DEANS COURT CHAMBERS

CIVIL INSURANCE FRAUD NEWSLETTER

Autumn 2020

From the Deans Court Chambers Fraud Team

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DEANS COURT CHAMBERS

Editorial

By Zoe Earnshaw
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Welcome to the Autumn Edition of our Fraud Newsletter. We hope you are safe and well despite the continued difficulties we all face.

The 2021 edition of the Legal 500 has recently come out. It is very pleasing to see that Deans Court's outstanding reputation in PI, clinical negligence and fraud work continues. A number of members have been recognised as leaders in their field – congratulations to all of them! You can read more about it here https://deanscourt.co.uk/chambers-news/deans-court-legal-500-2021-rankings

In our first article Simon McCann helpfully sets out the new rules and ongoing pitfalls in relation to proceedings for contempt of court. It has long been regarded as a procedurally complex area and it is to be hoped that the new rules bring some degree of clarity. James Hogg provides an insightful analysis of the case law and principles which arise in relation to the admission of similar fact evidence in civil proceedings. Such evidence can, in the right case, be of significant value, so knowledge as to when the Court will permit its admission is key.

Wasted costs applications are always contentious and Daniel Glover considers the circumstances in which successful applications can be made and provides handy guidance as to tactics. The question of set-off in relation to costs is addressed by Alex Taylor. He provides a detailed analysis of the recent case law in relation to whether costs can be set-off where QOCS applies.

David Boyle looks at the amendment to Statements of Truth and considers its implications for expert witnesses. Whether the change to the rules will mean that there is a greater sanction for experts who act in breach of their CPR 35 duties will be interesting to see.

Finally, as a team we were delighted with Pascale Hicks' recent success in securing a finding of fundamental dishonesty and persuading the Court to dismiss a claim pursuant to section 57 of CJC Act 2015. She has kindly provided a short case note with details.

On a personal note, I have recently been at Court for some in-person trials. It was great to be back in a real Courtroom instead of staring at images of people on my laptop! One was a high-value chronic pain case which turned heavily on surveillance evidence and showed clearly how such evidence can be fatal to a Claimant's claim. The evidence persuaded the Court to make a finding of fundamental dishonesty. Watch this space for an article about it in a future newsletter…

Throughout the lockdown, members of our Civil Fraud team have conducted an extensive programme of seminars to our instructing solicitors and insurers. These have been very well received, and we are grateful to all those that joins us online, and to those who gave us ideas for the programme. Details of the seminars given are available from our clerks, but by way of some examples, we have spoken on "Strategy and Tactics in FD cases", "Private Prosecutions and Contempt", and "COVID and FD claims". If you would be interested in hearing these or any of the rest of our programme, please do ask.

Can I take this opportunity to thank those readers who have provided valuable feedback and ideas for topics. We are always keen to hear your views and appreciate your continued support. Thank you for reading our newsletter.

ZOE EARNSHAW

20 October 2020

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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Contempt of Court: Long Overdue Change

By Simon McCann
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"Truth is ever to be found in simplicity, and not in the multiplicity and confusion of things"

(Isaac Newton)

On any view, the rules regarding the committal of a person for contempt of Court have, in the past, been the exact opposite of what Newton was after. On multiple occasions I have advised insurers and their panel solicitors in terms that could have been put in 10-foot high capitals on the outside of Chambers – "BE CAREFUL!"

The Rules – CPR 81 – were until, the beginning of October 2020, a complex labyrinth of procedure, Practice Directions and guidance notes. The Court of Appeal described the position as being "unsatisfactory and unclear". Happily, there have been substantial revisions to the process, and so it is a good time to take a quick look at the procedure that is now in place.

It should be said that nothing in the new CPR 81 alters the substantive principles as to when a committal may be successful, nor – as the very recent case of Oliver v Shaikh [2020] EWHC 2658 (QB) makes clear – the likely sentences. The new CPR 81.1 makes this plain:

> **"81.1**
>
> (1) This Part sets out the procedure to be followed in proceedings for contempt of court ("contempt proceedings").
>
> (2) This Part does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law.
>
> (3) This Part has effect subject to and to the extent that it is consistent with the substantive law of contempt of court."

Typically after a fraudulent insurance claim has failed or discontinued, the aggrieved insurer will make a CPR 23 application (in existing proceedings) or start a fresh set of proceedings via CPR 8 otherwise. That has not changed. Permission to proceed with the application (required before the final hearing) is needed in both a County and High Court case, although it is now clear that in the former case the Divisional Court will deal (CPR 81.3(8)), whilst in the latter, the High Court will consider the application in an existing High Court case (CPR 81.3(7)).

Of more interest is the clarity now brought by CPR 81.4 which sets out – with the helpful title, "Requirements of a contempt application" – what is required, making the procedural errors that beset earlier applications less likely. I am afraid that it is necessary for me to set out CPR 81.4 in full:

> **"81.4**
>
> (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
>
> (2) **A contempt application must include statements of all the following**, unless (in the case of (b) to (g)) wholly inapplicable—
>
> (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

Contempt of Court: Long Overdue Change

Continued…

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public."

Some of the main points to note are:

(1) The application has to be supported by written evidence setting out the facts alleged to make up the contempt (in numbered, chronological order), and which include the factors set out in the part (detailed for the first time in this revised rule)

(2) Personal service remains (although it can be dispensed with in certain circumstances), which is expensive

(3) The application must state that the respondent is entitled to apply for legal aid, and can be legall represented – this

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Contempt of Court: Long Overdue Change

Continued…

(4) is new, and potentially of great significance

(5) The application must specifically state that the respondent may be treated more leniently if they apologise

The second point of these 4 is important since now the applicant/insurer has to tell the respondent/claimant that they may be able to receive funding to defend the application. This is obviously more likely to encourage the involvement of lawyers, prolonging the process and increasing the costs.

It remains the case – more so, in fact – that the case chosen for the application for contempt must be the "right" one. Although the processes are now set out in a more comprehensible way, I would not say that they are now "simple", and they are certainly not "cheaper".

Slightly beyond the scope of this article though it is, I should also highlight some recent cases since we last considered the law of contempt in this Newsletter. In particular, I would draw the reader's attention to:

Recovery Partners GP Ltd & Anor v Rukhadze & Ors [2018] EWHC 2918 (Comm): a commercial case about the importance of the Statement of Truth (decided before the rules about the wording of the Statement changed earlier in 2020)

Liverpool Victoria Insurance Company Ltd v Zafar [2019] EWCA Civ 392: an expert committed for contempt; therefore, a case of rather limited scope.

However, there are some interesting passages. For example:

> "We say at once, however, that the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth. In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all".

> "Because this form of contempt of court undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation. The fact that only a comparatively modest sum is claimed in the proceedings in which the false statement is made does not remove the seriousness of the contempt**.** The sum in issue in the proceedings is however relevant, because contempt of court by an expert witness will be even more serious if the relevant false statement supports a claim for a large sum, or a sum which is grossly exaggerated above the true value of any legitimate claim".

Jet2 Holidays Limited v Hughes & Hughes [2019]

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Contempt of Court: Long Overdue Change

Continued…

EWCA Civ 1858: contempt of court in a case that was issued, but in which there were "pre-action lies"

AXA Insurance Plc v Masud [2019] EWHC 497 (QB): 16-month sentence following on from a fraudulent insurance claim.

The reader may note the identity of Counsel for AXA in the last case!

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DEANS COURT CHAMBERS

Backwards Through the Looking-Glass: Similar Fact Evidence in Civil Proceedings

By James Hogg
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The recent case of R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088 provided a useful restatement of the principles relating to similar fact evidence in family and civil cases.

In that case an application for contact made by the father of two children was opposed by the mother; the father was accused of coercive control and sexual abuse. The mother wished to adduce evidence of similar coercive control by the father towards another woman, with whom he had a liaison shortly after the demise of their relationship. That evidence was excluded at first instance and the mother successfully appealed; the Court of Appeal holding that the evidence was admissible and relevant, and that it was in the interests of justice that it be admitted.

The Court of Appeal reiterated the two-stage test set down in O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534 which involves firstly a legal test- i.e. whether the proposed evidence is relevant and admissible- followed by a case management test- i.e. whether the introduction of the evidence is reasonable and proportionate.

Per Lord Bingham:

"3. Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide.

As Lord Simon of Glaisdale observed in Director of Public Prosecutions v Kilbourne [1973] AC 729, 756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ….. relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

4. … *Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the enquiry".*

Accordingly, if an objective and fair-minded observer might attach importance to that evidence, then it will be considered relevant. Whether that evidence is then to be considered probative is an issue to be determined by the judge, who is, looking at all the circumstances of the case, to assess that evidence on the assumption that it is true.

Any application for such evidence must therefore provide sufficient background information for the court to enable those issues to be determined. A simple invitation to consider the pleadings will not suffice.

The second stage of the test tends to be more problematic for applicants. Lord Bingham acknowledged this in O'Brien:

"5. The second stage of the enquiry requires the case

management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted… The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole".

The application can therefore satisfy the first stage of the test but, as happened in JP Morgan Chase Bank & Ors v Springwell Navigation Corporation [2005] EWCA Civ 1602, fail at the second, if the court determines that the admission of the evidence would make the trial unwieldy and/ or involve significant further costs.

Those issues also require consideration in any application. If the issue is contentious then comparator trial timetables and, if the case is subject to costs budgeting, a revised budget, will assist in clarification. Think not only about what evidence you intend to call, but how that evidence will be presented.

The arguments usually raised in support of the admission of similar fact evidence include:

i. That justice requires the evidence to be admitted; i.e. if it is excluded, a wrong result may be reached.
ii. That there are wider considerations; for example, the public interest in exposing fraudulent claims.
iii. That arguments as to admissibility are better left to the trial judge.

The countervailing arguments include:

i. That the evidence will distort the trial and distract the judge by focusing attention on issues collateral to the issue to be decided.
ii. That the potential probative value of the evidence should be considered against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded.
iii. The burden which that evidence would lay on the resisting party in terms of the time, cost and personnel resources of giving disclosure, and the lengthening of the trial, with the increased cost and stress involved.
iv. The potential prejudice to witnesses if called upon to recall historical matters, or arising from the loss of documentation, or the fading of recollections.
v. Prejudice arising from the late admission of the evidence.

Similar fact evidence can be of great utility in fraud litigation- especially in fraud ring cases- typically when a defendant seeks to adduce past evidence going to propensity and/ or to demonstrate linkage between various individuals and/ or companies.

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In MRH v The County Court Sitting at Manchester [2015] EWHC 1795 (Admin), the judgment set out a summary of the similar fact evidence put before the court at first instance and to which an unsuccessful application had been made to exclude:

"5. In her defence Keoghs referred to 11 other road traffic collisions which occurred between 26th January 2012 and 17th January 2013 which they said had similar modus operandi and other common features. In all of them the claimant vehicles had braked for no good reason leading to the collisions which were the causes of the damage. In 10 of the 11 cases the claimant's vehicle had braked because a stooge vehicle in front had braked. After the collision the claimants had all used the services of the same recovery company. The claimants' vehicles were inspected in each case by the same company. Some or all of the claimants in each of the 11 cases were represented by MRH. In each case the claimant drivers were provided with a replacement car on credit hire by Apex or Pennington. It was alleged that all of these collisions had been fraudulently induced to make false insurance claims. The pleading said in terms that "For the avoidance of doubt, no allegations are made against any of the above named companies. Rather it is the use of their services by the various claimants (who have all experienced remarkably similar accident circumstances) that links the 12 collisions." Ian Toft of Keoghs provided a witness statement giving evidence about these other cases.

6. On 8th October 2014 the Recorder refused an application to exclude Mr Toft's evidence. He ruled that it was potentially admissible on the similar fact principle although whether that was indeed the case would have to be examined at the end of the trial".

What is the evidential standard of proof required and to what extent do the facts relating to the other occasions have to be proved for propensity to be established?

Courts have recognised a distinction between proof of a propensity and proof of the individual underlying facts said to establish that a propensity exists.

Per Peter Jackson LJ in R v. P:

"26. …In summary, the court must be satisfied on the basis of proven facts that propensity has been proven, in each case to the civil standard. The proven facts must form a sufficient basis to sustain a finding of propensity but each individual item of evidence does not have to be proved".

The evidential threshold for the initial admission of that evidence differs to that required at trial. Per Peter Smith J in Silversafe v Hood [2006] EWHC 1849 Ch:

"37. Equally in my view it would not be appropriate to strike out the similar fact evidence at this stage. The question of its probative value is really a matter for the trial Judge. It is always dangerous to make a pre-emptive decision as to the admissibility or probative value of any evidence in advance of trial when the full picture is not presented"

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Backwards Through the Looking-Glass: Similar Fact Evidence in Civil Proceedings

Continued…

Useful guidance as to the management and presentation of such evidence was provided by Andrew Edis QC (as he then was) in Locke v 1) Stuart, 2) AXA Corporate Solutions [2011] EWHC 399 (QB):

"34. It should be possible to prepare a document, based on the documentation… which accurately and fairly summarises their relevant contents so far as the primary facts are concerned. It can identify, in the manner of a Scott Schedule, which primary facts are in dispute so that the necessary material, and only the necessary material, can be adduced to deal with that. It may further also identify which inferences are agreed and which are not.

36. The process of agreeing the primary facts and the proper limits of any inferences which they may justify will start with a statement such as that prepared by Mr. Smith in this case, and will be assisted if particular care is taken to include appropriate concessions as to the proper limits of any "link" contended for".

The two-stage test in O'Brien is part of a broader tapestry of powers defined at CPR 32.1 which give the court the power to control the evidence by giving directions as to the issues on which evidence is required, the nature of the evidence required to decide those issues and as to the manner in which such evidence is to be placed before the court. The court may also exclude otherwise admissible evidence and limit cross-examination. Any application to rely on similar fact evidence should be tailored at the outset with those potential restrictions in mind.

Summary:

An application for permission to rely upon similar fact evidence should:

1. Be made as soon as practicable (balancing the requirement not to tip-off or prejudice ongoing investigations etc.);
2. Address both the legal and case management tests in O'Brien;
3. Explain clearly:
   a. What the evidence is;
   b. What the evidence demonstrates;
   c. How that evidence will be adduced;
   d. Why it is relevant to the issues to be decided;
   e. Why, considering all the circumstances, permission should be granted;
   f. What trial timetabling and litigation costs consequences are envisaged;
   g. What, if any, consequential directions are sought.

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Wasted Costs: A last chance saloon?

By Daniel Glover
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The Framework

The application of the wasted costs framework is often overlooked and, more often than not, misunderstood. This article provides a short synopsis of the wasted costs regime and its applicability in cases involving fraud, fundamental dishonesty and general litigation.

The framework of the regime begins with s.51(6)-(7) of the Senior Rules Act 1981 and extends to CPR 46.8 and the accompanying Practice Direction. I do not propose to recite the contents of the same and simply advise the reader to consider the relevant provisions in the White Book and the commentary therein.

There are a number of leading cases on wasted costs and most practitioners will be well acquainted with the judgment of Mr Rosen QC (sitting as Deputy High Court Judge) in *Al-Jaber v MB1 & Ors* [2019] EWHC 3759 (Ch) where a Defendant failed to secure an order for wasted costs arising out of an application made by the Claimant for a worldwide freezing order. In his concluding remarks, Mr Rosen QC reaffirmed the principles set out in *Ridelagh v Horsefield* [1994] Ch 205 and summarised the wasted cost regime as follows:

- The jurisdiction for wasted costs should only be used when matters are capable of summary determination (see further *Kagalovsky* and *Balmore v Wilcox and others* [2015] EWHC 1337 (QB)).
- Wasted costs means any costs incurred by a party as a result of any improper, unreasonable or a negligent act or omission on the part of any legal or other representative, or any employee of such a representative.
- CPR 46.8 and PD46 para 5.1 set out a two-stage procedure for wasted costs applications:
    - Stage 1: The court was required to consider whether it was satisfied that it had before it evidence which would likely lead to a wasted costs order being made.
    - Stage 2: A hearing where the court will go on to take a more detailed consideration of the application.
- The wasted costs order can be made up to and including the detailed assessment.

A Route to Fraud

Such is the variety of 'types of claims', there is an unlimited array of scenarios that may give rise to a wasted costs application within the confines of fraud. I only propose to look at one discrete scenario where I have secured orders for wasted costs in recent times.

Case Study- Knowledge of Solicitors

A recurring theme is the knowledge of claimant solicitors and the duty that claimant solicitors have to the court when dealing with claims that include allegations of fraud and/or fundamental dishonesty. Whilst lawyers can (and do rely) upon privilege, they cannot hide behind objective evidence.

Wasted Costs: A last chance saloon?

Continued…

A decision that helps to demonstrate this point (ie, the obligation upon solicitors to look critically at their own client's claim where allegations of fraud) is *Rasoul v Linkevicius & Groupama*, CC (Central London) (Judge Collender QC) 05/10/2012 (unreported) where an insurer succeeded on an application for a wasted costs order of the action against the claimant's solicitors. Judge Collender QC considered that the claimant's solicitors had been negligent in failing to recognise clear evidence of fraud by the client in circumstances where the insurer had made the allegation clear within the defence and if properly considered, a competent solicitor would have discontinued the case.

In reality, where issues of "impropriety, unreasonableness or negligence" arise, applications for wasted costs should be a corollary to applications made under CPR 44.15(c)(ii). From a practical viewpoint the evidence required for an application under CPR 44.15(c)(ii) is a higher burden than that under a wasted costs application by virtue of the knowledge required. This should ensure that where both applications are made, the evidence is capable of serving a dual purpose.

In summary, the overarching benefit of wasted costs applications is the potential costs recovery that is otherwise unavailable within the confines of qualified one-way costs shifting. Whilst not every case is suitable for such application, there are practice points that should form part of any lawyer's consideration with each claim they deal with.

Practice Points:

- Monitor the evidence and be sure to include a correspondence bundle at trial which highlights the evidence that lends itself towards a wasted costs application.

- Wasted costs evidence should be, where possible, unambiguous. The court will look to deal with the matter summarily. Where it cannot be dealt with summarily, the costs exposure will in most cases outweigh the value of the claim.

- Interim applications (i.e. to strike out and/or summary judgment) should also be supported by evidence of wasted costs.

- If the evidence is available, then plead the case on wasted costs at the time of filing and serving a defence. Notice is an important factor.

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DEANS COURT CHAMBERS

Costs off Setting in a QOCS Case: How to Make Sure Your Clawback Does Not End Up a Draw Back

By Alex Taylor
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A series of recent judgements have confirmed that, for the time being at least, a defendant to a personal injury claim which is subject to qualified one-way cost shifting (QOCS) may set off an award of costs in its favour against costs which it is liable to pay to the claimant. This article examines the circumstances in which a set off against costs is likely to be ordered and when it is not, some relevant considerations when seeking a set off and what the future may hold for this area of law.

The starting point for any consideration of costs is section 51 of the Senior Court Act 1981 which provides a court with a wide discretion to determine by whom and to what extent costs of and incidental to proceedings are paid. However, in personal injury cases the QOCS regime limits that discretion by preventing a defendant in whose favour a costs order is made from enforcing that order against the claimant, unless certain specific exceptions are fulfilled. The relevant exception for the purposes of this article is the automatic entitlement of a defendant to enforce a costs order against any damages and interest which a claimant is entitled to recover in the proceedings. The basis for this right is CPR rule 44.14:

*44.14—(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant **may be enforced without the permission of the court** but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for **damages and interest** made in favour of the claimant.*

A person reading this rule would be forgiven for concluding that the reference to a right of set off against damages and interest with no reference to an equivalent right against the claimant's costs is striking and almost certainly deliberate.

Prior to the implementation of the QOCS regime the right of a party to seek an order from the court that it may set off its costs entitlement against a cost liability was recognised within the rules. This appears in CPR 44.12:

*44.12—(1) Where a party **entitled to costs is also liable to pay costs**, the court may assess the costs which that party is liable to pay and either—*

(a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.

In many ways one might think this rule is no more than an expression of common sense, since any party seeking to enforce the payment of a debt would be met with a defence of set off if any sum was simultaneously owed in the other direction. A facility for the court to direct that only the balance is paid seems to be no more than a rule of expedience.

The question then arises of whether, and in what circumstances, a defendant with an entitlement to costs and a concurrent liability to pay costs is entitled to

set off one against the other, even in a case to which QOCS applies. This was the issue before the Court of Appeal in *Howe v MIB [2020] Costs L.R. 297*. In these proceedings the claimant claimed against the MIB following a road traffic accident in France relying on regulation 13 of the *Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003*. The claim was dismissed resulting in a cost liability for the claimant in the defendant's favour. A question then arose as to whether or not proceedings under the 2003 regulations were personal injury proceedings to which the QOCS regime applied or not. That issue was originally resolved in the defendant's favour but was reversed on appeal. The claim was ultimately held to be a claim for damages for personal injury and the claimant enjoyed the benefits of QOCS protection in respect of the costs of the underlying action. Costs of that appeal followed the event and an order was made in the claimant's favour.

When the dust settled on this litigation the position was that the defendant was entitled to the costs of the underlying claim but the claimant was entitled to the costs of the appeal. The defendant then argued in the Court of Appeal that its liability to pay the claimant's costs should be reduced or extinguished by setting them off against its own entitlement from the original claim. The claimant resisted such a set off by contending that rule 44.14 limited the circumstances of permissible set off in a QOCS case to a set off against damages and interest only.

Lewison LJ considered rule 44.14 and held:

"Enforcement" there means enforcement in accordance with all the rules of the court, which would include the various powers that the court had as to compel compliance with its orders. Secondly, Part 44.14 enables enforcement without the permission of the court, whereas 44.12 requires the permission of the court or at least a court order in order for one set of costs to be set off against another.

I consider, therefore, that the court does have jurisdiction under CPR Part 44.12 to order a set-off of costs."

Whether these are valid distinctions is open to debate. It may be correct that the reference to enforcement in rule 44.14 would encompass the CPR mechanisms for enforcing judgement debts, but the reality is that in the vast majority of circumstances in which 44.14 is invoked the set off will simply be effected by a recording in the courts order at the conclusion of the litigation. Similarly, in relation to the second ground, the fact that 44.12 requires permission would seem to carry very little weight where, in reality, it is simply a mechanism of expedience, reflecting a set off which the parties could apply for themselves in any event.

Nevertheless, the ratio of this case is that costs off setting in a QOCS case is permissible in principle. As we shall see from subsequent cases, however, that is only the first hurdle that a defendant seeking such an order must overcome. It is also necessary to persuade

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the court that it should exercise its discretion to permit such a set off in the circumstances of an individual case. Little was said on the issue of discretion in the case of *Howe*. Had it been fully argued there is scope to doubt whether in fact a set off should have been ordered in those particular circumstances. This is because at the conclusion of the main action the claimant enjoyed the benefit of QOCS protection. He was then forced to incur the costs of pursuing an appeal in order to vindicate his right to that protection. The effect of costs off-setting was that the claimant was forced to appeal but did not recover his full costs of doing so.

The next case to consider is *Faulkner v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 296 (QB)* which is a judgement of Mr Justice Turner in the High Court. The issue arose in the context of the late discontinuance of a disease case by a claimant and a subsequent application by a defendant to reinstate the claim and for the court to immediately strike it out under CPR rule 3.4 on the basis that the claimant had disclosed no reasonable grounds for bringing the proceedings. Turner J was not impressed by the application, which he dismissed, describing it as "*an arbitrary procedural act of wanton posthumous desecration followed by a prompt and unceremonious reinterment".*

The defendant was ordered to pay the claimant's costs of the application but argued that it was entitled to set off these costs against the claimant's liability to pay the defendant's costs of the underlying claim, which arose automatically upon discontinuance. With what appears to be a marked lack of enthusiasm, Turner J considered that he was bound to follow the judgement in Howe on the issue of principle, however he declined to exercise his discretion to do so. He referred to and was guided by a judgement in *Darini v Markerstudy Group (24.4.17 unreported)* in which it was held that where a claimant discontinues a personal injury claim, QOCS works as intended, namely that cost cannot be enforced by the defendant. It cannot be correct that the defendant is able thereafter to bring an unsuccessful application which is dismissed with costs but, as a result, places the claimant in a worse position than he would have been in, but for the application. This would leave a claimant effectively paying his own costs for the defendant's failed application.

Turner J did stress in his judgement that he was not seeking to lay down an absolute rule that a defendant who unsuccessfully applies to set aside a notice of discontinuance of the claim will never be entitled to a costs off set. However, it is plain from the decision made that a court is unlikely to exercise its discretion in a defendant's favour in such circumstances.

The final case to consider in this series is *Ho v Adelekun [2020] Costs LR 317.* The dispute arose following settlement of a personal injury claim to which fixed costs applied. A part 36 offer was accepted which included provision for assessment of reasonable costs. The claimant sought to argue that the defendant had contracted out of fixed costs, which the defendant disputed. The Court of Appeal resolved that argument in the defendant's favour. That left a situation in which the claimant was entitled to his fixed costs of the underlying

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claim but the defendant was entitled to its costs of the appeal. The defendant sought to set off one costs entitlement against the other.

On the issue of principle, it was accepted in the Court of Appeal that the judgment in Howe was binding, although the reasoning behind that judgment was strongly doubted. Newey LJ and Males LJ both saw considerable force in the argument that the reference to enforcement in rule 44.14 included set off and therefore should be read to preclude set off in respect of costs in QOCS cases. It was noted and accepted that the usual circumstances in which rule 44.14 would apply would involve a simple set off recorded in a court order, rather than use of CPR enforcement mechanisms. The omission of a right of set off against costs in rule 44.14 was held to be striking, as was the fact that the rule was not expressed to be subject to CPR rule 44.12. All this was said to add up to a "powerful case" for calling into question the decision in *Howe*.

Turning to the exercise of discretion, it was held that on the premise that QOCS and costs set off are not incompatible, arguments based on principle carry little force. A defendant would not need to demonstrate that the underlying claim was particularly weak, was an abuse of process or that there was misconduct by the claimant. A set off was permitted simply on the basis that there was nothing about the claimant's circumstances to render it unjust and because the defendant had incurred substantial costs vindicating her rights.

So what do we learn from these cases as to when an application to set off costs may succeed and when it may not? It is clear that it is likely to be rare for an unsuccessful application to reinstate and then strike out to benefit from an order for a costs set off. This is especially so for applications to strike out under one of the grounds in CPR 44.15.

The position in fundamental dishonesty cases may be slightly more nuanced. Where a defendant makes an application for a finding that a claim was fundamentally dishonest after a claimant has discontinued, the starting point would probably be that a court is unlikely to order a set off of costs where that application fails. However, given the nature of FD cases there may be scope to argue that the application, although ultimately unsuccessful, was reasonably made. Relevant factors may include the claimant's conduct in the proceedings generally, whether the defendant's dishonesty concerns were valid and justified, even if ultimately answered by the claimant, whether some dishonesty or misleading behaviour has been demonstrated, perhaps falling short of the standard for a fundamental dishonesty finding, and whether the claimant is deserving of the protection that QOCS provides in the circumstances of the individual case. Such arguments are as yet untested on appeal and will have to be assessed on a case-by-case basis.

In cases where a claimant has brought additional costs upon himself by pursuing a bad application or a failed appeal it is likely to be much easier to persuade a court that a costs set off should be ordered. Applying the

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approach in *Ho* there should be no requirement to demonstrate an especially weak case, any abuse of process or unreasonable conduct by the claimant. Costs set off should not be treated as a QOCS exception in that sense. The criteria may be as simple as there being nothing about the claimant's circumstances to render a set off unjust and that the defendant has incurred costs vindicating its rights. Exactly what sort of circumstances might make an order unjust remains to be clarified.

Where an interim costs order has been made in a claimant's favour, all possible efforts should be made by the defendant to delay the assessment and/or payment of those costs to the end of the action. In those circumstances if the defendant is successful in defending the claim there should be reasonable prospects of obtaining an order that the defendant's liability for the interim costs order should be extinguished by the claimant's liability for the defendant's costs of the action. However, if the interim costs order is paid at an interim stage, it is not likely to be possible to recoup that payment at the end of the action even if the defendant is successful.

Finally, there is a case in which an early part 36 offer by a defendant is not beaten by a claimant such that the defendant's entitlement to costs exceeds the claimant's entitlement to damages. Here it may be that neither party has put the other to wasted expense, save that the claimant should have accepted the offer. A defendant would have to make an application for an order under rule 44.12 to permit it to set off its costs entitlement against its liability to the claimant for pre-part 36 offer costs. In principle such an application should have some force.

As to the future, the comments made in *Ho* offer encouragement either for the rules to be revisited by the Civil Procedure Rules Committee or for the matter to be considered in the Supreme Court. Indeed, permission to appeal to the SC was granted in *Ho*. Whilst there is uncertainty as to how long the benefits of cost off setting for defendants may last, there are certainly opportunities to reap the benefits as matters stand, so long as applications are made in cases where a court is likely to exercise its discretion in the defendant's favour.

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Statements of Truth and its Applications to CPR35 Experts

By David Boyle
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The Civil Procedure Rules 1998 were introduced on 1 April 1999 with the oft-repeated mantra that this was a 'new procedural code'. In fact, the truth was that the new rule book replicated many of the concepts set out in its predecessors, the Rules of the Supreme Court 1965 and the County Court Rules 1981. Terminology was tweaked of course, and the Court was given centre stage with its Case Management powers in a bid to ensure that litigants were chivvied along towards trial, but much of the basic structure of litigation was as it always had been.

Two of the concepts which gave the impression of more substantive rewrite were the rules governing "expert" evidence (CPR35) and the introduction of the "statement of truth" in CPR22.

The statement of truth was a formal declaration, to be attached to any number of formal documents including statements of case, witness statements, information provided under CPR18, documents pertaining to service and the like. They certify that the signatory believed the truth of the contents of that document and the wording would be specific to the type of document. As an example, the maker of a witness statement would certify: "I believe that the facts stated in this witness statement are true."

A failure to sign a statement of truth meant that a statement of case might fall to be struck out (CPR22.2) and that a witness statement might not be admitted into evidence (CPR22.3) but the rule was silent as to what might happen to those who chose to sign a statement of truth when they knew that, in fact, the facts stated were not actually true.

Interestingly, the notes to the White Book (paragraph 22.1.21 in the 2019 White Book) read: "In certain circumstances, a false statement made in a document verified by a statement of truth may lead to a liability for contempt of court: see Section 6 of Pt81 (rr.81.17 and 81.18). Proceedings for contempt of court may be brought against a party if they make, or cause to be made, a false statement in a document verified by a statement of truth."

One might have thought that a more direct reference to the provisions of CPR32.14 might have been more apposite: "32.14: (a) 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."

Experts providing opinion evidence pursuant to CPR35 were to have their own statement of truth. The intention behind CPR35 was that single experts, preferably jointly instructed, were to be the norm, with the idea being that they would serve only the Court and not the party instructing them[1].

Their obligations followed on from the guidance of Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, 81 (which still forms the basic guidance for experts across much of the world), and those

[1] Detailed discussion of whether intention has been fulfilled is a separate paper.

obligations were codified in the Practice Direction to CPR35. Leaving aside issues of neutrality and independence, the key to any expert's opinion would be that they must set out the range of opinion and give reasons for their own opinion[2], which they would be expected to hold irrespective of whether they were instructed by the Claimant or the Defendant.

To ensure that such opinions were genuinely held, the statement of truth to be signed by an expert was specifically identified in the following sub-paragraph, 35PD3.3: "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

As with the parties themselves, the consequences of verifying a document with a false statement of truth were those set out in CPR32.14.

On 6 April 2020, the 113th Update to the Civil Procedure Rules Practice Direction Amendments updated CPR22 by changing the wording of the statement of truth, by adding the words in bold:

"[I believe][the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true. **I understand that proceedings for contempt of court may be brought against anyone who 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."**

More usefully, paragraph 2.4 of 22PD requires the statement of truth to be written in the witness's own language whilst paragraph 2.5 requires a statement of truth to be dated with the date it was signed. If a statement falls to be translated, 32PD (Evidence) sets out requirements to detail the process by which the statement had been prepared and the date of the translation falls to be stated.

The amendment to the statement of truth is one of form over function. It reinforces the import of the statement of truth to the person signing it, but in truth it is simply rendering express that which was already part of the rules. It simply put the warning front and centre for anybody obliged to sign such a document.

The amendment was apparently triggered by the case of *Liverpool Victoria Insurance Company Limited v Dr Asef Zafar* [2019] EWCA 392 (Civ) where the doctor, having been asked to change his prognosis by the solicitor had done so, and had thus signed a false statement of truth. The Court of Appeal, quite understandable, took a dim view of such a flagrant breach, and declared the sentence passed by Garnham J (6 months imprisonment, suspended) to have been unduly lenient (9 to 12 months immediate imprisonment was suggested as more appropriate, although their Lordships declined to increase the

[2] 35PD3.2(6). The simple, and obvious, inclusion of a requirement to explain why they rejected alternatives would make life significantly easier, but has never been included by the Rules Committee.

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sentence imposed). Reinforcing the import of the statement of truth was the underlying tenor of that judgment and, whilst the maker of the false statement in that case was an expert, it was important to highlight those issues to all those signing such documents.

It therefore comes as no surprise that 35PD3.3 has been amended in similar terms to 22PD. The new wording is therefore (emphasis added)

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. **I understand that proceedings for contempt of court may be brought against anyone who 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.**"

Will that, in reality, make any difference to a reporting expert who was already prepared to sail close to the wind? Probably not. Their obligations were clear and unambiguous before the amendment, but they can have no complaints if they are now caught.

So what different will it make in practice? The first thing to consider will be whether the report has, in fact, been signed properly. All too often, reports are now signed electronically (as are witness statements). Dates are included automatically, and often incorrectly, on the face of the report, and those experts who simply date their reports November 2020 might want to revisit that ambiguity by inserting the day on which they actually sign their reports. Those who are prepared to physically sign their reports will potentially be demonstrating both their understanding of the import of the signature and the need for accuracy. If they get it wrong, there can be no escaping the fact that they signed the document. For those who prefer the simplicity and effective anonymity of an electronic signature, they must now understand that their belief falls to be challenged, and that simply producing stock reports, pre-signed, puts them at risk of direct challenge. The Courts have made it clear that dishonesty will not be tolerated, particularly by those who seek to make money from the system. Those who believe that they are unlikely ever to set foot in a courtroom, and thus immune from criticism may well find that their first appearance will be the first of a series, not as an expert, but as the respondent to an application for committal for contempt.

David Boyle

David Boyle is a barrister and the author of "On Experts: CPR35 for Lawyers and Experts", "An Introduction to Personal Injury Law" and "The Mini-Pupillage Workbook" all of which are available on Amazon and via www.lawbriefpublishing.com. His new book, "Case Management" is due for publication in early 2021 and he has various other books in the pipeline.

Pascale Hicks persuades Court to engage Section 57 of CJCA 2015 and dismiss Claimant passenger's claim following a finding of fundamental dishonesty at 3 day trial

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Pascale Hicks (instructed by DWF) secured a finding of fundamental dishonesty against a Claimant passenger involved a road traffic accident claim at Preston County Court on 9 October 2020, leading to the dismissal of his claim under section 57 of CJCA 2015, the recovery of costs on an indemnity basis and the disapplication of QOCS protection. Rather than recovering damages, the Claimant found himself having to make a payment on account of costs of £30,000.

The Defendant had conceded at an early stage both fault for the road traffic accident and that the Claimant had sustained genuine physical and psychological injuries - but Miss Hicks successfully argued that the Claimant had pursued an exaggerated claim for substantial losses, claimed at well in excess of £500,000.

His Honour Judge Dodd held that the Claimant, had "demonstrated a willingness to manipulate the evidence to his perceived advantage" and that "this was not a single lie or evasion in the heat of the moment, but a course of conduct he persisted in for months and only resiled from when pressed on the point at trial." His Honour found that the Claimant had manipulated and withheld the disclosure of medical documents and reports because the evidence "didn't suit him" and that he had no good answer for the multiple inconsistent contemporaneous medical records put to him in cross examination by Miss Hicks.

The case provides a timely reminder that courts will not shirk from dismissing dishonest claimant's claims.

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