DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Summer 2019

From the Deans Court Chambers Fraud Team

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Welcome to our Civil Insurance Fraud Summer Newsletter.

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IN THIS EDITION…

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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.

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FUNDAMENTAL DISHONESTY IN LARGE LOSS CLAIMS: PINKUS V DIRECT LINE

By Zoe Earnshaw

Pinkus v Direct Line[1] was a catastrophic injury claim found to be fundamentally dishonest and dismissed in its entirety pursuant to section 57 of the Criminal Justice and Courts Act 2015.

FACTS

The Claimant was injured in a motorway collision. Liability was admitted and the matter proceeded as to causation and quantum only. The Claimant initially contended he suffered a traumatic brain injury and claimed a seven figure sum. After experts on both sides excluded such injury, his claim comprised minor whiplash and severe PTSD with dissociative symptoms. The value sought therefore reduced to approximately £850,000 shortly before trial. The Claimant alleged that he had difficulties with daily functioning and was unable to work. The defence case disputed the nature and severity of the accident and alleged that the Claimant suffered minor physical injury with short lived travel anxiety / an adjustment disorder only. It was alleged that the claim was exaggerated / fabricated and fundamentally dishonest. The matter was determined at a 7 day High Court trial with 8 lay witnesses, 10 treating clinicians, and 8 experts.

FUNDAMENTAL DISHONESTY

The Judge found the Claimant guilty of "*extreme fabrication*" and held he had consciously and deliberately exaggerated the nature and severity of the accident and his physical and psychiatric symptoms. He had deliberately and consciously lied during his evidence and staged some aspects of his presentation in the witness box. He had undergone treatment and rehabilitation "*in order to further his claim*". The evidence of his wife was also found to be exaggerated and fabricated. Damages were assessed at £4,500 and a finding of fundamental dishonesty was made. The Judge did not consider that the Claimant would suffer any substantial injustice beyond the loss of the genuine part of his claim. A referral for committal proceedings was made.

SIGNIFICANT POINTS

The case was significant not just because of its potential value but also because:

- **PLEADING**

  -A preliminary issue was heard as to whether the Defendant should be permitted to raise

[1] [2018] EWHC 1671 (QB)

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allegations of fundamental dishonesty given its defence. The defence made no admissions as to the injuries in general and denied certain specific injuries only. It did not plead fundamental dishonesty. Fundamental dishonesty was only pleaded in the counter schedule served shortly before trial. The allegation was pleaded in general terms only. The Claimant argued that the Defendant was precluded from alleging fundamental dishonesty because it had been alleged late and had not been fully particularised.

-The Judge followed the approach taken to pleadings in Howlett v Davies and another.[2] On the facts of the case he considered that the Claimant had known "*what he was facing*" for some time. There had been disclosure of surveillance, the Defendant's medical evidence raised credibility; there was a stark difference in the parties' valuations of the claim, the Claimant's own skeleton argument at an earlier hearing made reference to credibility, honesty and reliability being in issue and the Claimant had adduced statements in rebuttal of defence witnesses.

The Judge found that the defence case alleging dishonesty was "*justifiably and properly put".* He did however order that no cross examination would be permitted on issues which would take the Claimant by surprise.

- **EVIDENCE** - aside from experts**,** key evidence was in the form of:

  - Facebook evidence - the Claimant's Facebook account contained photographs and posts which were used to undermine his alleged injuries and restrictions;

  - Rebuttal witnesses - the Defendant relied upon two former friends and work colleagues who had worked with him since the accident. They gave evidence as to his ability to work, symptoms and functioning which contradicted the Claimant's claim.

- **COSTS**

[2] [2017] EWCA Civ 1696

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-The Court assessed costs on the indemnity basis. The Defendant was therefore no longer restricted to its budgeted costs. Further the finding of fundamental dishonesty enabled the Defendant to disapply QUOCS pursuant to CPR 44.16 and enforce its costs. Given the length of the trial and the volume of evidence, costs would have been substantial.

TACTICAL POINTS

To maximise the prospects of a finding of fundamental dishonesty:

a) Pleadings

i. Ensure the defence is well pleaded and complies with Howlett.

b) Evidence as to credibility

i. Surveillance - obtain footage over a variety of periods and ideally to coincide with attendance at medico legal appointments;

ii. Social media - analyse photographs and accounts as to daily life to investigate inconsistencies with reported injuries and functioning;

iii. Lay witnesses - call witnesses in rebuttal of alleged injuries / losses;

iv. Examination of records - analyse medical records, treatment records, DWP records, occupational health, and gym records etc;

v. Special damages - scrutinise and investigate possible dishonest special damages claims. Check with employers, gardeners, cleaners, repair garages, and treatment providers etc.

c) Challenge to "genuine damages"

i. Focus needs to remain on all heads of loss including those that are genuine. The reason is twofold. Firstly, when a claim is struck out under section 57 the genuine damages are offset from the Defendant's costs. Secondly the question of fundamental dishonesty is considered in the context of the claim as a whole. If the genuine damages are reduced then any dishonest damages may represent a

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greater proportion of the claim.

d) Trial

i. Time estimates - ensure there is sufficient time for detailed cross examination.

ii. Witnesses - Ensure defence witnesses have been thoroughly proofed in conference.

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HOW TO TREAT THERAPY FRAUD

By James Paterson

"Rough justice", a term with which we are all now very familiar, does not begin to describe the erosion in the standard of proof required for Claimants to recover the cost of private treatment in cases to which the Pre-Action Protocol for Low Value PI Claims in RTAs or the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (hereinafter 'the Protocols') apply. The claims for treatment can range from the routine physiotherapy and CBT one regularly sees to the more questionable osteopathy, hydrotherapy and acupuncture to, even in cases involving physical injury only, the particularly dubious: mindfulness and complimentary therapy. It seems that if the medical report at stage 3 loosely describes the treatment as reasonable and there is an invoice to support the sum claimed, then it is nodded through. It's rough, but it's cheap in the fixed costs regime, isn't it?

There is, therefore, a growing concern that the "rough justice" of the Protocols means that no proper consideration is being given to claims for treatment costs that either do not take place, or are exaggerated to some degree. This is the tip of what might be a particularly large iceberg.

There are considerable consequences for those who bring false claims that we have considered in this Newsletter before ("Section 57: A Powerful Weapon", by Zoe Earnshaw.)

However, there are also repercussions for those professional advisers who pursue dubious claims in the name of a Claimant. In Brown v Haven Insurance Company Ltd, unreported, 7 January 2016, Leeds County Court, the Claimant pursued a claim for £880 physiotherapy charges. The Claimant had not undergone the physiotherapy, as the claim was for prospective treatment. At trial, the Claimant stated that he was no longer suffering from symptoms, and that he had no wish to pursue that part of his claim. The District Judge dismissed the claim in its entirety and ordered the Claimant's solicitors to show cause as to why they should not pay some or all of the costs wasted. The Claimant's solicitor, who had signed the schedule of damages when she did not have specific instructions to do so, was ordered to pay the wasted costs of the claim for physiotherapy charges on the indemnity basis.

Submissions on the stage 2 settlement pack are crucial in monitoring and combatting potential treatment fraud. Invoices should routinely contain the name of the therapist as well as dates of sessions and, if applicable, the HCPC number of the therapist. If the invoice does not contain that

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information then it is important that it is requested at stage 2. The aim of this is to assist with the monitoring of how frequently the same names appear on invoices, and to enable a proper analysis of the chronology. The number of sessions provided (and on what dates) may not fit with other dates in the timeline. Patterns can be seen to develop on a broader level, and a positive decision can be taken to transfer a group of cases to Part 7 if necessary.

It is also important to challenge at stage 2 whether the treatment claimed took place in person or over the telephone and, if in person, the address at which the sessions were undertaken. As the Courts become increasingly vigilant about this issue, it cannot be said that such a requirement from the Claimant is unreasonable, even within the confines of the Protocols. It is trite law that a witness statement from the Claimant is an evidential tool available to him in the Protocols. Albeit paragraph 7.11 of the RTA Protocol is sceptical as to the need for a statement, they are now seen so regularly in hire claims that this cannot be deemed an overly onerous request. The simple and effective way to challenge the invoice is to require a statement confirming no more than whether the treatment was in person, the dates of the sessions and the address at which they took place.

This information allows further investigation into addresses to be undertaken in order to monitor any discrepancies in what is alleged. Of course, the statement of truth carries the necessary consequences should any foul play be detected.

The now well-rehearsed guidance of Mr Justice Spencer at paragraph 44 of Molodi v Cambridge Vibration Maintenance Service[1] (dealing with what the County Court would normally expect in LVI cases from a Claimant) includes the following: 'The court would normally expect such claimants …*to have sought appropriate treatment in the form of physiotherapy (without the prompting or intervention of solicitors)*'. It is to be expected, therefore, that not only will the nudging of claimants towards treatment become an increasing trend, but the temptation towards the production of "rough" or entirely fictitious invoices may become too great. It is important that these are not simply nodded through at stage 2.

The successful challenge of the more unusual forms of treatment also requires a proper challenge at stage 2.

[1][2018] EWHC 1288

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HOW TO TREAT THERAPY FRAUD

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The Defendant must take a point on the medical qualifications of the provider of treatment if appropriate, and should challenge any lack of specificity about the need for the treatment in the medical report. The more information that can be obtained about the nature, extent and method of treatment, the more extensive the investigations into the genuineness of the claims can be.

Whether the fixed costs regime of the Protocols is cost-effective for insurer clients or not depends entirely on what is passing through a system that does not permit detailed consideration of claims made. There is no cost-saving if false claims are routinely made and never challenged. The certainty is that until further analysis is applied to potential treatment fraud, we simply do not know the extent of what is happening.

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FUNDAMENTAL DISHONESTY AFTER DISCONTINUANCE: AN UNFETTERED DISCRETION

By Robert McMaster

A Claimant can discontinue a claim at any time. The fraudulent Claimant may use a discontinuance in order to attempt to avoid a finding of fundamental dishonesty and thereby the loss of the protection of qualified one way costs shifting. A right to discontinue in such circumstances could give rise to significant injustice. Defendants therefore have in their armoury CPR 44PD 12.4(c) which provides, "*where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4*". This article will review the cases dealing with the provision and identify practice points to be aware of when making such an application.

In Alpha Insurance A/s v (1) Lorraine Roche (2) Brendan Roche[1] Yip J considered the provision in an appeal where the Defendant had alleged that a claim brought by the Claimants (a mother and son) arising out of a road traffic accident was fundamentally dishonest in that the son was not an occupant in the car and the mother's claim was tainted by dishonesty. The day prior to trial the Claimants served a notice of discontinuance. Notwithstanding, the Defendant asked that the trial remain in the list to have the allegation of fundamental dishonesty determined to enforce their entitlement to costs. HHJ Gregory sitting at Liverpool County Court refused the application and held that there was nothing amounting to "*any particular exceptional quality about this particular case that should cause me to give further directions and to set aside further court time to allow this particular isolated issue of dishonesty to be ventilated*".

On appeal Yip J ruled that the wrong test had been applied. There was nothing within CPR 44PD 12.4(c) that required exceptionality. This was to be contrasted with CPR 44PD 12.4(d) applying to proceedings that had been settled, which did specifically include a requirement for exceptional circumstances. There was no presumption that the court should generally direct determination of the issues of fundamental dishonesty nor was there any presumption that the court should generally not make such a direction. In other words, giving such a direction should be seen to be neither routine nor exceptional. Therefore, the correct approach to the exercise of discretion was an unfettered one, requiring weighing all the relevant considerations in accordance with the overriding objective.

[1] [2018] EWHC 1342 (QB)

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FUNDAMENTAL DISHONESTY AFTER DISCONTINUANCE: AN UNFETTERED DISCRETION

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Although it was not uncommon for such cases to involve modest amounts in costs, in considering proportionality it had to be recognised that there is a clear public interest in identifying false claims and ensuring that claimants who pursue such claims are required to meet the costs of the litigation. Yip J stated that each claim will depend on its own facts and this is an area in which judges will be accorded a wide margin of appreciation. However, given that the wrong test had been applied, the discretion needed to be applied afresh.

Yip J noted that although the Defendant's allegations obviously raised a triable issue, she did not regard the evidence as being particularly strong. Two factors which weighed heavily in the balance were the late stage at which the claim was discontinued (the claimants having the defence alleging dishonesty for over a year prior to discontinuing the day before trial) and the complete lack of explanation as to why the claim was discontinued. Whilst it was accepted that there could be many reasons why a Claimant may discontinue, where liability was not disputed, save for the allegation of fundamental dishonesty, and where the claim was close to trial, some explanation could reasonably be expected. The issue of fundamental dishonesty was accordingly ordered to be tried.

The approach taken in Alpha Insurance accords with the earlier appellate decision of HHJ Gosnell in Rouse v Aviva Insurance (2016). In Rouse the Claimant claimed for personal injuries arising out of an accident which allegedly occurred when a bird cage from the Defendant's insured vehicle broke apart and struck the vehicle carrying the Claimant. The Defendant's insured provided a statement confirming not only had the birdcage not broken off but that a friend had been travelling behind him during the journey in any event. Hardly surprisingly the Defendant took a jaundiced view of the claim. The Claimant discontinued a few days prior to trial. The Defendant applied for a finding of fundamental dishonesty.

At first instance the District Judge held that the Claimant was not required to give any reasons for the discontinuance and the court could not be obliged to draw an adverse conclusion from the absence of any such explanation. The District Judge also disagreed that in some cases the issue of fundamental dishonesty could only be dealt with justly by hearing evidence and cross examination. He concluded that for reasons of proportionality and irrespective of the point in the proceedings in which a notice of discontinuance

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had been served, the court had to determine any application for a finding of fundamental dishonesty after discontinuance on the papers.

On appeal HHJ Gosnell held that the procedure to be adopted when dealing with applications under CPR 44PD 12.4(c) was a matter for the court's discretion and such applications could be dealt with on the papers, with a limited inquiry or with a full trial. The District Judge's concern about disproportionate costs was understandable. However, there could be circumstances in which it was proportionate for there to be a trial to determine the issue of fundamental dishonesty. In cases which were virtually ready for trial where all the evidence had already been prepared and exchanged, there might be a strong argument for saying that it would be proportionate to have a trial. Where discontinuance was served just after the defence, that might be a strong argument against having a trial, because it would involve forcing both parties to do a lot of costly work which would not otherwise be required.

HHJ Gosnell stated that the issue of fundamental dishonesty was a very serious one from the Claimant's point of view. In certain cases it would be unfair to expect a court to deal with the issue without an explanation from the Claimant and, more importantly, it would be unfair on the Claimant not to give him an opportunity to explain to the court why he brought the claim and why he discontinued. The Claimant could not be compelled to give an explanation but given that in some cases there might be a prima facie case of dishonesty, it would only be fair to allow him the opportunity to convince the court that the impression created by the papers was actually inaccurate. Where a Claimant did not give evidence or proffer any reason for the decision to discontinue, then the Defendant could invite the court to draw an adverse inference.

In terms of drawing the strings together and identifying practice points:

- An application under CPR 44PD 12.4(c) will in most cases be the preferred option as opposed to making an application to set aside the notice of discontinuance under CPR 38.4, not least given the risk of judgment being entered on the claim is removed if there is no finding of fundamental dishonesty. However, one possible exception may be when the Defendant wishes to rely upon section 57 of the Criminal Justice and Courts Act 2015.

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FUNDAMENTAL DISHONESTY AFTER DISCONTINUANCE: AN UNFETTERED DISCRETION

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- The timing of any application is important. Although the provision does not contain reference to a specific time limit such as the 28 day limit to apply to apply to set aside any notice of discontinuance pursuant to CPR 38.4(2), any undue delay in making the application may well result in permission being refused when applying the overriding objective.
- A summary determination on the papers may be appropriate in clear cases (for example where an admission has been made) but a Claimant should be given the opportunity to explain why a finding of fundamental dishonesty should not be made.
- The absence of any explanation as to why a Claimant discontinued is likely to be a feature of significance in determining whether a claim is fundamentally dishonest, especially in those claims where there is no ready innocent explanation such as ordinary litigation risk on liability. There should therefore be a clear opportunity afforded to the Claimant to provide an explanation and a request for an adverse inference clearly heralded in any application.
- The timing of the discontinuance is of importance and the nearer to trial the more likely permission will be given to proceed with an application for a finding of fundamental dishonesty. However, there may also be a feature of disclosure or witness statement exchange which prompted the discontinuance and which was not easily capable of innocent explanation that can be highlighted in any application.
- The lack of a positive allegation of fundamental dishonesty in the defence is not fatal to an application under CPR 44PD 12.4(c) but in such circumstances the issue should be raised as promptly as possible.

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BACK FROM THE DEAD? THE DYING ART OF REVIVING A CLAIM…

By James Hogg

Given that there are almost an infinite number of reasons why a statement of case may come to be struck out, it is unsurprising that the chapter in the White Book dealing with the vexed question as to whether a second action may or may not constitute an abuse of process poses more questions than it provides answers.

Some welcome structure and clarity has been brought to this area following the judgment of David Richards LJ in Harbour Castle Ltd v David Wilson Homes Ltd[1].

In the first action, commenced in June 2009, Harbour Castle Ltd (HCL) sought damages of £27.5 m for the alleged breach of a covenant by David Wilson Homes Ltd (DWHL). The covenant was to use all reasonable endeavours to obtain planning permission as soon as reasonably practical for two adjoining parcels of land owned by HCL. HCL's case was that if DWHL had used all reasonable endeavours, the requisite planning permission would have been obtained and, either it would have exercised the option or, if it did not, HCL would have sold the property to a third party at that price.

That claim was struck out in December 2012 pursuant to the terms of an unless order which had required HCL to provide security for the costs of DWHL. DWHL wrongly, as it turned out, thought that was the end of the matter.

In December 2016, just inside the limitation period, HCL issued a further set of proceedings. The cause of action was the same as in the first claim, as were the sums claimed, however HCL added a claim for consequential losses amounting to £186.4 m. HCL accepted that the addition of that consequential loss claim did not alter the essential characteristics of the second action as a repetition of the first, but relied upon the decision of the Supreme Court in Goldtrail Travel Ltd v Onur Air Tasimacilik AS[2] which significantly altered the legal test for determining whether a claim would be stifled by an order for security. In essence, HCL's submission was that it would not now be required to personally raise the requisite funds- as opposed to seeking that sum from a third party (the claimant's owner- a Mr. Jeans)- such that it would be wrong to conclude that there had been a deliberate breach of the original order for security.

[1][2019] EWCA Civ 505
[2][2017] UKSC 57

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That argument was accepted on the appeal by David Richards LJ who held:

> *14. I accept that, if Mr Jeans ceased to be prepared to fund the provision of security as alleged, it could not in the light of Goldtrail be said that HCL's failure to provide security by 20 December 2012 was a deliberate breach of Master Marsh's order. If that is right, it is bound to have a very significant, and probably decisive, effect on whether the second action is an abuse of process.*

Of significance therefore was the finding of the judge at first instance, William Trower QC, that:

> *128. In the present case, there is no doubt that the breach of the order made by Master Marsh… was deliberate in the sense that HCL (through Mr Jeans as its directing mind) knew of its terms and made an informed choice not to comply with it.*

The deliberateness of that decision, at the time of the original strike out, proved fatal to HCL's second action.

The court referred to the following passage from Hunter v Chief Constable of West Midlands Police[3], per Lord Diplock:

> *The inherent power to strike out proceedings as an abuse of process is one "which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people"*

He concluded:

> *24. The Judge was accordingly entitled to say, at [150], that HCL did not ensure that it used the opportunity provided by the first action to resolve its dispute with DWHL. Through Mr Jeans, it chose not to provide the security and so allowed the action to be struck out. It was a deliberate decision by HCL not to comply with the peremptory order for security. In my judgment, it was in those circumstances a clear abuse to commence new proceedings making the same claim. Going back to Lord Diplock's words in Hunter, it would be manifestly*

[3] [1982] AC 529 at 536

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> *unfair to DWHL to subject it to a second action, when HCL had chosen to abandon the first, and would bring the administration of justice into disrepute among right-thinking people.*
>
> *On any footing, it was a conclusion that was properly open to the Judge and it is not suggested that he took account of irrelevant factors or ignored relevant factors or applied wrong principles."*

Given the first action constituted an abuse of process, it followed that the second action (which sought to revive a claim that had already been advanced) was likewise an abuse.

Although DWHL were able to establish that the strike out had occurred as a result of a deliberate decision by HCL, it will not always be possible to ascertain intent, and the burden of proving an abuse of process will lie with the asserting party.

Having reviewed Janov v Morris[4], Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd[5], Securum Finance Ltd v Ashton[6], and Aktas v Adepta[7], David Richards LJ provided (para. 9) a useful summary of the relevant categories which, whilst expressly stated to be non-exhaustive, outlined two further categories: inordinate and inexcusable delay in the prosecution of a peremptory order; and a wholesale disregard of the Civil Procedure Rules, both of which will be easier to prove.

As the workload of courts across the country increases it is likely that an increased emphasis will be placed on finality in litigation. Defendants would be well-advised to ensure that unmeritorious or stale claims are, wherever possible, struck out.

[4][1981] 1 WLR 1389
[5][1998] 1 WLR 1426
[6][2001] Ch 291
[7][2010] EWCA Civ 1170

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ROAD TRAFFIC INSURANCE: CHALLENGES TO CONVENTIONAL WISDOM

By Alex Taylor

The landscape

Part VI of the Road Traffic Act 1988 provides the legislative framework for compulsory insurance of motor vehicles. By sections 143 and 145 the requirement for insurance applies to the use of a motor vehicle on a road or other public place and by section 185 a motor vehicle is defined as a mechanically propelled vehicle intended or adapted for use on roads.

Section 151 and 152 provide the mechanism by which an insurer of a motor vehicle must satisfy a judgment obtained against a person which falls within the scope of the compulsory insurance requirement for that vehicle (whether or not the defendant was insured under the contract), except where the insurer has obtained a declaration that the policy was void *ab initio* on the grounds of non-disclosure or misrepresentation.

The 1988 Act purports to give effect to the compulsory insurance requirements in the EC Motor Insurance Directives, the most recent incarnation of which is the Sixth Directive[1].

All authorised UK motor insurers are members of the Uninsured Drivers Agreement 2015 and the Untraced Drivers Agreement 2017. Conventionally, uninsured driver claims are litigated through the courts with the MIB as a second defendant and untraced driver claims follow a stand-alone process with an application directly to the MIB.

Cameron v Liverpool Victoria Insurance Company Limited[2]

The first recent challenge to conventional wisdom came in the case of Cameron in which a claimant attempted to sue an unidentified driver through the courts, simply naming the first defendant as "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". Having lost at first instance and on first appeal to the High Court, the claimant succeeded in the Court of Appeal.

The background to the case was that the claimant had been involved in an accident caused by a negligent driver who fled the scene. The registration of the vehicle was known, however, and it was traced to a registered keeper who refused to name the driver and was duly convicted of an offence for that refusal.

[1] [2009] 103 EC
[2] [2019] UKSC 6

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LV= was the RTA insurer of the vehicle but the insured name was not that of the registered keeper and, indeed, no individual with that name could be traced. It was suspected that the insurance may have been taken out in a bogus name. Section 152 of the 1988 Act provides that an insurer is required to satisfy a judgment if the liability is one which would be covered by the terms of the policy if the policy insured all persons and the judgment is obtained against any person other than one who is insured by the policy. LV=, therefore, potentially remained liable to satisfy any judgment obtained by the claimant against the person unknown.

The matter came before the Supreme Court in November 2018 with a judgment handed down in February 2019. The issue was defined as "in what circumstances is it permissible to sue an unnamed defendant?". The answer to the question is that it is a fundamental principle of natural justice that a person cannot be made the subject of the court's jurisdiction without having such notice of the proceedings as will enable him to be heard. It is therefore an essential requirement of any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant.

Whilst claims against unnamed defendants may be permissible where the defendants are capable of being identified and served in some way, it cannot be done where there is no-one identified to permit any form of service of the proceedings.

In practice the effect of this decision is that conventional wisdom prevails and claims arising from road traffic accidents in which the negligent driver's identity cannot be ascertained must be made directly to the MIB under the Untraced Drivers Agreement 2017. Insurers can breathe a sigh of relief as the prospect of having to defend a raft of litigated claims involving dubious accidents and insurance policies with little or no evidence of their own has been avoided.

Damijan Vnuk v Zavarovalnica Triglav D.D. [3]

The decision of the CJEU in Vnuk represents a significant challenge to conventional wisdom in respect of the scope of compulsory insurance in part VI of the Road Traffic Act 1988. One purpose of the domestic legislation was to give effect to obligations on Member States of the EU under the EC Motor Insurance Directives. As noted above, the 1988 Act limits the requirement for

[3] [2016] RTR 188

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compulsory insurance to the use of a motor vehicle on a road or other public place and to mechanically propelled vehicles intended or adapted for use on roads. In Vnuk the claimant had been knocked from a ladder by an agricultural vehicle reversing into a barn on private land. Conventional wisdom would say that such an accident is outwith the scope of compulsory insurance and any judgment obtained against the tortfeasor could not be enforced against the insurer of the vehicle using the section 151 / 152 mechanism.

In Vnuk it was held that the definition of a vehicle under the Directives is any motor vehicle intended for travel on land but not running on rails, and any trailer, whether or not coupled and the concept of 'use' of a vehicle under the Directives covers any use which is consistent with the normal function of that vehicle, regardless of where that use takes place. On that basis the effect of the limitations on the compulsory insurance requirement in the 1988 Act is that the domestic legislation falls short of fully implementing the Directives and the potential liability of a vehicle insurer may be far greater than had previously been thought, both in respect of the types of vehicles that are caught and the location of relevant accidents.

The effect of the decision has been seen in cases such as Torreiro v AIG Europe Ltd Case C-334/16 in which a military vehicle used during a military exercise on private land was held to be within the scope of the Directive's compulsory insurance obligation.

In Roadpeace v Secretary of State for Transport[4] it was held in judicial review proceedings that it was not open to UK courts to interpret the RTA 1988 under the *Marleasing* principle to extend cover so as to bring it into compliance with the Directive. To do so would require words to be added into the legislation which is not permissible. Instead a claimant who suffers a loss due to the gap between domestic and community law could (1) bring a claim for *Francovich* damages against the state (for an example see Delaney v Secretary of State for Transport[5]) or proceed against the MIB on the basis that it is an emanation of the state to which the Directives have direct effect (see Lewis v Tindale, MIB and Secretary of State for Transport[6]).

In Roadpeace the DfT also accepted that:

[4] [2017] EWHC 2725 (Admin) [2017] EWHC 2848 (Comm)
[5] [2015] EWCA Civ 172
[6] [2018] EWHC 2376 (QB)

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- the section 152 mechanism, by which an insurer can seek to avoid the compulsory insurance obligation by obtaining a declaration that a policy was void *ab initio* by reason of misrepresentation or non-disclosure by its insured, is incompatible with the directive.

- The European Communities (Rights Against Insurers) Regulations 2002 are incompatible with the Directives in that they applied only to accidents (1) on a road or other public place and (2) in the UK.

It is interesting to note that notwithstanding the decision in Vnuk the scope of the Untraced Driver's Agreement 2017 continues to be limited to accidents caused by or arising out of the use of a motor vehicle on a road or other public place in Great Britain.

The future

Although at the time of writing the precise details of when and how the UK will leave the EU remain to be determined, assuming that Brexit does take place the European Union (Withdrawal) Act 2018 will retain all EU derived domestic legislation and will convert all direct EU legislation into domestic law. It will also retain any rights, power and liabilities which, immediately before exit day were recognised and available in domestic law. However, any further developments in EU law will have no binding effect. They may be taken into account in the discretion of the UK courts. *Francovich* damages will be available only for a limited further period (2 years to commence a claim but only in respect of causes of action accruing prior to exit day). The principle of direct effect of directives against emanations of the state will be lost, save in respect of rights already recognised by the UK or European courts.

What is reasonably clear is that when the dust settles on Brexit a root and branches review of the extent and operation of the compulsory insurance requirement is required to achieve clarity and consistency for insurance companies and the MIB.

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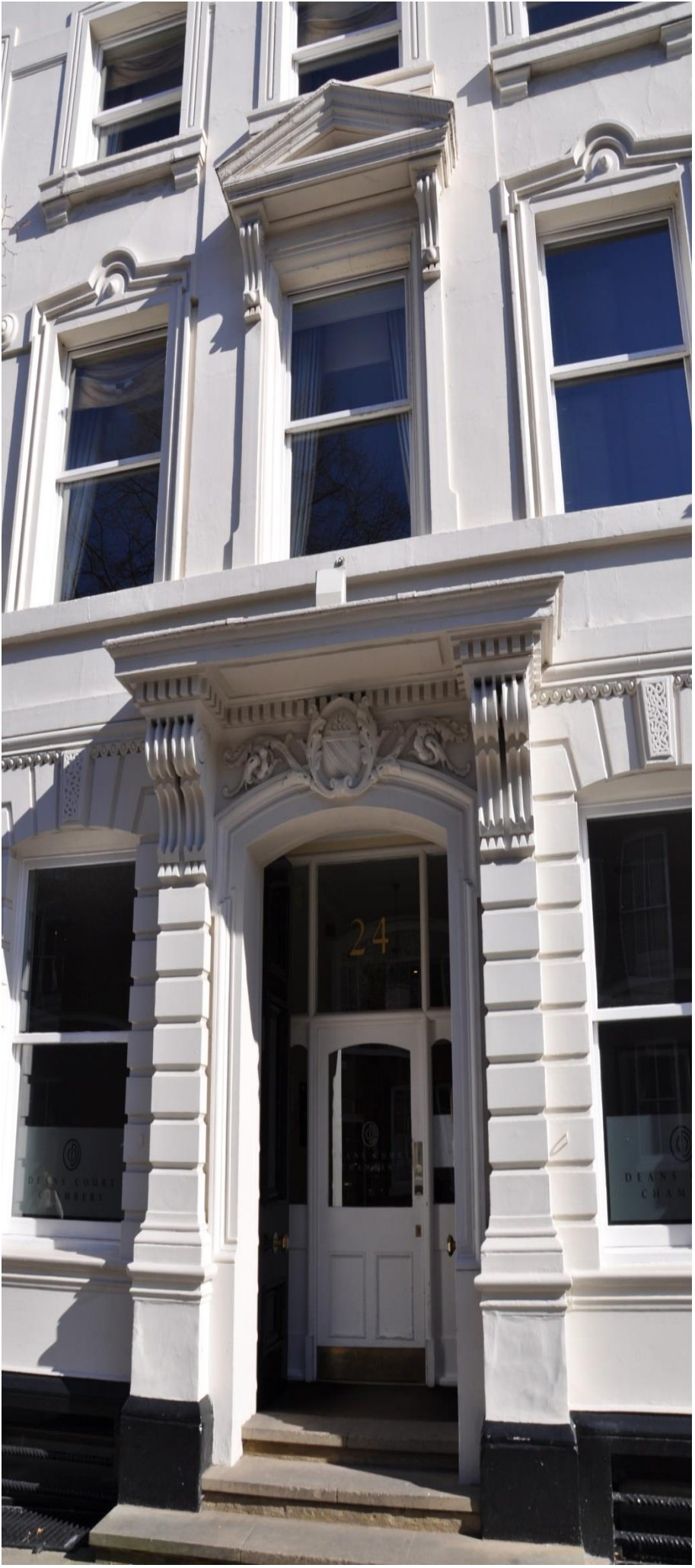

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