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TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Editorial

By James Henry jdh@tgchambers.com

Welcome to the latest instalment of the TGC Fraud Update. We hope you have all been keeping well. I will start with a big thank you to our outgoing editor, Anthony Johnson, whose efforts establishing and maintaining the Update over the last three years mean that it is now essential industry reading.

We are also very pleased to be recognised (again) as the only Band 1 set of chambers for motor insurance fraud work by Chambers and Partners UK, with 6 of our regular contributors deserving of special mentions: https://www.chambersandpartners.com/11840/2593/editorial/14/2.

There has been no slowing down of issues being considered by the higher courts, and this edition of the Update includes articles on issues ranging from s.57 of the Criminal Justice and Courts Act 2015, tort of deceit, the need (or otherwise) to plead fundamental dishonesty, contempt of court and the definition of dishonesty.

The headline articles continue to be supported by brief digests of some of our best successes, and this edition sees excellent examples of the results that we continue to achieve for all of our clients, and neatly demonstrate how the decisions of the higher courts alter practice in the County Courts.

Please do contact a member of the TGC fraud team if you have any queries about any of the items dealt with in this issue, or indeed about any other issues relating to insurance fraud and related matters.

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

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'Fundamental Dishonesty' – it was the gardener 'wot done it

James Laughland

Two and a half years after section 57 Criminal Courts and Justice Act 2015 came into effect, we finally have a High Court decision that provides a clear explanation about how this power is to be wielded in practice.

Previous decisions such as *Gosling v Hailo* and *Howlett v Davies* were concerned with interpreting the term *'fundamentally dishonest'* within a different context. The power arising under CPR 44.16 to set aside QOCS protection where a claim is found to be *'fundamentally dishonest'* can be adequately explained by reference to criteria such as whether the dishonesty *'went to either the root of the either the whole of his claim or a substantial part of his claim'* but the wording of section 57 is such that this a form of words does not fully encapsulate the breadth of that power. As HHJ Moloney QC said in *Gosling*, approved later by the Court of Appeal in *Howlett*, *'this phrase in the rules has to be interpreted purposively and contextually in the light of the context'*.

There are various features of section 57 that must be borne in mind. First, and perhaps most importantly, it is only relevant where the Court is satisfied (or the defendant has admitted) that the Claimant is entitled to some damages. So, there must have been initially a legitimate claim for damages, not a fraudulently induced accident. Note, the power can also apply to legitimate counterclaims.

Second, the Claimant against whom exercise of the section 57 power is sought must be shown to have been *'fundamentally dishonest'* either in relation to their own claim or to *'a related claim'*. A related claim is another claim for damages for personal injury made in connection with the same incident or series of incidents in connection with which the primary claim is made.

Third, it is an all-or-nothing power. Where the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to a primary claim or a related claim, then the court must dismiss the primary claim. The only caveat is whether the Claimant would suffer *'substantial injustice if the claim was dismissed'*. It is not appropriate to dismiss or reduce simply that part of an otherwise legitimate claim that may have been tainted by fundamental dishonesty. That was the old practice, consistent with *Summers v Fairclough*, that Parliament was determined to change.

Fourth, it is worth remembering that fundamentally dishonesty is not confined solely to matters concerned with quantum. Whilst such most readily provides easily comprehensible examples, the statute itself is not limited to dishonesty concerned with quantum. It is certainly possible to envisage a scenario where a Claimant has been fundamentally dishonest in order to enhance his or her prospects of success on the issue of contributory negligence. Such dishonesty, if proved, would lead to the dismissal of the whole claim.

The decision of Mr Justice Julian Knowles in *London Organising Committee of the Olympic & Paralympic Games v Sinfield* [2018] EWHC 51 (QB) canvasses all these points. There the Claimant had been injured in an accident whilst working as a Games Volunteer during the Paralympics. He tripped, fell and fractured his wrist causing continuing pain and restriction of movement. General damages were agreed at £16,000.

The Claimant's initial Schedule of Loss included a claim for the costs associated with employing a gardener. That claim was then corroborated by invoices disclosed that purported to come from the gardener. The claim was repeated in subsequent Schedules and in the Claimant's witness statement.

The claim was described as follows *'The Claimant has a 2-acre garden. Prior to the accident, the Claimant looked after the garden himself with his wife. Post-accident his wife continues to do some of the gardening but they had to employ a gardener for 2–4 hours per week at a cost of £13 per hour. Through the Winter months the gardener tends to do only 2 hours per week and during the Spring/Summer months this increases to 4 hours per week.'*

In fact, the gardener had been employed for many years pre-accident and always worked 4 hours per week, excluding January. Mr Sinfield's explanation and/or justification was that pre-accident he had had a choice as to whether to engage a gardener to assist with gardening whereas post-accident he said he had no choice. He contended that he felt justified in claiming a proportion of the expenditure incurred as a consequence of that loss of choice. Whilst he had created the invoices, these were for amounts less than what he had in fact paid out; a fact he relied upon to say that his dishonesty was not fundamental.

The Trial Judge, a recorder, accepted that Mr Sinfield had been muddled and careless in how he had explained and advanced the gardening claim initially, but held that he had not been dishonest about it. He found dishonesty in relation to the disclosure of false invoices and the Claimant's witness statement, as by then he should have realised he was in a hole, but held that still this did not amount to 'fundamental' dishonesty. In any event, the Recorder said, it would cause substantial injustice for the Claimant to lose the entirety of his otherwise genuine claim when that dishonesty only tainted one discrete part.

On appeal Mr Justice Julian Knowles reversed all aspects of the Recorder's decision. He held:

[62] In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he has thus 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. Dishonesty is to be judged according to the test set out by the Supreme Court in Ivey v Genting Casinos Limited (t/a Crockfords Club).

Dishonesty is a subjective state of mind, but the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the person accused of being dishonest judges by different standards.

This, amongst other things, proved to be Mr Sinfield's undoing. The words he used, together with the invoices he had created, could only sensibly be interpreted as being *'fundamentally dishonest'* and thus it was right for his entire claim to be dismissed, together with an order that he pay the costs of the action and appeal on the indemnity basis.

Lessons from *UK Insurance Ltd v Gentry*

Marcus Grant

In January of this year, the High Court handed down judgment in *UK Insurance Ltd v Gentry* [2018] EWHC 37 (QB). Teare J found that the Defendant, Mr Gentry, had manufactured a collision in order to make a fraudulent claim, and awarded damages for deceit to the Claimant insurer. The Court also found him guilty of contempt of Court and sentenced him to a term of 9 months imprisonment, suspended for two years on condition that he makes monthly repayments to the insurer.

Marcus Grant was instructed by Hamida Khatun of Keoghs LLP. The decision is reported on Lawtel at [2018] EWHC 37

Three aspects of UK Insurance v Gentry are worth exploring: first, its singular procedural history, which usefully illustrates the range of options open to insurers in resisting fraudulent claims; second, the standard of proof which the insurer had to meet; and third, the inferences which Teare J was prepared to draw from Mr Gentry's failure to adduce evidence adduced at trial.

1. The tort of deceit as an alternative to relief from sanctions:

In previous proceedings, Mr Gentry claimed that he had been the innocent driver in a night-time collision occasioned by the negligence of the insurer's insured, Mr Lee Miller. He alleged that he had suffered soft tissue injuries, and sought to recover damages in respect of them, as well as the pre-accident value of his Range Rover and substantial credit-hire charges which he quickly began to accrue. The insurer swiftly admitted liability for the accident via the MoJ Portal, but took no pro-active steps thereafter, and Mr Gentry succeeded in securing judgment in default of acknowledgement of service in August 2013. The insurer made a number of interim payments totalling £19,179, and damages were in due course assessed at approximately £75,000 (plus costs of £13,000), at a disposal hearing which the insurer did not attend. The insurer applied to set aside the judgment on the ground that its insured had not been properly served with the proceedings and it had not had adequate notice of the disposal hearing.

Subsequently, in February 2014, the insurer's suspicions were aroused when it discovered that Mr Gentry and Mr Miller were close friends before the accident – a fact which neither had disclosed. It filed a detailed defence alleging that the claim was fraudulent, and sought to set aside the judgment on that basis also. In response, Mr Gentry served a witness statement verified by a statement of truth expressing outrage at the suggestion that the claim was fraudulent, and denying that he knew Mr Miller prior to the accident in fulsome terms. That denial was, of course, wholly untrue. Although the insurer succeeded in setting aside the default judgment at

first instance, the Court of Appeal ultimately reinstated it and ordered the insurer to pay Mr Gentry's costs notwithstanding that there was cogent evidence of fraud, after considering the principles enunciated in *Mitchell* and *Denton*: *Gentry v Miller & UK Insurance Ltd* [2016] EWCA Civ 141. The Court of Appeal was, however, alive to the problem of fraud, and acceded to an application by the insurer to stay the execution of its decision, pending the outcome of any tort of deceit action seeking recovery for the consequences of Mr Gentry's fraud.

The insurer duly brought a deceit action, together with committal proceedings in respect of Mr Gentry's false witness statement. Although Mr Gentry admitted the contempt, he defended the deceit action on the basis that there had been a genuine accident, and that he had only denied knowing Mr Miller so as not to slow down or jeopardise his otherwise *bona fide* claim for damages. Consequently, it was for the insurer to prove that there was no genuine accident and the judgment in the original action had been procured by fraud. Teare J found for the insurer: Mr Gentry's car had been damaged some time prior to the alleged accident, which had not in fact happened, and he had constructed a particularly *'bold lie'* in order to cover his tracks. The insurer was awarded damages on the tort of deceit measure, consisting of the £19,179 worth of interim payments plus its costs of the original action, up to and including the Court of Appeal hearing, to be assessed on the indemnity basis. The insurer was also entitled to its costs of the deceit action and the committal proceedings, again on the indemnity basis. As regards the earlier order of the Court of Appeal, an innovative solution was called for, since Teare J did not have the power to set it aside: instead, the stay ordered by the Court of Appeal was lifted and substituted with an order that Mr Gentry was not entitled to the benefit of the Court of Appeal's decision.

The message is clear: the strictures of the CPR must be obeyed, and applications for relief from sanctions will not necessarily avail insurers where there has been inexcusable delay; equally, however, a fraudulent claimant should not be allowed to profit from his wrongdoing, and the tort of deceit provides a useful alternative remedy to undo all the consequences of a previous judgment that has been fraudulently obtained.

2. The standard of proof where fraud is alleged:

Teare J confirmed that, although strictly speaking the standard of proof in civil cases is the balance of probabilities, the evidence required to discharge the burden will depend on the nature of the parties' competing cases. Thus the more serious and extreme a claimant's allegations are, the more cogent the evidence in support of those contentions will need to be. The rationale for this is that seriously immoral or criminal behaviour is *'inherently unlikely'*, so the party defending himself against allegations of criminal conduct has, in effect, a head start. As Teare J put it at [19]-[21] of his judgment:

'since the allegation against Mr. Gentry is of criminal behaviour, which is inherently unlikely, particularly cogent evidence is required before the court can properly be satisfied on the balance of probabilities that he acted in the manner alleged ... In short the nature of the allegation makes it appropriate to apply a standard not far short of the criminal standard.'

He compared Mr Gentry's case with two of his previous decisions which concerned fraud outside the motor insurance context: *Parker v National Farmers Union Mutual Insurance Society* [2012] EWHC 2156 (Comm), in which an insurer alleged arson by its insured, and *The Atlantik Confidence* [2016] EWHC 2414 (Admlty), in which an insurer challenged a shipowner's application to limit its liability for lost cargo under the Limitation Convention 1976, on the ground that the shipowner had deliberately scuttled the vessel carrying the cargo. In both of those cases, Teare J observed that the insurers' allegations included fraud, and that the standard to be applied in determining whether their allegations were made out was *'not far short of the rigorous criminal standard'*. However, it should be noted that the court will not automatically treat a serious allegation as *'inherently improbable'*. The context must be taken into account: thus in In *Re B* [2008] 1 AC 11, the improbability that a parent had assaulted his child ceased to be of relevance, because the question was whether the child was at risk if she remained with both of her parents, and it was clear that *one or other* of them must have been responsible for assaulting her.

Plainly, litigants need to bear in mind that the civil standard is moderated by the nature of the allegations they advance and the context in which those allegations arise, when reviewing their evidence and formulating their positive case.

3. The evidence at trial, and inferences from silence:

Finally, Teare J made some interesting comments about the drawing of inferences from silence. Save for the evidence of his alleged passenger (which was discounted because the passenger was not a credible witness), Mr Gentry failed to adduce any evidence in support of his defence that the accident had been genuine. Crucially, he declined to give evidence himself, despite the fact that he attended the trial and was able to testify.

Teare J pointed out that this was not enough in itself to draw an inference: following *Wisnewski v Central Manchester Health Authority* [1998] PIQR P324, there also had to be evidence adduced by the insurer which tended to show that Mr Gentry's claim that there had been an accident was a deliberate lie. In other words, there had to be a prima facie case for Mr Gentry to answer, in order to draw an inference that Mr Gentry had declined to answer it because *'he feared that he would not be able to give an account of the collision which withstood cross-examination'*.

Teare J was satisfied that there was enough evidence adduced by the insurer to enable him to draw an inference from Mr Gentry's silence, namely the fact that Mr Gentry and Mr Miller knew each other prior to the alleged accident. Although it is possible for two friends to suffer a collision when driving their respective cars, it would be *'a striking and unlikely coincidence'*. Since it was an inherently unlikely coincidence, Mr Gentry should have given evidence to show that the accident happened as alleged notwithstanding the improbable circumstances. Teare J's decision will be of real assistance to insurers who (as is so often the case) have no direct evidence of fraud, and are only able to point to circumstantial evidence to show that it is inherently or statistically unlikely that an accident happened as alleged.

S.57 applications – when should they be heard?

Tim Sharpe

The court has a duty under s.57 Criminal Justice and Courts Act 2015 to dismiss a Claimant's claim where it finds that the Claimant is entitled to damages in respect of personal injury, but 'on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.'

The Act does not specify when that application should be made by the Defendant, in what form that application should be made, or when that application should be heard/determined. In theory therefore, the application could be made formally or orally, and might be heard at the trial or on some earlier date.

There is some force in contending that the application should be dealt with at trial, not least as (a) the parties are likely to need to go through the process of disclosure and exchange of witness evidence before a s.57 can either be made or determined, bringing the matter close to trial in any event, (b) the application is likely to require oral evidence that will overlap substantially if not entirely with the oral evidence that would be given at trial and (c) as the court is required to record the amount of damages that the court would have awarded to the Claimant in respect of the primary claim but for the dismissal of the claim (and then to deduct this sum from the Defendant's costs), this may require consideration of the complete evidence. In many cases therefore, these factors will be strong pointers to any s.57 application being dealt with at trial.

One particular risk for a Defendant in pushing for an earlier determination is that if the claim survives the s.57 application, the case may then left in an unsatisfactory or confused state whilst heading to trial – the Defendant will (presumably) have pleaded a case of fraud and will be heading to trial on that basis, yet the Defendant's main contentions have been tested in evidence and rejected as showing fundamental dishonesty (although it may be that a court hearing the application finds some dishonesty, but not to the level required to constitute 'fundamental dishonesty'). The Defendant will have shown its hand by cross examination in advance of the trial, and the court will be very slow to reach inconsistent conclusions (although further evidence exchanged after that application hearing may permit the same). Early determination of the s.57 application may narrow the issues and/or promote settlement.

While these factors tend to suggest that in many cases the application will be best dealt with at, and as part of, a trial, in appropriate cases an early hearing of a s.57 application is likely to lead to a swifter result, and with lower costs. There are few reported examples of this, but one case in which the Defendant successfully applied for a s.57 dismissal, and which was dealt with at an interlocutory hearing with oral evidence from the Claimant, is *Johnson v (1) Quainoo & (2) CIS*.

The background to this case was an accident that took place on 1st September 2012 when the First Defendant (insured by the Second Defendant) opened a car door and knocked the Claimant from his bicycle. The Claimant brought a claim for personal injury and associated losses, including a claim for loss of earnings pleaded in the sum of £85,000.

By his Particulars of Claim, the Claimant said that his injuries affected his work as an I.T. engineer and he disclosed a purported contract, claiming he had not been able to fulfil the same as a result of the accident.

The Defendants were represented by Kevin Perkins of Plexus Law Limited, and Tim Sharpe of TG Chambers. The Defendants admitted breach of duty and some loss (the Claimant must have an entitlement to damages before s.57 is engaged) but contended in the Defence

that the claim was fundamentally dishonest and that the contract disclosed in support of the £85,000 claim was a fabrication, having been crudely adapted from a contract between two Chinese companies that had been found on the internet following a simple Google search.

The Claimant also provided a copy of another contract, this time between his company and a company called IWebistics, dated 1st September 2012 (the very date of the accident, and allegedly signed just before the Claimant was knocked off his bicycle). This contract also purported to be for £85,000 but its authenticity was also called into question, not least as it was signed some two years before IWebistics was incorporated.

Confronted with this Defence, the Claimant abandoned his claim for loss of earnings but maintained his claim for general damages and other modest financial losses (including treatment). The Defendants made an application for a finding that the entire claim be dismissed pursuant to s.57 of the 2015 Act.

The matter was case managed by District Judge Bishop in the County Court at Croydon. Directions were given at an early stage that progressed both the substantive claim itself as well as the application, in tandem. The matter then came back before the same judge for further directions at which time it was ordered that the Defendants' application would be heard with a one day listing, with permission to the Claimant to give oral evidence if so advised (the Claimant having confirmed that he did not seek to cross examine Mr Perkins of Plexus who provided the witness statement in support of the Defendants' application and exhibited the relevant materials, including for example correspondence from the University of York confirming that the Claimant had never been a student there, despite the Claimant's claims to the contrary). Further directions to trial would be given at that hearing by the judge in the event that the Defendants' application failed.

District Judge Bishop heard the evidence on 29th June 2017 and gave judgment on 30 June 2017. In short, the Judge concluded that the claimant was 'overwhelmingly dishonest' and, in dismissing the case in full, found that he had lied to the Court in written and oral evidence, had committed perjury and had fabricated documents to advance a fraudulent claim. His dishonesty was found to be fundamental. The court rejected the Claimant's claim that he would suffer substantial injustice. The Defendants were awarded their costs of defending the claim and of the application. The judge assessed damages that would otherwise have been awarded based on the evidence available.

An issue for many insurers in this situation is that while a costs order might be made in their favour, the same is often not paid. It is in their interests for costs to be as low as possible. A determination of the fundamental dishonesty issue at an early stage can result in substantial costs saving (if not any shorter hearing time) as well as a quicker resolution of the claim, which is in the interests of all parties. In this particular case, notable savings were made as the substantive case management directions regarding expert medical evidence were set to be effective only after the interlocutory application, and of course became redundant when the claim was dismissed, with any further directions to trial to be considered by the same judge who had managed the case from the outset.

The case demonstrates that by careful and considered case management by the court, it is possible to determine a s.57 application in advance of the trial, if the particular facts of the case make the same suitable. This will not be the position in many cases, but where there evidence is relatively clear, and where there are potentially significant costs savings, a court may be more minded to hear the matter as a self-standing hearing. It is however envisaged that the majority of s.57 applications will only be suitable to be determined at trial. Practitioners are encouraged to share their experiences of the management of s.57 applications for future editions of this bulletin.

Fundamental dishonesty – to plead or not to plead?

James Henry

It is commonplace for insurers to rely on defences to claims that do not plead fraud or fundamental dishonesty, but instead either deny the claim or put the claimant to strict proof, while drawing the attention of the court to features of the evidence that tend to undermine the credibility of the claimant or the claim more generally. Claimants have long criticised that approach on the basis that it is a principle of justice that where an issue is to be ventilated at trial, and in particular a crucial and sensitive issue like honesty, the parties should know the other's case in advance. There is considerable force in that argument.

The judgment of the Court of Appeal in *Howlett & Howlett v Davies (1) Ageas (2)* [2017] EWCA Civ 1696 provides some much needed authority on the issue of pleading fundamental dishonesty. In short, an insurer does not necessarily need to have alleged that the claim was fundamentally dishonest for QOCS to be displaced on that ground, provided that 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.

Background

The Howletts claimed for injuries allegedly sustained when they were passengers in D1's car that hit a parked car as a result of D1's negligence. D1's insurer (D2) did not accept that the collision had taken place at all. Its pleaded case was that the Howletts were required to prove that they were involved in any genuine collision. In the alternative D2 ran an LVI defence. Credibility was expressly stated to be in issue. D2 required the Howletts to prove their cases 'on a balance of probabilities, set against the backdrop of the following facts and/or contentions'. There followed a list of 12 'concerns' ranging from what could be categorised as 'real concerns' (such as similar fact evidence emerging from another collision) to generic pleadings, such as the fact that the Howletts instructed 'geographically remote solicitors'. The defence went on to expressly disavow a positive case of fraud, but also said that 'should the court find any elements of fraud to this claim, D2 will seek to reduce any damages payable to the claimants to nil together with appropriate costs order'.

Trial

At the outset the Howletts made an application to strike out D2 defence. Their application was dismissed and that decision was not appealed. For reasons that are not clear from the judgment of the Court of Appeal, a 4-day trial took place. It was clear to the judge that the Howletts' honesty was in issue and he appears to have stated at the outset of the trial that dishonesty and exaggeration were matters which he would have in mind.

The Howletts were cross-examined on points relevant to their credibility, but it was never specifically put to them in terms that they were being dishonest, or that they had lied, but it was put to them that particular answers that they gave were untrue.

The judge dismissed the claims and held that the claims were fundamentally dishonest.

Appeal

The appeal was brought on the basis that it was not open to the district judge to make a finding of fundamental dishonesty unless such dishonesty has been both pleaded and put to the relevant witnesses.

The Court of Appeal (Newey LJ delivering the leading judgment) disagreed:

- The meaning of 'fundamental dishonesty' was discussed, and HHJ Moloney QC's approach in Gosling v Hailo was endorsed [16] – [17].
- Statements of case are crucial to the identification of issues, but the mere fact that a party has not alleged dishonesty will not bar a judge from finding a witness to have been lying. 'The key question in such a case 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' [31].
- An insurer does not necessarily need to have alleged in its defence that the claim was 'fundamentally dishonest' for QOCS to be displaced on that ground [32].
- Where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it [39].
- The fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying [39].

Consequences

The form of pleadings – The fact that D2's defence survived the application to strike it out is of some significance. When the Court of Appeal was determining whether the Howletts had had a proper opportunity to deal with the possibility of a finding of fundamental dishonesty, the issue was being assessed, in part, against the backdrop of the pleaded case that had survived the strike out application. Many cases where findings of fundamental dishonesty are sought will not have defences of the type pleaded in Howlett. Insurers will need to be conscious of the need to ensure that a claimant has been given adequate warning of the possibility of a finding of fundamental dishonesty, and the facts upon which it relies that will lead the judge to that conclusion.

Other forms of notice – The Court of Appeal has not been prescriptive as to the form of warning required. Although statements of cases are described as 'crucial to the identification of the issues between the parties and what falls to be decided by the court' the judgment emphasises substance over form. It seems inevitable that there will be arguments over whether correspondence containing allegations of dishonesty will constitute 'adequate warning'. Could 'without prejudice' correspondence also suffice?

The need to challenge dishonesty directly – It has been fairly common for claimants to be challenged during cross-examination without their honesty being directly criticised. If a judgment is then given in which the claimants honesty is criticised, the defendant is often an opportunity to make further submissions on the issue of fundamental dishonesty. The decision in Howlett should go some way to ensuring that practice is more limited. With the emphasis on proper notice of the issue, those acting for defendants will need to identify the elements of the claimants evidence which can properly be characterised as dishonest and the alleged dishonesty will need to be put to the witness fairly and squarely.

Liverpool Victoria Insurance v Yavuz & Others [2017] EWHC 3088 (QB)

James Laughland and Ellen Robertson

The High Court has found nine people guilty of contempt of court following committal proceedings brought by Liverpool Victoria Insurance. James Laughland, instructed by Marsha Crosland of DWF, acted for Liverpool Victoria Insurance (LVI).

The defendants had made claims involving three alleged crashes in North London, two in September 2011 and one in November 2011. LVI also relied on other claims made against it in respect of three further alleged crashes in the same area of North London in September 2011 and October 2011, two of which had involved proceedings. Mr Justice Warby found that LVI had proved that each of the nine defendants was guilty of contempt by telling lies in claim forms, particulars of claim and other documents created and submitted in legal proceedings which were signed by a statement of truth. The judge stated *'I am left at the end of the hearing in no doubt that all the defendants told deliberate lies from the outset, and throughout the proceedings in the County Court and this Court.'*

The judge considered the appropriate test for contempt, referring to the guidance given by Hooper LJ in *Barnes v Seabrook* [2010] EWHC 1849 (Admin) that a person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it. The judge considered it arguable that the proposition in Barnes was too narrow in its framing, noting that it seemed to be inherent in the wording of the Civil Procedure Rules that contempt would include a reckless individual who verifies a false statement with no care or consideration for whether it was true.

The defendants also argued that in order to amount to contempt it must be shown that a statement interferes with the course of justice in a material respect, and that the defendant was aware of its significance and purpose in the proceedings. The judge rejected that test. Although the false statement must have a tendency to interfere with the course of justice in a material way, it was putting the matter too high to say contempt required the person to have succeeded in causing actual interference.

One aspect of the judgment that has attracted particular attention has been Warby J's comments in the Footnote to the judgment on whether contempt proceedings could be brought in respect of false statements made in Claim Notification Forms (CNFs). The judge noted that many claims arising out of road traffic accidents are resolved without proceedings on the basis of CNFs. The judge considered the wording of para 4.2 of the Practice Direction on Pre-Action Conduct, which reads '*The court will expect the parties to have complied with this Practice Direction or any relevant pre-action protocol.*', and expressed a view that it was arguable, but not free from doubt, that contempt proceedings could be brought, as expecting the parties to comply was not necessarily the same as stating that the parties must comply. The judge did not make a finding on the matter but noted that the topic might merit further consideration from the Civil Procedure Rules committee or those drafting the relevant Pre-Action Protocols.

The Footnote has been interpreted by some as meaning that solicitors will be held responsible by way of contempt proceedings against them for signing statements of truth on behalf of their clients on documents which are later found to contain dishonest statements. However, the judge was expressing a view on whether the nature of Claim Notification Forms as documents were sufficient to found contempt proceedings. Although several documents had been signed by solicitors, the judge found none of the defendants had rebutted the presumptions that apply when a statement of truth is signed by a solicitor, finding that *'Every statement made by them [the defendants] or on their [the defendants]' behalf was a lie by them [the defendants].* This Footnote followed the judge expressing his reservations about whether witness statements or schedules of loss made before proceedings were issued could properly amount to contempt. The judge noted that it was not necessary to reach a conclusion on these issues as lies before proceedings began could properly be considered aggravating factors when considering sentence.

As occurred in this case, the distinction between false statements made before proceedings are issued and those made afterwards may not much matter, but it is a distinction worth bearing in mind. In particular, one should be careful not to make an accusation of contempt for breach of CPR 32.14 before proceedings have been issued.

All three drivers of the different accidents were committed to custodial prison services with immediate effect for 16 months, 12 months and 9 months. The passengers each received 4 months prison sentences with all, except one, suspended for one year. Each of the defendants was ordered to pay £9,000 towards LVI's costs of the application, giving a total sum of £81,000.

Does the recent case of LOCOG v Sinfield [2018] EWHC 51 (QB) mark a fundamental shift for the treatment of dishonesty in civil courts?

George Davies

There is bound to be much commentary on the first Senior Court's definition of 'fundamental dishonesty' as found in Section 57 of the Criminal Justice and Court Act 2015.

After a review of the recent County Court authorities and having noted the Court of Appeal's recent approval of HHJ Maloney QC's decision in *Gosling v Screwfix*, Cambridge CC, 29/04/14, Knowles J held at paras 62 & 63 of *LOCOG v Sinfield* that:

62. 'In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he has thus 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. Dishonesty is to be judged according to the test set out by the Supreme Court in Ivey v Genting Casinos Limited (t/a Crockfords Club), supra.

63. By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim.'

There appears to be nothing controversial about Knowles J's definition of 'fundamental'. However, what I think makes this decision more interesting is his consideration of the necessary state of mind of the claimant in order to make a finding of dishonesty. This is encapsulated in his adoption of the new test for dishonesty provided by the recent Supreme Court decision in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] 3 WLR 1212.

At paragraph 27 of *LOCOG v Sinfield*, Knowles J summarised the new test thus:

'...the judgment of the Supreme Court in Ivey v Genting Casinos Limited (t/a Crockfords Club) [2017] 3 WLR 1212 in which the court restated the common law test for dishonesty and, in summary, held that whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards.'

It appears that the trial judge in *LOCOG v Sinfield* decided that it was unnecessary to consider the claimant's state of mind or mens rea when determining dishonesty. Indeed, this has been the approach adopted by other County Court Judges when considering Section 57 and/or CPR 44.16. For example in *Menary v Darnton*, Unreported, HHJ Hughes QC at Portsmouth County Court, the judge said at paras 10 to 11:

'10. ...CPR 44.16(1) only requires the defendant to establish fundamental dishonesty on the balance of probabilities, the civil standard of proof. I think it unhelpful therefore to focus on the meaning of dishonesty as described in the criminal courts, such as in the case of R v Ghosh ... or as defined by criminal statute, such as the Theft Act 1968.

11. The use of the word 'dishonesty' in the present context necessarily imports well understood and ordinary concepts of deceit, falsity and deception. In essence, it is the advancing of a claim without an honest and genuine belief in its truth...'

In my view, HHJ Hughes QC was simply following the well tried and tested approach to findings of dishonesty in civil cases. Essentially a judge should consider all the written and oral evidence in the round, step back and assess whether or not (on the balance of probabilities) a party or witness had told lies. There was no need to start probing into the concept of mens rea.

Further, the Court of Appeal in *Howlett v Davies* [2017] EWCA Civ 1696 expressly approved HHJ Maloney QC's definition of 'fundamental dishonesty' and did not seek to impose any requirement to explore states of mind or mens rea. One therefore may wonder why it was necessary for Knowles J to start importing considerations of mens rea into a civil case. After all, consideration of mens rea has never been much of a requirement in tort law.

However, when one reads *Ivey v Genting Casinos* it's clear that the Supreme Court were spelling out that there should be a convergence in the approach taken by courts of all stripes to the test of dishonesty. As *Howlett v Davies* actually post-dated *Ivey v Genting Casinos* one wonders whether *Howlett v Davies* now needs to be-read in the light of *LOCOG v Sinfield*. (I think that Knowles J got it right and the Court of Appeal got it wrong!) In *Ivey v Genting Casinos*, the Supreme Court stated:

'62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378: see Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 WLR 1476, Abou-Rahmah v Abacha [2006] EWCA Civ 1492; [2007] Bus LR 220; [2007] 1 Lloyd's Rep 115 and Starglade Properties Ltd v Nash [2010] EWCA Civ 1314; [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in Barlow Clowes by Lord Hoffmann, at pp 1479–1480, who had been a party also to Twinsectra:

'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.'

63. Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceeding....'

In *LOCOG v Sinfield*, Knowles J quoted paragraph 74 of *Ivey v Genting* Casinos:

'When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

It is noticeable that this passage refers to a 'fact finding' tribunal – and makes no distinction between criminal and civil courts.

The upshot of *LOCOG v Sinfield* was that the claimant's state of mind was held to be dishonest at the appeal stage even though it appears not to have been an issue expressly considered at first instance.

Whilst the import of a party's state of mind or mens rea into tort law makes for an interesting academic debate (beyond the scope of this article and, frankly, beyond the scope of this author) one is left with the question does it make any practical difference?

My view is yes. A proper application of paragraph 74 of *Ivey v Genting Casinos* presumably requires more careful cross-examination, more detailed submissions and a closer analysis of a party's state of mind by the trial judge (than seems to have traditionally taken place in many civil trials). The Judge then has to consider how that state of mind squares with the '*objective standards of ordinary decent people*' before a finding of dishonesty can be made.

LOCOG v Sinfield therefore informs us that all civil fraud trials now need to be considered through the prism of *Ivey v Genting Casinos*.

A final complicating thought concerns the issue of recklessness. A fraudulent misrepresentation can, of course, be made dishonestly or recklessly. One wonders if this concept is to be approached differently or in the same way post *Ivey v Genting Casinos*. Answers on a postcard, please.

Recent Noteworthy Cases

Nawaz v Belmehdi – 14.9.17 and 5.12.17 – Wandsworth CC – District Judge Parker

Fraud – Fundamental dishonesty – non-party costs order

Edward Hutchin, instructed by Andrew Auchterlounie of Keoghs, represented the successful Defendant and his insurers in this significant fraud case.

The Claimant claimed damages including a credit hire claim of over £86,000, following a road traffic collision alleged to have occurred when the Defendant reversed into the Claimant's motorcycle. The claim was defended on the basis that it was fraudulent, the impact being the Claimant's fault for driving into the Defendant's stationary vehicle, and that the Claimant's evidence about the accident and his losses could not be believed.

After a trial in Wandsworth County Court, involving oral evidence from the parties, and expert forensic engineering evidence, the claims were dismissed. The Judge held that the claim was fraudulent, the Claimant's evidence having included a high degree of inconsistency and embellishment. She also found that the Claimant misled the court about his financial position, which underpinned his hire claim, and that his evidence about his other losses was unbelievable, so that the entire claim was fundamentally dishonest.

The claims were therefore dismissed, and an enforceable costs order made in favour of the Defendant. The Judge also provided for the Defendant to make an application for non-party costs against the accident management company which provided the hire claimed.

An application for non-party costs was subsequently made against the accident management company, on the basis that it substantially controlled and stood to benefit from the litigation. This was resisted. However very shortly before the hearing, the accident management company agreed to pay the entirety of the assessed costs of the proceedings, resulting in a very substantial recovery by the Defendant's insurers.

Some useful general points emerged from the case:

- Under s.51 SCA 1981 and CPR 46.2 and 44.16, the court has a power to make a non-party costs order. CPR 44 PD 12 specifically refers to a credit hire claim as an example of a case in which a non-party costs order may be appropriate.
- This can be a powerful weapon where, as in this case, the credit hire claim vastly exceeds the value of the other damages claimed. If there is evidence that the proceedings were effectively conducted by and for the benefit of the credit hire company, a non-party costs application can ensure recovery of costs where the Claimant's personal means may be limited, and send a message direct to credit hire companies that pursuing such claims is not risk-free.

Kona v Servest Limited 18.12.2017 – Coventry *County Court* HHJ Gregory

Fundamental dishonesty – section 57 CJCA 2015

Edward Hutchin, instructed by Damian Rourke of Clyde & Co, successfully represented the Defendant in this case, in which a finding of fundamental dishonesty was made, and the court applied section 57 CJCA 2015, after an application was made by the Defendant at an interlocutory stage without a trial.

The Claimant made a claim for compensation for personal injuries arising out of an accident at work. He alleged that he had suffered physical and psychological injuries, including a serious knee injury, which had significantly affected his mobility and work capacity. He claimed substantial damages including loss of earnings, valuing the claim at £150,000.

Liability was admitted but causation and quantum were in issue. The claim was allocated to the multi-track and directions given for a 2 day trial.

After service of medical evidence and witness statements, an application was made to amend the defence and plead fraud, relying on a schedule setting out surveillance and social media evidence which contradicted the Claimant's account of his injuries. The application included a request for an interlocutory hearing to determine whether the entire claim should be struck out on grounds of fundamental dishonesty under section 57 CJCA 2015.

Shortly before the hearing, the Claimant conceded that it was appropriate for an order to be made, without admitting the evidence relied on, and sought to negotiate on costs. However at the hearing the judge applied section 57 CJCA 2015, and ruled that the entire claim should be dismissed on grounds of fundamental dishonesty, awarding the Defendant costs, and giving permission for enforcement against the Claimant.

The case illustrates the potential to deploy section 57 CJCA 2015 at an interlocutory stage in an appropriate case. By clearly presenting powerful evidence of dishonesty at an early stage, the Defendant in this case succeeded in defeating the claim, and obtaining a finding of fundamental dishonesty, without the need to expend further, potentially irrecoverable, costs, by waiting for a full trial before applying for the claim to be dismissed.

Tomlinson v Ministry of Justice 4 January 2018, Guildford County Court District Judge Nightingale

Prisoner claim – accident circumstances – causation – fundamental dishonesty

Emily Wilsdon (instructed by the Government Legal Department) appeared in this case arising from a fall from an upper bunk bed in HMP Coldingley, alleged to have been caused by a missing guard rail and an ill-fitting mattress. No explicit reference to dishonesty in the judgment itself was required for the judge to conclude that her findings of fact led inexorably to a conclusion that there had been fundamental dishonesty.

It was the Defendant's case that there was and always had been a guard rail on the Claimant's bunk bed. There was no contemporaneous evidence from the Claimant or otherwise that the guard rail was missing. Nor did he mention this immediately after he fell from his bed and was injured. Supportive evidence from his then cellmate was given little weight due to his non-attendance. The Claimant had sleep apnoea, but had failed to plead as part of his case the allegation (made in his witness statement) that the Prison should never have assigned him to a bunk bed due to this medical condition.

The Defendant could rely on daily cell fabric inspection logs and a comprehensive set of records of maintenance requests and work. The judge said 'I cannot be satisfied that if there was not a guard rail it would have been missed on every single daily inspection, and not logged. I am also satisfied that I cannot find that if there was a repair or request for a guard rail it would have not made it onto [the system which was] a comprehensive and contemporaneous record of all works done to the cell'. She went on to find that 'I think Mr Tomlinson did fall from his bed but not in the way he alleges', and she therefore dismissed the claim.

The judge accepted the submission that, *though in her decision she had made no reference to dishonesty*, her conclusion that the fall was not caused in the way alleged by the Claimant led inexorably to the conclusion that he had been dishonest. That dishonesty was plainly fundamental, it went to the core of the way the accident had happened, and therefore she decided that QOCS protection should be lifted. Fixed costs therefore no longer applied, pursuant to CPR 45.29F(10), and the Defendant was awarded £5,111 in costs.

Balint v UK Insurance – High Court (QBD) and County Court at Central London (various dates) – Mr Justice Morris, Mrs Justice Whipple, HHJ Baucher

Fundamental dishonesty/QOCS – third party costs Order – security for costs against third party (credit hire company)

Paul McGrath appeared for UK Insurance instructed by Hamida Khatun, Keoghs LLP

The Claimant brought a claim for personal injury and associated losses, including a claim for credit hire in excess of £126,000. The Defendant had admitted responsibility for the collision but disputed quantum. HHJ Collender QC dismissed the claim for injury and allowed a trifling sum for hire. The Judge described the claim for injury as fundamentally dishonest. The Defendant applied for its costs and enforcement of those costs on the grounds of CPR 45.16(1) (fundamental dishonesty) and applied for a third party costs order against the claims management company and also the credit hire company. The Defendant also applied for a wasted costs order against the Claimant's solicitors.

The Defendant succeeded in its application to enforce its costs against the Claimant pursuant to CPR 45.16(1).

The claims management company were dissolved and struck off the register of companies and the application against it stayed.

The credit hire company resisted the third party costs application. The Defendant sought permission to cross-examine the director of the credit hire company and the fee earner handling the claim. The Judge (HHJ Baucher) granted the Order. As the director was not in attendance, the hearing had to be adjourned with the credit hire company being held liable for the costs. The Judge also acceded to the Defendant's application for security for costs against the credit hire company in the costs only proceedings. The Judge made an Unless Order in this regard. The credit hire company appealed the security for costs decision. The credit hire company received permission to appeal (Morris J.) but was refused a stay of execution on the Unless Order (Whipple J.). As the credit hire company had failed to pay the security, the Unless Order took effect and they were debarred from defending any further. In September 2017 the credit hire company were ordered to pay the Defendant's costs of the action (to be assessed) and £30,000 on account of such costs (HHJ Baucher). The Claimant's solicitors successfully resisted the wasted costs application, but, given the matters raised at the hearing and in judgment, were ordered to pay the costs of the Defendant's application for wasted costs in any event.

Mihai (and 3 others) v James and Zenith Insurance – Luton CC, 7 and 12 December 2017 – HHJ Melissa Clarke

Rear end shunt – liability – bogus passenger – fundamental dishonesty and QOCS

Paul McGrath appeared for Zenith Insurance instructed by Tina Clarke, DWF LLP

The Claimants alleged that they were involved in a road traffic accident on a slip road caused by Mr James' negligence. Mr James counterclaimed alleging that the First Claimant was responsible for 'slamming on' his brakes. Zenith Insurance was joined as the First Claimant's insurer. Zenith withdrew indemnity for late notification. The Judge found that the Defendant was solely responsible for the accident, his having been 2 car lengths behind on the approach to the main A1(M) at 40 mph or so, and so was unable to react in time making the collision inevitable. The accident caused the C1 £1650 in vehicle damage costs.

However, the Judge dismissed the claims for personal injury as follows: C1 and C2 failed to prove on the balance of probabilities that they were injured; C3's claim was struck out for non-attendance and putting forward, without explanation, conflicting medical evidence; and C4's claim was dismissed on the basis that the Judge found that he was not within the vehicle at the time (i.e. it was a bogus and dishonest claim).

Further, the Judge accepted the Defendant's submission that the remaining claim of C1 (vehicle damage) should be dismissed under s.57 Criminal Justice and Courts Act 2015 due to his fundamental dishonesty (not in relation to his own claim, but in relation to the related claim of C4).

In relation to costs, the Judge determined that the Claimants ought to pay the costs of the other parties to be assessed. Further, the Defendant also ought to pay Zenith's costs. Payments on account were ordered.

As to QOCS, only C2 was entitled to the protection. C1 lost his protection because the Court determined that the definition of the 'claim' in CPR 44.16(1) was wider than the Claimant's own claim, and included a 'related claim' as defined in s.57. C3 lost her protection due to the strike out (CPR 44.15) and C4 lost his protection as the claim had been fundamentally dishonest under CPR 44.16(1).

(1) Hussain (2) Ahmed (3) Hussain v. (1) Grossobel (2) Royal & Sun Alliance Plc CC at Edmonton, 8 December 2017

Slam On – Conspiracy – Fundamental Dishonesty

Sian Reeves (instructed by Stuart Poole of DWF LLP) represented the Second Defendant motor insurer at the trial of the three Claimants' claims for damages arising out of a road traffic collision, which occurred when the First Defendant drove into collision with the rear of the Claimants' vehicle.

The Second Defendant refused to indemnify the First Defendant due to non-disclosure of traffic offences. Prior to trial, the Second Defendant also had concerns as to whether the First Defendant had deliberately caused the collision.

At trial on 21 September 2017 the Deputy District Judge heard evidence from all 3 Claimants and the First Defendant. The Claimants were cross examined on behalf of both Defendants on the basis that the First Claimant driver deliberately slammed on his brakes to induce a collision. Significant inconsistencies in the Claimants' evidence as to why they were in the vehicle, as to the circumstances of the collision and the immediate aftermath, and as to their pre-collision claims history and injuries, were also explored in cross examination.

In a reserved judgment handed down on 8 December 2017, Deputy District Judge Boon held that:

1. The collision was caused by the First Claimant deliberately slamming on his brakes, and that the collision was induced;
2. All 3 Claimants were complicit in the slam on; and
3. All 3 Claimants had dishonestly claimed damages as a result of the collision, and that all 3 Claimants were fundamentally dishonest.

The Claimants were ordered to pay the First Defendant's costs assessed at £19,000.00, and the Second Defendant's costs assessed at £21,000.00. Costs were assessed on the indemnity basis. Both Defendants were granted permission to enforce the costs orders to the full extent against the Claimants.

Ramachandran v Eley 4 January 2018, Kingston Upon Thames CC, DDJ Holmes-Milner

LVI – Credit Hire – Fundamental Dishonesty

David R White (instructed by Hannah Ferns of Horwich Farrelly) appeared in this matter arising from a collision with the Claimant's taxi. Liability was admitted, but causation and quantum were in issue.

The Defendant's insured driver failed to attend on the morning of trial, apparently suffering illness, so the matter proceeded on the Claimant's evidence alone.

The Claimant was a reasonable witness for the most part, but his evidence crumbled on two key points. The first was a previous accident in which he had been involved. Whilst the Claimant had ostensibly been open about the happening of the previous accident (and it was a long time prior, so there was no suggestion of overlap of symptoms) his handling of questions about it was bizarre. At first, he suggested that he could remember no detail whatsoever of the previous incident. Not the location, the mechanics, the car he was driving: simply nothing at all. That was, of course, incredible. As investigation went on, he began to reveal some details, but then could not explain why he had been so reluctant to comment previously. It made him appear extremely shifty.

The second key issue with which he struggled was the credit hire. The Claimant's evidence on the contractual arrangements was, again, somewhat suspicious. It began to appear as if the arrangements made were something of a sham set up by the taxi company for which he worked in order to try and make money opportunistically out of the accident.

The Judge found that the evidence on those points was sufficient for him to say that the Claimant had been lying about his injury, and a finding of fundamental dishonesty was made, and QOWCS disapplied.

The case was particularly notable for the way in which the Claimant's live evidence on the special damages, in particular the credit hire, undermined his credibility overall, and thus led to findings of dishonesty in relation to the injury claim. The Judge described the credit hire arrangements as 'troubling and suspicious'. Items of special damages in LVI cases can sometimes be treated as an afterthought from a defendant point of view, but this case is a lesson in how they can actual be central to winning the case.

Braili v EUI Ltd
Croydon CC, DDJ Perry, 1 February 2018

Fraud alleged – slam-on case

Julia Smyth (instructed by Hamida Khatun and Ben Leech at Keoghs) represented the insurer in this case, arising from a collision at a roundabout. The Defendant's case was that the Claimant had stopped deliberately on the roundabout to induce the collision.

The Defendant's insured had taken photographs at the scene, showing the Claimant's vehicle on the roundabout immediately after the collision. One of the photographs was served with the Defence, which alleged fraud from the outset and invited the Claimant: (a) to call evidence from his passenger, and (b) to file a Reply, warning the Claimant that the Court would be invited to draw adverse inferences if he did not do so. The Claimant did not file a Reply, but sought to explain the photograph in his evidence by claiming that he had been shunted into the roundabout by the force of the collision. The Judge rejected the Claimant's evidence, finding that the collision had occurred on the roundabout and going on to make a finding that the Claimant had stopped deliberately and that the claim was fraudulent. He accepted that the Claimant's passenger had been looking over his shoulder before the collision, drew an adverse inference because of the unexplained failure to call the Claimant's passenger, and found that the inconsistencies in the Claimant's evidence as to the collision circumstances and his injuries destroyed his credibility. QOCS protection was lifted and the Defendant was awarded its costs in full on the indemnity basis. The Judge refused the Claimant's application for detailed assessment, instead awarding the Defendant all of its costs as claimed following summary assessment.

Carpenter v EUI, Basildon CC, 23.01.1
Late intimation – fundamental dishonesty – application of Howlett v Davies

James Henry, instructed by Husnain Yousaff of Horwich Farrelly and EUI, represented the Defendant in this late intimation case where the Court found 'the strongest evidence of dishonesty'.

The claim was intimated 21 months after the accident, at which time C continued to complain of ongoing neck symptoms. She served evidence form a GP and also an orthopaedic surgeon. D's main criticism of C's evidence was that she did not seek any medical attention (outside the medico-legal process). C said that was because she only went to the GP in 'life or death situations'. Her medical records undermined that contention. She had actually attended for a number of ailments during her 36-month prognosis without mentioning her alleged neck symptoms.

C's real undoing was the exaggeration of her symptoms, which she described as 'dreadful' 'horrible' and, at times, 9/10 on a scale of 1 to 10. The Judge found it 'wholly inconceivable' that someone suffering from those injuries for as long as C did would not mention it to her doctor. It was described as the very strongest evidence of dishonesty. Fundamental dishonesty had not been pleaded, but applying Howlett v Davies the Court held that it did not need to be.

The claim was dismissed with a finding of fundamental dishonesty and an award of indemnity costs.