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The fight against fraud

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"Fundamental dishonesty" and other measures, outlined by Denise Brosnan

- **Organised fraud is on the increase within the public sector.**
- **Among the recommendations in the Insurance Fraud Taskforce's report published in January was the belief that more effective action should be taken against fraudulent solicitors.**

Local authorities, like many other public bodies and insurers, are facing ever-increasing levels of fraudulent activity.

Organised fraud is on the increase within the public sector and with the advent of the Enterprise Act we have seen Public Liability claims take the lead, ahead of Employment Liability claims, as far as fraudulent claims are concerned. Tighter regulation and legislation against motor fraud has also led to increased fraudulent activity in EL and PL claims.

Among the recommendations in the Insurance Fraud Taskforce's (IFT) report published in January was the belief that more effective action should be taken against fraudulent solicitors with steps being proposed to tackle the issue of claimant firms bringing claims without proper instructions. Insurance claims tend to be more and more about the enablers, the ancilliary parties who stand to gain from these claims, rather than the claimants themselves. Several of the Taskforce recommendations are relevant to the public sector.

The edge

Local authorities tend to have the edge on insurers in adopting active defence policies where fraud is suspected. Repudiation rates for PL claims remain high, despite the attractions of settling within the portal process with the benefit of lower costs.

Before *Ul Haq v Shah* [2009] EWCA Civ 542 , [2010] 1 All ER 73 it was frequently successfully argued in cases where a claimant had exaggerated their loss or supported the fraudulent claim of another that their own claim should be struck out on the grounds of "abuse of process". This judgment limited the punitive options for defendants, determining instead that the dishonest claimants would still be awarded the genuine aspects of their damages, but would be penalised in costs. Several endorsing judgments followed with a worrying acceptance on the part of the courts that "lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed…".

In 2012, in *Summers v Fairclough Homes*, [2012] UKSC 26, [2012] 4 All ER 317 the Supreme Court determined that to make a false claim and to adduce false evidence is an "abuse of process". The claimant had grossly exaggerated the extent of his injury, claiming £800,000 in compensation for a claim worth £80,000. This case shifted the courts' approach, determining that the court has the power to strike out a "fundamentally dishonest" claim, albeit it limited the court's discretion to only very exceptional cases.

Since then, a package of reforms has increased a defendant's prospects of reducing a claimant's entitlement to damages if the claimant or the claim has been "fundamentally dishonest" or the claim is an "abuse of process". This notion is at the heart of s 57 of the Criminal Justice and Courts Act (CJCA) which came into force in April 2015. It is further embedded into the CPR through the introduction of the rules on QOCS (CPR 44.15 and 44.16).

Section 57, Criminal Justice and Courts Act 2015

The Act applies in personal injury cases where the court finds that the claimant is entitled to damages but, upon an application by the defendant, the court is satisfied, on the balance of probabilities, that the claimant has been "fundamentally dishonest" in relation to the primary claim or a related claim. The claim must then be struck out unless by doing so the claimant would suffer substantial injustice.

Distinct from CPR 44.16 it is the "claimant" under s 57 who must be found fundamentally dishonest rather than the claim.

It remains to be seen how the courts might apply the notion of "substantial injustice". It is hoped that a tough approach will be taken in the case of fraudulent personal injury claims.

QOCS

Of real significance to defendants are the exceptions to QOCS protection allowing recovery of costs against the claimant.

CPR 44.15 entitles a defendant to enforce a successful costs order without the permission of the court where the proceedings are determined an abuse of process.

Under CPR 44.16, costs can be recovered from a claimant with the permission of the court where the claim is found, on the balance of probabilities, to be "fundamentally dishonest".

The lead case is *Gosling v Screwfix* [2015] in which Judge Moloney held that the phrase must be interpreted "purposively and contextually" to determine whether the claimant is "deserving" of the costs protection afforded by QOCS. He contrasted fundamental dishonesty with that which is incidental or collateral. The dishonesty must "go to the root of either the whole of his claim or a substantial part of his claim".

The courts have shown a surprising willingness to make findings of "fundamental dishonesty" under CPR 44.16 reflecting an underlying intent to penalise fraudulent claimants. We have seen a steady stream of reports of cases in which QOCS protection has been lost.

It is hoped that the courts will grasp s 57 of the CJCA with equal fervour.

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