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Issue XIII March 2022

TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Welcome to the latest instalment of the TGC Fraud Update

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These are busy times. As foreshadowed in previous editions of this update, the introduction of the whiplash reforms has seen a substantial rise in the 'layering' of previously straightforward claims with claims for treatments in various guises, and claims associated with recognised psychiatric injuries. Those increases come at the same time as a significant rise in credit hire claims arising from incidents involving motorcycle couriers and delivery drivers, no doubt fuelled in part by the enormous demand for 'dine-in' services, as well as the shifting business models of the credit hire and accident management industries. Many of the resulting claims from 2020 and 2021 still remain a long way from trial, and judging by the number of aged claims that are listed for trial, but are being vacated at the last minute due to a lack of judicial availability, the number of claims filling lists in the County Court is likely to persist for years to come.

Meanwhile, the High Court continues to deal with increasing volumes of serious and high-value injury claims in which allegations of fundamental dishonesty are being alleged.

In this issue:

- James Yapp looks at the Supreme Court decision in *Ho v Adelekun* [2021] UKSC 43, with notes of caution in relation to offers of settlement and enforcement of costs in QOCS cases.
- Tim Sharpe analyses two recent High Court decisions on the application of s.57, and considers the tricky issue of claimants hiding behind mistakes or decisions of their representatives.
- Robert Riddell considers the decision of the Court of Appeal in *Griffiths v TUI* [201] EWCA Civ 1442 concerning the judicial evaluation of 'uncontroverted' expert evidence.
- Anisa Kassamali examines the distinction between dishonest exaggeration and fundamental dishonesty in the context of *Elgamal v Westminster City Council* [2021] EWHC 5210 (QB).
- I take a look at the principles guiding the amendment of pleadings to advance a positive case of dishonesty, and whether there is a need to do so in light of *Howlett* and the recent decisions in *Covey v Harris* [2021] EWHC 2211 (QB), *Mustard v Flower* [2021] EWHC 846 (QB) and *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB).

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

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

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

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Ho v Adelekun [2021] UKSC 43

James Yapp

Can a defendant in a QOCS case set off a costs order in its favour against a costs order made in the claimant's favour? If so, to what extent?

The decision of the Supreme Court in *Ho v Adelekun* [2021] UKSC 43 was handed down last October.

The Supreme Court's decision does permit a defendant to seek a set-off of against costs. A defendant can recover its costs by any means available, but only up to the monetary amount of the claimant's orders for damages and interest. Costs orders in favour of the Claimant are not taken into account in setting the cap for enforcement.

An order is required under r44.12 for a costs-costs set-off. The net effect in many cases will be that defendants will set their costs off against a claimant's damages, and the claimant's costs will remain untouched.

Previous decisions

In *Howe v MIB* [2017] EWCA Civ 932 the Court of Appeal had concluded that setting off costs against costs was not a species of enforcement. QOCS deals only with enforcement. QOCS therefore did not impact upon a defendant's ability to set off competing costs orders.

When this issue came before the Court of Appeal in *Ho*,[1] Ms Adelekun had argued that *Howe* was wrongly decided. The Court of Appeal saw the appeal of this argument, but considered themselves bound by *Howe*.

Newey LJ explained that, if they weren't bound, the Court of Appeal would have been inclined to accept that *"where QOCS applies, the Court has no jurisdiction to order costs liabilities to be set off against each other... "and that" Section II of CPR Part 44 represents a self-contained code [limiting a defendant to] set-off against damages and interest under CPR 44.14"*.

The Supreme Court's decision

The Supreme Court overturned the decision in *Howe*, concluding that setting off costs against costs *is* a form of enforcement.

The Supreme Court did not go as far as the Court of Appeal might have done. The Supreme Court did not conclude that QOCS precludes setting off costs against costs *per se* – the conclusion, towards which Newey LJ would have been inclined.

Rule 44.14 imposes a cap on how much can be enforced. A defendant in a QOCS case can recover its costs by any means available, including set-off against a costs order in favour of a claimant, but only up to the monetary amount of the claimant's orders for damages and interest.

A sting in the tail

The sting in the tail for defendants is the combined effect of the decisions in *Ho* and *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654.

CPR 44.14(1) permits enforcement up to the *"aggregate amount in money terms of any orders for damages"*. *Cartwright* confirmed that neither the schedule to a Tomlin order nor acceptance of a Part 36 offer result in an order for damages.

Examples

3 scenarios illustrate some of the possible permutations:

Scenario 1 – Claimant fails at trial but has another costs order in his favour (e.g. the costs of an interim application).

Defendant costs= £10,000
Claimant order for damages and interest= £0
Claimant costs= £1,000

The Defendant would not be entitled to enforce its costs order at all. It would be required to pay the claimant's costs without deduction.

Scenario 2 – Claimant wins at trial but fails to beat an early Part 36 offer from the defendant:

Defendant costs= £10,000
Claimant order for damages and interest= £1,000
Claimant costs= £10,000

The defendant would be entitled to enforce its costs – by any means available – up to the limit of £1,000.

The defendant would be unable to enforce £9,000 of its costs.

Scenario 3 – Claimant accepts an early Part 36 offer from the Defendant on the eve of trial.

Defendant costs= £10,000
Claimant agreed damages and interest= £1,000
Claimant costs= £5,000

The defendant could not enforce its costs order at all as there is no order for damages in the claimant's favour. It would have to pay the claimant's costs and damages.

The outcome in *Ho*

The underlying personal injury claim settled for £30,000 by acceptance of a Part 36 offer. There was a dispute over whether the claimant was caught by fixed costs. This appeal reached the Court of Appeal.[2]

The Claimant was limited to fixed costs of c.£17,000. The Defendant received an order for costs of c.£48,000 in relation to the appeals. The Defendant could not enforce its costs against the Claimant's damages because there was no order for damages. The Defendant sought an order for set-off against the Claimant's costs.

The case was akin to scenario 3, above, as there was no order for damages in favour of the Claimant. The Defendant's costs order was unenforceable in its entirety.

Something for everyone

This decision has been welcomed by many claimant representatives. Conversely, it has disappointed many on the defendant side of the fence. Paragraph 44 of the judgment neatly illustrates the competing policy considerations at play, although the Supreme Court had made clear that they were not well placed to consider them reliably.

> "We recognise that this conclusion may lead to results that at first blush look counterintuitive and unfair. **Why should a defendant which has a substantial costs order in his favour have to pay out costs to a claimant under an order made against him when the two costs orders would net off against each other**, leaving both sides to meet their own solicitor's costs themselves? Whether or not… such a result accords with the policy underlying QOCS, we hold that it is the result that follows from the true construction of the wording used in Part 44.
>
> **Any apparent unfairness in an individual case… is part and parcel of the overall QOCS scheme devised to protect claimants against liability for costs and to lift from defendants' insurers the burden of paying success fees and ATE premiums** in the many cases in which a claimant succeeds in her claim without incurring any cost liability towards the defendant."

Practical effects

In many cases the practical effect will be to ring-fence a claimant's costs. If there is to be any enforcement of a defendant's costs then it will usually be by way of set-off against damages, rather than by the court ordering a set-off against the claimant's costs under r44.12.

What might some of the knock-on effects be?

- Part 36 offers will appear to provide less costs protection to defendants than they once did.
- Defendants may seek to settle claims by way of 'conventional' consent orders rather than by Part 36 or by Tomlin order. One imagines few claimants will be inclined to accept such an offer absent special circumstances.
- Defendants may make more applications for non-party costs orders to displace QOCS protection. Similarly, applications for proportional costs orders to reflect relative success – e.g. the defendant to pay 50% of the claimant's costs of the action, rather than orders going both ways – may become more common.

The difficulty for Defendants is that just because these outcomes are more attractive, it won't necessarily make them easier to come by.[3]

- Where a claimant accepts a defendant's Part 36 offer out of time, the usual order is that the defendant pays the claimant's costs until the expiry of the offer, and that the claimant pays the defendant's costs thereafter. Defendants might be more inclined to ask the court to make a different order under r36.13(4). However, the court must make the 'usual order' unless it is satisfied that it will be unjust to do so – r.36.13(5). In light of the Supreme Court's comments, will a court really conclude that it is unjust for the QOCS regime to work as drafted?
- Defendants may decide to proceed to trial rather than settle if they have significant interim costs orders in their favour. This might be seen as one of the less helpful ramifications of the decision. This effect may be felt less acutely in a fraud context where more cases are likely to proceed to trial in any event.
- However, fraud cases may feature 'low-ball' Part 36 offers made by a defendant. Defendants and claimants will be well-advised to look again at any such offers: late acceptance of such an offer may be more attractive to a claimant than it once was.

To the Supreme Court – and beyond?

The Supreme Court doubted whether a procedural question of this sort should have made it so far in any event. In the court's view the Civil Procedure Rules Committee was better placed to put right this ambiguity in the QOCS rules.

The CPRC minutes of 5th November 2021 refer to the decision in *Ho*. The costs sub-committee's consideration of the decision will be deferred until further consideration has been given to wider work on fixed recoverable costs and costs generally.

The MoJ is currently considering policy issues, including whether fundamental changes to the QOCS regime are required. It seems the CPRC costs sub-committee will not consider the decision in *Ho "until the policy imperative on QOCS is known"*.

Until then, practitioners will have to consider the combined implications of *Cartwright* and *Ho* very carefully, particularly when making or evaluating offers to settle.

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1. Covered in the 6th edition of the TGC costs newsletter and the 11th edition of the TGC fraud newsletter.

2. Interested readers are referred to the 5th edition of the TGC costs newsletter.

3. As recently as this month, albeit in a non-PI context, Cockerill J referred to the danger of proportional costs orders undermining the general rule that costs follow the event – Deutsche Bank AG London v Comune Di Busto Arsizio [2022] EWHC 219 (Comm).

Claimant dishonesty, or solicitor incompetence? Two recent decisions

Tim Sharpe

Luul Michael v I E & D Hurford Limited T/A Rainbow [2021] EWHC 2318 (QB)

The background to this appeal was a road traffic collision that took place in 2018 when the Defendant's driver collided with the rear of the Claimant's vehicle at traffic lights. The Defendant paid the pre-accident value of the Claimant's car (£4,200) and the matter proceeded to trial in Leeds before Recorder Cameron in relation to personal injury, credit hire (claimed at £7,728 of which £524.18 was awarded at trial) and physiotherapy charges of £800.

While dishonesty was not expressly pleaded, it was put to the Claimant in cross examination that he was dishonest and that some of his documents were fraudulent. The Recorder found that the Claimant was not dishonest and his evidence was credible and true.

During his evidence, the Claimant was asked about his claim for physiotherapy. His statement claimed that he had "obtained" physiotherapy and "I feel that it helped". The Claimant served a 2-page report accompanied by a detailed note of 8 treatment sessions. These documents appeared in the Claimant's signed List of Documents. When asked about this in cross examination the Claimant said he had attended *one* session and had been given home exercises. When asked about the £800 claim, he said "where...where is it I don't know, I....". He then said that the questions were confusing him.

The Recorder considered that the Claimant was genuinely confused, and was a poor historian. The court made an order of £100, accepting the Claimant's oral evidence about one session over the documents suggesting 8 sessions.

The evidence also considered the Claimant's alleged failings in relation to his impecuniosity documents and his failure to mention one of his jobs, as well as the failure to include credit card statements on his Disclosure Statement. The court found that the Claimant was unfamiliar with parts of his statement and on occasions "gave the impression of really not knowing what day of the week it was sometimes." However, the court determined that the Claimant was honest and accurate insofar as he could understand what was being asked of him. He had "happily volunteered" information that was not in his witness statement, even when the same did not assist his case.

The Claimant was awarded damages of £3,624.18 and the trial judge rejected the Defendant's application for the dismissal of the claim under s57 Criminal Justice and Courts Act 2015. The court noted that the wording required "the Claimant" to be dishonest and the court considered that Claimant himself had not been dishonest. The trial judge considered that the various discrepancies in the Claimant's evidence were explained by his lack of understanding of what was going on. Since the Claimant did not know or understand the basis of the claim that the solicitors had advanced on his behalf, the Recorder could not conclude there was dishonesty on the part of the Claimant from the inaccurate physiotherapy claim and other inaccuracies in the Claimant's statement of case, evidence in chief and omissions in the disclosure statements.

On appeal before Stacey J, it was argued that the Recorder was wrong not to have found that the Claimant was fundamentally dishonest. Unlike in other appeal cases on the issue of fundamental dishonesty, this was not a situation where the trial judge had failed to provide adequate reasons. As a challenge to the findings of fact, a very clear case is needed for an appellate court to overturn the conclusions of a trial judge who has seen and heard the evidence.

The High Court considered that the trial judge was entitled to reach the conclusion that the Claimant had not been dishonest in relation to the claim, and was entitled to accept that he had not exaggerated his symptoms or injuries. It was held that it was clear that he was unfamiliar with the content of his statement and the trial judge was entitled to accept the honesty of his answers in oral evidence.

The physiotherapy documents appeared on the Claimant's List of Documents which he had signed, and the claim was referred to in his own statement which the Claimant had signed, as well as in his pleadings. The High Court determined that the trial judge was entitled to conclude that if there had been dishonesty, it was not on the part of the Claimant. The court referred to the well-known test for dishonesty in *Ivey v Genting* and held: "It is too bold a submission to assert that an inaccurate pleading or defective disclosure statement is synonymous with the respondent's fundamental dishonesty." It was accepted that there may be cases where signing an inaccurate witness statement, statement of case or disclosure statement will be evidence of dishonesty, but it does not automatically follow. In this case the Claimant was able to provide an honest explanation.

The difference in wording between s57(1)(b) of the 2015 and CPR 44.16 was noted, with the former referring to the "Claimant" being fundamentally dishonest, while the latter refers to the "Claim" being fundamentally dishonest. The decision confirms that unless the Claimant themselves is dishonest, s57 will not apply.

In *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield* [2018] EWHC 501(QB) Julian Knowles J had commented (at para 60):

"...it will be rare for a claim to be fundamentally dishonest without the claimant also being fundamentally dishonest, although that might be a theoretical possibility, at least."

Stacey J however noted that "it may, perhaps, be a less rare occurrence than it seems when the benefit of the disputed elements of a claim (such as physiotherapy treatment, vehicle storage and transportation and credit hire fees) are not paid to a claimant for their benefit, but paid to the service provider, by a claimant's solicitor." The court held "Whether or not the Recorder suspected that parts of *the claim* were dishonest, the Recorder was perfectly entitled to conclude that *the claimant* was not."

The court noted further that "If the defendant solicitors consider that potential dishonesty lies with a claimant's solicitor and not their client then surely their attention is better directed at the solicitor firms, rather than the hapless client who has instructed them?.....Where, as here, there was a genuine accident with genuine injuries and vehicle damage, but also aspects of the evidence which appear troubling or dishonest, a defendant may, in order to prove dishonesty on the part of a claimant him or herself, need to explore in evidence potential complicity or collusion by a claimant with their solicitor. It may depend in part on the adequacy of the explanation for the inaccuracies provided by the claimant. That did not happen in this case."

While perhaps correct in theory, the decision may be seen as undermining the role of the Statement of Truth. Here, the false claim for physiotherapy was maintained in pleadings, Disclosure Statement and witness statement. In determining the case on the Claimant's oral evidence, the court has arguably allowed the Claimant to be divorced from those documents. It may be said that this undermines the trust that parties can place in Statements of Truth if the Claimant is not to be judged against the same.

Moreover, the observations of the High Court are of little assistance to the Defendant who only uncovers the Claimant's dishonesty during the Claimant's oral evidence at trial. In this case, it seems that the Claimant's presentation of his case via his pleadings, disclosure and statement all suggested that the 8 sessions had taken place. It is unclear therefore how the Defendant was supposed to (at proportionate cost) have uncovered or even suspected the falsity of this head of claim in sufficient time to do anything about it (or indeed, at all). One also has to question whether a trial judge would be likely to be amenable to adjourning part-heard in order for the issue to be the subject of further evidence. Similar considerations

would doubtless be raised at the directions stage. It seems unlikely that in a modest value claim the court would grant directions / further directions relating to the consideration of "collusion", not least given the obvious problems of privilege arising from any attempt to look behind the relationship between the Claimant and his solicitors. This raises the possibility of a Claimant who has presented what appears on its face to be a dishonest claim, "hiding" behind the cloak of privilege and blaming others, while continuing to recover damages. Others however might argue that the decision reflects a just outcome – with the Claimant recovering the sums due to him arising from a genuine accident (but no more) and without having the potentially serious consequences of a fundamental dishonesty finding visited upon him.

Dorinel Cojanu v Essex Partnership University NHS Trust [2022] EWHC 197 (QB)

This recent decision of Ritchie J addresses the issue of when dishonesty is or is not "fundamental", and also the issue of failings by legal representatives.

The Claimant sought damages for clinical negligence. In short, he was admitted to prison on 17th June 2015 with deep cuts to two fingers. His case was that the Defendant cancelled pre-arranged day surgery and then delayed in making arrangements for his treatment, such that he suffered permanent injuries rather than making a swift recovery. The claim was issued for damages of £5,000 but this was later increased to £390,000. Shortly before trial, the Defendant was given permission to amend the defence to allege fundamental dishonesty by the Claimant. In addition, the Defendant pleaded a case of illegality – this aspect is not considered further in this Article.

The basis of this Fundamental Dishonesty allegation included that:

1. while the Claimant had alleged in his evidence that he sustained the cuts while defending himself from a knife attack by his wife, this was fundamentally dishonest in that in reality he had attacked his wife with a knife and stabbed her whilst drunk and that he injured himself in the attack or while resisting arrest;
2. the Claimant's evidence and case relating to quantum was based on various dishonest premises. In particular, the Claimant claimed damages for the cost of private surgery but by this time the Claimant was living in Romania, where surgery was cheaper. Further, the Claimant's claim for damages for handicap on the labour market was premised on loss of earning capacity based on UK salaries and yet he intended to live in Romania. It was alleged that the claim was dishonesty inflated.

At trial, Recorder Gibbons found that the Claimant's evidence about how his fingers became cut was "very far from the true picture". On appeal, the Claimant sought to challenge the finding of any dishonesty – this was rejected, the court noting the sentencing remarks from the Crown Court from when the Claimant was convicted of attempting to murder his wife on 16 June 2015. However, the High Court allowed the appeal in relation to whether that dishonesty was "fundamental" such as to engage s57 CJCA 2015.

On that issue the court held on appeal:

> "I consider that the mechanism by which the Claimant received his cut was irrelevant to success in the clinical negligence claim. The Claimant did not need to prove how he was cut to win the civil action. He was injured before admission to prison. At that time he was not convicted of anything. It matters not whether he had suffered the injury opening a tin of beans, in gang warfare or whilst attempting to murder his wife. In the civil claim at first the Claimant said nothing of the cause of the cuts. Nor did he need to. Later, when the defendant pleaded it out, the Claimant lied about the cause. The Claimant was being dishonest in relation to his crime, during which he was injured and for which he has never admitted his guilt. But the cause of the cut fingers has no relevance to the clinical negligence claim. In my judgment the mechanism of how he cut his finger is incidental to the claim or collateral thereto."

As to the presentation of a claim seeking damages based on the Claimant remaining in the UK, when the Claimant had returned to Romania and intended to remain there, the trial judge found that the claim was based on "wholly false premises." By the time his up to date schedule of loss was drafted, the Claimant had been deported to Romania. The High Court felt that his counsel's (not of these chambers) use of UK figures and rates was irrelevant and wrong in law – "the UK figures were as irrelevant as were the builders' rates of pay in Monte Carlo or the costs of surgery in New York." There was no evidence as how the Claimant's solicitors came to sign the schedule on his behalf. The court noted on appeal "I do not see how the errors in the drafting of the schedule on the method of calculation of a *Smith v Manchester* award or the other heads of loss can be laid at the Claimant's door and in any event I do not consider that they are proof of dishonesty by the Claimant."

High Court allowed this part of the appeal, considering that the Recorder had "conflagrated the failings of the Claimant's lawyers in their drafting of the schedule, which was drafted wrongly in law and based on irrelevant evidence, with the Claimant's own evidence which was true and honest in that he asserted he was afraid because he was likely to be deprived of work capacity in Romania either tending livestock or as a carpenter/builder."

The court held that the Recorder had failed to apply the *Ivey v Genting* test properly, failing to assess the Claimant's state of mind as a fact and then failing to apply an objective standard to assess whether the Claimant's conduct was dishonest.

The court held further:
"I consider that the incorrect pleading and the failure to quantify the claim properly by the Claimant's lawyers in the schedule is not in this case a fundamental dishonesty. It was not a dishonesty at all. In addition, on the facts of this case inadequate pleading is not within the mischief which Parliament aimed to prevent by the passing of s57. Nor is incompetence, carelessness, negligence or mere omission by the lawyers. The section requires proof of the Claimant's dishonesty not his lawyers' lack of competence. It may be a moot point whether that includes the dishonesty of his lawyers (none is asserted here) but that may be an issue for another case, it was not in issue before me in this appeal."

The decision on what constitutes "fundamental" dishonesty should not be seen as surprising. Such dishonesty must go "to the heart" or the root of the claim, must "substantially affect the presentation of his case, either in respects of liability or quantum", and must potentially adversely affect the Defendant in a significant way. In this case, the central issues included whether a particular referral letter was sent (and if not, negligence was admitted) and the extent to which the Claimant's symptoms were caused by a failure to repair his injuries within 10 days. The original cause of the Claimant's cuts was irrelevant to the same and the decision on this aspect is perhaps easier to understand. Reading the appeal decision, one may have the impression that the High Court at least considered that the trial judge may have sought to use s57 as a "credibility filter" to bar "those with previous convictions from bringing civil actions." This of course is not what the law provides.

However, the decision separating the Claimant from his pleadings has echoes of the decision in *Luul Michael v I E & D Hurford Limited T/A Rainbow* [2021] EWHC 2318 (QB) and may be seen by some as diminishing the trust that a Defendant can place on a statement of truth, given the willingness of courts to look behind the same to the Claimant's subjective evidence (despite the inability of the Defendant to prove matters otherwise covered by privilege). Whether these cases represent a softening of the approach of the courts to cases of dishonesty, or an attempt to ensure that the boundaries of s57 are well defined, remains to be seen.

The judgment may also become prominent in the coming months given that having reviewed the various authorities on s57 (including *Howlett v Davies*) the court considered that one of the requirements for a s57 decision was for s57 to be pleaded. While the same certainly requires an application, it may be felt that the effect of *Howlett* and the fact that s57 imposes a *duty* on the court, is such that pleading is not required.

Griffiths v TUI (UK) Ltd: Rubber stamp or trial by ambush?

Robert Riddell

The much-anticipated decision of the Court of Appeal in *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 has helped to clarify the circumstances in which defendants can seek to undermine at trial previously unchallenged expert evidence.

The Claimant purchased an all-inclusive package tour with the Defendant for a holiday in Turkey in 2014, during which time he suffered a serious gastric illness. Subsequently, he brought a claim for personal injury, alleging that the illness had been caused by contaminated food and drink supplied by the hotel. Proceedings were issued in the County Court and the matter was allocated to the multi-track. Both parties were given permission to rely on expert evidence from a gastroenterologist and microbiologist. In the event, the Defendant decided against instructing a microbiologist and failed to serve its gastroenterology report in time. Accordingly, the only expert evidence on causation which was available before the Court at trial was the report from the Claimant's microbiologist, Professor Pennington.

While the Defendant had put Part 35 questions to Professor Pennington, he was not called to be cross-examined. In that sense, his evidence was (on appeal) considered to be "truly 'uncontroverted'"; in other words, the factual basis of the report had not been previously challenged or undermined either by service of contrary expert evidence, disclosure of any documentary evidence or in cross-examination.

That might have been a highly advantageous position for the Claimant, had it not been for the perceived deficiencies in Professor Pennington's report, which was subjected to sustained criticism by the Defendant during closing submissions. In her judgment, HHJ Truman agreed that the report was "minimalist" and contained inadequate reasoning. Consequently, she dismissed the claim on the basis that she was not satisfied that the medical evidence proved that the Claimant's illness had been caused by contaminated food or drink. As she concluded in her judgment:

> "The Court is not a rubber stamp to just accept what [an expert] has said. When causation is clearly in issue, I do consider it incumbent on the medical experts to provide some reasoning for their conclusions... [T]he Court cannot just draw an inference from the fact that someone was ill, and... other potential causes have to be considered and excluded".

The matter came before Martin Spencer J on appeal, who considered that the appeal raised a fundamental issue as to whether a court is obliged to accept an expert's uncontroverted opinion even if that opinion can be properly characterised as bare assertion (and if not, in what circumstances the court can reject such evidence). Having concluded that there was no direct authority on the question, the judge found that a court would always be entitled to reject an uncontroverted report "which was literally a bare *ipse dixit*, for example if Professor Pennington had produced a one sentence report which simply stated: 'In my opinion, on the balance of probabilities [the Claimant] acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel'. However, he decided that the court is not entitled to subject an uncontroverted report to the same assessment of weight which it would undertake only if there were other, competing expert or factual evidence:

> "Once a report is truly uncontroverted, the role of the court falls away. All the court needs to do is decide whether that report fulfils minimum standards which any expert report must satisfy if it is to be accepted at all".

The judge did not consider Professor Pennington's report constituted bare assertion; indeed, he doubted whether any report which complied with the requirements of CPR PD35 could ever justifiably be characterised in such terms. But while accepting that there were deficiencies in its reasoning, Martin Spencer J nonetheless reached the conclusion that in the absence of challenge, the court must assume that there is some reasoning which lies behind the opinion, and that this reasoning is not challenged. He therefore allowed the appeal.

The High Court's decision had immediate and far-reaching effect in holiday sickness litigation, leading to a plethora of Defendant applications to cross-examine Claimant experts at trial, even within the fast track where live expert evidence would rarely be proportionate to the value of the claim.

Such a costly strategy appears to have been obviated by the majority decision of the Court of Appeal. Asplin LJ (with whom Nugee LJ agreed) determined that there was no bright line in the authorities which would require a court unequivocally to accept expert evidence that had not been controverted. Reviewing the Supreme Court's treatment of case law in *Kennedy v Cordia LLP* [2016] 1 WLR 597, Asplin LJ found only authority for what she believed to be the uncontroversial proposition that an expert must explain the basis for their conclusions, and that, without reasoning, an expert's bald statement is of little assistance for the court. There could be no displacement of the normal judicial function to apply the burden of proof and making findings based on all the factual and expert evidence.

Significantly, the majority also agreed that there was nothing inherently unfair in seeking to challenge expert evidence only in closing submissions, as long as the veracity of the report is not impeached. Asplin LJ endorsed HHJ Truman's conclusion that the court is not a rubber stamp; otherwise, "the court would be bound by an uncontroverted expert's report which satisfied CPR PD 35, even if the conclusion was only supported by nonsense". Further, it is not the responsibility of the opposing party to give the Claimant an opportunity to make good evidential deficiencies in the report, which could and should have been done prior to its service. Asplin LJ made clear that a court's decision to accept or reject expert evidence (whether uncontroverted or otherwise) will be dependent on the relevant circumstances of the case, albeit some chain of reasoning supporting its conclusions is necessary however short.

Conclusion

The majority decision will undoubtedly be welcomed by defendants (and not just in travel claims). But a glance at the blistering dissenting judgment of Bean LJ would give any sensible commentator pause before declaring this the end of the matter, even where the Court of Appeal refused permission to appeal to the Supreme Court.

Bean LJ relied on the self-declared trite proposition set out in *Phipson on Evidence* that a party is required to challenge in cross-examination any witness whose evidence he wishes to submit should not be accepted by the court. As such, Professor Pennington's report could and should have been challenged in cross-examination. While Bean LJ did not agree with Martin Spencer J that a court is bound to accept uncontroverted evidence, he believed that a judge is generally bound to accept the evidence of an expert if it is uncontroverted and the opposing party did not elect to cross-examine the expert for tactical reasons, despite having the opportunity to do so. He profoundly disagreed with Asplin LJ's conclusion on fairness. In his view, the Claimant had been ambushed in closing submissions and did not have a fair trial of his claim.

Bean LJ's complaint about the Defendant's tactical avoidance of cross-examination may have some force in a multi-track case, where there would be an opportunity to cross-examine, but it is perhaps less compelling in the context of a lower value claim.

But Asplin LJ's decision is also not without warning to defendants: as she held, while there is nothing impermissible in reserving criticisms of an expert until submissions, allowing claimants to run to trial with unchallenged expert evidence is a "high risk strategy". As in the decision of *Howlett v Howlett* [2017] EWCA Civ 1696, defendants may be advised to consider a 'cards on the table' approach to ensuring claimants are placed on adequate notice of the criticisms that may be raised at trial.

Dishonest exaggeration does not necessarily constitute fundamental dishonesty: *Elgamal v Westminster City Council* [2021] EWHC 5210 (QB)

Anisa Kassamali

***Elgamal v Westminster City Council* [2021] EWHC 5210 (QB) is one recent addition to the expanding body of case law on what amounts to fundamental dishonesty. It clarifies when a claimant's dishonest exaggeration of genuine injuries constitutes fundamental dishonesty and, importantly, when it does not.**

Background

Marwan Elgamal injured himself on 27 January 2012 whilst performing a 'flip' at Westminster City Council's gym. At the time of his accident, Elgamal was a 22 year old trainee stunt man with a clear intention to fully qualify and develop a career in the field. He was heavily involved in the sport of 'free running' (ranking 8th at the World Championships in 2008) and enjoyed parkour.

There was no dispute that Elgamal's injuries were genuine and that they put paid to any potential career as a stunt man. The question was whether Elgamal's dishonest exaggeration of the level of his ongoing disability arising from these injuries (as found by the trial judge HHJ Murdoch on the basis of, amongst other evidence, surveillance footage which contradicted Elgamal's account of his injuries to medical experts) meant that he had been fundamentally dishonest.

HHJ Murdoch held at trial that Elgamal's dishonest exaggeration did not mean that he had been fundamentally dishonest. His exaggeration was *"not fundamental in this case"*. Ultimately, the exaggeration did not significantly affect the value of Elgamal's claim. Whilst he was found to have exaggerated, and he failed to recover the significant losses he claimed for loss of earnings, the two were not actually connected. As HHJ Murdoch explained, the reason why he did not make out his claim for loss of earnings was due to *"the failure to produce the evidence to establish a difference between what a stuntman earns and sedentary employment. His lies played no part in this aspect of the case."* Relatedly, the finding of exaggeration did not materially reduce the level of general damages which Elgamal was awarded, nor did it result in a loss of a *Smith v Manchester* award.

High Court decision

Jacobs J upheld HHJ Murdoch's decision upon appeal. He did not interfere with the first instance decision on the fact of Elgamal's dishonest exaggeration and agreed, in any event, that any such exaggeration would not significantly impact the value of Elgamal's claim. This was not a case of fundamental dishonesty.

Jacobs J's judgment provides useful broader commentary for practitioners on whether there is fundamental dishonesty where a claimant is found to have dishonestly exaggerated the impact of a genuine injury.

The authorities are replete with judicial statements on what constitutes fundamental dishonesty. It is often said that it is dishonesty which goes to the root and heart of the claim (per the seminal case of *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB)). Jacobs J referred to this line of authority and added that *"the question of whether the relevant dishonesty was sufficiently fundamental should be, and is, really a straightforward 'jury' question"* [72]. What constitutes a *"straightforward 'jury' question"* in this context will no doubt be the subject of argument and interpretation.

Jacobs J specifically emphasised that dishonest exaggeration of genuine injuries does not, in and of itself, constitute fundamental dishonesty. Ultimately, whether or not there is fundamental dishonesty depends on the facts. Courts are concerned with the potential impact of the dishonest exaggeration on the value of the claim which is made. Put differently, if on the facts of the case the dishonest exaggeration accounts for a significant portion of the claim, it is more likely to be fundamentally dishonest.

It will be obvious in some cases whether or not the exaggeration has a potential impact on the amount that might be awarded for a particular head of loss. However, in others, the potential impact of the exaggeration may be less clear. The nature and severity of the genuine injury is relevant to any such considerations. Jacobs J observed that where that injury is serious (as in Elgamal), the issue whether there is fundamental dishonesty *"is likely to raise a more nuanced question depending upon the degree of exaggeration"* [104].

Where there is room for dispute as to the impact of the dishonest exaggeration on a particular head of loss, Jacobs J emphasised that the burden for proving fundamental dishonesty rests with defendants. It is therefore defendants who will need to *"lay the necessary groundwork…for example, by eliciting from experts that their opinion on a particular head of loss would be different if a claimant's case as to the extent of injury were accepted or rejected"* [75].

Elgamal in context

The question whether a claimant's dishonest exaggeration constitutes fundamental dishonesty has often come before the courts. The courts' conclusions have differed based on the particular facts of the cases before them, which is consistent with Jacob J's comments in *Elgamal*. Put simply, dishonest exaggeration becomes fundamental dishonesty where the exaggeration goes to the root and heart of the claim, usually because it significantly affects its value.

By way of example, the courts considered these issues in the 2021 cases of *Smith v Haringey* [2021] EWHC 615 (QB) and *Robert Sudale v Cyril John Limited* (County Court at Leicester, 5th February 2021). It is telling that there were findings of fundamental dishonesty in both cases.

- In *Smith v Haringey LBC*, the claimant was found to have dishonestly exaggerated by misleading experts as to the extent of her injuries in the spine and pelvic area (on the basis of, amongst other elements, the defendant's surveillance material). The High Court confirmed that this exaggeration constituted fundamental dishonesty because it was the sole basis for the claimant's loss of earnings claim. It significantly affected the value of her claim and so went to the root of her claim.
- The County Court at Leicester reached a similar conclusion in *Robert Sudale v Cyril John Limited.* The claimant sought damages for personal injuries sustained in an accident at work when he fell approximately 15 feet from a mobile scaffold tower. The defendant relied on surveillance footage of Sudale in order to argue that he was not suffering symptoms to the extent stated in his evidence and presentation to medical experts (and, upon seeing the footage, the orthopaedic experts changed their views). The claimant denied any exaggeration, importantly for the purposes of the fundamental dishonesty finding, maintained his extensive claim for future care and loss of future earnings on the basis of his exaggerated injuries. The exaggeration therefore impacted the value of his claim in a significant way.

Concluding comments

Elgamal does not much alter the fundamental dishonesty landscape. It serves as a timely reminder to practitioners acting on behalf of both claimants and defendants that a claimant's dishonest exaggeration does not, in and of itself, constitute a finding of fundamental dishonesty. In particular, defendants wishing to allege fundamental dishonesty will have to *"lay the necessary groundwork"* and evidence how the exaggeration would (significantly) impact the valuation of a particular head or heads of loss.

As for claimants, *Elgamal* and the other examples provide yet another reason to be cautious about surveillance footage. In all three instances, the defendants' covert surveillance was at least somewhat relevant to the determination that the claimants had exaggerated. Surveillance of this nature is now almost a given in cases where fundamental dishonesty is alleged, and to be expected by claimants.

Late amendments to plead FD – an argument for substance over form

James Henry

In *Covey v Harris* [2021] EWHC 2211 (QB) John Bowers QC (sitting as a Deputy Judge of the High Court) gave permission to the defendant to a serious personal injury claim (pleaded at £8.8M) to amend his defence to advance a positive pleading of fundamental dishonesty. The hearing took place 11 days before the trial. The Judge considered the relevant competing factors and found that it was *"very sensible to plead [fundamental dishonesty] and, indeed, to do so with the level of detail that has been pleaded here"*.

Covey did not break any new ground, but offers a good opportunity to reflect on the need to properly address allegations of dishonesty in pleadings, and the need to focus on substance rather than form:

- The starting point is that justice ordinarily requires that issues which either party properly wishes to raise should be heard: *Cobbold v London Borough of Greenwich* [1999] EWCA Civ 2074.
- That approach was endorsed in *Hussain v Sarkar* [2010] EWCA Civ 301 in the context of an application to amend a defence to plead fraud one week before the trial (the case being decided before the introduction of the concept of 'fundamental dishonesty'): *"Justice requires that each party should have a reasonable opportunity to present any case which it may properly wish to advance"* (para. 23).
- In *Howlett & Howlett v Davies* (1) Ageas (2) [2017] EWCA Civ 1696 the Court of Appeal held that there was no requirement to plead that a claim is fundamentally dishonest in order to have QOCS displaced on that ground, so long as the claimant had fair notice of the challenge to their honesty, and an opportunity to deal with it: "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" (para. 31).
- In *Mustard v Flower* [2021] EWHC 846 (QB), the Defendant was not permitted to amend its defence to include a contingent plea that, if the court determined at trial that the claimant had consciously exaggerated her symptoms, it reserved the right to seek a finding of fundamental dishonesty and apply to have the claim dismissed pursuant to the s.57 of the Criminal Justice and Courts Act 2015. The defendant could make a s.57 application without having foreshadowed it in a pleading, there was no basis for the plea at that time, and it would be prejudicial to the claimant. Some commentators argued that the decision in *Mustard* actually discouraged defendants from laying their cards on the table, and it was said that the decision was inconsistent with the guidance in *Howlett* to the effect that the claimant should have fair notice of the challenge to their honesty. The reality is that it had become commonplace (post-*Howlett*) for defendants to plead the caveat that they 'reserved the right' to allege fundamental dishonesty, in the event that the trial judge found the claimant to be fundamentally dishonest. In fact, that tautological position rarely clarified the issues.
- In *Matthewson v Crump & Anor* [2020] EWHC 3167 (QB), although the defence did no more than 'reserve the right to plead' that the claim was 'fraudulently untrue' the issue of fundamental dishonesty was properly before the court and the claimant had a fair

opportunity to deal with it because it was raised in the defendant's skeleton argument and it was put to the claimant during the hearing that parts of his evidence were untrue.

- *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) (discussed in detail by Tim Sharpe in this edition of the Fraud Update) was a widely publicised decision of Ritchie J, overturning a finding that the claimant was fundamentally dishonest about the way in which he had sustained his injury (the claimant had cut his fingers in the process of the attempted murder of his wife) on the basis his dishonesty related to the way in which he sustained the injury, and was not directly relevant to the issues in the civil injury claim. The decision made headlines in the press for obvious reasons, but is noteworthy for present purposes because the Judge stated (at para.47) that "there are 5 steps to be taken by a trial judge when faced with a defence under S.57 before a finding can be made of fundamental dishonesty". The first of those was "(i) the S.57 defence should be pleaded". That principle appears to have been distilled from the case law without any direct reference to an authority on the point, and would, on its face, seem contrary to the decision of the Court of Appeal in *Howlett*. However, 'should' is not expressed in mandatory terms, and *Howlett* dealt with the need (or not) to plead fundamental dishonesty in relation to CPR 44.16, rather than s.57. Notwithstanding those observations, the decision is likely to cause some confusion and uncertainty.

Decisions like *Covey* reflect a judicial trend to allow amendments to plead fundamental dishonesty, so long as it is fairly and squarely put, with proper detail, even if it is late in the day and some time and has passed since a claimant has nailed his colours to the mast. It was noted in *Covey* that the defence in *Brint v Barking, Havering and Redbridge University Hospitals NHS Trust* [2021] EWHC 290 (QB) was pleaded on the eve of trial.

Defendants considering seeking findings of fundamental dishonesty (whether pursuant to CPR 44.16 or s.57) would be well advised to concentrate their pleadings on making the claimant aware of facts that lay the evidential foundation for such findings, with proper notice and in sufficient detail to put the claimant on notice of the challenge to their honesty, as opposed to simply 'reserving the right' to make submissions about fundamental dishonesty. Wherever possible, if a positive case of dishonesty is to be put to the claimant, it is best practice to plead that case, but if the focus is on the substance of the issues rather than the form of the pleading from the outset, it is more likely that a late amendment will be permitted to formalise the positive case, even if made very close to the commencement of trial.

Noteworthy Cases

Dadalto v. (1) Zurich Insurance (2) Laskiewicz (Central London CC, 25.05.21)

Credit Hire- Need –Evidence

Anthony Johnson (instructed by Ben Parker of Horwich Farrelly) successfully secured the dismissal of the Claimant's appeals against the trial judge's decision in two cases that had been heard together.

The Claimant's two sizeable credit hire claims had both been disallow by the trial judge on the basis that he hadn't discharged his burden of satisfying the very low threshold in respect of the issue of need.

The Claimant was a Motorcycle Courier and his case had been that he required a replacement motorcycle to continue in that work. Three days before the trial, he was granted permission to rely upon a fourth witness statement that revealed, for the first time, that he also owned a Vauxhall Astra for his own exclusive use. The trial judge accepted that this revelation had come too late for the Defendants to make any enquiries in relation to it. The credit hire claims were dismissed on the basis that the Claimant's duty to mitigate his losses extended to making enquiries of his employer and his insurers whether it would have been possible to use that car rather than his motorcycle for the short periods after each accident whilst he was without a motorcycle.

The Claimant's representatives appealed on the basis that the trial judge had been mistaken as a question of fact. They focussed upon a comment by the judge that the Claimant's honesty was 10.5/10, which it was alleged meant that his evidence should have been accepted on every point of fact. It was also contended that the judge had misunderstood how low the bar is set in respect of need in credit hire claims.

On appeal, HHJ Lethem accepted that a lacuna in the evidence had been created by the Claimant in relation to need and mitigation. The trial judge had not needed to go as far as to make findings as to the Claimant being unreasonable in using the vehicle for work because his exercise hadn't got that far: he had acted unreasonably and failed to mitigate by not even making any enquiries. Just because he felt that the Claimant was very honest, he had nevertheless been entitled to treat his evidence that he couldn't have used a car for his work with a 'healthy degree of scepticism'. The Claimant could have changed the presentation of his case at the point that he had revealed the existence of the car, but instead had 'gambled' in electing not to do so. Whilst that was sufficient to determine the appeal, he also commented that it would have been open to the trial judge to go further than he did and to find that the Claimant had deliberately hidden the existence of the car.

HHJ Lethem also commented on the fact that the judgment being appealed against was an *ex tempore* judgment being dealt with by a Deputy District Judge at the end of a very long day in Court. He said that it was plain that the judge would have been expressing himself concisely in a more brief fashion given the time of day, but that this did not mean that it was not possible to infer from the transcript that he had understood the correct legal tests and taken appropriate matters into account in determining them in the Defendant's favour. He noted that findings of fact in a judgment will inherently be an incomplete statement of the impression formed by even a meticulous judge. He reminded himself that appellate tribunals must always be concerned about inferences, weight and nuances that are not always evident in a judgment and defer to the trial judge accordingly.

Sakyi v Pybus, Hastings CC, 20.5.21

Fundamental dishonesty – costs after discontinuance

Edward Hutchin, instructed by Damian Rourke of Clyde & Co, represented the successful Defendant insurers in this application for an enforceable costs order following discontinuance.

The Claimant claimed very substantial damages following a road traffic accident. However he discontinued his claim the day before trial after disclosure of CCTV footage which contradicted the account of the accident put forward in his pleadings and witness statement, and raised serious doubts about his injury claim.

The Defendant insurers were not content to allow the Claimant to benefit from QOCS protection in the circumstances, and despite the discontinuance, which led to the trial hearing being vacated, the insurers applied for an enforceable costs order on the basis of fundamental dishonesty. Edward appeared at the final hearing, at which the Claimant challenged the jurisdiction of the court to make such an order.

The judge ruled in favour of the Defendant, making a finding of fundamental dishonesty, and ordering the Claimant to pay indemnity costs, with a substantial payment on account to the Defendant.

The judge acknowledged that there were legal issues as to the scope of the power to make fundamental dishonesty findings after filing notice of discontinuance, but the outcome confirmed that in appropriate cases such applications can be made successfully, making clear to Claimants that they cannot rely on the rules about QOCS and discontinuance to escape the costs consequences of false claims.

Begum v General Lift Company Limited, (18th March and 21st June 2021, Central London CC, Recorder Gallagher)

Fundamental Dishonesty – QOCS – credit hire

James Yapp (instructed by Amy Goodwin of DAC Beachcroft) was instructed in this case involving a personal injury and credit hire claim pursued by a motorcycle courier.

The claim arose from a road traffic accident between a motorcycle courier and a van driven by the Defendant's former employee.

The Claimant alleged that he was waiting at a junction when the van struck his bike from the rear. He claimed he was knocked to the ground and suffered injury.

The Defendant's driver said the Claimant had overtaken the van, 'given him the finger' and then slammed on his brakes. He said the Claimant was not knocked from the bike by the minor contact. He said the Claimant later *"jumped like a starfish"* against the van and feigned injury.

The Recorder found that the Claimant had lied about the circumstances of the accident. He found that the accident was caused by the Claimant's actions. He found that the Claimant was not knocked to the ground. He found the Claimant had lied about his alleged injuries. He made these findings to the criminal standard.

The Recorder found that the claim was fundamentally dishonest. The Claimant was ordered to pay costs on the indemnity basis and to return a previous interim payment.

Daniel Azeez & ors. v. (1) Nicolae (2) Esure

Strike Out- Improper Service – First Defendant Didn't Exist

Anthony Johnson (instructed by Paul Sweeney of Esure via Damian Ward of Keoghs) successfully secured the Striking Out of four claims brought in relation to a road traffic accident where fraud was suspected.

The First Claimant, a professional boxer, was pursuing very sizeable claims for credit hire and vehicle damage, along with personal injury claims brought by all four Claimants. The claims had been allocated to the Multi-Track and a re-listing of a two day trial was imminent at the point of the Strike Out.

In a written judgment, Recorder Jones QC said that he 'unhesitatingly' accepted the Second Defendant's case that the First Defendant had never existed. The evidence before him of the various investigations that had been conducted by the Second Defendant led him to conclude that, on the balance of probabilities, whoever had been involved in the index accident had provided the Claimants was a false name and address at the scene. He was fortified in that conclusion by the fact that the Claimants' representatives, Bond Turner, had been on notice of the point for well over three years but had adduced no evidence which suggested that the First Defendant did in fact exist. Accordingly, pursuant to *Marshall v Maggs* [2006] EWCA Civ 20, there could not be good service.

He further found in the alternative that, even if he had not conclusively found that the First Defendant did not exist, the Claimants would have been unable to show good service at his 'last known address' pursuant to CPR 6.9. He found that a letter from the Second Defendant outlining some of its concerns about the case would have put 'reasonably careful' solicitors on notice of the fact that false information could have been given to their client at the scene. Having ignored that 'red flag', they had not then gone on to take the 'reasonable steps' that were required of them by CPR 6.9(3).

Giving a further oral judgment on costs enforcement, the Judge found that QOCS should be disapplied and the Second Defendant's costs would be enforceable on the basis that the claim had disclosed no reasonable grounds of success for the purposes of CPR 44.15(a). He said that, whereas there may have been a cause of action against someone (he explicitly made no ruling on the facts of the underlying claim), there could not be reasonable prospects of success in a situation where valid service could never have taken place. Either through 'negligence or inadvertence', the Claimants' solicitors had done nothing and created a situation where there was no reason for the Claimants to avoid the financial consequences of the Strike Out.

One of the major arguments that had been pursued by the Claimants' representatives in relation to the hearing was that the Application was too late, i.e. any issue relating to the service of the proceedings should have been dealt with at the outset. The Judge disagreed, pointing out that the Second Defendant had pleaded the issue in paragraph 1 of its Defence and the Claimants had done absolutely nothing in response to it. He accepted the Second Defendant's position that it would have been possible to deal with the discrete point covered by the Application as a preliminary issue at the outset of the Trial, but that it had been in everybody's interests for it to be dealt with sooner rather than later by way of a separate Application.

Vasile et al v Sabre Insurance Company, (3rd-4th March and 7th June 2021, Haverfordwest CC, HHJ Beard)

s.57 – Fundamental Dishonesty – QOCS

James Yapp (instructed by Shannon Cottam of DWF) was instructed in this case involving 7 claimants, a liability dispute, occupancy issues and exaggerated special damages claims.

The Defendant's insured driver was unable to attend trial. The Defendant's case on liability and occupancy was significantly hampered. The Judge accepted that all of the Claimants were passengers in the vehicle and that the accident was caused by the Defendant's insured.

The First and Fifth Claimants pursued loss of earnings claims suggesting they had been absent for work for a number of weeks. The claims were particularised in some detail in their schedules of loss. The First Claimant's account did not stand up to scrutiny of the documentary evidence. His claim was dismissed pursuant to s.57 of the CJCA 2013.

The Fifth Claimant discontinued during trial. Her claim was found fundamentally dishonest based upon the documentary evidence.

Chhabria v Skyfire – Wandsworth County Court, DDJ Davis, 01.07.21

James Henry (instructed by Hannah Dobson of Horwich Farrelly) appeared for the Defendant in this claim arising from a liability-admitted RTA involving claims for vehicle damage and credit hire, which was dismissed pursuant to s.57 on the basis of the Claimant's fundamental dishonesty about his injuries.

What made the case noteworthy was the Judge's approach to the assessment of credibility, which included analysis that is often lacking from judgments following fast track trials, but that will resonate with many readers of this Update. The Judge found that whenever C was in difficulties during cross-examination, he would revert to one of 4 touchstones:

Firstly, C repeatedly said the accident was over 3 years ago. That was true, but the Court expects claimants to be familiar with the basic facts of claims. The second touchstone was that where there were inconsistencies, C had a tendency to blame his lawyers or medical professionals. Whenever there was a problem with disclosure, he said he had given the documents to his lawyers. The third touchstone was to say 'it's all there' when it 'palpably was not'. The fourth touchstone was to say he was the aggrieved party, but he failed to take on board D's very clear case that although breach of duty was accepted, it was being said that he was falsifying or exaggerating his claim.

The entire claim was dismissed and C ordered to pay indemnity costs.

Schobs v LV, 23.07.21, Chelmsford CC, DDJ O'Malley

Exaggeration – Causation – Fundamental dishonesty

Robert Riddell (instructed by Aysha Ahmad of Horwich Farrelly) represented the successful motor insurer in a late intimation claim brought by a Claimant with an extensive pre-accident medical history. The Claimant alleged he had suffered a range of severe whiplash injuries lasting almost 2 years following a road traffic collision involving the Defendant's insured. Liability had been agreed on a 50/50 basis, but the claim was defended on the grounds of late intimation (the CNF being sent 18 months post-accident) and medical causation.

Notwithstanding the minimal damage to the vehicles involved, the judge accepted that the collision was capable of causing injury. However, she was not satisfied that the Claimant had proven that he was injured as alleged.

The Court conducted a *Molodi* analysis of the Claimant's post-accident conduct:

- First, the Claimant did not seek any medical attention for accident-related symptoms. The judge rejected the Claimant's oral evidence that he had sought treatment from a practice nurse soon after the accident and discussed his injuries with his GP during an unrelated encounter. Neither of these appointments had been foreshadowed in his witness statement, and there was no supporting contemporaneous medical record. The judge did not accept that any reasonable medical professional would fail to make a note, particularly given the Claimant's evidence was that he was at the time "in agony" with accident-related pain.
- Further, the Claimant regularly attended his GP in the weeks and months following the accident for other, unrelated issues and failed ever to mention his injuries, which, on his account, were causing ongoing and severe pain. The judge found this wholly implausible.
- Third, there were significant inconsistencies between the CNF, medical report and written/ oral evidence.
- Finally, the judge found that the Claimant had materially failed to disclose pre-existing problems in his neck, for which he had attended his GP just weeks prior to the accident, to his medicolegal expert. Even though the Defendant had not pursued this issue in Part 35 questions, the Court accepted that this significantly undermined the report's reliability.

The judge dismissed the claim as unproven. Further, she positively concluded that the Claimant had not in fact been injured at all in the accident and had failed to deal with evidential matters of serious concern. Accordingly, she found the claim to be fundamentally dishonest and ordered the Claimant to pay the Defendant's enforceable costs of £6,545.

Darroux v Mulsanne Insurance Company Limited, (1st November 2021, Romford CC, DDJ Piperdy)

Fundamental Dishonesty – QOCS

James Yapp (instructed by Sangeet Sanghera of DWF) was instructed in this remote trial arising from a low speed RTA.

The Defendant's driver did not attend to give evidence. The Judge concluded that this was an accident capable of causing injury. However, she found that the Claimant was not in fact injured.

The Claimant gave inconsistent evidence in cross-examination. He maintained that he had consulted his GP regarding the accident. This did not appear in his records. The Judge rejected the Claimant's account as dishonest.

The only mention of the accident in the Claimant's medical records was the day before his GP received the mandate for release of his records. This was many months after the accident at an unrelated consultation. The Judge did not accept that this timing was a coincidence.

The claim was dismissed with a finding of fundamental dishonesty.

Hemings (1) Brown (2) v Petgrave – Mayors and City of London County Court, DDJ Redpath-Stevens, 18.11.21

James Henry (instructed by Leah Whitehead of Horwich Farrelly) appeared for the Defendant in this case involving 2 claims for personal injury, which were dismissed on different grounds of fundamental dishonesty.

The Defendant challenged causation generally and the veracity of the claims on the basis that the Claimants had been inconsistent in their evidence. In particular, C1 had hidden a pre-existing condition from her medico-legal expert. Moreover, her GP records indicated that she had been to the GP several hours before the collision complaining of pain in the same area in respect of which she was making a claim. C1 contended that the GP had made an obvious error in recording the time of the attendance, which should have been after the accident. The problem with that was that the accident did not occur until 2.15pm and C1's account of how she managed to get an appointment and an examination so quickly, without ever mentioning the RTA, was incredible. Her claim was dismissed in ist entirety.

Interestingly, the Judge found that C2 (C1's son), whose evidence on the face of the papers appeared even more inconsistent than C1, was genuinely injured, but had substantially exaggerated his claim and had been fundamentally dishonest in relation to his otherwise genuine claim. C2's claim was therefore dismissed in its entirety pursuant to s.57 of the Criminal Justice and Courts Act 2015.

Trocea v Grigory and Covea, (14 January 2022, County Court at Clerkenwell and Shoreditch, District Judge Manners)

Staged accident – fundamental dishonesty – unexplained routes and journey details

David R White (instructed by Marsha Crosland of DWF) appeared in this case, which demonstrated the value of checking every detail of the back story when a staged collision is suspected, and in particular alleged routes.

The Second Defendant insurer's concerns about this case (in which the First Defendant played no substantial part) were made out at trial, when the litigated Claimant, and his partner (who, along with another alleged passenger, had a pre-litigated claim of her own, but attended trial only in the capacity of a witness on this occasion) were unable to maintain a credible story about the journey they were apparently taking when the alleged accident occurred, or the purpose for the same.

Although the Claimant's evidence was in general terms poor under cross examination, the first serious inroad into the credibility of the claim arose from the fact that the Second Defendant had been careful to check the journey the Claimant had suggested he was taking on Google maps. This revealed that there was, in reality, no good reason for the Claimant to be on the road he said he was at the time of the alleged collision, and in particular not heading in the direction he must have been for the accident damage to make sense. Helpfully, the plotting of the suggested route and the accident locus were evidenced in the trial bundle, making the point a simple one for the Judge to appreciate.

Whilst the Claimant and his partner had clearly given some thought and preparation to the lies they came to court to tell, the hard evidence of the nonsensical nature of their proposed route was difficult for them to overcome. It meant that the court was prepared to tolerate detailed cross examination around the alleged journey, where otherwise such might have been deemed irrelevant. As ever, this, eventually, revealed that, where a story is made up and a witness is not genuinely recounting events that in fact occurred in a genuine way, there are always details that have not been considered. That inevitably leads to inconsistency, or an inability to answer simple questions. In this case, even some matters that might be thought to be relatively basic caused the witnesses problems: the exact purpose of the party they were apparently heading to, and the nature of the relationship with the other alleged passenger in their vehicle, and the circumstances in which he had been collected by them.

The Judge was thoroughly unimpressed with the Claimant, and found that the whole thing was a sham. She dismissed the claim with a finding of fundamental dishonesty, and a substantial enforceable costs order in the Second Defendant's favour.

So, if in doubt, get on Google Maps, and if the evidence is helpful, get it in the trial bundle produced by a short witness statement.

Chauhan v RSA, Birmingham DR, 21.11.21

Fundamental dishonesty – forgery

Edward Hutchin, instructed by Peter Smithson of Clyde & Co, represented the Defendant insurers in this case in which it was alleged that a Ministry of Justice worker had forged gym records to support her claim for damages.

After a 2 day trial involving detailed cross-examination and submissions, including analysis of computer records, the judge found that the Claimant had made a dishonest claim relying on false documents.

Edward also appeared at the subsequent High Court appeal hearing at which the judgment was upheld, addressing important issues relating to the scope and definition of fundamental dishonesty.

Sadat & Jabarkhail v Elkouby, Willesden CC, 20.1.22

Fraud – occupancy

Edward Hutchin, instructed by Nigel Parker of Keoghs, represented the successful Defendant and his insurers in this case in which the claims of 2 Claimants were dismissed on grounds of fundamental dishonesty, the judge finding that the alleged passenger was not present in the car at the time of the accident.

The Claimants issued separate claims alleging that they were travelling together in a car when it was involved in a road traffic accident, and sustained injuries as a result. The Defendant disputed the Claimants' account of the accident, and called evidence denying that there were any passengers in the vehicle at the time of the accident, or that any occupants could have been injured.

The Defendant successfully applied for an order that the 2 claims should be heard together. At trial the judge dismissed both claims, finding that there were no passengers in the car, and rejecting the driver's claim that he had been injured. The judge made findings of fundamental dishonesty in respect of both Claimants, and made an enforceable costs order in favour of the Defendant.

These cases illustrate that, whilst occupancy cases present challenges, with strong witness evidence and detailed cross-examination to bring out other discrepancies, occupancy defences can succeed, and result in the dismissal of related claims by actual occupants.

Kaczmarczyk v Sutherland, (28th January 2022 – Clerkenwell & Shoreditch CC – DDJ Skelly)

Fundamental Dishonesty – QOCS

James Yapp (instructed by Nhi Vo of Horwich Farrelly) was instructed in this fast track trial arising from a road traffic accident which occurred when the Defendant had stepped out of his vehicle at traffic lights.

The Claimant alleged that the Defendant had driven into the rear of his vehicle causing 'significant' damage

It was the Defendant's case that he had stopped behind the Claimant at traffic lights. He said he could smell petrol so he stepped out to check on a jerry can in the boot of his car. He said his car rolled forwards and the impact occurred before he could get back in and apply the brakes. Both parties agreed that the Defendant had taken out the jerry can in the aftermath of the accident. The Judge accepted the Defendant's account.

The Judge accepted this was an accident at much lower speed than C suggested. He found it could not have caused the injuries claimed.

The Claimant said his injuries were initially 9/10 and persisted at a 7/10 level for at least 3 months. He said in the early stages it was the worst pain he had ever experienced. He had a telephone consultation with his GP after a few days and underwent physiotherapy. He did not return to his GP. This was contrary to how he had behaved following previous accidents which, he said, had caused less severe injuries.

The Claimant gave inconsistent evidence regarding the site and progression of his injuries. The Judge found that the Claimant gave the impression of making up a story as he went along.

The Judge found that C had failed to prove his special damages claims. The claim was dismissed as fundamentally dishonest.

Trocea v Grigory and Covea, (14 January 2022, County Court at Clerkenwell and Shoreditch, District Judge Manners)

Staged accident – fundamental dishonesty – unexplained routes and journey details

David R White (instructed by Marsha Crosland of DWF) appeared in this case, which demonstrated the value of checking every detail of the back story when a staged collision is suspected, and in particular alleged routes.

The Second Defendant insurer's concerns about this case (in which the First Defendant played no substantial part) were made out at trial, when the litigated Claimant, and his partner (who, along with another alleged passenger, had a pre-litigated claim of her own, but attended trial only in the capacity of a witness on this occasion) were unable to maintain a credible story about the journey they were apparently taking when the alleged accident occurred, or the purpose for the same.

Although the Claimant's evidence was in general terms poor under cross examination, the first serious inroad into the credibility of the claim arose from the fact that the Second Defendant had been careful to check the journey the Claimant had suggested he was taking on Google maps. This revealed that there was, in reality, no good reason for the Claimant to be on the road he said he was at the time of the alleged collision, and in particular not heading in the direction he must have been for the accident damage to make sense. Helpfully, the plotting of the suggested route and the accident locus were evidenced in the trial bundle, making the point a simple one for the Judge to appreciate.

Whilst the Claimant and his partner had clearly given some thought and preparation to the lies they came to court to tell, the hard evidence of the nonsensical nature of their proposed route was difficult for them to overcome. It meant that the court was prepared to tolerate detailed cross examination around the alleged journey, where otherwise such might have been deemed irrelevant. As ever, this, eventually, revealed that, where a story is made up and a witness is not genuinely recounting events that in fact occurred in a genuine way, there are always details that have not been considered. That inevitably leads to inconsistency, or an inability to answer simple questions. In this case, even some matters that might be thought to be relatively basic caused the witnesses problems: the exact purpose of the party they were apparently heading to, and the nature of the relationship with the other alleged passenger in their vehicle, and the circumstances in which he had been collected by them.

The Judge was thoroughly unimpressed with the Claimant, and found that the whole thing was a sham. She dismissed the claim with a finding of fundamental dishonesty, and a substantial enforceable costs order in the Second Defendant's favour.

So, if in doubt, get on Google Maps, and if the evidence is helpful, get it in the trial bundle produced by a short witness statement.

AB (a minor) v Ageas Insurance Ltd, 18.02.22, Romford CC, DDJ Walton

Exaggeration – Late Intimation – Dismissal

Robert Riddell (instructed by Katy Hudson of DWF) acted for the insurer in a personal injury claim brought by a Litigation Friend on behalf of his 3-year-old son.

The claim was defended on the basis that it was only intimated 2 years after the accident, despite the Litigation Friend and the boy's mother both bringing their own injury claims within 2 months of the accident. No mention was made at that time that their son had also been injured. Curiously, the Litigation Friend's witness statement sought to explain the delay on the grounds that (a) the boy was (at the time) too small and vulnerable to be stressed by the prospect of litigation; and (b) they wanted to be sure that he had fully recovered from his injuries with no long-term consequences – despite the overall prognosis being just 2 months.

Having heard the Litigation Friend's evidence, the judge concluded that the Claimant had not discharged the burden of proof. First, there was no contemporaneous documentation of injury, despite the Litigation Friend's assertion in his witness statement (and to his medical expert) that the Claimant had been taken to his GP. The evidence suggested that the Claimant attended when necessary on other, unrelated occasions. In the absence of any contemporaneous evidence, the judge considered the medical report was of only limited assistance in circumstances where it was produced so long after the alleged injuries had resolved. Second, the judge found there was a pattern of inconsistencies in how the injuries were reported between the CNF, medical report and the Litigation Friend's witness evidence.

Finally, the judge considered it inherently improbable that the Claimant was injured because (a) he did not require any time off nursery (despite the Litigation Friend's statement indicating that he had taken time off; in fact, the Defendant obtained the Claimant's nursery records which revealed no absence for accident-related issues, but an absence in the previous weeks for a minor, unconnected ailment); (b) he did not attend his GP; and (c) his parents, who were both in the vehicle at the same time, did attend their GP. Accordingly, while the judge found that the Claimant may have incurred injuries, there was insufficient connection on the balance of probabilities that the Defendant be liable for those injuries as a matter of causation.

While the judge carefully assessed whether to set aside QOCS, he did not believe that the inconsistencies went to the root of the claim and could be explained by reference to, among other things, the "bolt process of claims lawyers". This case does indicate, however, that the Court will not allow an injury claim to succeed without adequate scrutiny simply because it is brought in the name of a child.