based upon a mistaken impression.** However, from time to time both sides do actually come up to proof in the witness box. What then is a defendant insurer or Judge to do when faced, at trial, with seemingly consistent but irreconcilable versions of events delivered by seemingly plausible witnesses?

In a recent case, I was instructed by Clare Senior at Clyde & Co (on behalf of Admiral Insurance) to defend a seemingly straightforward low velocity impact claim. The incident had occurred in a busy car park in broad daylight when the defendant's car had reversed into the claimant's car. Breach of duty had been admitted but causation of loss denied on the basis that the Claimant was not in her car at the material time. Fraud was therefore pleaded against the Claimant. Both sides relied on one witness each but, at trial, neither of the two witnesses appeared.

The Claimant (an articulate and intelligent young lady) came across as materially consistent, adamant and (in my view) plausible. There was nothing of great assistance in the medical records because she freely admitted that she had not sought any medical attention because she was already suffering from a pre-existing injury. Her claim was for a relatively minor exacerbation. She had no real claims history. The Defendant was equally plausible.

The Judge was therefore left with deciding the case on the basis of the Claimant's word against that of the Defendant.

The answer to this sort of case is rarely found in the documents. Rather it all boils down to a 'swearing match' (as I recently heard a Court of Appeal judge describe such a scenario) between the competing witnesses and the Court is left having to decide whom to believe. How should it go about this?

When it comes to assessing the evidence of a witness, most Judges and lawyers have swimming about in their back of their brains, various concepts such as 'credibility', 'demeanour' and 'consistency'. Whilst these terms are frequently bandied about in closing submissions there is often some doubt or confusion as to how they are to be applied by the Court and what actual weight is to be given to them.

Fortunately, the Court of Appeal has provided some assistance in regard. In Bailey v Graham (aka Levi Roots) [2012] EWCA Civ 1469, the Court cited with approval the following principles to be considered when determining the credibility of a witness:

*"(1) The Judge as Juror (1985) by Lord Bingham of Cornhill pp 6-9 in which he sets out the five main tests for determining whether a witness is lying, namely, consistency with what is agreed or clearly established by other evidence, internal consistency, consistency with previous statements of the witness, the general credit of the witness and his demeanour.*

*(2) Eckersley v Binnie (1988) 18 ConLR 1, 77 which emphasises that if all the evidence points one way good reason needs to be shown for rejecting it.*

*(3) Re H [1996] AC 563, 586 where Lord Nicholls of Birkenhead pointed out that the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.*

*(4) Mibanga v Secretary of State of the Home Department [2005] EWCA Civ 367, 24 which points out that a fact-finder must survey all the relevant evidence before reaching his conclusion."*

Whilst the facts of the Levi Roots case revolved around the provenance of 'Reggae Sauce', the evidential principles it confirms are of general application to all cases concerning the assessment of witnesses' credibility.

Another useful authority is that of *Goodman v Faber Prest Steel* [2013] EWCA Civ 153. In that case, the Court of Appeal overturned the trial judge's finding because she had been overly swayed by the performance of a claimant in the witness box and had not given due weight or consideration to the contemporaneous medical records. A retrial was ordered. In *Goodman*, the Court of Appeal cited (at para 17) Lord Goff's speech from *Armagas Ltd v Mundogas S.A.* [1985] 1 Lloyd's Rep.1, at page 57 col. 1: *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."*

Taken together, these authorities can give real structure and confidence to the closing submissions of an advocate who is advancing a case of fraud in a deadlocked case. In my view, they also give structure and confidence to the fact finder who may be reluctant to commit to a positive finding of fraud in the absence of clear judicial guidance as to how he or she should approach their task. These cases can therefore be used to marshal the doubts or niggles which a fact finder might have about a party and help translate that judicial unease into a coherent and positive finding of fraud.

In the index car park case, the trial judge was taken to the aforementioned authorities. After some deliberation, he found in favour of the Defendant after he had taken time to review carefully the parties' oral evidence and after he had compared and contrasted it with their written evidence and the photographic evidence of the alleged damage. Neither side could fault his approach.

# How Should Courts Deal With Fundamental Dishonesty Applications Following Late Discontinuance?

**Anthony Lenanton**

**In the February edition of this newsletter Matt Waszak considered the options open to a defendant insurer faced with a late discontinuance in a suspicious claim.**

In *Rouse v Aviva Insurance Limited* (unreported, Bradford County Court, 15.1.16) His Honour Judge Gosnell considered the appropriate procedure for determining an allegation of fundamental dishonesty where the claimant discontinued a claim.

The facts of the case are unusual. The claimant alleged that he was a passenger in a friend's car. They were travelling behind a Ford Focus. The claimant's case was that as they drove along a birdcage which had been strapped to the Ford Focus broke apart and struck the vehicle in which the claimant was travelling causing him to suffer soft tissue injuries. The defendant's insured's evidence was that not only did the birdcage remain intact and strapped to the vehicle but that a friend had been following behind the Ford Focus and so the claimant could not have been behind his vehicle.

The claimant discontinued two or three days before trial and the defendant made an application for a finding of fundamental dishonesty. The matter came before a District Judge. The District Judge had to decide whether the application should be dealt with on the papers or at a hearing. He came to the conclusion that the court must determine the issue *'on the submissions from the parties based on the papers available to the court at the time'*. It is important to note here that the District Judge was not saying only that this case should be dealt with on the papers, but rather he went further and found that all such applications should be dealt with on the papers and without a hearing. He said any other approach would involve disproportionate costs.

The defendant appealed. His Honour Judge Gosnell allowed the appeal:

'[M]*y decision in this and other cases is that it is a matter for the court's discretion as to how this procedure should be adopted. In my view, where the Rules do not say what the procedure should be but direct that issues have to be determined, it is within the court's general discretion as to how to do that. If it could only be done on paper I would have expected the Rules to say so.*'

His Honour Judge Gosnell considered that it was open to the court to determine such applications (a) on the papers; (b) with a limited inquiry; or, (c) at a full trial. This is consistent with what was said by His Honour Judge Moloney QC in *Gosling v Screwfix* at paragraph 52. The correct approach in each case therefore depends on the facts of the case and on the exercise of the Court's discretion, having regard to proportionality of costs and the interests of justice and fairness to both parties.

As this case and others make clear, service of a notice of discontinuance is not the end of the matter for a claimant. Defendant insurers will no doubt wish to make their application in appropriate cases, but will need to decide in each case how they want the court to deal with the application. It may be that the view is taken that the defendant's case will be strengthened by the opportunity to cross-examine the claimant and for the court to hear from the defendant's witnesses. If a hearing does take place and the claimant elects not to use the opportunity to proffer a reason for his discontinuance then the defendant can invite the Court to draw an adverse inference.

# Inferring dishonesty from discontinuance: two examples

**Piers Taylor**

**Earlier this year, I was involved in two cases concerning fundamental dishonesty findings post-discontinuance. Both cases were similar in a number of respects: the original Defences had only required the Claimants to prove their claims in respect of causation of injury (rather than allege fraud or dishonesty); the Defendants had obtained and served further evidence during the course of the proceedings; and the Claimants had discontinued shortly after service of the additional evidence.**

Of interest was that the Court in each case was prepared to infer dishonesty from the timing of the discontinuance in the absence of any specific explanation for it. That is to say, the fact that each Claimant discontinued apparently improved the Defendants' cases on dishonesty.

*Butcher & Butcher v Liverpool Victoria Insurance Company* (Gloucester CC, 22.01.2016)

Following a put to proof Defence the Defendant had obtained the Second Claimant's medical records and both Claimants' Facebook entries. It also wished to rely upon a telephone call recording with the First Claimant in which he confirmed, shortly after the accident, that no occupant in his vehicle had been injured. All of this supported a positive case that the Claimants had not been injured following the accident and I was instructed by Maria Franchetti of Keoghs shortly before trial to draft an Amended Defence alleging fraud.

When the application to amend the Defence and the new disclosure was served, both Claimants discontinued their claims. At the hearing of the Defendant's application to amend, the Court required the Defendant to make a new application for a finding of fundamental dishonesty (which was, following the discontinuance, what it then sought) so the Claimants could be properly on notice of it and respond to it if they so chose. Despite this, neither Claimant attended the hearing of the application. DDJ Loughridge was 'persuaded without hesitation' that both claims were fundamentally dishonest, inferring from the timing of the discontinuance that the Claimants accepted the harmful evidence against them.

*Vitkiene v Aviva Insurance Ltd* (Edmonton CC, 15.02.2016)

I was instructed by Joanne Felsted of DAC Beachcroft in this matter. The Claimant's accident report form to her own insurers had indicated she had not been injured. Her Claim Notification Form had alleged a neck injury, but her claim was for injury to her back apparently lasting for eleven months. The Defence put her to proof as to the fact and nature of any injury. A month before the trial, the Defendant uncovered evidence that the Claimant had been involved in a number of other (previously undisclosed) accidents, including one four months after the index event in which she allegedly sustained injury. This evidence was served close to trial and the Claimant discontinued shortly afterwards.

The Defendant applied for a finding of fundamental dishonesty to be dealt with at the trial fixture, but the trial judge re-listed for a new hearing with more notice for the Claimant. The Claimant prepared a statement in response to the application and was cross-examined at the final hearing. DDJ Bennett made a finding that the claim had been fundamentally dishonest. She was concerned with the absence of any evidence of injury independent of the litigation, particularly the failure to visit a GP in some eleven months of alleged symptoms. She was also mindful of the proximity in which the discontinuance followed the Defendant's discovery of the subsequent accident, which in her judgment was a matter that should have been disclosed. The Judge was also concerned at the Claimant's failure to adequately address the non-disclosed accident and the reasons for non-disclosure in her evidence in response to the application.

# A brief guide to the Tort of Deceit

**Sacha Ackland**

**The issue of dishonesty usually arises in the context of a personal injury claim, i.e. there are concerns about the veracity of the accident, the legitimacy of credit hire charges, and/or whether any genuine injury was sustained. Dealing with such claims is straightforward – the decision for the insurer client is simply whether the prospects of defending are good enough to contest to trial, or in the case of a Claimant suspected of conscious exaggeration, how much to offer to reflect the genuine elements of injury and loss.**

We are sometimes asked about the tort of deceit and how it might be used in defending a suspect claim. The simple answer is that it can't. That is not to say however that it is of no use to us at all. The principles are fairly straightforward – they essentially mirror the ingredients of fraudulent misrepresentation (the equivalent claim in contract).

## 1. What are the essential ingredients?

- A false statement of fact (it must be possible to identify the statement but it need not be in words per se, a statement may be implied by words or conduct);
- That the maker of the statement intended it to be relied upon;
- That it was in fact relied upon;
- That the maker of the statement knew it to be false (or was reckless as to whether it was true or not, i.e. an innocent mistake is not enough); and
- Consequential financial loss.

It is this final requirement that will usually prevent the tort being pleaded in a Defence. If you have identified a fraudulent claim before making any payments, there is no consequential loss. It might be possible to bring a Counterclaim for any payments already made, if for example a PAV payment has been paid prior to suspicions arising. However this is usually unnecessary due to CPR 25.8(1), which enables the court to order repayment of an interim payment. I have personally never encountered any difficulties using this provision to ask the court to make an order for repayment.

## 2. Can it ever be used in staged/induced accident scenarios?

The obvious application will be where a payment has been made by the insurer in part or in full, and there is no live claim. In some cases this might occur where some evidence has come to light only after significant sums have been paid out not only to the parties but to their legal representatives. Note that the limitation period does not start to run until the Claimant (i.e. the insurer) has discovered the fraud or could have discovered it with reasonable diligence.

## 3. Burden and Standard of Proof?

As per usual, he who asserts must prove. In a reversal of the usual roles, the insurer client will be the Claimant and the onus is on the Claimant to prove each and every ingredient as set out above. The standard of proof is the usual civil standard as per *Re B (Children) (FC)* [2008] UKHL 35. It is perhaps worth emphasising that in the case of a staged accident there are at least two potential Defendants – the insured and the third party. As the damages claim is based on consequential loss (as opposed to simply reclaiming an interim payment) it doesn't matter if no payments were made to the insured – it is not a requirement that the maker of the false statement has benefited from it personally. Nor indeed is it essential that the maker of the statement intended the financial loss, although in our context the motive will invariably be financial gain.

## 4. What evidence is required?

The usual evidence of dishonesty, including any evidence of a link between the two supposedly unknown drivers; expert forensic engineering evidence suggesting vehicle damage inconsistency; accident and/or claims history; links to accident management companies or similar; and similar fact evidence. Obviously the strongest cases are likely to be those where there is positive evidence of fraud (as opposed to evidence which simply casts doubt on the accident circumstances).

The evidence should be properly explained in a witness statement, ideally from the person who carried out the investigation, or the solicitor with conduct of the case and familiar with its history. As in fraud cases, it may well be possible to serve a Hearsay Notice and adduce this evidence on paper. Occasionally the Hearsay Notice will be challenged and the maker of the statement can be required to attend court.

## 5. What loss can be recovered?

All consequential loss, subject to the duty to mitigate. This therefore includes all payments made including legal fees and investigation costs. It is worth noting that the loss need not be reasonably foreseeable *(Doyle v. Olby (Ironmongers) Ltd)* [1969] 2 QB 158.

## 6. Does it actually work?

Yes, in the right case. Claiming in the tort of deceit is to all intents and purposes the same as running a case with a positive pleading of fraud, save that there is no fall back option of arguing that the accident circumstances have not been proven. Also, the evidence of loss must be clear. By way of example I represented CIS (instructed by Catriona Basey of Hill Dickinson LLP) in a claim against two drivers believed to have conspired to fake an accident and pursue dishonest claims.

Default Judgment was obtained against the insured but the third party driver contested the claim and was represented by competent solicitors and counsel. However our forensic engineering evidence was essentially unchallenged and this was one of the reasons that the claim succeeded after a two day trial. We also successfully contended for awards of exemplary damages against both Defendants, although these were modest given that the financial loss had already been compensated.

# Should the Exchange of Rates Evidence in Credit Hire Claims be Sequential?

**Tim Sharpe**

**In the recent past, and in particular since the decision in Stevens v Equity [2015] EWCA Civ 93, it has become a relatively common tactic for certain credit hire companies to serve or to seek permission to serve "rebuttal" witness statements in response to the Defendant's Basic Hire Rates evidence, by way of sequential exchange of statements.** The application is sometimes made on the basis that having seen the Defendant's rates, the same may be capable of agreement, such that costs will be saved as the Claimant will not produce further evidence. This seems to rarely happen in practice, and the evidence that is in fact served in response often goes well beyond providing alternative rates and includes direct commentary on the Defendant's evidence and rates.

In a decision in *Miller v AIG Europe Limited* (15th January 2016, District Judge Bell, County Court at Guildford) in which I was instructed by Jeff Turton of Weightmans, Liverpool, the Court was critical of such an approach by the Claimant. The Small Claims Track directions had provided for the parties to exchange evidence of BHR, but the Claimant sought to vary that order to provide for sequential exchange. By the time that the application was heard, a statement had been provided on behalf of the Claimant by a witness from the credit hire company. Part of that statement provided alternative rates but a large part of the statement was "commentary or submission" by the Claimant's witness.

The court noted *"it seems to me that it is not the appropriate role of a factual witness to be providing submissions and commentary in the way that Mr Evans [the witness for the Claimant credit hire company] seeks to do in his document. A witness statement is not the place for argument. That is the role of counsel or the representative at the final hearing. The witness statement is a statement of fact and should be restricted to statements of fact".*

The court also took into account the relatively modest value of the claim and added *"the reality is that this is a small claims track matter with a limited ambit. It is not proportionate for the claimant in this case, or other similar cases, to put forward long and detailed argumentative documents under the guise of witness statements. That is not the purpose and the court, in my view, should be astute to prevent that happening which can only incur additional costs beyond those which are necessary."* The Court therefore declined to allow the Claimant permission to rely on the paragraphs of evidence that amounted to commentary and directed that the statement be amended and reserved.

While the Court did not give a specific judgment on sequential exchange (in addition to the inclusion of commentary in a statement) the court said that the Claimant *"would have a substantial task to persuade me in a case where the point in principle arose that it would be appropriate to have sequential evidence. Evidence, as a matter of fact, is generally dealt with by way of mutual exchange. It seems to me that if Mr Nichol [counsel for the Claimant] seeks to argue that the claimant can see the defendant's factual evidence first before putting forward its own factual evidence, it gains a strategic advantage" and added later "it does not presently seem to me a very attractive argument,*

*although it will have to be dealt with in a specific case where the point arises, for the claimant to suggest that it can see the defendant's factual evidence and then have a second bite at the cherry in terms of deciding whether to adduce its own basic hire rate evidence."*

The Court concluded *"the final point to reinforce is that there needs to be recognition on the part of parties to these small claims track matters for the need to limit and focus their factual evidence on matters that are relevant and which are truly factual and to avoid the temptation, to which I am afraid Mr Evans has succumbed, to put forward an argumentative commentary as opposed to factual evidence in what is supposed to be a factual witness statement."*

While a County Court decision, this decision (reported on Lawtel) may be of assistance to Defendant practitioners in tackling the trend for credit hire companies to seek to see the Defendant's evidence first before deciding whether to put in their own rates or attack the Defendant's evidence, and ought to limit costs in smaller value claims.

# LVI tactics – Early Calderbank Offers and Witnesses by Video Link

**David White**

**Two tactical issues that frequently arise in LVI claims were addressed by the Court in the case of *Morris v. Sallis* (Guildford County Court, 28.04.16) in which I appeared for the Defendant, instructed by Lindsey Bartling of Horwich Farrelly.**

## Introduction

Low Velocity Impact is one of the hardest arguments on the fraud 'spectrum' for Defendants to run. Two problems frequently faced are:

i. It tends to be less 'all or nothing' than more straightforward fraud cases, and even if courts are not persuaded that the injury has been entirely made up, a finding of exaggeration at least to some extent is not uncommon. That gives Defendants something of a headache: how can you give yourself some protection against costs (normally the largest part of the outlay in lower value cases) where there is a case that you are convinced is not entirely genuine, and hence want to fight, but where there is a significant risk of some finding in the claimant's favour, without making an offer that will be snapped up by the claimant and his solicitors? and

ii. How do you keep the defendant driver, who, being at fault for the accident come what may, has little to gain personally from proceedings, involved? Particularly if that driver decides to move to the other side of the world.

This case has some useful tips on both fronts.

## Facts

The Claimant was a driving instructor, giving a lesson at the time of the accident. She was aided by the compelling evidence of her former pupil, who was completely independent (and had no claim herself). The pupil described the accident and mechanism of injury in a way that strongly supported the Claimant.

The Claimant therefore, despite her own extremely poor evidence, ultimately succeeded in persuading the court that she had suffered some injury. However, the Claimant herself was found by the court to be an unreliable witness, and the Judge found there had been significant exaggeration of the impact her injury had had upon her. As a result, a General Damages award of just £1,000 was made, and Special Damages were significantly reduced.

## 'Calderbank' Offers

The overall outcome was that the Claimant failed to recover more than an early 'Calderbank' type offer that the Defendant's insurer (Sabre) had made before proceedings were issued. In the circumstances, whilst the Court did not believe that the costs impact should be the same as that of a Part 36 offer, it was persuaded that there should be No Order as to Costs, saving the Defendant insurer a significant amount of money.

This type of early offer is potentially very useful in LVI cases where the Claimant may recover something, but might be found to have exaggerated. It allows the Defendant to control the costs that are payable if the offer is accepted, but gives some cover for costs at trial, which, as above, are often the most expensive part of the process in this kind of claim. Particularly given the impact of QOCS, and the hurdles faced in proving fundamental dishonesty where some injury is proven, albeit in the face of exaggeration, such early, low, 'Calderbank' offers are a tactic well worth considering for insurers, and those representing them.

## Use of Video Link Evidence

The case was also notable, as the Defendant had moved to Australia for a year following the accident, and was not in a position to return to the UK for the trial. Following an interim application, the Defendant was granted permission to give her evidence by video link. The technology worked surprisingly well, though it presented some of its own challenges. Counsel can only communicate with the client in the court room, so the Court's indulgence (and an adjournment) has to be sought if instructions need to be taken. It is also important to ensure that the witness still acts appropriately as if they are in the Courtroom, and not in their bedroom in front of a laptop as they actually are. In particular, a suitable background scene and appropriate attire are advised (e.g. not Aussie beachwear!)

There are of course potential disadvantages with video links, in particular the strength of a witness's credibility may be attenuated, as it is not as easy to communicate freely with a judge through the screen. However, if it allows cases that might otherwise have to be dropped for reasons of practicality to be fought with success as it did here, then it is certainly worth bearing in mind as an option.

If it is to be used, it should be raised with the Court as soon as practicable, and it will be important for solicitors to keep on top of HMCTS to ensure that the technology is in place (this case had to be moved from a different trial centre to accommodate the video link).

# Recent Noteworthy Cases

## (1) Mohamed (2) Ahmed (3) Mohamed v (1) Cernaj (2) Aviva Insurance Limited (Central London CC, HHJ Boucher)

### Fundamental Dishonesty – Procedure – Discontinuance

**Paul McGrath *(instructed by Cara Spendlove of Keoghs LLP)* appeared in this case in which the Claimants each alleged that they had sustained injury following a road traffic accident. The Second Defendant pleaded fraud and alleged that the 'accident' was either contrived or had been stage managed.** The Second Claimant's claim had previously been struck out. The First and Third Claimants pursued their claims to trial. After the First Claimant had been cross-examined, the Judge gave an indication that the First Claimant's evidence had been incredible. The Claimants decided to discontinue their claims.

The Second Defendant applied to lift the restriction on enforcement of its costs on account of fundamental dishonesty by both Claimants, submitting that the accident did not occur and thus both of their claims were fundamentally dishonest. In resisting the application, Counsel for the Claimants submitted that the Third Claimant had not given any oral evidence and that he should not face such an application in the absence of his having given evidence. The Judge held that his election to discontinue (and thereby not to give evidence) did not bar such an application but that it was right that he should have the opportunity to give evidence on the application if he wished to do so, however, his evidence would have to be judged alongside the incredible evidence given by the First Claimant. The Judge refused to adjourn the matter and gave the Third Claimant the opportunity to give evidence there and then.

The Third Claimant elected not to give evidence. The Judge determined that the accident had not occurred and that the First Claimant and Third Claimant had been fundamentally dishonest and lifted the restriction on enforcement on the Second Defendant's costs.

The Judge also lifted the restriction in relation to the First Claimant due to his having pursued a credit hire claim (i.e. a claim for the financial benefit of another: CPR 44.16(2)(a)) and joined the credit hire company to proceedings for the purposes of considering whether they too ought to bear all or part of the Second Defendant's costs (this application is due to be heard at an adjourned hearing).

## *Saat & Khiveh v. Sicak & Tesco Insurance (20.04.16, Central London CC, HHJ Baucher)*

### Fraud-Fundamental Dishonesty – Referral to DPP

**Marcus Grant (instructed by Hannah Lowe of Keoghs) appeared for Tesco Insurance to defend two claims brought by a husband and wife from an alleged accident involving an accident management company (Accident Claims Expert "ACE") based in Barnet, North London.**

Tesco was unable to trace its insured to the address provided when setting up the policy. Database searches revealed that the same address was used to set up a policy with Aviva Insurance that resulted in a second accident claim. Aviva was unable to trace its insured to the same address. Its insured provided Aviva with a mobile telephone number that arose in a third accident claim also made against it. All three accidents involved the same accident management company, ACE.

Tesco Insurance and Aviva Insurance pleaded defences alleging fraud against the claimants in the three accidents. The Aviva Insurance claims were subsequently struck out and discontinued respectively and the Tesco Insurance claim continued to trial. The Claimants were cross-examined and found to be unreliable and to have lied about the happening of the accident, and about their subsequent alleged injuries and consequential losses. The First Claimant alleged that he had been involved in four separate accident claims in the first four years of living in the UK, having moved here from Iran. Neither Claimant was able to adduce any independent evidence that the accident occurred as they claimed. The First Claimant failed to disclose that he had his car repaired, and that he had sold it some seven weeks before he relinquished a credit hire car costing c. £95 pd that he was maintaining a claim for.

HHJ Boucher dismissed the claims on the basis they were fraudulent. She found that the Claimants were 'fundamentally dishonest' within the meaning of CPR 44.16(1) and ordered them to pay Tesco Insurance's costs of the action on an indemnity basis. Further, she ordered that the file and her judgment be passed to the DPP with a view to criminal prosecution of the Claimants, observing that too much valuable Court time in Central London was being consumed by fraudulent insurance claims, delaying access to justice to genuine and needy litigants, such as homeless litigants wishing to challenge repossession orders.

## *Shahid & 4 ors. v Direct Line Insurance (Central London CC, HHJ D. Mitchell)*

### LVI – Bogus Passenger – Exaggerated Quantum – Fundamental Dishonesty

**Paul McGrath (instructed by Hamida Khatun and Angela Hole of Keoghs) appeared in this case arising from a genuine three car collision. The rear vehicle (insured by Direct Line) nudged the centre vehicle into the lead vehicle. The lead vehicle was alleged to have the five Claimants on board.** The Court heard the evidence of the adult Claimants and determined that they were lying about injury and lying that the Fifth Claimant had been in the vehicle at the time of the accident. The Judge rejected their evidence and claims for injury and was very concerned to note that recommendations for physiotherapy had come only from solicitors and that each Claimant seemed vague about what treatment they had actually received.

The Judge accepted the submission that the vehicle was not recovered from the scene (despite the claim that it had been) and that the claim for hire must fail because the car was only damaged in a minor way and could have been repaired prior to the hire period. The PAV had already been paid and so the claims were dismissed in their entirety and the Claimants ordered to pay the Defendant's costs of the action. The Judge found that the alleged claims for injury and the supporting of a bogus claim amounted to fundamental dishonesty and thus lifted QOCS protection. The Judge also accepted the submission that the First Claimant had made a claim (credit hire) for the financial benefit of another and this was another reason to disapply QOCS protection.

## *Shaukat Ali Shah v Wilkins (05.04.16-07.04.16, Central London CC, HHJ Freeland QC)*

### Induced Accident – Fraud Ring

**Charles Curtis acted for the Defendant (on instruction from Keoghs and Liverpool Victoria) in this matter where the Claimant's claim was dismissed after a three-day trial.** This was one of a series of six linked claims which were successfully defended on the basis that the collisions had been deliberately induced. Following each collision, the third party had used the services of One Call Accident Management, for the provision of a credit hire vehicle. LV's insured contended that the Claimant had stopped deliberately on the slip road to the A13, acting in conspiracy with a decoy vehicle ahead. Evidence was given by the Claimant, the Defendant and a number of witnesses.

The Judge found the Claimant and his witnesses to be unreliable, unimpressive and inconsistent. He stated that he had serious misgivings about their evidence, but, in dismissing the claim and describing it as a "narrow" decision, he was not prepared to go the step further to make a finding of fraud.

## *Nazir v (1) Nagshbandi (2) UK Insurance Limited (12.05.16, Central London CC, HHJ Hand QC)*

### Appeal – Burden of Proof – Balancing the Competing Accounts

**Paul McGrath (instructed by Courtney Skitterall of Keoghs) represented the Defendant in this final appeal hearing.** At first instance, the trial judge had rejected the Second Defendant's positive case of fraud and found that the accident had been proven on a balance of probabilities. The Judge, in doing so, had considered the fact that claims had been discontinued and abandoned, and that witnesses who were relevant had not been called, but determined that without more evidence this could not assist him one way or another and then went on to balance the competing cases. When doing so, he did not expressly deal with the Second Defendant's evidence on the position of the First Defendant and related policies and claims. The Second Defendant appealed, arguing that the Judge ought to have considered and/or drawn an adverse inference from the non-calling of witnesses and abandoned claims and that the Judge failed to properly weigh the Second Defendant's evidence in the scales and failed to take a step back and form an overall view.

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

## *Valentin (1) Cauneac (2) v UPS (Bedford CC, 28.01.16, HHJ Harris QC)*

### Induced Accident – Discontinuance – Fundamental Dishonesty

**James Henry (instructed by Adrian Cottam and Amy Hickey of Clyde & Co) acted for UPS in its successful defence of fraudulent claims for injury, loss of earnings, credit hire, storage and recovery charges totalling c.£70,000.**

As readers will be well aware, it is common for organised gangs of 'slam-on' motor fraudsters to target commercial vehicles. They are usually well insured, occupied by a lone driver often easily identifiable because of company branding on the vehicles. When lorries are targeted, it is often said by would-be claimants that they would not have risked their lives by performing an emergency braking manoeuvre in front of a lorry and that such a dangerous manoeuvre would be 'suicidal'. This case involved a slight variation on the standard 'slam-on' manoeuvre, and it was suspected that the manoeuvre may have been performed to limit the potential injury to the fraudsters, while still targeting a well-insured delivery lorry.

The claimants' vehicle braked heavily causing UPS's driver to slam-on his brakes on the A406. As the UPS lorry came close to the back of the claimants' vehicle they moved off again, but only travelled a few metres before slamming on the brakes to a complete stop. Assuming that the claimants had moved off safely after the initial braking manoeuvre, the UPS driver released his brakes and went into the back of the stationary claimants' vehicle.

UPS contended that the two claimants had deliberately induced a road traffic accident. The case was listed for a two-day trial, but on the day before the trial was due to start a notice of discontinuance was filed.

The case fell under the QOCS regime. UPS proceeded to trial and sought findings of fundamental dishonesty against both claimants, notwithstanding that the claimants would not be giving evidence, in order to secure an enforceable costs order. His Honour Judge Harris QC considered the case on the papers and found that the claims were fundamentally dishonest within the meaning of CPR 44.16. Permission was given to enforce costs, which were to be assessed on the indemnity basis.

## *Ismailpour v Mountain & Aviva (Mansfield CC, 22.03.2016)*

### Fraud Ring – Circumstantial Evidence

**Edward Hutchin (instructed by Katie Lomax of Keoghs) represented the successful Defendants in this major fraud ring case.** After a trial in Mansfield County Court, involving oral evidence from witnesses but also detailed consideration of evidence in linked claims in which findings of fraud had been made, the judge rejected the Claimant's evidence, accepting the Defendants' case that the Claimant, operating in conjunction with a lead vehicle, had deliberately caused a collision. In addition, he accepted that there were strikingly similar features with a number of cases featuring in a major fraud ring trial which was heard in Nottingham County Court by HHJ Godsmark QC in late 2015. The judge found that this case too was a fraudulent attempt to claim compensation, and commented that the Claimant's claim for damages would in any event have been dismissed because of the Claimant's unreliable evidence. The claims were dismissed and judgment entered for the Defendant on its Counterclaim, with indemnity costs in favour of the Defendant.

This case marked another success in the battle against a series of false claims linked to a fraud ring operating in the Lincoln area. The result was also an endorsement of the persistence of the Defendant insurers in defending all claims to trial. A series of apparently linked cases was originally identified and tried together in Nottingham, and the Designated Civil Judge found a number of links to a fraud ring inducing accidents in and around Lincoln (see Fraud Update February 2016). The present case was not tried with that cohort, having been issued separately after the period during which those cases were being case managed. However the insurers elected to proceed to a separate trial, relying on the evidence of their policyholder, but also including within their disclosure the documents used in the Nottingham trial. These were included within the trial bundles in Mansfield, together with the judgment of HHJ Godsmark QC, so that the links between the present case and those heard previously in Nottingham could still be relied on. The trial judge accepted that, following *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, it was open to him to make findings of fraud based on circumstantial evidence, and without the need to prove the facts and allegations in the linked cases before doing so. The Defendants were therefore able to defeat the claim, and show it was linked to the other similar claims, even though it was not heard together with those claims at trial.

## *Amin v Miah & Direct Line Insurance PLC (Central London CC, April 2016)*

### Put to Proof Defence – Unproven Claim

**Lionel Stride (instructed by Neil Sheperd of Clyde & Co) represented the Second Defendant insurance company in a Multi-Track claim for personal injury and vehicle-related losses (including credit hire and storage charges of around £80,000) arising out of an alleged accident on 30.12.12.** There was no allegation of fraud but the Second Defendant invited the Court to dismiss the claim as unproven on the evidence (in accordance with authorities such as *Regina Fur Company Ltd v Bossom* [1958] 2 Lloyd's Rep 425, *National Justice Compania Naviera SA v Prudential Life Assurance Company Ltd ("Ikarian Reefer")* [1995] 1 Lloyd's Rep 455 (CA); *Kearsley v Klarfeld* [2005] EWCA Civ 1510; and *Francis v Wells* (2007) EWCA Civ 1350 (CA)).

HHJ Mitchell found that the Claimant's reliability varied depending on the issues, and therefore had to be treated with considerable caution. In this respect, he was particularly exercised by material discrepancies between the Claimant's account of the accident and his own engineering evidence as to the likely mechanism of the accident: the Judge accepted that the damage could not properly be explained by the Claimant's evidence as to how the accident had occurred. HHJ Mitchell held that, on balance, he simply could not be satisfied that the Claimant had discharged the burden of proof and dismissed the claim. He also indicated that, if he was wrong on liability, he would still have dismissed the claim for hire on the basis that he could not be satisfied that any damage sustained in the accident had rendered the Claimant's car unroadworthy, such that a replacement vehicle was needed.

## *Singh v Petcu & Aviva (05.02.16, Mayors and City of London Court)*

### Fundamental Dishonesty – QOCS Application – Circumstantial Evidence

**Edward Hutchin (instructed by Adam Mayer of Keoghs) represented the successful Defendant insurers in this case, which concerned the increasingly common issue of whether an application can be made to enforce a costs order in a QOCS case on grounds of fundamental dishonesty, where there has been no trial because the claim has been discontinued.**

The case involved three Claimants who alleged that they had been travelling in a Ford Transit van which had been hit by the Defendant's policyholder pulling out from a side road. The policyholder failed to cooperate, but his insurers were joined as Defendants and entered a defence alleging fraud. The claims were listed for trial, but only fifteen days before the hearing date, the claims were discontinued. The Claimants' solicitors also successfully applied to come off the record. Instead of simply letting the matter rest, the Defendant insurers issued an application to enforce the costs order in their favour under CPR 44.16. The application was supported by a witness statement from the solicitor referring to the evidence in support of the allegation of fraud, including engineering evidence suggesting the Claimants' vehicle had been stationary, as well as details of the policyholder's non-cooperation and other circumstantial evidence.

HHJ Collender QC, sitting at the Mayors & City Court, allowed the application. He commented that, although none of the circumstantial evidence taken individually might have been significant, overall a picture had built up of a fictional claim. He found that all of the claims were fundamentally dishonest, and that the Defendant insurers were therefore entitled to enforce their costs order to its full extent. He then assessed those costs, allowing them in the full sum claimed.

This case illustrates that QOCS should not prevent costs orders being enforced in appropriate cases. Equally, Claimants who make fraudulent claims, but discontinue without pursuing them to trial, should not rely on this preventing enforceable costs orders being made against them where their claims were fundamentally dishonest.

## *Ryan Coogan v (1) Mosor (2) Aviva Insurance Limited (Edmonton CC, DJ Morley)*

### Accident occurred but not with identified driver

**Paul McGrath (instructed by Courtney Skitterall of Keoghs) appeared in this claim in which the Claimant alleged that he had had an accident with another car but as the other driver was aggressive he had not taken his details but merely noted the registration number. His solicitors then sued the named policyholder (taken from a MID search) in negligence.**
The Claimant included Aviva in proceedings as an interested party (but without stating any cause of action against them). Aviva pleaded that the alleged policyholder was probably a fictional entity, created for the purposes of facilitating fraud in one way or another.

The Claimant succeeded in satisfying the Judge that the accident occurred but failed in proving that the driver was indeed the named Mr. Mosor, as alleged. The Claimant's claim was thus dismissed against the First Defendant and accordingly, as no judgment had been entered, the claim entirely failed. The Claimant's attempt to rely on s151 Road Traffic Act 1988 failed (no judgment to enforce) and the Claimant's attempt to rely on The European Communities (Rights Against Insurers) Regulations 2002 also failed (the 'insured' was not liable for the collision). The Claimant had to pay the Second Defendant's costs of the action.