DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Autumn 2018

From the Deans Court Chambers Fraud Team

MANCHESTER

24 St John Street
Manchester
M3 4DF
0161 214 000

PRESTON

101 Walker Street
Preston
PR1 2RR
01772 565600

Welcome to our Civil Insurance Fraud Autumn Newsletter.

Meet the team:


Tim Horlock QC


Sebastian Clegg


David Boyle


Simon McCann


Paul Higgins


Pascale Hicks


Ross Olson


Anthony Singh


Robert McMaster


Zoe Earnshaw


Alex Poole


Victoria Heyworth


William Tyler


Alex Taylor


Jonathan Lally


James Hogg


Rachel Greenwood


Jonathan King


James Paterson


Nilufa Khanum


Junaid Durrani


Daniel Glover


Gareth Poole


Zara Poulter

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

IN THIS EDITION…

For more detailed information on all counsel, their full CVs and experience can be found on our website at www.deanscourt.co.uk

If there are any topics you are interested in, anything you would like to discuss, or if you have any comments or feedback please feel free to contact us on 0161 214 6000, or you can reach our Senior Clerk at mgibbons@deanscourt.co.uk.

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

Editorial

By Simon McCann

"*Are we stealing this boat?",* she asked

"Stealing is such an ugly word", he mused

"Well, what do you want to call it?"

"An extreme case of window-shopping"

"The City of Lost Souls" (2012)

On 22 August this year, the Association of British Insurers published its analysis of insurance fraud for 2017[1]. It will probably come as no surprise to the reader of this Newsletter that a fraudulent claim was detected for each and every minute that passed in that year, to a total of well over half a million claims. Within these, the ABI's data showed, there were 113,000 fraudulent cases, and 449,000 dishonest insurance applications. Whilst the number of fraudulent claims was down, their value had increased slightly to £1.3 billion. With the Office for National Statistics quoting a figure for the adult population of the UK as about 52 million in 2018[2], that means that one in 460 people has made a fraudulent insurance claim in the last year, whilst one in 92 of us has presented some form of dishonest application to insurers.

If not quite the norm, a false claim is no longer an unusual phenomenon in the mind of the person in the street. Whilst they themselves certainly not have made a wholly false claim, they may have tried to get cheaper car insurance by lying about motoring convictions, and even if they have not they surely know someone who has. There is a perception, at some levels, that this is "fair game", and, like "extreme window shopping", acceptable. Recently, I was instructed in a case by an insurer where the Claimant had been "nagged" (the Claimant's word) into making a claim for injuries by a claims manager or solicitor (the Claimant was not sure which, and nor were we) despite having told the insurer on the telephone (twice) that she was not injured. The Claimant was told that there was "a pot of gold [waiting] . . . you only have to claim it".

On 23 October, in the Parliamentary debate over the Civil Liability Bill, Chris Philip MP said this:

> *"Secondly, the hon. Gentleman [Andy Slaughter MP] referred to the 1% fraudulent claims figure. The reason the reported figure, which in my submission is dramatically under-reported, is so low is that insurance companies are, quite wrongly, choosing to settle those claims—even suspicious claims, even claims without merit—without defending them, because the cost of defending them, which is about £10,000 or £15,000, far exceeds the value of the payout. So the 1% figure cited by the hon. Gentleman goes nowhere close to reflecting the true scale of fraudulent claims in this area."* [emphasis added]

[1] https://www.abi.org.uk/news/news-articles/2018/08/one-scam-every-minute/

[2] https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/projectedukadultpopulationfor2018

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

Editorial

Continued…

With respect to him, I am not at all sure that Mr Philip is correct in what he says – at least as to the part of his speech which I have highlighted. Insurers are more capable and keen than ever to defend fraudulent claims, and are better able to detect them.

Since the debate over the effect of fraudulent insurance claims is once again in the mind of the legislature at least, we have a piece in this our third Newsletter from Glenn Campbell and Junaid Durrani which serves to remind us of some of the core points we would do well not to forget when we are seeking to identify and combat fraud.

Ross Olson takes an informative look at the way in which Courts are dealing with telematics and GPS data, whilst Jonathan King and William Tyler provide us with some costs arguments to consider. Last but very much not least, James Hogg analyses the much-understood rules needed when we doubt the honesty or accuracy of disclosed documents.

Thank you for taking the time to read our Newsletter!

Simon McCann

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DEANS COURT CHAMBERS

FLAGGING UP FRAUD: A BEGINNER'S GUIDE

By Glenn Campbell & Junaid Durrani

Introduction

Fraud in the course of litigation is not new. In his Essays, first published in 1597, Francis Bacon observed,

> *"The principal duty of a judge is to suppress force and fraud; whereof force is the more pernicious when it is open, and fraud when it is close and disguised.[1] "*

As a sign of the way the wind is blowing, and rather more recently, Mr Justice Martin Spencer, giving judgment in a case involving RTA fraud, and allowing an appeal by the Defendant against the decision of a County Court Judge who had held dishonesty was not made out, said:

> *"Before considering the particular issues in this case, it is also pertinent to recognise the problem that fraudulent or exaggerated whiplash claims have presented for the insurance industry and the courts. This was recognised in March 2018 when the Ministry of Justice published a Civil Liability Bill which aims to tackle insurance fraud in the UK through tougher measures on fraudulent whiplash claims, proposing new, fixed caps on claims and banning the practice of seeking or offering to settle whiplash claims without medical evidence. The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgement, cause judges in the country to approach such claims with a degree of caution, if not suspicion …. Of course, I recognise that claimants will sometimes make errors or forget relevant matters and that 100% consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and, certainly, in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine or, at least, deserving of an award of damages.[2] "*

What motivates the fraudster, and whether fraud has in fact increased or whether it is simply better detected, are matters beyond the scope of this article. What all those likely to read it know, however, is that the personal injury sphere is not immune from the issue, which arises across a spectrum of cases, ranging from run of the mill "whiplash" claim thorough to disputes over injuries of the utmost severity. Two particular Tools have been applied to attack the problem, one

[1] "Of Judicature"; Francis Bacon, 1st Viscount St Alban, Lord Chancellor 1618-1621

[2] Molodi-v-Cambridge Vibration Maintenance Service [2018] EWHC QB 1288; [2018] RTR., 380 at p.398 para 44

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

legal and procedural, the other technological. The first is the principal topic addressed here. As for the second, whilst the IT revolution of the last quarter century or so has generated new opportunities for the dishonest, it has, at the same time, enhanced the ability to detect and prove their activities.

The question of dishonesty is potentially relevant in three ways. Firstly, is the claim one with merit which the claimant deserves to win? Secondly, if the claim succeeds, should the award of damages be reduced to reflect dishonesty in the way the claim was advanced? Thirdly, if the claim fails, ought the shield against liability to pay costs imposed by the Qualified One Way Costs Shifting rules be displaced?

The first question is a factual one. A claimant who a Judge finds is lying about the facts relating to an accident or injury, for example, in a claim based on an allegation of food poisoning whilst on a foreign holiday, is very likely to lose. The second question brings into play the common law rules relating to dishonest conduct which justifies contractual avoidance for misrepresentation or damages in tort for deceit, and which may lead to the benefit of an otherwise valid claim for damages being lost.[3] The third raises the question of whether Qualified One-Way Costs Shifting applies: a claim that is found to be on the balance of probabilities to be fundamentally dishonest can lead to the Court ordering that the restriction on recovery of costs should be lifted, enabling the successful party to attempt to enforce an order for costs, a right which will, of course, vary greatly in terms of its practical value[4]. When acting for defendants and their insurers, whilst time is not strictly of the essence, early efforts to establish the true facts are likely to pay dividends further down the line, rendering the incurring of costs a worthwhile investment. Avenues which might lead to useful evidence showing or suggesting dishonesty need to be properly explored, with attention being paid in particular to some of the common types of dishonest conduct which arise in road traffic cases and the factors which may be indicative of such conduct.

Common Scenarios

- *Low Velocity Impact (Low Speed Impact)*

  In cases where accident damage is minimal, the

[3] See on this Zurich v Hayward [2016] UKSC., 48; [2018] A.C., 142 where insurers successfully vitiated a compromise of a personal injury claim by establishing that they had been induced to enter it by fraudulent misrepresentations, and see also Summers v Fairclough Homes [2012] UKSC., 26; [2012] 1 WLR., 2004 where the power to strike out part or all of a claim for damages due to dishonesty in its prosecution, was considered. See also, for a practical example, London Organising Committee of the Olympic and Paralympic Games v Sinfield [2018] EWHC QB 51; [2018] PIQR., 133, another example of a High Court Judge allowing an appeal from a County Court Judge on a dishonesty claim; permission to appeal had been granted by Martin Spencer J.

[4] Insurers may consider it worthwhile to proceed down the contempt of court route in cases where fundamental dishonesty is made out and the facts support an allegation of dishonesty in, for example, signing statements of truth or when giving evidence at trial. No QOCS finding is necessary as a preliminary to contempt proceedings although it may well motivate them

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

presentation of a subsequent personal injury claim involving whiplash may give grounds for scepticism. Firstly, could the collision could have resulted in any injury at all, and secondly, if such an injury is established, its nature and extent.

In respect of accident damage and/or damage consistency, instead of relying on expert evidence which may not be readily available[5], defendant insurers simply put the claimant to proof. Whilst at least economical, this renders it critical to be able to displace the claimant's credibility and persuade the Court to prefer the evidence of the insured as to the nature and extent of any such collision.

- *Phantom Passengers*

  Here, a claim is presented by parties who dishonestly claim that they were travelling in a vehicle when a collision occurred which caused them. The main challenge in these cases is almost always the insured, perhaps bolstered with photographic evidence taken at the scene of the accident. In some cases the insured may be a party to the fraud, and care may be required to watch for this complication.

- *Deliberate Accidents*

  An insured may state that they have been the victim of a deliberate or staged accident. It is crucial to examine the claimant's accident history by reference to the usual insurance databases, and links with other individuals involved in the collision whether on social media or otherwise. Deliberate accidents may also involve a complicit insured, and in such cases, often involving vehicles at maximum occupancy, greater scrutiny may be required.

- *Late Intimation of Claim*

  A more recent trend in support of an allegation that a personal injury has not occurred are when such claims are intimated long after the accident date. It is obvious that honest claims are more likely to be pursued in a timely fashion. Notwithstanding the limitation period of 3 years, if there is no reasonable explanation presented as to why a personal injury claim wasn't brought at a date closer to the accident or when other heads of loss were presented, this may undermine the claimant's credibility.

Things to Look Out For

It is obvious that all cases are dependent on their own particular facts, but there are "red flags" which are useful in identifying dishonest conduct and which insurers might usefully bear in mind, particularly in the immediate post-accident period:

- *Direct evidence of the claimant and/or insured*- if

[5] See Casey v Cartwright [2006] EWCA Civ 1280 and Kearsey v Klarfield [2005] EWCA Civ 1510

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

an unusual version of events is advanced (for example, erratic manoeuvres, or a description which does not match the circumstances, or even the conduct of the parties at the time of the accident) then this may be a sign to investigate further. In circumstances involving low speed impact and an admission of breach of duty, the insured's evidence is often crucial in determining the prospects of success and so a detailed account is needed as soon as possible after the accident.

- *No Corroborative Evidence*- for example, there are no witnesses who saw the collision and/or there is no CCTV evidence.

- *Insurance policy history*- if the accident had occurred shortly after the insurance policy is incepted but the policy is then subsequently cancelled, it may be legitimate to infer that the policy was taken out as a step in pursuit of a fraud;

- *Type of vehicle involved*- a low value (normally much older, although obviously not always) vehicle may be more likely to be involved in a dishonest claim, particularly if the circumstances show that the accident occurred a short time after the policy was taken out or the policy was cancelled shortly thereafter, for the obvious reason that the old banger has less intrinsic value to the participants;

- *Multiple claims/accidents*- particularly when coupled with an abrupt cancellation of an insurance policy, a number of collisions within a short period of time can suggest that the policy was only taken out in pursuit of a fraud.

- *Previous accident history*- if the claimant or the insured have a long history of accidents and particularly whiplash claims, this again may be suggestive of dishonest conduct. Accurate claims databases (such as National Insurance Numbers and previous addresses) can help identify when aliases are being used and may also assist in splitting the dishonest claimants from the unlucky ones.

- *The consistency of the claimant's account*- This requires an overview of the evidence, from claims notification all the way through to trial. Molodi v Cambridge Vibration Maintenance Service was a good example; the defendant successfully appealed the entry of judgment for the claimant at trial on the basis that the claimant had clearly lied about the number of accidents he was involved in and he was in reality a "demonstrably inconsistent, unreliable and untruthful" witness.

- *Claimant's medical history*- A failure by the claimant to mention previous accidents and/or to explain the lack of any formal medical attention

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

when there is a long-standing history of GP attendance can undermine credibility overall;

- *Online information*- For those who maintain a public social media profile, Facebook, Twitter and Instagram accounts have long been fertile ground for investigators in determining the veracity of claimants who allege they have sustained an injury. Wider searches are also often quite fruitful. A recent case sent to one of the authors was discontinued at trial when the claimant's skydiving qualifications where checked with the qualification provider. The evidence was late; however, it indicated that the claimant was said to have undertaken a course in becoming a skydiving instructor whilst in the throes of a 9-month whiplash injury.

Conclusion

Not every avenue of investigation would necessarily result in a successful defence, however, the Courts are increasingly alert to the issue of fraud in the context of civil litigation and personal injury claims in particular. Prompt investigation of all claims with the following up of potential leads suggestive of possible dishonesty is now a necessary step if insurers are to avoid being the victims of dishonesty, whether at the hands of a crooked claimant or a complicit insured.

Glenn Campbell and Junaid Durrani

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DEANS COURT CHAMBERS

COST CONSIDERATIONS IN LOW VALUE FRAUD CLAIMS

By Jonathan King

If the introduction of fixed recoverable costs in low value personal injury claims was intended to simplify matters, then it has failed to do so; at least in the context of actual or suspected fraud.

From a claimant's perspective (and that of his or her solicitor) there is additional work in considering the often-voluminous disclosure associated with "concerns" Defences. There is also the heightened scrutiny required of the accuracy of the claimant's witness evidence, Part 18 replies, and medical evidence, together with the costs of obtaining evidence from the various individuals whose absence a defendant might otherwise suggest should give rise to adverse inferences. All of these factors can very easily make such claims un-economic should only fixed recoverable costs apply.

From a defendant's perspective, the position is no simpler. Should an insurer defend a case on a "concerns" basis and live with the *potential* limitations as to how such a case might properly be put at trial and the costs order (if successful) which will likely follow (QOCS applying)? Or should that insurer plead a positive case of fraud with the possibility of allocation to the Multi Track and of much greater potential costs exposure? Lose at trial, and an order for indemnity (and therefore not fixed) costs might be made, either because the claimant matched or did better than a Part 36 offer, or *possibly* because an allegation of fraud did not get off the ground. If QOCS protection is removed on grounds of fundamental dishonesty, will any costs in fact be recovered?

The cases of Ahmed v (1) Lalik (2) Co-Op[1] and, more recently, Howlett v Davies[2] provide interesting reading for practitioners pondering such balancing exercises and an opportunity to recall certain familiar, but important, principles.

In Ahmed, the insurers (D2) relied upon what was described by Cranston J as a "strict proof" defence which averred that the claim was vitiated for lack of bona fides, and which set out a number of matters giving rise to an "allegation of a suspected lack of good faith". The matter remained on the Fast Track and proceeded to trial, whereupon Recorder Jack ruled that it was wrong of the Second Defendant "merely to imply fraud", rejected the Second Defendant's suggestion of a link and conspiracy between the Claimant and the First Defendant, but still dismissed the claim. This was in large part on the basis that he was not satisfied that the Claimant had proved his case in respect of damage to the vehicle and, in turn, injury. In dismissing the Claimant's application for permission to appeal, Cranston J considered that the comments of the Court of Appeal in Amin v Hussain did not cast doubt on the principles set out in Kearsley v Klarfeld and Francis v Wells and ruled that:

[1] [2015] EWHC 651 (QB)
[2] [2017] EWCA Civ 1696

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

COST CONSIDERATIONS IN LOW VALUE FRAUD CLAIMS

Continued…

> *"… in this type of case (minor road vehicle accidents) it is not necessary for the defence to make a substantive allegation of fraud or fabrication, but it is sufficient to set out the detailed facts from which the court would be invited to draw the inference that the claimant has not, in fact, suffered the injuries or damage alleged."*

Cranston J noted that he could see no error in the way in which the judge approached the defence, both in terms of rejecting the Second Defendant's case on conspiracy and in drawing adverse inferences and refusing to accept the Claimant's evidence as credible.

In Howlett, the Defendant did not positively plead fraud and confirmed at the outset of the trial that it was not going to allege fraud, but mounted a robust attack on the Claimants' honesty and credibility, inviting the judge to conclude that their evidence was "the stuff of fantasy and liable to be shown to have been a lie". Deputy District Judge Taylor found the Claimants to be dishonest (and therefore removed QOCS protection), whilst noting that the issue of fraud is,

> *"not an issue I am invited to find in this case, and I will not be using that expression because the importance about the word "fraud" is that it is a legal definition and unless it is something that is specifically pleaded, I do not believe that I have the right or the power to use it in my judgment."*

In turn, the Court of Appeal had, strictly, to consider whether a judge could find a claimant to be fundamentally dishonest (and thereby disapply QOCS) without this having been pleaded. In confirming that a judge could indeed do so, Newey LJ indicated that the absence of a positive pleading of fraud *may* not prevent a defendant from suggesting to a witness in cross examination that he was lying, nor would it preclude the trial judge from finding that, for example, the alleged accident did not happen of that the claimant was not present providing that the claimant had been given adequate opportunity the possibility of such a conclusion and the matters leading a judge to it.

Each of Ahmed and Howlett provide a helpful reminder of a number of threads which might helpfully be drawn together when considering costs exposure as part of strategy, as follows:

- Where credibility and the *bona fides* of the claim are squarely in issue, it is perfectly open to a judge to draw adverse inferences from the absence of potential witnesses, subject to the principles helpfully summarised within paragraph 29 of the judgment in Ahmed. It is unlikely to be open to a Claimant to suggest that, for example, it was simply uneconomic to adduce such evidence in the context of a fixed recoverable costs claim

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

COST CONSIDERATIONS IN LOW VALUE FRAUD CLAIMS

Continued…

- In turn, if the nature of the allegations or the scope of the work caused thereby genuinely puts the matter beyond the scope of the Fast Track and fixed recoverable costs, then a Claimant should seek – but might well not achieve - allocation to the Multi Track. Such an allocation is the end of the application of fixed recoverable costs – the Court of Appeal's ruling in Qader v Esure putting the point effectively beyond doubt

- An effective claimant Part 36 offer almost inevitably leads to an indemnity costs order and thus permits recovery of non-fixed costs from the relevant date onwards (Broadhurst v Tan). Although CPR 36.17(4) permits a court to decline to award indemnity costs if the court "considers it unjust to do so", the rebuttable presumption is that indemnity costs will follow

- Where a defendant wishes to run a *positive* case of fraud and where there is a proper evidential basis for doing so, this should be positively pleaded. Where successful, this will avoid the uncertainty of inviting a court to find, absent a positive pleading of fraud that the claim was fundamentally dishonest such that QOCS ought to be disapplied. The absence of such a pleading does not, however, prevent a very robust attack on a claimant's credibility and findings of dishonesty and fraud where appropriate, provided that the claimant has 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.

- From a defendant's perspective, the nature of the defence needs to be considered carefully in light of both the present (and expected) future evidence, but also the insurer's underlying strategy. Is the insurer principally interested in defeating claims whilst limiting its exposure to damages and costs, or is the insurer intent on exposing fraud where found to exist making an example of those found to perpetrate it?

Although such considerations are not new, the stark contrast between the fixed costs regime and that which might be recovered otherwise, and the need for thorough scrutiny of such cases despite the potential limits on costs recovery, renders early and informed consideration of strategy more important than ever.

Jonathan King

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DEANS COURT CHAMBERS

THE USE OF VEHICLE TELEMATICS AND GPS DATA IN FRAUDULENT RTA CLAIMS

By Ross Olson

Vehicle telematics data can be a powerful weapon in defeating fraudulent RTA claims. Increasingly sophisticated systems have enabled insurers to deploy evidence establishing a vehicle's precise location and speed at a given time (GPS or "tracking data") along – in some instances – with details of braking patterns and acceleration/deceleration rates (accelerometer or "G-force" sensors). Certain insurers, notably "Insure The Box", have invested heavily in this area, using telematics data from insured vehicles as a means of combating fraud, whilst also "rewarding" careful drivers with discounted premiums.

In the most basic example, GPS or tracking data can be deployed to establish that a vehicle allegedly involved in a collision was not "at the right place at the right time". However, insurers have secured notable but generally unreported victories in other scenarios, including:

- In an alleged "rear end shunt" claim, showing that although the insured vehicle could have been involved in a collision as alleged, its braking/deceleration patterns were not consistent with this being "accidental";
- In a case where the claimant and the insured driver had both repeatedly denied knowing one another, demonstrating that the insured vehicle had in fact been driven to the claimant's address on numerous occasions prior to the accident;
- In an alleged "slam on" incident, establishing that the claimant's vehicle had driven around a roundabout repeatedly before sudden braking;
- In a "LVI" claim, proving that an insured vehicle was travelling at less than 5mph at the point of collision.

Along with some private motorists, many taxi and haulage companies implement vehicle tracking/routing systems which can be far less sophisticated than the "black box" devices developed by insurers. Often, insured companies are able to produce print-outs of "GPS location shots" taken at time intervals for a given vehicle, which are then plotted onto maps/plans for court proceedings. This material can appear to provide impressive and possibly conclusive evidence of a vehicle's route, location and (in some instances) speed. Indeed, it is tempting to consider the documentation produced by these systems to be "self-proving" in this regard, in some instances, following disclosure.

However, care must be exercised when compiling and presenting this evidence. There is a significant variation in the precision with which these systems can locate/track vehicles. Many are not designed to produce data of the accuracy required, for example, to pinpoint a vehicle to a given street or carpark (etc), at a specific time. Environmental factors such as the presence of high buildings, tree cover, the topography of an area and the presence of tunnels, can materially

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

affect the accuracy of the GPS shots. Some areas are still affected by poor GPS coverage (particularly for cheaper/older systems). Consideration must also be given to the time lapse between the GPS shots and what, if any, assumptions the system software makes as to the behaviour of the tracked vehicle between shots – in particular, this can adversely affect the reliability of any speed data/calculation.

Practice points:

- Early critical evaluation of any GPS/telematics/tracking data which might be deployed in defence of a claim is essential. On occasions, ambitious assertions can be made by the insured as to the accuracy and reliability of any given system – particularly when faced with a claim which is thought to be fraudulent - which may not bear close scrutiny;

- Identify at an early stage the key individuals who are in a position to give evidence in relation to the operation of the system along with its specification, tolerances/accuracy and calibration – they will probably be required to provide witness statements in support of any disclosed data;

- If the data is likely to be critical to the defence of the claim at trial, consider an early conference with these witnesses to "test" the likely strength of the evidence;

- Be prepared for the claimant to challenge the system/data in all respects. Expert evidence may be deployed in this regard (possibly on both sides) which will inevitably increase the expense and complexity of the proceedings;

- Do not lose sight of the other investigations and evidence gathering in the case. Ideally, GPS/telematics evidence should be deployed alongside other "credibility" material against the claimant to assist in cross-examination;

- Be aware that some judges will view the data with suspicion and require a "chapter and verse" explanation of its provenance, authenticity and accuracy.

Ross Olson

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DEANS COURT CHAMBERS

COSTS AGAINST THIRD PARTIES

By William Tyler

Two of the frustrations of anti-fraud work within personal injury litigation are that judges who disbelieve claimants are often reluctant to find their claims to have been "fundamentally dishonest" and, when they do, trying to enforce an order for costs. What, then, are the options for recovering costs from third parties?

The general rule on third party costs orders is CPR46.2. It does not fetter the general discretion of the Court, which is wide. As a result, a multitude of cases have examined the exercise of the power in a variety of factual contexts. The unfortunate result is a seemingly impenetrable maze of examples.

These examples include the case of Oriakhel v Vickers[1]. In that case, insurers in a bogus road traffic claim sought costs from the Claimant's co-conspirator, who was a witness at the trial. The Court of Appeal found that it was not necessary for a non-party against whom a costs order was sought to be a funder or controller of the litigation. They nevertheless declined to exercise their discretion against the co-conspirator on the facts of the case.

Commenting on the range of decisions in Deutsche Bank v Sebastian Holdings[2] the Court of Appeal stated,

> *"... the exercise of the discretion is in danger of becoming overcomplicated by authority . . . We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind."*

There is no reason in principle, then, why the knowing facilitator of, or conspirator in, a fraud cannot be pursued for a non-party costs order even if they are not the controlling hand of the litigation. Although the lesson from Oriakhel is that where that entity could have been made a party to a fully pleaded counterclaim, but is not, this may be a powerful factor against the exercise of the discretion.

One group of organisations against whom the CPR expressly envisage applications being made against are Credit Hire Organisations (CPR 44.16(2) and 44PD12.2). In the recent case of Select Car Rentals (North West) Limited v Esure Services[3] Turner J (former head of Deans Court Chambers) determined that the express provisions referred to above did not carve out a separate class of non-party costs orders, but were rather an expression of the operation of CPR 46.2.

In that case, a claim for personal injury and credit hire had been dismissed in the County Court on the basis that the Claimant had failed to prove her case, but the

[1][2008] EWCA Civ 748
[2][2016] 4 W.L.R. 17
[3][2017] EWHC 1434 (QB)

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

trial judge had declined to make a finding of fundamental dishonesty. The insurers therefore pursued the CHO, whose interest in the claim amounted to more than two thirds of its value, for their costs. The application was successful to the extent of 60% of the potential costs liability, and the decision was upheld by Tuner J on appeal. He commented,

> *"The fact that any given credit hire organisation's connection with a claim is no greater than is commonly the case does not, without more, provide it with an automatic immunity from a non-party costs order. There is no room for the argument that it is a prerequisite to the making of such an order that such involvement be exceptional."*

Significantly, there is also no requirement, in making a non-party costs order, for the receiving party to establish that they have been caused to incur costs by the conduct of the third party.

However, that requirement **is** present when costs are sought from a party's legal representative under r.46.8. The leading case in this area remains Ridehalgh v Horsefield[4] and the threshold is notoriously high, requiring the receiving party to establish not merely that a legal representative has been negligent but that they have been in breach of their duty to the Court (Persaud v Persaud)[5] . The benefit of the doubt goes to the legal representative who will ordinarily have their ability to defend any allegation hampered by privilege

Pursuit of a hopeless case may constitute a basis for an application, provided no reasonably competent legal advisor would have evaluated the case as having sufficient chance of success to justify continuing with proceedings, and the court has had access to counsel's advice on the point (Dempsey v Johntone)[6].

The proven dishonesty of a party will not normally be visited on its legal advisor, who acts on instructions having given advice. This position is not significantly altered where the funding arrangement with the legal advisor has enabled the litigation (as with a CFA, for example). Accordingly, the situations in which a legal representative has been made the subject of an adverse costs order in fraudulent personal injury proceedings are few and far between.

Nevertheless, in Thompson v Go North East Limited and Bott & Co Solicitors[7], solicitors for a bus passenger who claimed to have been injured in an accident caused by the negligence of the bus company's employee were made the subject of a wasted costs order. The bus company had disclosed CCTV footage that contradicted the account given by the claimant to his medical expert and invited the claimant to provide that footage to the expert for his

[4][1994] Ch. 205 CA
[5][2003] EWCA Civ 394
[6][2003] EWCA Civ 1134
[7] Sunderland County Court, 30th August 2016 unreported

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

comment. They did not do so. Proceedings were issued and the Particulars of Claim contained an account inconsistent with that given to the expert (part of the inconsistency being whether the claimant was sitting or standing). A witness statement was then served that was also inconsistent. Eventually the claimant asked the medico-legal expert about the basis for his opinion and he withdrew his support for the case. Proceedings were discontinued two months prior to trial.

The District Judge found that by failing to show the medico-legal expert the CCTV footage when invited to do so, the Claimant's solicitors had acted improperly. He found that had they done so, the expert would have withdrawn support for the claim before it was issued and the claim would have ended at that point. In addition, the District Judge found the provision of further inconsistent accounts in the Particulars of Claim and Witness Statement, without explanation, was improper conduct. The solicitors were ordered to pay wasted costs from the date they received the CCTV footage.

William Tyler

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DEANS COURT CHAMBERS

DISBELIEF + DELAY = DISASTER? Challenging disclosed documents

By James Hogg

A frequent feature in fraud litigation is the disclosure of documents which are considered by your opponent to be suspect. Such documentation may be of central importance to the cases of the claimant and/ or the defendant.

Whilst the intention of the receiving party may be to dispute the authenticity of the document at trial, they will be debarred from doing so unless the provisions of CPR 32.19 have been complied with.

Frequently overlooked by both claimants and defendants, CPR 32.19 requires:

> Notice to admit or produce documents
>
> 32.19—
>
> (1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.
>
> (2) A notice to prove a document must be served—
>
> *(a) by the latest date for serving witness statements; or*
>
> *(b) within 7 days of disclosure of the document, whichever is later.*

The rule is mandatory. Its purpose is to ensure that the parties and the court know, with certainty, whether the authenticity of any given document is in dispute well in advance of trial. The rule applies equally to electronic disclosure.

The timescales to raise an objection are tight and, in the ordinary course of directions, it will be too late to do so once witness evidence has been served and considered.

It will thus be necessary to scrutinise disclosure without the benefit of witness evidence and, if questions arise regarding that documentation, they should be addressed either in open correspondence or by way of a CPR 18 request.

Note that simply putting the other party to proof in a pleading as to the authenticity of a document will not satisfy the requirements of the rule- see Mumford v HMRC[1].

In Lloyd v Kruger[2], refused the claimant's late application to challenge the authenticity of an email and held, approving the earlier judgment of McGann v Bisping[3]:

> *"10. CPR 32.19(1) establishes an important principle, namely that parties are to put their cards on the table well before trial (and, in any event, within the time scale provided by CPR 32.19(2)) so that the parties and the court know, beyond question, whether the authenticity of any disclosed document is a matter in dispute… The purpose of this rule is to aid efficient case management and to ensure that there is no*

[1][2017] UKFTT 19 (TC)
[2][2018] EWHC 2011 (Comm), Lionel Persey QC (sitting as a High Court Judge)
[3][2017] EWHC 2951 (Comm)

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

DISBELIEF + DELAY = DISASTER? Challenging disclosed documents

Continued…

trial by ambush."

The effects of that refusal were significant:

> *"11: CPR 31.19 was not complied with and the Claimant is therefore deemed to have admitted the authenticity of the disputed email".*

That deemed admission will apply notwithstanding that this may conflict with a party's pleaded case and/ or their witness evidence.

Note, however, that a failure to serve a CPR 32.19 notice does not prevent a party from arguing that the contents of the document are inaccurate, or, for example, that the document does not evidence a legally binding agreement.

Procedure

No precise form of words is required; however, the notice should be put in either the pleadings or in open correspondence, and should identify the specific documents and the specific concerns with each document.

As regards the duty of cooperation expected between the parties, it was held in McGann that:

> *"24. There is, of course, no general duty on parties to point out to their opponents the procedural mistakes that those opponents have made. However, where a party intends to take a procedural point which, if correct, will mean costs are being wasted by the other side, the duty of cooperation under CPR 1.3 requires that party to take the point promptly. On the facts of the present case, the high level of realism and co-operation required of parties to commercial litigation should have involved Mr McGann's legal team in giving notice of this point (if it was to be taken at all), either in correspondence or at one of the many case management hearings which took place, at a time well before the significant costs of dealing with these issues had already been incurred on both sides"*

Implied Waiver?

It will be for the disclosing party to raise objection if the receiving party attempts, without having given the correct notice, to undermine the authenticity of the document at trial.

In Eco3 Capital Ltd & Ors v Lusdin Overseas Ltd[4] it was held to be too late for a party to place reliance on CPR 32.19 in closing submissions when the documentation had been challenged during cross-examination. Per Rose J:

> *"109. Mr Bishop first placed reliance on rule 32.19 in his closing speech. By then it was too late. The accuracy of the date of the diary note had been fully explored in evidence. It was not appropriate on the last day of trial to invite the judge to ignore part of the evidence on the basis*

[4] [2013] EWCA Civ 413

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

that it was shut out by a deemed admission".

Remedy?

The court in Lloyd acknowledged its power to grant relief to the claimant pursuant to CPR 3.9 and the "Denton criteria", however, the application was refused, not least because the trial had concluded!

Whilst the facts in that case were extreme, it is often the case that the absence of such a notice does not become apparent until shortly before the trial. Any application for relief at that time may be refused if the trial date could no longer be met or if the cost of resolving the issue was disproportionate (for example if expert handwriting evidence was required).

Relief was however granted in McGann. The conduct of the parties during the litigation proved to be decisive. Per Richard Salter QC (sitting as a High Court Judge):

> *"22. In considering all the circumstances of the case, it seems to me to be of particular significance that both parties prepared for trial, both in 2015 and 2017, on the basis that the authenticity of these documents was in issue, and that Mr Bisping was not precluded from challenging their authenticity by any deemed admission."*

No CPR 3.9 application had been made in that case. Rather, the trial judge exercised of his own motion the power conferred by CPR 3.1(2)(m) to make an "order for the purpose of managing the case or furthering the overriding objective" and by CPR 3.10 "where there has been an error of procedure such as a failure to comply with a rule [to] make an order to remedy the error", and dispensed with the requirement for service of a CPR 32.19 notice.

In a similar vein, in Tuke v JD Classics Ltd[5], Julian Knowles J granted a claimant relief from service of a late CPR 32.19 notice:

> *"112. … this is not a case of a deliberate and intentional flouting of a rule designed to deliberately wrong foot an opponent. This was an honest oversight by those advising Mr Tuke, and no doubt the point has been taken on board for the future. It would in my judgment be artificial and not in accordance with the overriding requirement to deal with cases justly and at proportionate cost to allow this case to go forward on the basis of a deemed acceptance of genuineness of the invoices when the factual reality is different and has been known at all times by both sides to be different and the matter has been squarely put in issue in the proceedings and has been dealt with in evidence by Mr Hood on behalf of the Defendant.*

It is noteworthy in that case that the appropriate time limit pursuant to CPR 32.19(2)(a) was held to be the

[5][2018] EWHC 531 (QB)

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

initial date for service of witness statements, and not the extended time granted to the claimant after certain witness statements had been struck out.

Forgery?

Mere service of a CPR 32.19 notice is insufficient if a party is going to allege forgery. Such allegations must be clearly pleaded- see Redstone Mortgages Ltd v B Legal Ltd[6]. Per Norris J:

> *"57. Requiring a party to "prove" a document means that the party relying upon the document must lead apparently credible evidence of sufficient weight that the document is what it purports to be. The question then is whether (in the light of that evidence and in the absence of any evidence to the contrary effect being adduced by the party challenging the document) the party bearing the burden of proof in the action has established its case on the balance of probabilities. Redstone cannot (by a refusal to admit the authenticity of a document) transfer the overall burden of proof onto B Legal, any more than it could do so simply by refusing to admit a fact.*
>
> *"58. The question is therefore whether any evidence as to the provenance of the document has been produced, and if it has then whether (although not countered by any evidence to the contrary) such evidence is on its face so unsatisfactory as to be incapable of belief. It is vital that the process of challenge is fair.*
>
> *Criticism of the evidence about the authenticity of the document cannot amount to a covert and unpleaded case of forgery. If a case of forgery is to be put then the challenge should be set out fairly and squarely on the pleadings (and appropriate directions can be given). If the charge is that a witness has forged a document (or has been party to the forgery of a document) and the grounds of challenge have not been set out in advance, then if the questions are not objected to the response of the witness to the charge must be assessed taking into account the element of ambush and surprise.*

Practice Points

- Challenging the authenticity of a disclosed document needs to be considered early on;
- If authenticity is to be disputed, a notice complying with CPR 32.19 must be served;
- The notice must be served at the time of witness statement exchange at the latest;
- Bear in mind the distinction between disputing the authenticity of a document and the accuracy of its contents.

James Hogg

[6][2014] EWHC 3398 (Ch)

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3

MEMBERS OF CHAMBERS

Stephen Grime QC	1970	QC 1987
Tim Horlock QC	1981	QC 1997
Stuart Denney QC	1982	QC 2008
Susan Grocott QC	1986	QC 2008
Mary O'Rourke QC	1981	QC 2009
Jane Cross QC	1982	QC 2010
Lewis Power QC	1990	QC 2011
Michael Hayton QC	1993	QC 2013
Julia Cheetham QC	1990	QC 2015
Peter Atherton	1975	
David Eccles	1976	
Timothy Ryder	1977	
Nick Fewtrell	1977	
Ruth Trippier	1978	
Hugh Davies	1982	
Timothy Trotman	1983	
Russell Davies	1983	
Glenn Campbell	1985	
Paul Humphries	1986	
Karen Brody	1986	
Christopher Hudson	1987	
Heather Hobson	1987	
Nicholas Grimshaw	1988	
Bansa Singh Hayer	1988	
Ciaran Rankin	1988	
Peter Smith	1988	
Jonathan Grace	1989	
Robin Kitching	1989	
Michael Smith	1989	
Michael Blakey	1989	
Janet Ironfield	1992	
Timothy Edge	1992	
Alison Woodward	1992	
Fraser Livesey	1992	
Lisa Judge	1993	
Peter Horgan	1993	
Rosalind Scott Bell	1993	
Sebastian Clegg	1994	
Peter Rothery	1994	
Kate Akerman	1994	
Carolyn Bland	1995	
David Boyle	1996	
Simon McCann	1996	
Paul Higgins	1996	
Archna Dawar	1996	
Elizabeth Dudley-Jones	1997	
Sophie Cartwright	1998	
Richard Whitehall	1998	
Daniel Paul	1998	
Sasha Watkinson	1998	
Joanna Moody	1998	
Ross Olson	1999	
Pascale Hicks	1999	
Sarah J Booth	1999	
Virginia Hayton	1999	
Elizabeth Morton	1999	
Susan Deas	1999	
Joseph Hart	2000	
Rosalind Emsley-Smith	2001	
Anthony Singh	2001	
Robert McMaster	2001	
Zoe Earnshaw	2001	
Alex Poole	2002	
Alex Taylor	2003	
William Tyler	2003	
Victoria Heyworth	2003	
Rebecca Gregg	2003	
Anna Bentley	2004	
Doug Cooper	2004	
Mark Bradley	2004	
Jonathan Lally	2005	
Michelle Brown	2005	
Arron Thomas	2005	
Victoria Harrison	2006	
James Hogg	2006	
Helen Wilkinson	2007	
Rachel Greenwood	2008	
Michael Jones	2008	
Jonathan King	2009	
Eliza Sharron	2009	
Nilufa Khanum	2009	
James Paterson	2010	
Simon Edward Rowbotham	2011	
Emily Price	2012	
Junaid Durrani	2009	
Daniel Glover	2013	
Gareth Poole	2014	
Patrick Gilmore	2014	
Harriet Tighe	2014	
Prudence Beaumont	2016	
Zara Poulter	2017	
Claire Athis	2017	
Adrian Francis	2018	

0161 214 6000 Clerks@deanscourt.co.uk WWW.DEANSCOURT.CO.UK
DEANS COURT CHAMBERS, 24 ST. JOHN STREET, MANCHESTER, M3 4DF FAX: 0161 241 6001 DX: 718155 MANCHESTER 3