DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Autumn 2017

From the Deans Court Chambers Fraud Team

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Welcome to our Civil Insurance Fraud Autumn newsletter.

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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.

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DEANS COURT CHAMBERS

Editorial

By Simon McCann

> "*To me, a claims man is a surgeon – his desk is an operating table. And those pencils are scalpels and bone-chisels. And those papers are not just forms and statistics and claims for compensation. They're alive; they're packed with drama, with twisted hopes and crooked dreams. A claims man, Walter, is a doctor and a bloodhound and a cop . . . all in one*"
>
> Edward G Robinson as Claims Manager Keyes in Double Indemnity (1941)

Welcome to this first edition of the Newsletter from the Civil Insurance Fraud team at Deans Court Chambers.

We have decided to produce the Newsletter for a number of reasons. Primarily, we feel there is a need for good, practical tips and guidance. There are so many interesting and complex issues coming before the Courts (fundamental dishonesty, QOCS, deceit, disclosure, data protection, and the use of social media to name but a few) that the practitioner, be they solicitor, insurer or otherwise, can be forgiven for reaching for a straightforward, easy-to-read guide. We hope that the Newsletter will be that, and will provide some assistance to the "claims" men and women who are, like Claims Manager Keyes, hard pressed to be all things to everyone at once.

The second reason is: we were asked! Clients have asked at seminars and other training events if we could give them our views on some of these issues, and we are happy to respond.

I am sure that you will already know – and apologies if you do not – that we have a team of Fraud specialists in Chambers that can rival any set. Our barristers regularly appear in some of the leading cases, and speak on the topic of Civil and Insurance Fraud at a national level. Some of the highlights in this first edition are David Boyle's piece on holiday sickness claims, and the article by Paul Higgins with an update on Contempt of Court hearings.

The Newsletter is not designed to be a series of legal treatises. We have deliberately set out to provide you with "bite size" and practical articles on issues that we have identified from discussions with clients are of interest to them. For editions to come, we welcome any ideas that the reader may like us to comment on. Please do feel free to email me on the address below.

Thank you for taking the time to read this publication.

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DEANS COURT CHAMBERS

Travel Sickness Claims

By David Boyle

Since the introduction of the Fixed Recoverable Costs regime in 2013, there has been a huge increase in claims for holiday sickness suffered whilst on an all-inclusive holiday. Whilst the claims themselves are not normally hugely valuable (with general damages between £1,000 and £2,000 the norm), the fact that such claims fall outside the FRC provisions means that costs fall to be assessed on the standard basis. That, combined with the fact that the Small Claims Track limit remains at £1,000, and the existence of QOCS protection for unsuccessful Claimants, has made this sort of litigation attractive for those solicitors who might traditionally have undertaken high volume, low value, road traffic work or the like.

When such claims started to emerge, the majority of tour operators took the view that it would be cheaper to pay out rather than fight, but the rapid increase in the volume of such claims caused second thoughts. The trickle became a flood, and stories appeared about claims farmers in resorts, encouraging people to fake illness with a view to paying for their next holiday. That is not to say that every food poisoning claim is false, or that the effects of such illness cannot be debilitating, but the fact that the volume of claims by English tourists was so very much higher than that made by German or Scandinavian tourists at the same hotels was inevitably the subject of much comment in the media and politically.

The gist of any such claim by a Claimant is that he fell ill by reason of having been exposed to a pathogen by the Defendant tour operator (or the hotel delivering services on their behalf). The provisions of the Package Travel, Package Holidays and Package Tours Regulations 1992 mean that the tour operator can be held liable in the UK for a breach of duty by their suppliers of services abroad, particularly when combined with the provisions of the Supply of Goods and Services Act 1982, requiring goods and services to be of '*satisfactory quality*'.

A variety of arguments were originally advanced on both sides: Claimants argued that poor hygiene around the hotel generally might have caused their illness, with various generic allegations about other people making complaints, or the state of the swimming pool or hotel grounds, or the presence of birds and insects around the hotel complex, all being made to support the suggestion that their illness arose by reason of some sort of failing on the part of the Defendant.

Meanwhile, Defendants pointed out the likely incubation period of different pathogens so that those who claimed that they fell ill on the first day (and thus lost their entire holiday) faced the argument that they must have contracted the bug before they travelled.

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Travel Sickness Claims

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Cases were also won and lost on whether the Claimants were believed when they said that they had not eaten outside the hotel.

On 25 January 2017, the Court of Appeal handed down its decision in Wood v TUI Travel plc (t/a First Choice) [2017] EWCA Civ 11, which clarified that food stuffs provided by a tour operator as part of the provision of an 'all-inclusive' holiday were goods for the purposes of the Supply of Goods and Services Act 1982, such that if the food was contaminated, it was not of satisfactory quality and the Defendant would be in breach of contract.

Whilst the decision in Wood includes salutary warnings about the difficulty that a Claimant will face in proving not just that he fell ill, but that he fell ill because he was provided food which was contaminated (rather than any of the many other potential causes), the decision was viewed by many as a green light to bringing a claim. If the Claimant can prove that he fell ill, that the cause of the illness was contaminated food, and that the contaminated food was provided to him by the hotel as part of his package, then the tour operator has no defence. Even if the hotel has appropriate service standards, that is only of evidential weight as to whether there was, in fact, contaminated food served. Allegations about swimming pools were quietly abandoned, and claims proceeded on a straight-forward 'food poisoning' basis.

That has led the Defendants to examine such claims in great detail. Just as the Claimant must prove that he fell ill by eating contaminated food provided by the hotel, the Defendants are now looking at whether there is objective evidence that the Claimant fell ill. Those Claimants who can be shown not to have been ill, by whatever means, are at risk of findings of Fundamental Dishonesty, with the QOCS protection being disapplied and Contempt of Court Committal proceedings to follow. Bringing a claim for food poisoning, far from being a harmless way to pay for the next holiday, potentially involves the commission of various crimes and a civil contempt of Court.

The Defendants are also looking at whether there is objective evidence of contaminated food being served, and whether there is evidence of other potential causes for which the hotel is not liable. Given that norovirus or other airborne pathogens are more likely to affect a family group living and sleeping in close proximity, is it not more plausible that where the only reported illness in the hotel is within that one particular family group, the cause is something other than the food which everyone ate, or the pool in which everyone swam? The generic complaints, advanced as a matter of course by Claimants' solicitors, are only likely to be valid if everyone thus exposed then falls ill.

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Travel Sickness Claims

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The problem is compounded by the quality of the expert report relied upon by the Claimants. Rather than providing diagnosis and prognosis reports, doctors are straying into opining as to causation, without which the claim cannot hope to succeed. Unfortunately (and all too often), doctors with no specific expertise in diagnosing causation of gastric complaint provide *ipse dixit* (unreasoned) reports alighting on the one possible cause of illness which will see the Claimant receive compensation and costs. Moreover, experts fail to address the range of opinion and their reasons for rejecting alternative causes.

Given the requirements of CPR35, the clear guidance as to the duties of experts most recently repeated by the Supreme Court in the case of Kennedy v Cordia (Services) LLP [2016] UKSC 6, and the risk of complaint to the General Medical Council for providing opinions beyond their expertise (c.f. Pool v GMC [2014] EWHC 3791), the doctor who provides such an opinion now faces a level of scrutiny far beyond that which they might have faced before. Some Courts are requiring doctors to produce CPR35 compliant reports before directions are even given. Some Courts are striking out the reports completely. Others are requiring doctors to attend for cross-examination, whilst others are permitting, or even requiring, Gastroenterology evidence. Some judges are simply letting cases proceed on the basis that the report is insufficient to get the Claimant home, but it is for the Claimant to bring and prove his case. Importantly a doctor who opined before having the requisite expertise so to do cannot fill in the gaps in his CV on an *ex post facto* basis – he should not have opined in the first place. Similarly, a belated attempt to justify an opinion which should not have been expressed on the evidence originally available is both implausible and unacceptable.

It has been suggested that the advent of Fixed Recovery Costs in such claims will stamp them out. It may well do so, although, with respect to the rule makers, an increase in the Small Claims Track limit and/or a more generous provision for fixed recoverable costs in more complicated cases and/or a liability to pay costs in the event that a claim fails would have prevented the problems, both in travel sickness and other personal injury claims, in the first place.

In any event, despite the suggestion from Wood that holiday companies are strictly liable for holiday illness, there is still much to play for.

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DEANS COURT CHAMBERS

The Tort of Deceit – the Basics

By Victoria Heyworth

The tort of deceit has historically been used relatively rarely as a method by which an insurer can recoup losses arising from fraudulent claims. With a perceived rise in such being brought before the Courts, and with the industry keen to demonstrate "zero tolerance", the action of deceit has become of greater interest.

Deceit is a tort, the cause of action for which is the dishonest or reckless statement of an untruth causing a person who relies upon that statement some loss. The loss can be recovered by way of damages, and can extend to being the costs of defending a dishonest personal injury action. Misrepresentation is similar but is based in contract. The Claimant who is successful in proving misrepresentation has an additional remedy in a rescission as of right of the contract.

The insurer seeking to recover damages for deceit is in the unusual position of being the Claimant in an action brought against the alleged fraudster. In such a claim, the Claimant (the insurer!) must prove the following elements (which were first set out in Derry v Peek as long ago as 1889):

(a) that the Defendant made a false representation to the Claimant (silence is not enough);

(b) that the Defendant knew the representation was false or was reckless as to its truth;

(c) that the Defendant intended that the Claimant should act in reliance on it;

(d) that the Claimant did in fact act in reliance and in consequence suffered loss.

There are no defences to an action in deceit beyond a Claimant failing to prove one of the constituent elements, although in practice this is why many claims brought fail. Whilst it may often be the case that the falsity is relatively easily proven (the trip never occurred, the car accident was staged etc), proving the element of reliance can be difficult, especially when an insurer suspected fraud and investigated accordingly.

The case of Hayward v Zurich [2016] UKSC 48 (not technically dealing with the tort of deceit, but the remarks are highly pertinent) confirmed that an insurer Claimant does not need to show that it believed the misrepresentation/statement, so long as it can show that settlement (as it that case) had been "induced" by the misrepresentation to its detriment. It is enough to show that the insurer thought that the Court might believe the Claimant, even if it did not. That was a "*material cause*" of the settlement in that case.

Insurers who have settled a case and then find evidence of fraud do, however, have to show that their initial investigations would not have revealed the evidence that later came to light.

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The Tort of Deceit – the Basics

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The result in Hayward, a case which the insurer won in the Supreme Court, might have been different if the insurer had been in possession of the full facts and settled at the level it did anyway – there would have been no reliance on the lies told by Mr Hayward. As was said in the Supreme Court, "*it could not be fairly said that Zurich had full knowledge of the facts*."

Remedies

Ordinarily the damage in deceit is pecuniary in nature; however, claims can be made for loss of property, real inconvenience or even personal injury.

The measure of damages in deceit is the loss directly flowing from the Claimant's reliance of the Defendant's statement.

Kuddus v Chief Constable of Leicestershire [2001] UKHL 29 recognised that exemplary damages could be awarded in a deceit case. However, exemplary damages awards must be made with a view to a Defendant's means. That said, in the event that a Defendant does not give the Court any evidence of what those means are, a Court can make whatever award it deems just.

Recent examples of successful deceit actions include:

QBE Insurance (Europe Limited) v David Kelly (Junior), David Kelly (Senior), Allan Lewis Liverpool County Court 14 July 2017 (unreported but available online). A finding of deceit made out on the facts against two of three Defendants in the context of a staged road traffic accident claim.

Wrobel v Georgerazvan Central London County Court 18 November 2016. Awards for exemplary damages of £2,000 each were made following a successful counterclaim in deceit.

Direct Line Group Plc v Akramzadeh Queen's Bench Division 15th June 2016 (unreported but available online). Exemplary damages were awarded in the successful claim for deceit arising from 29 claims in 9 staged accidents. The award included the costs of salaries paid to staff investigating the fraud even though they would have been paid anyway. Total exemplary damages were £75,000.

Alam & Ors -v- Blackwell Coventry County Court 1st March 2016 (unreported but a summary available online). Several Claimants were ordered to pay a total of £40,000 in exemplary damages after the Defendant succeeded in a counterclaim brought in deceit.

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The Tort of Deceit – the Basics

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Hassan v Cooper Queen's Bench Division District Registry (Preston) 2nd March 2015 (unreported but available on line). The Court awarded exemplary damages to a Part 20 Claimant who had successfully defended a dishonestly exaggerated claim for damages for personal injury and loss arising out of a road traffic accident. The exemplary damages were calculated by reference to the amount the original Claimant had sought to obtain by fraud, including costs.

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Achieving Indemnity Costs

By Alex Poole

Following a finding of fundamental dishonesty and dismissal of a fraudulent claim, an award for costs in favour of a Defendant should be on the indemnity as opposed to the standard basis. However, there are occasions when a tribunal has declined to do so on the basis that indemnity costs ought only to follow where the conduct of a party in a narrow sense, has been unreasonable; i.e. that the reasonableness or morality of raising a particular issue per se, or its substantive merits, are not proper considerations for the court in determining the basis of assessment. This is wrong.

The court has a discretion as to costs – CPR 44.2. Under that rule, the Court's discretion is wide and unfettered: it must consider all the circumstances. "Conduct" includes questions such as whether it was reasonable to raise a particular issue, as well as how a party has pursued it. The question of exaggeration is identified in the rule itself. Obviously, fabrication is worse than exaggeration.

The cases of Reid Minty (A Firm) v Taylor [2001] EWCA Civ 1723 and Kiam v MGN Ltd (No. 2) [2002] 2 All ER 242 make it clear that behaviour worthy of moral condemnation is not a pre-requisite for indemnity costs – conduct that is "unreasonable to a high degree" can suffice. A "wrong or misguided" case will not be worthy. Of course, a dishonest claim is neither merely wrong nor misguided only with the benefit of hindsight – far from it. The fraudster knew from the start that his claim was dishonest, and still pursued it.

In Excelsior Commercial and Industrial Holdings c Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879, Lord Woolf, then Lord Chief Justice, said (paragraph 19):

> *". . . if the court is going to make an order for indemnity costs . . . it should do so on the assumption that there must be some circumstance which justifies such an order being made. If I may here adopt the way it was put in argument by Waller LJ, there must be some conduct or (I add) some circumstance which takes the case out of the norm."*

Lord Woolf thus explicitly recognises that the discretion to award indemnity costs goes beyond a mere consideration of conduct in the narrow sense or even conduct at all. It is a sufficient condition that the Court wishes to make expression of its disapproval of the conduct of the litigation itself, or its commencement or other circumstance. What is required is that something takes the case out of the norm. It must follow *a fortiori* that some circumstance worthy of moral condemnation is a strong basis for an award.

In Three Rivers District Council and Others, Bank of Credit and Commerce International SA (In Liquidation) v The Governor and Company of the Bank of England [2006] EWHC 816 (Comm), Tomlinson J gave useful guidance for the imposition of indemnity costs:

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Achieving Indemnity Costs

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(a) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(b) The critical requirement is that there must be **some conduct or some circumstance which takes the case out of the norm.**

(c) Insofar as the conduct of the unsuccessful party is relied on as a ground for ordering indemnity costs, **the test is not conduct attracting moral condemnation**, which is an a fortiori ground, **but rather unreasonableness**.

(d) The court can and should have regard to the conduct of an unsuccessful party during the proceedings, both before and during the trial, as well as whether it was **reasonable** for that party **to raise and pursue particular allegations**.

(e) Where a claim is **speculative, weak, opportunistic or thin**, the party pursuing it can expect to pay indemnity costs if it fails.

(f) Cases where allegations of dishonesty are pursued aggressively by hostile cross examination are vulnerable to such an order.

(g) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful Claimant, that is a further ground.

Practice Points

Advocates may wish to make the following key points:

- "Conduct" is to be understood by reference to its definition in the CPR.
- Something is required to take the case out of the norm.
- It cannot be reasonable to pursue a case that is known to be false.
- Moral disapproval is not a requirement for an order of indemnity costs, but parties who knowingly pursue false cases can expect no quarter from the Court.
- Failure to accept reasonable offers can itself be unreasonable to a degree high enough to warrant an order for indemnity costs. This applies where the claim is speculative or known to be hopeless or false.

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Achieving Indemnity Costs

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- The purpose and effect is not penal but compensatory: to grant the receiving party something closer to but never more than the costs it did incur. It is still likely to be left out of pocket. The unreasonable conduct or other feature justifying indemnity costs is what has increased the expenditure, and so the order is the appropriate tool to redress the balance.
- The paying party will retain the protection afforded by CPR 44.3 (1): the court will not allow costs that were incurred unreasonably or were unreasonable in amount.

On a practical point, it seems clear that Defendants should therefore make offers to allow the Claimant to discontinue with no order as to costs, citing the basis upon which they rely for asserting that the claim is fundamentally dishonest. If these offers are accepted early then that is usually a boon to Defendants and insurers alike. If they are rejected by Claimants who then go on to lose and to suffer the finding of fundamental dishonesty, it is essential that counsel for the Defendant be briefed on this correspondence and, if possible, be provided with copies to hand up as appropriate when applying for indemnity costs. Combined with reliance on the passages above, such correspondence will make an application hard to resist.

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DEANS COURT CHAMBERS

Update on Committals

By Paul Higgins

The reader will be aware of the increasing number of instructions given to pursue for contempt those who bring fraudulent claims. To date in Deans Court Chambers, no such case has been run unsuccessfully.

The purpose of this short article is not to set out the relevant legal tests and procedural steps. It is simply a short update to highlight two defences which are being seen in the Courts.

The first defence is capacity. CPR 21.3(4) provides that

'*Any step taken before a ... protected party has a litigation friend has no effect unless the court orders otherwise'*.

The potential effect of this provision needs no elaboration, and it is unsurprising that some of those faced with otherwise unavoidable consequences have sought refuge within it.

The starting point for an assessment of capacity is the test set out in sections 2 and 3 Mental Capacity Act 2005. Capacity will be absent if a person is unable to make a decision by reason of an impairment of, or a disturbance in the functioning of, the mind or brain. He will be unable to make a decision if he is unable:

(a) to understand the information relevant to the situation;

(b) to retain that information;

(c) to use or weigh that information as part of the process of making the decision; or,

(d) to communicate his/her decision (whether by talking, using sign language or any other means).

In Bailey v Warren [2006] EWCA Civ 51, Arden LJ identified those matters that fell to be considered:

"*...The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters to be considered in accessing a client's capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions that arise in litigation. Capacity to conduct such proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice...*"

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Update on Committals

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If there is a legitimate and justifiable basis for capacity to be raised then expert evidence from consultant psychiatrists will become necessary, and there may be a need for an oral hearing to determine that issue. This will inevitably increase costs. However, although a number of Respondents have sought to avail themselves of CPR 21.3(4) in recent times, none has yet been successful. Insurers should not be deterred.

The second defence is identity: the Respondent denies having ever brought a claim, or having instructed his or her solicitors. These cases can become complicated by issues of privilege. Naturally, if the Respondent's denial is valid then no privilege vests in him. However, the solicitors often take issue with that proposition, and refuse to release documents going to identity.

As to this, it is settled law that where a client sues his former solicitors, he impliedly waives his claim to privilege and confidence in relation to all matters relevant to an issue in the proceedings.

It has been said that this is because "*he cannot both open up the confidential relationship between himself and his solicitor (in order to prove his case) and at the same time seek to enforce against the solicitor his duty of confidence (to prevent the solicitor adducing evidence of matters relevant to the issues in the proceedings)"*: see Muller v Linsley & Mortimer [1996] 1 PNLR 74, per Leggatt L.J. Furthermore, it is not a strict requirement of any waiver that proceedings have been launched: see D (A Child) [2011] EWCA Civ 684.

Accordingly, although this is an area that is not without difficulty on certain factual matrices, insurers can be confident of obtaining documents going to this issue if properly advised and represented.

No update on committal proceedings would be complete without reference to so-called holiday sickness claims. The recent and widely-reported increase in the prevalence of this species of claim has caused package holiday operators to reconsider how they respond. Resorts are now able to harvest and preserve CCTV footage, and to ensure that drinks and food are itemised by client. Social media posts remain key – inconsistencies emerging between the contemporaneous qualitative description of the holiday placed online and that contended for subsequently in the letter of claim/medical evidence. In the most serious cases operators are now actively pursuing contempt proceedings.

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Section 57 – A Powerful Weapon

By Zoe Earnshaw

Section 57 of the Criminal Justice and Courts Act 2015 was intended to remedy the inadequacy of the common law by giving Defendants an effective remedy for defeating an entire claim which was in greater part, but not entirely, dishonest. Attempts to achieve a similar objective in cases like Summers v Fairclough Homes [2012] UKSC 26, had not been fruitful.

Since the provision came into force on 13 April 2015, there have been few reported decisions considering its application, and parties have been left to an extent in the dark as to how the Courts would interpret it. Would it be the weapon hoped for, or would its application in practice be generous to Claimants? Would it bite where the Claimant suffered serious injury? Would the Courts take a generous approach to "*substantial injustice*"? It remains to been seen how the jurisprudence will develop over time, but there has at least been a start with the first instance decision of Ms Recorder Hatfield QC in Stanton v Hunter (Liverpool County Court, 31 March 2017), where the Court adopted a robust approach.

The Claimant suffered multiple orthopaedic injuries when he fell through a roof on the Defendant's farm and landed on a concrete floor. These necessitated admission to hospital for a month including a period in intensive care.

The Defendant admitted liability but alleged contributory negligence. The matter proceeded on quantum. The Claimant claimed that his injuries stopped him from working as a taxi driver, and sought damages on the basis that he was unlikely to ever work again. His claim was pleaded in excess of £320,000.

The Defendant alleged that the claim was fundamentally dishonest. Surveillance footage showed the Claimant working without apparent restriction. Disclosure of the taxi firm's records showed a pattern of working from three months post-accident. By the time of trial the Claimant had served a revised Schedule accepting that he had engaged in some work since the accident, and reduced his claim. He alleged that his false statements as to his work arose due to his limited literacy combined with psychological difficulties along with the conduct of his former solicitors.

The Court rejected the Claimant's explanations, and found that his dishonesty could only be characterised as fundamental. Whilst it was submitted on his behalf that the decision would have "*miserable consequences*" for him, it was not alleged that he would suffer "*substantial injustice*" so as avoid the dismissal of his claim. Accordingly the claim, which would have merited an award of £51,625, was dismissed.

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Section 57 – A Powerful Weapon

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The decision is encouraging for Defendants given that:

(a) The Claimant had suffered a genuine accident and liability was admitted;
(b) The Claimant had undoubtedly suffered serious injury;
(c) The Court took a firm stance in rejecting the Claimant's purported explanations;
(d) The Court was not swayed by the Claimant's partial admissions and reduction of his claim by the time of trial;
(e) There was no finding of "substantial injustice".

Practice Points

The Defendant had amended the defence to plead a clear case of fundamental dishonesty, and was diligent in securing good evidence in support of the plea (including surveillance).

- A successful application for disclosure of the file from the Claimant's previous solicitors paid dividends in undermining the Claimant's assertions that the dishonesty in his claim was at his solicitor's suggestion.
- Given that the Claimant failed to allege substantial injustice, it is unclear what the Recorder would have decided on the point had it been fully advanced.
- For Defendants the case shows that well set out and evidenced allegations will be taken seriously by the Courts. Findings of fundamental dishonesty can be made even in a serious and valuable case and, when appropriate, need to be considered.

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A review of Balber Kaur Takhar V Gracefield Developments [2017] EWCA Civ 147

By Daniel Glover

At first sight, this decision might appear to be of peripheral relevance to personal injury or insurance practitioners. However, closer examination reveals that it is, in fact, a useful case for those of us concerned with potentially fraudulent insurance claims, and one which can usefully be read along with the decision of the Supreme Court in Hayward v Zurich [2016] UKSC 26. To what extent can fraud vitiate a judgement?

Balber Takhar ("BT") had been the former owner of several properties. In 2006 the properties were transferred into the name of Gracefield Developments. Gracefield was a limited company set up by BT and Mr & Mrs Krishans.

The parties fell out. Proceedings were commenced in 2008 concerning the terms on which the transfers were effected. BT maintained the transfers had been intended to leave the properties in her name, and that, as part of the agreement, the Krishans would deal with the renovation costs (such costs to later be recovered through rental income of the properties). The Krishans disagreed. They argued the Properties were to be transferred to and sold by Gracefield. In return, BT was due to receive 50% of the profits from the sale and the sum of £300,000.

At first instance, His Honour Judge Purle QC dismissed the claim by BT and found in favour of the Krishans. In his judgment, the presence of a 'scanned' copy of a profit sharing agreement from April 2006 was important evidence supporting the Krishans' version of the agreement.

In 2013 BT issued fresh proceedings in the High Court seeking the order of HHJ Purle QC be set aside. The main argument advanced was that the original judgment had been procured by fraud. In these second proceedings, BT instructed a handwriting expert who concluded that BT had never signed the April 2006 Agreement. The only possible conclusion was fraud by forgery. The Krishans applied to strike out this second action on the basis that it was an abuse of process because the evidence of fraud could (and should) have been presented within the original 2008 proceedings.

The basic principles of setting aside a judgment obtained by fraud were not in dispute. It was agreed that:

- there has to be "conscious and deliberate dishonesty" in relation to a matter relevant to the judgment
- the test of materiality required a showing that the fresh evidence would have fundamentally impacted on the way that the first court came to its decision
- materiality is to be determined by reference to the impact on the evidence in the first case

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The main issue was whether there was an additional requirement to show that the new evidence (of the forged signature) could have been obtained at the time of the first trial with "reasonable diligence", akin to the test on appeals under the well known rule in Ladd v Marshall [1954] 1 WLR 1489. Although accepting that there was support for the Krishans' position within other common law jurisdictions, the Judge at first instance, Newey J (as he then was), concluded that there was no requirement to show an exercise of due diligence in obtaining the relevant evidence before the first trial as a pre-condition for relief by way of setting aside.

The Court of Appeal disagreed. A judgment is not to be set aside on the grounds of fraud unless the challenging party can satisfy the condition of reasonable diligence at the time of the original action. The balance between finality of judgments and the need to deter fraud was in favour of finality.

Practice Points

- Parties cannot rely on re-litigating if they later discover cogent evidence of fraud.
- The relevant due diligence must be conducted long before trial. Do not leave matters until the end of the litigation process. Follow up on "hunches" at the right time.
- There is a risk a failure to do so may create potential professional negligence actions.
- If a judgment is obtained by a late-discovered fraud, there will have to be the clearest evidence as to how and when the fraud came to light, what steps were taken to exclude the possibility of fraud the first time around, and what has been done to investigate since.
- Whilst it is of course accepted that there is a higher demand for cost efficiency over quality, there is a risk that vital information or key issues may be overlooked at first blush if lines of enquiry are not followed up.
- Balance the outcome of this case with Hayward, in which the Supreme Court (Lord Toulson) said: *"it is difficult to envisage any circumstances in which a mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established"*.

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