CONNIVING, COLLUSION AND CONTEMPT

Section 1: Fraudulent Claims: Crashing But Not Burning

***Wasim UL-HAQ and Others v Anita Shah* [2008] EWHC 1896 (QB)**.
Walker J (on appeal HHJ in Birmingham CC)

(Permission granted by McKenna HHJ – see his role in 'Bashir', below)

(Counsel for appellant, Ralph Lewis QC was trial Judge in 'Kelly', below)

Background
Ms Shah caused rear end RTA collision to the car Mr UL-HAQ was driving. Mr UL-HAK, his wife (a passenger) brought claims for their injuries, but there were no claims made on behalf of their 2 children who were also in the car. Controversially, there was a claim by Mr UL-HAK's mother, Ms Khatoon.

The Defendant denied that Ms Khatoon had been in the car, and:

(a) they counterclaimed for a declaration to that effect, and

(b) sought damages for deceit against Mr UL-HAQ, his wife and Ms Khatoon.

(c) asserted that no claim should be allowed by Mr UL-HAQ or his wife because they had been complicit in a fraudulent assertion.

The Decision of Mr Recorder Parks QC
The Judge found that Mrs Khatoon's claim was fraudulent. She had not been in the car, and Mr UL-HAQ and his wife had conspired with her to present a fictitious claim.

Mrs Khatoon's claim was dismissed with costs on the indemnity basis. However, the Judge stopped short of striking out the claims by Mr and Mrs UL-HAQ. The Judge assessed their respective entitlement to damages and interest. He then dismissed the counterclaim, holding that no declaration was needed because of the findings that he had recorded in his judgment, and because no loss caused by the deceit had been identified. However, the Judge ordered that Mr and Mrs UL-HAQ pay 2/3^{rds} of the Defendant's costs of defending the respective claims.

On appeal, the Court upheld the conclusion for different reasons. However, in coming to his decision, the Judge reviewed a large number of prior cases involving fraudulent behaviour (see below)

Short cut
The rule as it will be applied by the Courts
The result of the case – and the test to consider is:

1. To what extent did the Claimant act contrary to the overriding objective;

2. In light of the conclusions on 1, should the Court use its discretion to strike out the statement of case under 3.4(2)

Useful example of application of this test in *Ghalib v Ghaffar* (below)

Relevant question 1 factors:
(a) participation in a fraudulent claim was extremely serious breach of the overriding objective:

i. increasing costs;
ii. wasting Court resources;

(b) it was, however, impossible to determine who was the 'main instigator';

Relevant question 2 factors:

(a) striking out would not deprive the Claimants of substantial claims;

(b) the Court's role in countering fraud claims – the Judge described this as "not a particularly strong consideration" in the context of CPR3.4(2) – and certainly not an overriding consideration. (paragraph 45)

(c) the dishonesty was in relation to someone else's claim, not their own;

(d) Mr and Mrs HAQ *had suffered* minor injuries;

(e) The dishonesty was not "of the worst kind" – such as forging documents;

(f) The dishonesty did not impact substantially on the Court's ability to resolve the case fairly;

(g) Non-insurance fraud ought not to be dealt with in the exceptional way the common law recognises in the context of insurance (paragraph 50);

(h) There are other ways to penalise wrongdoers:

i. awarding indemnity costs

ii. the potential criminal sanction (no evidence on the issue in this case) participation in a fraudulent claim was extremely serious breach of the overriding objective:

The Order was therefore to permit the (modest) claims of Mr and Mrs HAQ, but Order each to pay 2/3 of the Defendant's costs (on the indemnity basis) of defending each case, leaving c£1,400 to be paid by them (and Ms Parveen).

Long cut

Significant general cases reviewed by Walker J (put in chronological order)

Arrow Nominees Incorporated v Blackledge [2001] BCC 591 (C/A)
When discussing (among many others) issues of failure to disclose, or doctored documents, Ward LJ commented:

> "The attempted perversion of justice is the very antithesis of the parties coming before the Court on an equal footing." (paragraph 73)

Molloy v Shell UK Limited [2001] EWCA Civ 1272 (C/A)
This case is famous for the dicta of Laws LJ (paragraph 18)

> "For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the Court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the Defendant's costs."

Axa General Insurance Limited v Gottlieb and Gottlieb [2005] EWCA Civ 112.
This is authority for the proposition (in a claim on one's own insurance) that

> "An insured who is discovered to have advanced [a claim which either in whole or in part is dishonest] will not merely be deprived of the amount of the fraudulent claim … but will also be debarred from recovering the amount of the claim which could have been made instead of the fraudulent claim."

Kelly v Churchill Car Insurance [2006] EWHC 18 (QB), Gibbs J
Be careful with 'Kelly' – see bold text below
This considered new evidence after the trial showing that the Claimant had lied about the three out of four heads of claim (only the cost of vehicle repairs was accurate). Gibbs J decided that, notwithstanding the Claimant's dishonesty in relation to one aspect of the claim:

> "I am not persuaded that I should depart from the basic principle of the law of negligence, and disallow compensation for proven or admitted loss caused by a tortfeasors. The fact that a Claimant dishonestly puts forward unjustified heads of loss should not disentitle him in law from recovery such head or heads of loss as are indisputably made out. The special rule relating to avoidance of insurance claims is, as it seems to me, confined to the special considerations governing that area of the law. I can find no support than equivalent or similar rule relating to claims in tort." (paragraph 15).

The Judge considered that he could ensure that justice was done by varying or setting aside the relevant aspects of the Recorder's findings from whatever heads of damages, and penalising the Claimant in costs. The Judge's approach was then to set aside the claim for loss of earnings which was considered fraudulent.

The Judge then reconsidered the damage for pain and suffering, which was based in that case solely on what the Claimant had told her GP, and said

> "It is possible that the Respondent suffered some degree of pain, suffering and/or inconvenience; but knowing the extent to which he had perjured himself in the course of these proceedings, I cannot be satisfied that what he said would have been sufficient to establish any ascertainable loss under these heads. The justice of the case is not served by referring these issues back for a rehearing. Accordingly, I set aside the awards under these heads. The remaining head of loss for which damages were awarded was the cost of repair. This is admitted, and will accordingly stand." (paragraph 17)

Gibbs J also decided that the fraudulent claimant ought to pay the costs of the original claim and of the appeal on the indemnity basis.

In AL-HAQ, Walker J noted specifically (paragraph 21) that Gibbs J had not been referred to the *Arrow Nominees'* case, nor had any submissions been addressed to him as to the exercise of his discretion under CPR3.4(2).

Review of Phantom Passenger Cases by Walker J (put in chronological order)

Ghalib v Ghaffar and Hadfield (HHJ Phillips, 29.1.04)
HHJ Phillips founds that the first and second claimant, who had been in the car struck by the Defendant, had given false evidence that another person had been in the car, in order to provide him with a fraudulent claim. The Judge considered that the *Arrow Nominees* case gave rise to 2 questions for him to determine:

1. To what extent did the Claimant fail to help to further the overriding objective;

2. Whether in light of the conclusions on 1, the exercise of the Court's discretion to strike out the statement of case under 3.4(2).

This case is very useful, not only for the 'test' adopted by Walker J in AL-HAQ but for considerations to weigh:

On question, 1:

(a) "Putting forward a false witness statement calculated to mislead the Court … the antithesis of helping the Court to further the overriding objective of dealing with cases justly.";

(b) "By their conduct … increased the costs of the litigation substantially" (1 day trial became 2)

(c) Case received a disproportionate amount of Court resources;

On question 2:

(a) breaches of the CPR were substantial;

(b) claims were of limited value – so dismissal would not be very significant;

(c) likely trial could have been avoided if the Claimants had not breached the overriding objective;

(d) a fair trial of all relevant issues had taken place (unlike the situation in *Arrow Nominees* – where the trial had lasted 29 days and then been aborted);

(e) Claimant's misconduct was in respect of someone whose case was no longer before the Court (that claim had been discontinued);

(a) There had been misconduct by the *Defendant* - who lied about the occupants of her own car until she got into the witness box.

Weighing those factors, his Honour Judge Phillips did not strike out the claims but rejected the Claimant's evidence of injury on the grounds that their credibility was shot.

Patel & Patel v Ali, 30.01.06, Mr Recorder Wilby QC
The Recorder decided that there were only 2 passengers in the Claimant's vehicle and consequently he dismissed each of the second, third and fourth Claimants' claims because he could not be satisfied which one of them would have been among those passengers. He then struck out the first Claimant's otherwise valid claim under CPR 3.4(2), having considered 2 questions set out by His Honour Judge Phillips in the Ghaffar case.

Khan & Others v Hussain & others 16.5.07
This case (an appeal from the DJ) involved another phantom passenger, and possibly a switch of cars – ie passengers saying they were in one car rather than the other! (the Judgment is adopted in UL-HAQ) – but not the result – here the (highly robust) Judge struck out the claims.

Bashir & Others v Ahmed & Others 2.11.07, HHJ McKenna
This is a case in which the Judge dismissed the fraudulent claims of 2 parties to the action as well as 2 otherwise genuine claims, on the basis of the criteria in Ghaffar, and in Khan. The Judge also dismissed a claim by one Claimant who had been only 11 at the time of the accident, and was 15 at trial, because she had not volunteered the truth in the witness box.

A final point
The decision to strike out is a case management decision – so that the appellate Court must be extra-cautious about interfering (paragraph 44). If the Judge rehearses the correct test, and applies it, it will be difficult to interfere.

Section 2: Claimants in Contempt

Joanne Kirk v Carol Walton
[2008] EWHC 1780 (QB)
Cox J

Background
This case concerned what was agreed to be a minor rear end shunt RTA on 14.9.01. Proceedings were issued in August 2004 shortly before limitation. At the time the Claimant (then 45) had been a university administrator, and had a history of musculo-skeletal complaints. She alleged that (in October 2002) she had had to give up work as a result of her symptoms.

The size of the claim and the eventual settlement

In January 2005 the Claimant's revised Schedule amounted to over £800,000 (and included substantial claims for past and future loss of earnings and care/assistance. On 16 February, the Defendant paid £25,000 into Court and in addition offered to pay the CRU of £9,000.

For reasons explained below, on 1 December 2006 the Defendant offered to settle the claim for the sum in Court providing the Claimant paid all of the costs from 21 days after the original payment in. The claim was later settled on that basis by a consent order dated 26 June 2007, and the Claimant being awarded all of her costs up to and including 21 days after the payment into Court.

Developments in the evidence leading to settlement

The Claimant relied on medical evidence from an orthopaedic expert and a consultant physician/rheumatologist. Before the claim commenced, a report in November 2004 by the rheumatologist diagnosed fibromyalgia related to the accident.

Almost exactly a year later the Defendant's rheumatologist concluded that "Exaggeration is the major and probably dominant feature. I believe Mrs Kirk's condition is now no worse than before the accident …"

The Defendant's orthopaedic surgeon, who examined the Claimant on 8 December 2005, "could identify no physical cause for the Claimant's symptoms, and he could not explain her marked disability 'solely on the basis of a so called whiplash type injury to her neck' " (Judgment paragraph 12)

Mr Ross, the Claimant's spinal surgeon, found it "difficult to understand why her symptoms were persistent … there were no physical findings to explain her presentation in orthopaedic terms (Judgment paragraph 12).

DVD evidence

The Defendant disclosed extensive DVD recordings taken on various days in March 2005 and then between September and December 2005 (in fact the Defendant served further DVD recordings, including some footage only disclosed at the contempt of Court hearing on 4 June).

Of course, in keeping with Defendant (and good?) practice, the DVD was not served until after the Claimant had served her witness statement.

The Claimant's evidence

The Claimant's statements were served on 10 April 2006 and 7 June 2006 and depicted, as the Judge found "a woman who is severely disabled, unable to work and in need of substantial care and assistance".

These were followed by Part 18 answers to the Defendant's questions (on 26 September 2006) which echoed the Schedule and statements and set out disabilities the Claimant suffered daily. They also confirmed assertions in an "Incapacity for work questionnaire" signed on 9 September 2004.

The last of the Claimant's evidence were some (somewhat defiant) comments about the DVD footage, in which the Claimant stated: "Overall the tapes show nothing of significance concerning my behaviour during the occasional short outing I have made during the 11 days of surveillance" (paragraph 19). The Claimant also noted that the surveillance teams have been unable to gain access to her house and therefore see how she behaved before and after the periods of footage.

The medical response to the DVD footage

Mr Getty, the Defendant's spinal surgeon, said the video showed "a person who really one would not assume had any particular musculo-skeletal problems" (paragraph 20). Mr Bernstein, the Defendant's rheumatologist, gave a concurring opinion about the Claimant's symptoms and disabilities.

The law

Paragraph 32.14 of the CPR provides as follows:

(1) Proceedings for contempt of Court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

(2) Proceedings under this rule may be brought only:
    (a) by the Attorney General; or
    (b) with the permission of the Court.

Cox J quotes ***Malgar Limited v R E Leach (Engineering) Limited*** (1999) WL 104 8312 in which the VC of the Chancery Division made the following points clear (page 2 of that judgment):

> "Proceedings for contempt are not private law proceedings. They are public law proceedings. … It is a case of an allegation of public wrong, not private wrong. Interference with the course of justice is plainly a public wrong and it is right therefore that there should be a public control over the launching of proceedings for this species of contempt … The Court from which permission is sought will be concerned to see that the case is one in which the public interest requires the committal proceedings to be brought. I repeat that these are not proceedings brought for the furtherance of private interest. They are brought in the public interest and are in some respects like criminal proceedings. Nonetheless they are civil proceedings and they are civil proceedings to which the overriding objective set out in CPR 1 is therefore applicable."

The Judge then referred to the important comments of qualification by Pumfrey J in ***Sony Computer Entertainment & Others v Ball & Others*** [2004] EWHC 1192 (Ch) in which the Judge indicated that:

> "The discretion to permit applications of this nature to proceed must be exercised with very great caution. It can hardly be appropriate, it seems to me, to permit a general investigation of the facts surrounding the particular infringement in the context of the contempt proceedings. … The Claimant must satisfy the Court there is a strong case – and preferably an admitted case – that a particular misrepresentation is untrue."

<u>The Judge's Conclusions</u>
The Judge viewed (all of the) the DVD recordings herself, and stated:

> "The contrast between the Claimant's verified statements, persisted in over a prolonged period of time, and what is shown on the DVD footage, taken together with the comments of the Defendant's medical experts, is such as to raise a strong prima facie case against the Claimant; and the Defendant's allegations cannot be regarded as either tenuous or argumentative. The DVDs are of sufficient length and are sufficiently contemporaneous, representative, and consistent to merit a full investigation of the matter." (Paragraph 33)

It is interesting to note that the Claimant had not served any further evidence from either of her own medical experts after the DVD evidence was disclosed – hence the Judge's reference only to the comments of the Defendant's experts.

The Judge then explained the context in which she approached her decision, noting specifically that she was taking into account the fact that fibromyalgia is a controversial and non specific diagnosis with a spectrum of symptoms which may be variable – a matter she considered would go to the Claimant's defence of the contempt proceedings (paragraph 35). The Judge also reminded herself about the extent of the caution necessary before granting permission for such proceedings to be brought (paragraph 29). However, with all those matters in mind she came to the very clear conclusions:

> "There is, in my judgment, a strong public interest in personal injury claimants pursuing honest claims before the Courts" […] "On the material presently before me there is a strong case, which requires an answer from the Claimant, in contempt proceedings". (paragraph 34)

Importantly, the Judge also decided that "The mere fact that the action was settled, on the terms agreed between these parties, does not extinguish any contempt" (paragraph 36).

She agreed with the Defendant that they might have been criticised had they threatened or instigated such proceedings during negotiations before the claim had come to an end. The Defendant had never denied that the Claimant had suffered an accident and suffered injuries, and loss and damage. They had offered, and indeed concluded the case for £25,000 plus the costs to the date of the payment into Court. In those circumstances, the Judge said:

> "I reject entirely the suggestion that this is satellite litigation amounting to an abuse of the Court's process." (paragraph 37)

What Next for Ms Kirk?

It remains to be seen how the Court will resolve the issues in the contempt proceedings, and a number of important considerations come to mind:

(a) Who will fund the Claimant's defence of the proceedings? She faces a prison sentence, among other sanctions, if found guilty of contempt of Court, but presumably will have little by way of funds to defend such an action, save for the residue of the damages agreed between the parties;

(b) Is the Claimant entitled to Legal Aid to defend the proceedings?

(c) What medical evidence will be permitted in the second action – will the Claimant be permitted to adduce entirely new evidence from new medical experts, if she so wishes?

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