DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Spring 2018

From the Deans Court Chambers Civil and Insurance Fraud Team

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Welcome to our Civil Insurance Fraud Spring newsletter.

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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.

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DEANS COURT CHAMBERS

Editorial

By Simon McCann

> "*Those insurance guys think they're such geniuses. What they forget is that every time they build a better mousetrap, the mouse gets smarter too.*"
>
> "Whiplash Willie" Gingrich in 'The Fortune Cookie' (1966)

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

Our thanks to those of our clients and friends who read our first Newsletter and responded so positively. Your feedback has both encouraged us, and helped to develop some of the articles in this edition. To our new readers, please do tell us what we could add that you might want our view on.

The ingenuity of fraudsters should not surprise us. But it does: time and again. Were the effort they display to be put into the presentation of genuine claims, and fighting hard for the right compensation for the deserving client, no-one in the insurance industry could complain. However, really remarkable schemes are seen nearly every day. A colleague in Chambers recently told me of a case in which eBay images were manipulated through Photoshop to present insurers with images of cars that had nothing to do with the claim. The opportunities that a digital world has to offer to the liar are many.

The industry is, of course, looking at big data and analytics as tools of the future. The Courts will have to deal with the evidential issues these techniques will bring at some point. However, with "tech-as-is" in mind, we look in this edition at some aspects of the vast subject of surveillance evidence in a paper by Alex Taylor, and at the use of social media evidence in an article by Zara Poulter. We also have some technical material on the Portal from James Paterson, and something from me on evidence given by way of translations.

"Whiplash Willie" was from a different time. He may now find that his client's case is consigned to the small claims track. However, unless Willie's client has a holiday sickness claim to peddle, do not doubt but that there will be an increase in the longevity of neck injuries and spike in the number of PTSD diagnoses very soon. Watch this Newsletter for an update!

Thank you again for the feedback. More please! We would like to write in a straightforward way on the issues you want to hear about.

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DEANS COURT CHAMBERS

Surveillance Evidence: To Disclose or not to Disclose?

By Alex Taylor

Surveillance evidence has been an important tool in the armoury of the fight against fraud for many years, so what is the most effective way to introduce such evidence and where do the pitfalls lie?

Surveillance evidence poses Defendants with a conundrum. On the one hand the pre-action protocols, CPR and the Court's active case management encourage openness, early disclosure and setting out a positive case at the earliest opportunity. However, providing the Claimant with a warning that surveillance is intended or is underway is likely to defeat its purpose. Surveillance evidence is at its most effective when it unambiguously contradicts a document that the Claimant has signed with a statement of truth. That might be his witness statement or schedule of loss, or it could be a reply to part 18 questions. These factors tend to cause Defendants to hold onto footage until the Claimant cornered; however, if there is a delay in disclosure to allow that to happen, this can attract criticism, and, of course, the footage is ultimately only of use if the Court gives permission to rely on it.

It is established that surveillance footage constitutes a 'document' for the purposes of the disclosure rules in CPR 31. As it is obtained in contemplation of litigation, it is privileged from inspection unless and until a decision is made to waive privilege. At that stage, the whole of the footage would be available for inspection. Just as with a written document, it is not possible to selectively waive privilege.

When giving standard disclosure, surveillance footage which has been obtained but which remains privileged should technically be listed in part 2 of the disclosure statement as a document in the Defendant's possession or control but which is privileged from inspection by the Claimant. Even that, however, is likely to give the Claimant a warning which the Defendant may prefer not to give. Equally, the continuing duty of disclosure (CPR 31.11) requires a party to notify every other party immediately if a disclosable document comes to his notice at any time during proceedings. The fact that the document is covered by privilege does not dis-apply this obligation. Privilege entitles a party to withhold inspection of a document. It does not affect the duty to disclose its existence.

HHJ Collender QC considered these issues in Douglas v O'Neill[1], noting the clandestine nature of surveillance evidence and the fact that revealing its existence may deprive a Defendant of an opportunity to carry out further surveillance or to demonstrate inconsistency between the footage and the Claimant's written evidence. Whilst the judge did not go so far as to say that Defendants are excused from the full rigors of their duty to disclose in these circumstances, he did

[1] [2011] EWHC 601 (QB)

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Surveillance Evidence: To Disclose or not to Disclose?

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observe that judges considering applications to introduce surveillance evidence must balance the competing policy considerations of protecting a Claimant from ambush and the need to have evidence of dishonesty before the Court.

The need to prevent ambush is a theme running through various judgments on this issue. In Rall v Hume[2], Potter LJ stated that where there is surveillance evidence that substantially undermines the Claimant's case "*it will usually be in the overall interests of justice to allow the Defendant to rely on the film, so long as it does not amount to an ambush*".

To avoid suggestions of ambush, it is sensible to recall what was said in Douglas v O'Neill: "*a Defendant in possession of surveillance evidence should make the decision to rely upon it and disclose it as soon as reasonably possible after receiving sufficient material setting out the Claimant's case, which has been endorsed with a statement of truth so as to enable the surveillance material to be used effectively. If a Defendant fails to do so, and the failure to do so has unacceptable case management implications, then that Defendant risks being unable to rely upon that material."*

These are, however, judgments from a number of years ago, and there have been amendments to the overriding objective and CPR 3.9, as well as the introduction of costs budgeting since they were handed down. The case of Gentry v Miller[3], CA provides a sobering reminder that there is no guarantee that evidence of fraud should be admitted regardless of delay or procedural breaches. In that case, an insurer was refused relief from sanction to rely on evidence in support of an allegation of fraud largely due to delay in making the application. The seriousness of the allegation and the cogency of the evidence do not in themselves guarantee that procedural failings will be forgiven in the modern era.

By way of further example, in Hayden v Maidstone and Tunbridge Wells NHS Trust[4], permission to rely on surveillance evidence was granted despite delay in obtaining the evidence that was unexplained, unreasonable and culpable. The price the Defendant paid was the costs of the application, the wasted costs of the vacated trial and the additional costs of the Claimant's expert considering the footage (all on an indemnity basis). A significant factor in the Court's reasoning was when the Defendant should reasonably have commissioned the evidence. An expert had raised suspicions about the claim many months earlier, and the Court felt that there was a duty on the Defendant to pursue the surveillance option promptly after that if it wished to do so at all.

2 [2001] EWCA Civ 146
3 [2016] EWCA Civ 141
4 [2016] EWHC 1121 (QB)

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Surveillance Evidence: To Disclose or not to Disclose?

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More recently, in Hicks v Rosta & MIB an application to rely on surveillance evidence was made 10 months before trial, but was only heard 5 weeks before. By the time the application was listed the Defendant had disclosed further surveillance evidence, some of which pre-dated the issuing of the application and some of which was obtained later. No mention had been made in the application of ongoing surveillance. The later footage was disclosed 2 months before the trial. The Court vacated the trial and permitted the Defendant to rely on the evidence disclosed 10 months before trial. The judge held that it was reasonable for the Defendant to wait until service of the Claimant's witness statement and to have a conference with counsel before disclosing the footage. The judge also held that it was reasonable not to have disclosed the existence of the surveillance footage in the list of documents or the costs budget, so as not to alert the Claimant to its existence. However, in relation to the later disclosure permission was **refused** due to the delay, the absence of good explanation for the delay, and the more serious breach of the duty of ongoing disclosure. At the same time, it was accepted that if, however, the Claimant wished to use any of the later disclosure, he was entitled to do so to support his claim. On the facts of this particular case, it seems likely that the fact that the

Defendant was not left with no evidence at all of exaggeration probably emboldened the Judge to exclude the later footage.

Practice points:

- Surveillance evidence showing real exaggeration or dishonesty is likely to be admitted if it goes to an issue in the case.
- Delay in the disclosure of any surveillance should be explained in any application to rely on it or the supporting witness statements, or to amend the Defence in light of the surveillance.
- The closer to trial an application is made, the more likely it is to be viewed as an ambush of the Claimant.
- Generally, it is permissible to wait until the Claimant's written evidence or Schedule is produced, or a medical expert's view has been obtained, before disclosure
- However, the closer to trial the disclosure comes, the more difficult it will be to secure reliance on it.

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5 [2017] EWHC 1344 (QB)

The Use of Social Media

By Zara Poulter

The use of social media in personal injury and insurance litigation is by no means novel; however, it remains an effective evidential tool to establish fraud and/or fundamental dishonesty. Its utility should be considered at all stages of litigation and deployed not only at trial, but also in interlocutory applications and, where appropriate, on appeal.

This article considers the use of social media in cases at three distinct stages of the litigation process: interlocutor, tria, and appeal.

In Gursharan Sikand v CS Lounge Suite Limited and LA Fitness Limited (Mayor's and City of London Court, 11th July 2016), the Court struck out the Claimant's case on the grounds that it was inherently dishonest and amounted to an abuse of process. Liability had been admitted and judgment entered. However, the Defendants made an application to strike out the claim on the grounds that it was an abuse of process. The Defendants' arguments rested substantively on the contrast between the Claimant's case as contained in his Part 18 Replies and his Schedule of Loss, and the reality reflected in his social media accounts and surveillance evidence.

The Court found that the surveillance evidence alone would not suffice to justify striking out the claim at that stage, as at worst it suggested the Claimant was exaggerating his injuries and that he might be able to explain its content in oral evidence.

However, the judge found there to be serious and significant dishonesty gleaned from his social media accounts. The Claimant pursued a substantial past and future loss of earnings claim. He was purporting to be unemployed, yet his LinkedIn accounts demonstrated that he had been in continual employment prior to and since the accident.

The Claimant's Twitter account contained numerous references to his employment and was at odds with the level of disability that he had advised to the medical experts. In these circumstances, the judge was satisfied that the claim could be struck out at that stage. Cross-examination of the Claimant at trial was not required as the untruths were *"palpable, undeniable and unanswerable"*. The judge found that where untruths pervade the case generally or are so central to the issues, they contaminate the entirety of the case: *"The outcome is that the whole case becomes tainted and the Claimant forfeits his right to a trial."* It is also worth noting that fraud had not been pleaded – the judge did not consider this gave rise to any unfairness as the Defendants' case was sufficiently posited in their application.

In Cirencester Friendly Society Limited v Christopher Parkin[1], an insurer used social media evidence in support of its claim against the Defendant for the repayment of income protection pay-outs.

1 [2015] EWHC 1750 (QBD)

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The Use of Social Media

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The High Court found the Claimant to be guilty of a number of fraudulent representations in the course of obtaining the policy and pursuing claims under it. The Court observed: "*like so many people nowadays, in particular those who seem minded to seek to perpetrate frauds, he seemed incapable of keeping off the Internet and sharing the true nature of his activities through social media*". The insurer compiled an abundance of evidence from the Defendant's social media, including YouTube contributions, to demonstrate that the Claimant was in fact capable of working, had been racing a sports car, was not separated from his wife, lived for some time in Cyprus, and was a habitual user of cannabis. The Court found that the awards under the scheme had been obtained by fraud and as a result were set aside and deemed unenforceable. The Defendant was ordered to repay over £19,000.

In Brighthouse Limited v Tazegul[2] the High Court considered an appeal on the basis that fresh evidence indicated the judgment at first instance had been obtained by fraud. The fresh evidence in question was taken from Facebook to demonstrate a relationship between the Claimant and his 'independent' witness, beyond anything which either had admitted in their oral evidence (on which the judge had relied in arriving at his judgment). Facebook evidence had previously been used in the case, however, this had been limited to illustrating a friendship between the Claimant's wife and the partner of the independent witness, and the witness himself and the Claimant's manager. This was explained away in oral evidence as coincidence and by the fact that Crawley was a small town where people were generally known to one another.

The new Facebook evidence demonstrated: the Claimant and his witness had mutual friends in common; interaction via comments on a third party's profile some 2 months after the accident; a comment directly from the Claimant on a photo posted by the witness (and vice versa), which the judge found to be a personalised reference wholly inconsistent with the impression of their relationship conveyed at trial; and finally, that the Claimant and his witness were members of the same gym.

When seeking to deploy the Facebook evidence in this case, there was, of course, the need to satisfy the test for fresh evidence – the threshold is high. In the instant case, the Court reached the conclusion that there was a *prima facie* case of fraud and perjury, and referred the matter back to the lower court for determination.

Practice points:

- When? The above cases demonstrate that social media can be utilised at any stage of proceedings if the evidence is sufficiently cogent. Defendants should, as ever, be mindful of tactical timing – as in Sikand a well-timed application following receipt of Part 18 responses. Of course, fresh evidence on appeal

2 [2016] EWHC 2277 (QB)

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The Use of Social Media

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should be used as a last resort, but there is provision for Defendants to obtain findings of fraud when evidence arises after trial.

- What? Defendants/insurers should consider a broad range of social media, including but not limited to: Facebook, Instagram, LinkedIn, Twitter, YouTube, Reddit, Askfm and Tumblr. Investigations from these sites can reveal the following: exaggeration or fabrication of injuries, connections between witnesses and/or parties, and details of the Claimant's employment, relationships, sport and recreational activities.

- Why? Needless to say, social media evidence that undermines or contradicts a Claimant's case can be of great financial benefit to Defendants/insurers and can result in the following outcomes:
    - Strike outs for abuse of process or no reasonable grounds for bringing the claim;
    - QOCS dis-applied pursuant to CPR 44.15;
    - Findings of fundamental dishonesty and QOCS dis-applied pursuant to CPR 44.16;
    - Findings under s. 57 Criminal Justice and Courts Act 2015;
    - Findings of fraud;
    - Contempt of court proceedings;
    - Re-trials;
    - Judgments set aside.

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Lost in Translation

By Simon McCann

Courts are well-used to taking evidence from witnesses whose first language is not English. Judges are patient, accommodating and polite despite the delays, difficulties and occasional frustrations that the process can bring. However, the pre-trial presentation of written evidence from a non-English speaker is almost invariably done in breach of the Civil Procedure Rules.

Some reference the Rules to begin: CPR 22.1 deals with the documents that must bear a Statement of Truth, and who can verify them – ideally it is the party, but the solicitor/insurer is permitted to verify in most cases. Witness statements are an exception to this, and a statement must be signed by its maker (for understandable reasons). CPR PD 32.8 provides that a witness statement must be in the witness' own words, which means in his or her own language. Re Phoneer[1] is the authority for this – if authority is needed to prove what the Rules clearly state.

In Re Phoneer, the Deputy High Court Judge heard evidence from witnesses whose level of understanding of English varied, and who gave their evidence through interpreters, despite the fact that the statements that had been served were in English. The Deputy High Court Judge said:

> *"This is unsatisfactory and capable of being unfair to the other side since, faced with statements in English, the expectation - unless instructed to the contrary by one's own clients of course - is that the maker of the statement speaks and understands English.*
>
> *It also potentially causes the court some difficulty as to the reliability of the English, particularly where agreements are being alleged or denied on one side or the other. I simply remind everyone that the Civil Procedure Rules prescribe what must happen in these circumstances. A witness statement must comply with the relevant Practice Direction: see Rule 32.8. The relevant Practice Direction to Part 32 of the Civil Procedure Rules requires that a witness statement must, if practicable, be in the witness's own words: see paragraph 18.1. The obvious consequence is that, if the witness does not speak English, the witness statement will be in that person's own language, which must then be translated and the translation filed and verified in accordance with paragraph 23".*

The position could not be clearer.

It is important to note that the first language of the statement must be the witness' own (which the witness then signs). This is then translated into English (before that version is also signed) – it is not to be done the other way around.

1 [2002] 2 BCLC 241

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Lost in Translation

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The former Designated Civil Judge of Manchester introduced a "preferred" wording of an order dealing with witness statements in cases where there was a known issue with language. The order closely mirrors CPR PD 22, r3A, and requires that:

"The Claimant shall serve witness statements from the Claimant and any witness who cannot understand English, which statements shall be written in a language that they can understand. Each statement shall:
"(a) be accompanied by a translation of the foreign language witness statement into English, and
"(b) be accompanied by a statement from the translator verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement".

If the Claimant (or any other witness) cannot read or write English with sufficient capability that they can be cross-examined on their written evidence (presented in English) at trial, then they cannot comply with CPR 32.8 by serving a witness statement that is English. Nor is it sufficient to serve a statement in English and hope to get by with an interpreter at trial. All too often it happens that a party whose proceedings to date have been put forward in English attends Court without a word of these issues being raised. The effect is often adjournments, extra costs, and delay. Occasionally some sort of fudge is (wrongly) considered acceptable – relatives are asked to translate, or the Judge takes on the role of quasi-interpreter, filtering what they can from the answers given. The Judge can then look like they are trying to "help" the Claimant, even though they are simply trying to move the process along. This is entirely unfair to all sides (and the Judge), and should be avoided, whatever the judicial pressure to fulfil the day's workload.

It is accepted that, from a Defendant's point of view, there can be tactical advantage to this situation – until properly translated and verified, the Court may (note: "may") direct that the witness' evidence is inadmissible (CPR 22.3). There can be some technical "wins" as a result – some Judges take a firm view, especially when the Particulars of Claim are also (typically) in English but signed by the non-English speaking Claimant. In that case, the more robust tribunals have struck out the entire claim as being a nullity, rather than simply rendering evidence inadmissible – though if a Claimant's own evidence is rendered inadmissible, it is hard to see how their claim could succeed. The point – rightly made – is that the absence of proper verification is not a hollow objection or a rule for the sycophant: Statements of Truth are vital to the functioning of the CPR.

However, the unsatisfactory position of improper translation and verification is often reached because the Claimant's solicitor has not taken full instructions.

The irregularity in the procedure has arisen because of the on-the-cheap vagaries of claims management and

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Lost in Translation

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fixed fees – "it's my solicitor's fault, not mine". The job has not been done properly until the last minute.

The excuse often heard for turning up with a previously unannounced translator is that the Claimant can speak (or get by) in English, but is not up to the trial process being in English – "we were just making sure". Despite the fact that this sort of submission is really rather thin, some Judges are tempted to let the default(s) pass, and enquire whether the Defendant has pointed out the default prior to trial (thereby ignoring the fact that pointing out procedural errors is not required by the Solicitors Regulatory Authority's rules). This should be resisted, and the Rules emphasised.

The adjournment of a trial, even with costs, rarely benefits the insurer. Costs orders for Defendant's that can be set off against damages and costs if the Claimant wins are pyrrhic victories. Wasted costs orders against solicitors are satellite litigation which Courts will not be keen to encourage.

The best option, clearly, is to apply to strike out the claim if it is the Claimant's Particulars of Claim which stand in default – the position is stronger if the Claimant's own statement is also defective. However, if the proceedings are compliant, and it is the statement of a witness (even the Claimant's statement) which is defective, the Claimant's application should be to render that evidence admissible. A Claimant without a witness statement may, of course, struggle to prove his case even if his Particulars of Claim are compliant.

If there is a background of other procedural default, or if a particular Judge or Court is known to apply a strict application of the Rules, these are also perfectly legitimate factors to consider when considering the position before or at trial (if that is when the problem first arises). Whether any errors should be pointed out to the Claimant's solicitor is moot – most Judges would not rule that this was necessary.

Practice Points:

- The witness statement (and Particulars of Claim, if it is the Claimant who cannot read English) should be in the witness' own language first;
- That statement should then be translated by an authorised person into English (check that the person is properly authorised, and have used the proper wording);
- The witness must append the English language version to his/her own statement;
- The translator has to exhibit both the non-English and English statement to their statement;
- The witness has to sign both versions of their own statement;
- The witness has to sign those statements *in the presence of the translator*.

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Protocol Admissions of Causation – Cause and Effect

By James Paterson

An issue which frequently arises out of cases in which the defence is one of causation by way of low velocity impact (or late intimation in road traffic accidents or EL/PL claims) is the need, if any, to resile from an admission made under either 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'). It is important to note that an admission made in the Protocols is an admission of not only breach of duty but also that "*the defendant…caused some loss to the claimant, the nature and extent of which is not admitted*". The admissions are meant to have binding effect.

It is important to note at the outset that CPR14.1B, in dealing with admissions made under the Protocols, draws a distinction between (at CPR14.1B(2)) a Defendant seeking to withdraw an admission of causation and (at CPR14.1B(3)) a Defendant seeking to withdraw "*any other admission*". The very nature of the distinction supports the contention that the Rules Committee envisaged situations whereby a Defendant would seek to withdraw an admission of causation in the Protocols and run causation defences in Part 7, i.e. that the admission of causation is one that necessarily needs to be withdrawn to run that defence.

There is an argument that one must read "*caused some loss*" disjunctively with "*the nature and extent of which*" and therefore it is still within a Trial Judges ambit to dismiss a claim in its entirety or to award £0. However, that is not the correct approach.

The constant of causation defences is the submission that the Claimant is not believed by the Defendant and should not be believed by the Court. The Claimant has not, the Defendant typically submits, been injured at all, nor sustained any loss of income or needed physiotherapy. That position is inconsistent with an admission of "*some loss*". Experience shows that, in such a case, the Defendant is best advised to seek to withdraw from any admission which included the element of causation.

This may be contrasted with cases in which the Defendant does accept "*some loss*" (or at least does not submit for no loss); however, it wishes to pursue a section 57 (of the Criminal Justice and Courts Act 2015) argument against what the Defendant avers is a clearly exaggerated, for example, loss of earnings claim. The section, of course, presupposes that the Claimant has established an "*entitlement to damages*" (s57(1)(a)). In those circumstances, there would be a far stronger argument that a Defendant does not need to resile from a Protocol admission since causation would (even of only to a limited extent) be made out. The argument would then be that, although the Defendant admits liability and loss, the "*entitlement to damages*" referred to in section 57 is extinguished by

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Protocol Admissions of Causation – Cause and Effect

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the finding of fundamental dishonesty which the Court must make (in the right circumstances).

This might be considered a bold strategy by the Defendant that had admitted everything, and then went on to seek a section 57 ruling without resiling. It is an unattractive and risky position to adopt, and leaves the Defendant with the burden of proving dishonesty if it is to "win". It also eliminates the possibility of any "Plan B", such as when a Trial Judge, perhaps unwilling to make a finding of fundamental dishonesty, might still dismiss a suspect quantum claim (or elements of it) in its entirety on the basis that the Claimant has not discharged the burden of proof. That option (the "£0" option) is not available to a Judge if the admission of "some loss" being caused stands.

If there are good arguments to be pursued as to causation and/or section 57, Defendants who have made an Protocol admission of causation are best advised to resile from that admission as soon as practicable. Delay, of course, is a factor in the success or otherwise of such an application.

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The evolution of "Fundamental Dishonesty"

By Anthony Singh

The reader will be aware that "fundamental dishonesty" was introduced into CPR 44 in April 2013 as one of the means by which QOCS could be displaced. However, there was no definition provided or guidance as to the interpretation of the phrase.

Into that void came in particular Gosling v (1) Hailo (2) Screwfix Direct (2014)[1] and Zimi v London Central Bus Company Limited (2015)[2], in which the meaning of the word "fundamental" was considered and defined as being more than merely dishonest on a collateral matter or a minor, self-contained head of loss. "Fundamental" had to go to the root of the matter or a substantial part of the claim, or had to be something which was crucial and of central importance to the case.

Also worthy of note in respect of any QOCS case law review is the less well-known matter of James v Diamanttek[3] where, on appeal, permission was granted to enforce a costs order on the basis of fundamental dishonesty. In this NIHL matter, the trial judge had found that the Claimant was not telling the truth, yet later found in the application for permission to enforce costs that she had not "*formed the impression that he was a dishonest person*" and that "*the fact that I found that he did not tell the truth on the day does not . . . mean that I must find he was dishonest*".

On appeal, His Honour Judge Gregory posed two questions when considering fundamental dishonesty: (1) what are the fundamental bases of the claim? and (2) was there any dishonesty in relation to any of those bases? Given that one of the fundamental aspects of the claim was the deprivation of the use of ear defenders – and the Claimant had been found to have lied in respect of that issue – that led to the conclusion that the case was a fundamentally dishonest claim and any decision to the contrary was perverse.

Following the introduction of the phrase into the CPR, it was also utilised in s57 CJCA 2015 with greater scope that just the costs arena. The reader will be aware that it is now possible to strike out an entire claim (which may include honest and proper heads of loss) where there has been fundamental dishonesty in any part of the claim or related claim.

As detailed in our previous newsletter, s57 was applied robustly in Stanton v Hunter[4] in a quantum only dispute where surveillance footage undermined the Claimant's alleged restrictions and, despite a revised and reduced schedule of loss, the dishonesty was characterised as fundamental because of the repeated falsehoods that were put forward by the Claimant. This resulted in the entire claim (which would have merited an aware of £51,625) being dismissed.

[1] 29/04/14 County Court at Cambridge
[2] 08/01/15 County Court at Central London
[3] 08/02/16 County Court at Coventry

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The evolution of "Fundamental Dishonesty"

Continued…

In the recent case of London Organising Committee of the Olympic and Paralympic Games v Sinfield[5], a substantial claim for gardening expenses was considered. It had been grossly exaggerated. The Judge endorsed the previous conception of fundamental dishonesty, namely that it conveyed the idea of something going to the root or the heart of the matter, and added his own formulation (at paragraph 62) that:

"…a Claimant should be found to be fundamentally dishonest…if the Defendant proves on a balance of probability that the Claimant has acted dishonestly in relation to the primary claim and/or a related claim and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way, judge in the context of the particular facts and circumstances of the litigation…"

He then applied his formulation to the facts of the case (at paragraphs 84 to 87):

"Even on the findings made by the judge, according to that test, what Mr Sinfield did was fundamentally dishonest. He presented a claim for special damages in a significant sum, and the judge found that the largest head of damage was evidenced by the dishonest creation of false invoices and by a dishonest witness statement. Both pieces of dishonesty were premeditated and maintained over many months, until LOCOG's solicitors uncovered the true picture. As presented on the Preliminary Schedule, items 5 and 8 made a total of £14,033.18 out of a total claim for special damages of £33,340.86. Mr Sinfield therefore presented his case on quantum in a dishonest way which could have resulted in LOCOG paying out far more than they could properly, on honest evidence, have been ordered to do following a trial. "I reject Mr James' argument that the claim was not fundamentally dishonest because, by comparing multiplicands, the overstatement was less than £3,000, and so any dishonesty cannot be said to go to the heart or root of the claim. The fact is that Mr Sinfield dishonestly maintained a claim for £14,033.18 which he was not entitled to. The fact that a later medical report showed that a gardener would have been employed within three years, thereby limiting future losses to three years, is neither here nor there…The dishonesty therefore potentially impacted it in a significant way.

[4] 31/03/17 County Court at Liverpool
[5] [2018] EWHC 51(QB)

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The evolution of "Fundamental Dishonesty"

Continued…

"The judge should have concluded that Mr Sinfield had been fundamentally dishonest in relation to the claim and therefore, prima facie by virtue of s.57(3), the entire claim fell to be dismissed unless, by s.57(2), that would result in substantial injustice to Mr Sinfield. Instead, he asked himself the question (para 22): 'If the greater part of the claim is genuine and honest, is the dishonesty fundamental? I answer that by considering s 57(2)'. In my respectful opinion, that was the wrong question and the wrong answer. If the claimant has been fundamentally dishonest in the way I have indicated then the fact that the greater part of the claim might be honest is neither here nor there (subject to substantial injustice): by enacting s 57(3) Parliament provided that the entire claim, including any genuine parts, are to be dismissed.

"As I have said, I consider that even on the findings of dishonesty which the judge made, the claim should have been dismissed (subject to substantial injustice). But if I am right in relation to Ground 1 then, a fortiori, the claim should have been dismissed". [Emphasis added]

In Howlett and Howlett v (1) Davies (2) Ageas Insurance Limited[6], the Court of Appeal wrestled with "fundamental dishonesty". The meaning of phrase as expressed by His Honour Judge Moloney QC in Gosling was not challenged, but rather considered to be "*common sense"* (paragraph 17). Importantly, the absence of an allegation of dishonesty in the pleadings will not necessarily bar a judge from finding a witness to have been lying, thus QOCS can be displaced with a finding of "fundamental dishonesty" without fraud having been alleged in the Defence – so long as the Claimant has been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion (paragraphs 31 and 32).

What of the future? Liverpool Victoria Insurance Company v Yavuz and others[7]. This case was an application for committal for contempt of court arising out of fraudulent road traffic accidents.

Warby J found the claims to have been thoroughly false and dishonest from the start, and all nine Defendants were found guilty of contempt of Court. In doing so, he asked a question regarding the status of the statements of truth on a CNF and whether contempt proceedings could be founded on a false declaration on a CNF – which are more often than not signed by the legal representative on behalf of the client. At the end of his judgment (paragraph 153) Warby J commented:

> *"…It may be arguable therefore that a false and dishonest statement in a CNF in Form RTA1 could found an application to commit for contempt, but it cannot be said that the matter is free from doubt…This is a topic that*

[6] [2017] EWCA Civ 1696
[7] [2017] EQHC 3088(QB)

The evolution of “Fundamental Dishonesty”

Continued…

> *may be worthy of consideration by those responsible for these [Pre-Action Protocols], and perhaps the Civil Procedure Rules Committee.”*

Whilst that would be an interesting development, I suspect that in reality any risk to solicitors would be negated simply by having the lay client sign the initial statement of truth on the CNF at the outset.

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DEANS COURT CHAMBERS

The Costs of Covering up a Friendship: UK Insurance Ltd v Gentry

By Pascale Hicks

The High Court has re-confirmed lying for pecuniary gain will not be tolerated.

In UK Insurance Limited v Stuart John Gentry[1], Teare J has given clear guidance on:

a) The burden and standard of proof for a tort of deceit claim.
b) Inferences of fraud to be drawn by a Court from circumstantial evidence.

The Claimant made a claim in 2013 for an alleged road traffic accident, and had secured a default judgment for £75,089. In January 2018, following a trial focusing on the tort of deceit, the Claimant was ordered to re-pay the insurance company sums that had been paid out to him. In contempt of court proceedings, he was sentenced to a 9-month term of imprisonment suspended for two years on the proviso that payment was made to UK Insurance Limited.

The judgment illustrates that insurers are able to pursue dishonest Claimants through the tort of deceit and contempt of court pursuant to CPR 32.14 and 81.17(1)(a) (committal for making a false statement of truth).

At the trial, reliance was placed on the original recordings of the notification of the accident by UK Insurances' insured, Mr Miller, which evidenced that he and Mr Gentry had, from the outset, sought to hide the truth of their friendship and knowledge of each other from UK Insurance.

The insured described Gentry as "*the bloke I hit*". A couple of months later, when the insured enquired with UK Insurance about the claim, he described him as "*the guy that I hit*", explaining he had just seen him in the supermarket.

The smoking gun for UK Insurance came when the social media and Experian searches revealed that Miller and Gentry were known to each other before the alleged collision.

The burden of proof in the tort of deceit claim lay with the Claimant insurer. It had to prove to the Court that the Defendant has dishonestly represented to it that he was involved in a genuine collision.

In respect of the standard of proof, Teare J held:

"The burden must be discharged on the balance of probabilities but since the allegation against Mr. Gentry is of criminal behaviour, which is inherently unlikely, particularly cogent evidence is required before the Court can be properly satisfied on the balance of probabilities that he acted in the manner alleged[1]."

[1] [2018] EWHC 37 (QV)

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The costs of covering up a friendship: UK Insurance Ltd v Gentry

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He went on to add:

"The nature of the allegation makes it appropriate to apply a standard not far short of the criminal standard."

"Thus, in order to discharge the burden of proof, UK Insurance must be able to exclude any substantial, as opposed to fanciful or remote, possibility that the collision was genuine. The court must have a very high level of confidence that the allegation is true."

The Courts are aware that there is rarely direct evidence of fraud. Teare J gave guidance to the lawyers to assist in their analysis of whether fraud is likely to be established:

"Where there is no direct evidence of fraud it can only be inferred from circumstantial evidence. Thus, it is necessary for the Court to have regard to all the relevant evidence and to the story as a whole. Having considered the evidence it is necessary to stand back and consider whether the alleged fraud has been made out to the required standard."

At the trial of the tort of deceit claim, Mr Gentry maintained the accident was genuine but refused to give evidence. He relied on the oral evidence of a passenger, Mr Voller, who was said to have been in his vehicle at the time of the alleged accident. However, Voller was also found to have lied about his friendship with Gentry:

"The fact that these two drivers were friends and the circumstance that each of the persons present at the time has been reluctant to disclose that friendship are matters, which in my judgment, cogently suggest that the collision was staged."

The Court examined the contemporaneous documents: invoices, damage reports, proof of payments, recorded telephone conversations, hire agreements (when a free hire car had been offered) and lack of mileage on both cars prior to the alleged accident. Some of these documents were consistent with there having been a collision, but also consistent with there having been a staged collision.

While each case will turn on its own circumstances, this judgment shows the Court's approach: to analyse the documents, consider the explanations for inconsistencies and omissions, consider the weight of the lack of oral evidence from the defendant and then undertake a balancing exercise. As the Judge concluded:

"In cases of this nature it is necessary to stand back and regard to the whole of the evidence. I have sought to do so and take the whole story as a whole. Having done so I am persuaded that the accident was staged."

The judgment reinforces common sense and morals: be honest and tell the whole truth.

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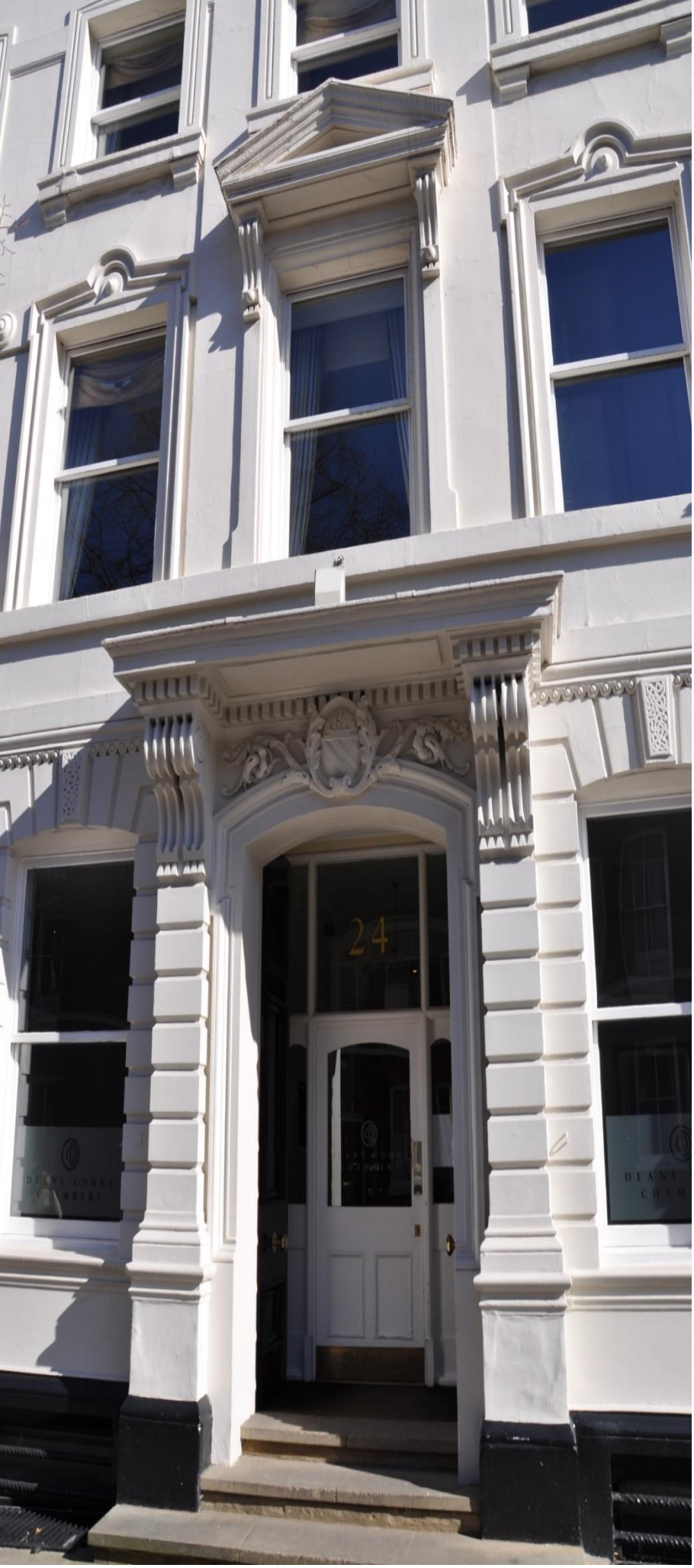
[2] See Parker v National Farmers Union Mutual Insurance Society [2012] EWHC



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