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The Dishonest Litigant

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The Dishonest Litigant

"Lies, damned lies and statistics"

[Benjamin Disraeli (possibly…)]

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What we are not covering

- Not going to cover the incidence of insurance fraud. That is something that, frankly, one could take any number of views on – based on the various statistics maintained by interested bodies. All the more so as many of the statistics are based on English claims information.
- Not going to cover the investigation of fraudulent claims.

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What we are covering

Instead, what we are going to cover is:

1. The power to strike out for fundamental dishonesty;
2. (very briefly) Some expenses issues surrounding fundamental dishonesty; and
3. Fundamental dishonesty discovered after settlement.

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"[51] Bogus or fraudulently intimated personal injury claims are not new. One of the great advocates of the 20th century, Sir Patrick Hastings, recounted vividly in his memoirs, Cases in Court (William Heinemann Ltd, 1949, pp 4—20), how as a young barrister before World War 1 he built up a practice defending insurance companies against such claims. Now as then, they present a serious problem. Personal injury claims usually fall to be met by insurers and the ultimate cost is borne by other policy holders through increased premiums."

Lord Toulson, Zurich v Hayward [2016] 3 WLR 637

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"[32] We recognise that there have been many cases in which claimants dishonestly inflate their claims or even, as in the case of Mr Ul-Haq's mother, fraudulently invent them."

Lord Clarke, Summers v Fairclough Homes [2012] 1 WLR 2004

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"[10] Fraudulent insurance claims are a serious problem, the cost of which ultimately falls on the general body of policy-holders in the form of increased premiums. But it was submitted to us that a forfeiture rule was not the answer to that problem… Courts are rarely in a position to assess empirically the wider behavioural consequences of legal rules. The formation of legal policy in this as in other areas depends mainly on the vindication of collective moral values and on judicial instincts about the motivation of rational beings, not on the scientific anthropology of fraud or underwriting. As applied to dishonestly exaggerated claims, the fraudulent claims rule is well established and, as I have said, will shortly become statutory."

Lord Sumption, Versloot Dredging v HDI Gerling [2016] 3 WLR 543

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Summers v. Fairclough Homes [2012] 1 WLR 2004

- Affirming the usual approach of the court
- Altering the approach to fraud after proof
- Some critical comments

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Lord Reed

- “Where on the other hand it is established prior to proof, possibly as the result of an admission or a preliminary proof, or where it becomes apparent during the proof, that one of the parties is seeking to subvert the process of the court by fraudulent means, the court has to decide whether the case should be allowed to proceed any further.

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Lord Reed

… It essentially has 2 choices. It can decide to carry on … and do the best it can in the circumstances, or it can decide to dismiss the party's case there and then."

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4 approaches

- the court's power to punish contempt encompasses the power to dismiss the action;
- a litigant who resorts to fraud *ipso facto* forfeits his right to have the court hear his case;
- the court should adjudicate so long as the fraudulent conduct has not rendered a fair trial impossible;
- the resort to fraud imposes an unnecessary burden on court resources and the case should only be heard so long as a just determination can be made without incurring disproportionate expense

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Shetland Sea Farms Ltd v. Assuranceforeningen Skuld 2004 SLT 30

- The court possessed an inherent power to strike out an action which amounted to an abuse of process

- The purpose of striking out a claim was to protect the integrity of the court's procedures by: "preventing one party from putting the other at an unfair disadvantage and compromising the just and proper conduct of the proceedings."

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Shetland Sea Farms

- If a fair trial was still possible despite the dishonesty, the court ought not to stop the proceedings.

- To do so would simply be judicial retaliation for the affront to the court.

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Summers: what it does not do

- Nothing in the judgment affects the correct approach to striking out a claim before evidence in whole or part (*Masood v. Zahoor* [2010] 1 WLR 746, at [76] *approved*).

- Nothing in the judgment affects those cases where fraud or dishonesty taints the whole claim.

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Summers: the facts

- 2003 the claimant fell from a stacker truck at work, sustaining a fractured scaphoid bone in his right hand and a comminuted fracture of his left heel bone.
- About 6 months after the accident liability was admitted by the defender employers. He had two arthrodesis operations on his heel.
- Nearly 3 years later, defenders sought to withdraw admission

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Summers: the facts

- 2007: trial on liability
- 2 months after judgment, surveillance carried out
- Following day, Statement signed by claimant
- December 2008, schedule of £818,616
- Defenders lodge surveillance and seek to strike out on grounds of "grossly and dishonestly exaggerated" claim

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Summers: the judge's findings

- The judge found that the claimant was not fit for heavy work and would find walking over uneven ground to be uncomfortable, but had no other disabilities.

- But he rejected the claimant's evidence because:

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Summers: the judge's findings

- the surveillance of the claimant loading a van with kitchen fitting components was "absolutely inconsistent" with his account of disabilities (fraudulently repeated in an application for benefits from the DWP);

- his account of using painkillers to overcome pain was not credible when he was seen walking to and from medico-legal examination with no crutches, but presenting himself in those examinations with crutches;

- his wife's diary recorded the claimant working and playing football.

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Summers: the judge's findings

- The judge found that there were legitimate elements of the claim and awarded nearly £89,000 in damages.
- The defenders sought to argue that the claim should have been struck out and that the earlier decision of *Ul-Haq v. Shah* [2010] 1 WLR 616 had been wrongly decided.

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Ul-haq: briefly

- It was conceded and accepted by the court that there was a jurisdiction to strike out a genuine claim on the ground of abuse of process. The Court of Appeal disagreed.

- Smith and Toulson LLJ held that it is the policy of the law and the invariable rule that a person cannot be deprived of a judgment for damages to which he is otherwise entitled on the ground of abuse of process. There was no suggestion that a fair trial of Mr and Mrs Ul-Haq's case had been prevented.

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Ul-haq: briefly

- The inclusion of a false claim with a genuine claim does not itself turn a genuine claim into a false one or justify the striking out of the genuine claim. To do so would be to deprive a claimant of his substantive rights as a mark of disapproval; something the court has no power to do [46].

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Summers: overruling *Ul-haq*

- Ratio:

"[T]he court does have jurisdiction to strike out a statement of case for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum. But it should only do so in very exceptional circumstances." [33] and [36]

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Summers: reasoning

- Striking out a claim is to stop the proceedings and prevent further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late.
- To deliberately make a false claim and to adduce false evidence is an abuse of process. The court has an overriding objective to determine cases justly.

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Summers: reasoning

- The court must therefore scrupulously examine the circumstances to ensure striking out is a proportionate means of controlling the court process and deciding cases justly.
- All reasonable steps have to be taken to deter fraudulent claims, but there is a balance to be struck. That could mostly be achieved by assessing liability and quantum in the usual way and giving judgment [50].

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Summers: reasoning

- "The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small." [49]

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Summers: an explanation

- "We tried quite hard to think of circumstances in which it would be proportionate to strike a claim out after a trial on liability and quantum. The only possibility that occurred to us was one where there had been a massive attempt to deceive the court by the measure of damages would be very small. But, on reflection such considerations seem more appropriate before a trial than after it. There may of course be other considerations. Only time will tell. It is difficult to predict the future."

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Summers: deterrence

In *Summers*, the Supreme Court said that deterrence of fraudulent claims could be achieved by:

- adverse findings in evidence against the fraudulent party
- ensuring that dishonesty does not increase the award of damages
- reducing interest
- findings in costs
- proceedings for contempt of court

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Lord Kerr's view

"… let me express a purely personal view on the question whether an all-embracing, universally applicable rule can be applied in order to determine whether a particular species of fraud will bring about dismissal of the action. I appreciate that most insurers would welcome a fairly precise, easily applied rule to decide this question. But is such a rule either feasible or desirable? I should own up immediately to an instinctual aversion to the devising of an overly technical rule for the resolution of most legal issues … In my experience, such rules promise more than they can deliver on purported application."

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A fair trial?

- *Arrow Nominees v. Blackledge* [2000] 2 BCLC 167, CA

- Courts Reform (Scotland) Act 2014

- "It makes little sense to be willing to dismiss an action for non-compliance with a procedural rule and the consequent waste of time and money, but to forbear from doing so when a similar or greater waste has been occasioned by a litigant's dishonesty."

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Not all one way…

"[27] In The Star Sea at para 61, Lord Hobhouse warned that the courts should be

"prepared to examine the application of any such principle to the particular class of situation to see to what extent its application would reflect principles of public policy or the over-riding needs of justice. Where the application of the proposed principle would simply serve the interests of one party and do so in a disproportionate fashion, it is right to question whether the principle has been correctly formulated or is being correctly applied."

Versloot Dredging

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Expenses

- What if, in terms of *Summers*, a defender offers to settle the part of a claim that he believes to be genuine, but not the part he believes to be fraudulent?
- Tender cannot deal properly – has to carry an award of "the expenses of process" to be effective.
- This problem specifically noted in *Summers*.

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Expenses

"[53] As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the court that the prospect of such orders is likely to be a real deterrent."

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Expenses

"[54] There was much discussion in the course of the argument as to whether the defendant can protect its position in costs by making a Part 36 offer or some other offer which will provide appropriate protection. It was submitted that a Part 36 offer is of no real assistance because, if it is accepted, the defendant must pay the claimant's costs… We accept the force of that argument. However, we see no reason why a defendant should not make a form of Calderbank offer (see Calderbank v Calderbank [1976] Fam 93) in which it offers to settle the genuine claim but at the same time offers to settle the issues of costs on the basis that the claimant will pay the defendant's costs incurred in respect of the fraudulent or dishonest aspects of the case on an indemnity basis."

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Expenses

DM v Lothian Health Board [2015] CSOH 89

"[17] This court has a very wide discretion in relation to expenses and is well able to reflect disapproval of the conduct of a party in litigation, be it fraudulent or otherwise, by refusing expenses, in whole or in part, to a party who has had success in a litigation. In my opinion, however, counsel for the defenders made a bold submission on the motion roll. He invited the court to condemn the successful pursuer to whom damages have been conceded and tendered and find that she deliberately falsified her symptoms for financial compensation and so penalise her in relation to her motion for expenses."

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After the Event

- Can a decree, obtained by fraud, be unpicked?
- Well recognised as a ground of reduction:

"One obvious instance would be where a judgment had been obtained by reason of some fraud practised on the Court."

Adair v Colville and Sons 1926 SC (HL) 51, Viscount Dunedin

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Zurich v Hayward [2016] 3 WLR 637

What was the Issue?

"[60] . . .parties have identified the critical issue in these terms: In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation, (a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or (b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?"

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Zurich v Hayward [2016] 3 WLR 637

What was the Issue?

"[61] The parties have raised an additional question as to the circumstances, if any, in which suspicion by a settlor of exaggeration of the claim precludes unravelling the settlement when fraud is subsequently established; but in so far as the question involves any point of law, it is enveloped by the first issue."

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Zurich v Hayward [2016] 3 WLR 637

"[22] These pleas show that Zurich was suspicious of Mr Hayward but no very clear allegations were, or could be, made. However, it is not in dispute that Zurich did as much as it reasonably could to investigate the position before the settlement. The evidence was not as good from its point of view as it might have hoped but the fact is that Zurich did not know the extent of Mr Hayward's misrepresentations. The case was settled at a time when the only difference between the experts was the likely duration of future loss. The figure agreed was about half way between the respective opinions of the experts.

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Zurich v Hayward [2016] 3 WLR 637

It was not until the advent of Mr and Mrs Cox that Zurich realised the true position. Hence, as the judge expressly found, the amount of the settlement was very much greater than it would have been but for the fraudulent misrepresentations made by Mr Hayward. The small amount ultimately awarded by the judge, which is not challenged, shows the extent of the dishonest nature of the claim. I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud."

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Zurich v Hayward [2016] 3 WLR 637

"[71] I agree with Judge Moloney QC's analysis in para 2.5 of his judgment. The question whether there has been inducement is a question of fact which goes to the issue of causation. The way in which a fraudulent misrepresentation may cause the representee to act to his detriment will depend on the circumstances. He rightly focused on the particular circumstances of the present case. Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it…

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Zurich v Hayward [2016] 3 WLR 637

He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was."

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Zurich v Hayward [2016] 3 WLR 637

Post Script:

"[73] It was expressly conceded on behalf of the insurers for the purposes of the present appeal that whenever and however a legal claim is settled, a party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement. It makes no difference to the outcome of the present case and the court heard no argument about whether the concession was correct. Any opinion on the subject would therefore be obiter, and since the court has not considered the relevant authorities (including Commonwealth authorities such as Toubia v Schwenke [2002] NSWCA 34) or academic writing, it is better to say nothing about it."

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Further Reading

- *Lies, Damned Lies: Abuse of Process and the Dishonest Litigant, Lord Reed 26 October 2012 (available on UKSC website)*
- *Kemp and Kemp, Vol 1, Ch 8*
- *Fundamental Dishonesty and the Criminal Justce and Courts Act 2015, Brett Dixon [2015] JPIL, Issue 2, 108*
- *Alpha Rocks Solicitors v Alade [2015] 1 WLR 4534*

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