Court protection from abuse of process—The means are there but not the will

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Editor's Note

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Summers v Fairclough Homes Ltd [2012] UKSC 26

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The jurisdiction to strike out for abuse of process dictated by public interest

In *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 W.L.R. 616, the Court of Appeal held that the court had no jurisdiction to dismiss a claim for abuse of process at the end of the trial on the sole ground that the claimant sought to advance his claim by fraudulent means. It was of the view that the court had no power to deny such claimant what was otherwise due under the substantive law, even if the claimant had knowingly and fraudulently exaggerated his claim and notwithstanding any deceit and perjury to which the claimant resorted to support the false claim (for criticism of this decision see A. Zuckerman, "Must a fraudulent litigant be allowed to think: if the fraud is successful, I will gain much; if it is not, I will still recover my legitimate claim?" (2011) 30 C.J.Q. 1). *Ul-Haq* was followed by the Court of Appeal in *Summers v Fairclough Homes Ltd* [2010] EWCA Civ 1300. On appeal, the Supreme Court overruled *Ul-Haq* as a matter of general principle, though it upheld the result of the decision under appeal: *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.

The Supreme Court held that the court did have jurisdiction to strike out a statement of case for abuse of process under CPR 3.4(2), or under its inherent jurisdiction, even after a trial in which the court had made a proper assessment of liability and quantum. Lord Clarke, delivering the judgment of the Supreme Court, had no doubt about the existence of such power:

> "[41] The language of the CPR supports the existence of a jurisdiction to strike a claim out for abuse of process even where to do so would defeat a substantive claim. The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in

> such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made."

The Supreme Court agreed with the Court of Appeal's view in *Masood v Zahoor* [2009] EWCA Civ 650; [2010] 1 W.L.R. 746 at [72]

> "that, while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined (*Summers* at [43])."

In so doing it accepted the view advanced in A. Zuckerman, "Access to Justice for Litigants who Advance their Case by Forgery and Perjury" (2008) 27 C.J.Q. 419 (which was referred to in both cases).

Abuse of process and forfeiture of the right to have one's claim adjudicated go hand in hand. Parties are entitled to legal process in order to prosecute legitimate causes. Since access to justice is available for the redress of wrongs, a party who uses it for the commission of a crime or a wrong forfeits the right of access in relation to the particular cause.

Striking out a case for abuse of process is primarily designed to protect the legitimacy of the court's own process. For a court that suffers its process to be used for the commission of a crime or a wrong will lose public confidence in its ability to maintain the rule of law.

The idea that the court's legitimacy must be protected from misuse is not confined to procedure but finds expression in substantive law too. Thus, a court will not enforce an illegal contract, a principle encapsulated in the maxim ex turpi causa non oritur actio. In such cases the court may withdraw assistance of its own motion. The reason was explained by Coleman J. in *Birkett v Acorn Business Machines Ltd* [1999] 2 All E.R. (Comm) 429:

> "The principle behind the court's intervention of its own motion in such a case is to ensure that its process is not being abused."

It might be said that there is no analogy between the unenforceability of illegal contracts and striking out for abuse of process since in the former no substantive right arose as a result of the illegality. Yet, the ex turpi principle has been employed in situations where there would otherwise have been a right. In equity relief will be denied to a litigant that does not approach the court with clean hands. It might be argued that this situation is also not analogous because equitable remedies are discretionary, whereas a substantive right denied in consequence of a strike out decision is not discretionary. However, the ex turpi principle predates equity and has a wider application than just in contract and equity. As we shall presently see, it may be employed to deny non-discretionary remedies.

The rule of law can be maintained only if the court is seen as an instrument for good, not evil, only if it promotes standards of probity and rectitude. The requirement of clean hands has its roots in Roman law. In *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 N.S.W.L.R. 552 at 557–558, Young J. of the New South Wales Supreme Court (Equity Division) said:

> "'He who seeks equity must do equity' and that both derive from the ecclesiastical law which in turn derived from the Roman law. … it would seem that the basis is the Roman law *exceptio doli* which came into Roman law shortly after 66 BC: see Lee's *Elements of Roman Law*, 4th ed (1956) at 450. The central idea behind this *exceptio* was to provide a defence which would prevent the plaintiff's action succeeding when the plaintiff had acted dishonestly in bringing the action."

There would be no need for such a principle where the entire claim was fraudulent, for it would then be dismissed as unfounded. The doctrine comes into play to deny a claimant relief to which he would otherwise be entitled because of his dishonesty. Common to both the ex turpi principle and to the clean hands doctrine is the appreciation that close court involvement with dishonest causes or dishonest litigants can bring it into disrepute.

A recent House of Lords decision illustrates this point. In *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, the claimant committed manslaughter and was imprisoned. He brought a claim in damages for loss of earning resulting from his imprisonment against the defendants on the grounds that they were responsible for the infliction of psychological harm on him, which in turn led to the commission of the crime. The House of Lords dismissed the claim. It held that a rule of law, founded on public policy which itself was an aspect of the principle of ex turpi causa, precluded a person from recovering compensation either for losses suffered in consequence of his own criminal act or for damage that was the consequence of a sentence imposed on him for a criminal act.

Similar public policy principles came into play in *Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] UKHL 39; [2009] 1 A.C. 1391. The appellant company had been used by its owner as a vehicle for defrauding banks. The victim obtained judgment against the company for deceit, but the company was insolvent. Its liquidators brought an action in negligence against the auditors, seeking to recover losses caused to the company in consequence of the extension of the period of its fraudulent activity caused by the auditors' breach of duty. The House of Lords held that where a "one-man company" had deliberately engaged in serious fraud, the principle of ex turpi causa prevented it from claiming that its auditors were in breach of their duty of care in failing to detect that fraud.

What is notable about these cases is that in each the claimant had an underlying legitimate cause of action against the defendant. In each, the defendant had wronged the claimant. The claimants were denied relief not for lack of a case on the merits, but due to public policy considerations. Awarding compensation for loss of earning following from imprisonment would offend public perceptions of justice, even where the crime was committed as a result of a wrong inflicted on the convict. Similarly, public opinion would be offended by an award of compensation to a company used for perpetrating fraud, even where the compensation would ultimately be for the benefit of those persons harmed by the criminal activity. Underlying the House of Lords' decisions in both cases was an appreciation that it would affront public opinion if the court were seen to grant relief to claimants whose cause was seriously tainted by criminal activity. The refusal of relief, it merits stressing, was not founded on the need to deter others but on the need to maintain confidence in the administration of justice.

In *Summers*, the Supreme Court rejected the claimant's argument that an ascertained claim for damages could only be removed by Parliament. It stated that it

> "is for the court, not for Parliament, to protect the court's process. The power to strike out is not a power to punish but to protect the court's process." (at [45]).

Clearly then, the Supreme Court considered the jurisdiction to strike out for abuse of process to be founded on the public policy of protecting the legitimacy of court process. Although it did not allude to the ex turpi principle and to its application in the House of Lords decisions mentioned above, it is clear that abuse of process by fraudulent litigants falls to be dealt with by the application of the same principle.

The Supreme Court accordingly held that it was in the public interest that there should be a power to strike out a statement of case for abuse of process in order to safeguard the court's process. At the same time it stressed that the jurisdiction was discretionary and

> "that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly" (at [48]).

By drawing attention to the need for proportionality in the exercise of the strike out jurisdiction the court could be taken to follow established principle that discretionary jurisdiction must be used reasonably; it must not use its power in an unwarranted or oppressive manner. For clearly, if the court were to strike out a claim for minor infractions it would go beyond what was necessary to protect its process and may itself become a source of injustice. It may be noted here that the ex turpi principles too must be applied flexibly to ensure proportionality, as where the court withdraws its assistance on grounds of illegality (see the Law Commission paper on this topic, available at: *http://lawcommission.justice.gov.uk/docs/lc320_The_Illegality_Defence.pdf* [Accessed July 31, 2012]).

It would appear, however, that the Supreme Court had a somewhat different view of proportionality: proportionality in the sense of a correlation between the seriousness of the attempted fraud and the value of the substantive right denied to the fraudulent litigant. This approach to proportionality departs from the aim of the jurisdiction a protective of the court's process and adopts a punitive justification. A punitive sanction must fit the crime; the graver the crime the greater the punishment.

This inconsistency goes to the heart of the judgment and robs the court's thinking about the exercise of the abuse of process jurisdiction of coherence and common sense. Had the Supreme Court confined itself to establishing the general principle that striking out was available for abuse of process in the kind of situation under consideration, its decision would have been unobjectionable. Unfortunately, it proceeded to develop an approach to the jurisdiction which is at odds with the underlying justifications of the jurisdiction, which the court had embraced to establish it in the first place. As a result, the Supreme Court crafted the abuse of

process jurisdiction in a manner that is bound to diminish its usefulness, increase expense and complexity, while failing to safeguard the legitimacy of court process.

Ex turpi rationale dropped in favour of deterrence

The Supreme Court stated that while the power to strike out a statement of case for abuse of process may be exercised at any stage, the court "will only do so at the end of a trial in very exceptional circumstances" (at [36]). Two key passages call for close examination in this regard. At [50] the court said:

> "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."

And in the following paragraph ([51]) it added:

> "… [W]e do not accept the submission that, unless such claims are struck out, dishonest claimants will not be deterred. There are many ways in which deterrence can be achieved. They include ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings."

When assessing whether the striking out power should have been used in circumstances such as the present, the Supreme Court considered that a balance needed to be between assessing liability and quantum and reaching a correct conclusion on the merits, on the one hand, and on the other hand the need to deter deceitful claims (at [50]).

Yet, the Supreme Court did not explain why, having stated that the "power to strike out is not a power to punish but to protect the court's process" (at [45]), it came to consider deterrence as the principal consideration in exercise of the striking out jurisdiction. True, measures such as committal for contempt and criminal proceedings could, at least in theory, deter future litigants from advancing fraudulent claims. But future deterrence is beside the point when it comes to what view the public would take of the judgment given in the particular case. What is at stake in cases such as *Summers* is whether an award of damages to a claimant who set out to use legal process as an instrument of fraud would bring the administration of justice into disrepute.

Put differently, since striking out for abuse of process by advancing a fraudulent claim is closely related to the ex turpi principle, it is hard to see why the court preferred to focus on deterrence considerations rather than follow the ex turpi principle. No explanation was given. It is possible that had the Supreme Court articulated its reasons for preferring deterrence considerations to public interest ones, its decision would have been less vulnerable to criticism. As it is, the failure to work out the full implications of the ex turpi principle and of the rationale of protecting the court's process weakens the judgment and renders it incoherent in a number of respects.

The weakness of the deterrence strategy

Having proceeded on the premise that the function of striking out for abuse of process is deterrence, the Supreme Court considered that other measures of deterrence were preferable and that therefore striking out for abuse of process should be used only as a last resort. This assumption requires close examination, which is best carried out in the context of the facts of this case.

The claimant, Summers, was injured in an accident at work and brought an action against his employers, the defendants. Liability was initially admitted, but later withdrawn when the defendants saw medical reports which cast doubt on the claimant's account of the accident. The claimant obtained judgment on liability with damages to be assessed.

The claimant alleged that as a result of the accident he was subject to severe movement restrictions and signed a witness statement to that effect. He submitted a schedule of loss in the sum of £838,616. By then the defendants had obtained surveillance information, which showed the claimant moving freely. They disclosed the surveillance evidence and applied to have the claim struck out in its entirety on the grounds that it was dishonestly grossly exaggerated. Whereupon the claimant made an offer to settle for £190,200. The Department of Works and Pensions, which had been making social security payments to the claimant who maintained that he was unable to work, also resorted to undercover surveillance which showed the claimant working normally. Even so, the claimant served a further schedule of loss alleging restriction of movement but this time claiming only £251,481. This too was supported by a statement of truth. The claimant continued to insist on his disability when testifying at the trial on quantum. In an attempt to bolster his allegations of disability the claimant had induced national health doctors to administer treatment by falsifying his symptoms.

The trial judge found (at [6]):

> "The evidence before me is sufficiently cogent to sustain a claim of fraud not only applying the civil standard of being satisfied on the balance of probabilities but also on the criminal standard of being satisfied beyond reasonable doubt insofar as that standard is materially different when allegations of fraud are made. In my judgment the Claimant has deliberately lied to the medical men and to the Department of Work and Pensions on the application form when he said he had ongoing symptoms after March 2007."

Nonetheless, the judge went on to disentangle truth from falsity and found that the claimant had proved actual loss of £88,716, which he proceeded to award the claimant. On top of this the judge awarded the claimant interest in respect of that amount for the whole period and costs save for the costs that were caused by his false allegations. He did so because the defendants refused to negotiate a settlement with the claimant and declined to make a CPR 36 offer. He concluded that although the claimant's dishonesty caused the proceedings to be extended, the defendants by their own choice caused them to take longer to get to trial and to end in a trial by their refusal to negotiate with a view to settlement, which, in the judge's view, would in all probability have been achieved if the defendants had been willing to take part in negotiations. Moreover, the defendants were not fooled by the claimant's dishonesty.

This last reason, seemingly taken to count in favour of awarding interest and costs, is extraordinary. It is difficult to see why the fact that the defendants were not fooled by the false claims should count in favour of the deceitful claimant; for had the defendants been fooled, the court would have been fooled too and would have been induced to facilitate the claimant's fraud. Had the defendant been fooled, there would have been no opportunity for a sanction at all. Rather than express meaningful disapproval for an attempt to defraud, the court seems to reward the claimant for his failure to bring his fraud to a successful conclusion. Perverse though this reasoning may appear, the Supreme Court voiced no reservation.

Having concluded, as explained above, that the court's policy towards fraudulent claims turns on deterrence considerations, it expressed the view that deterrence could be obtained in other ways and that therefore the court should normally proceed to give a judgment on the merits rather than strike out a claim (at [51]).

The Supreme Court listed several other means by which deterrence may be achieved: ensuring that dishonesty does not increase the award of damages; making adverse costs orders, reducing interest, proceedings for contempt and criminal proceedings. It is doubtful that either separately or collectively these methods of deterrence are effective or efficient in terms of the use of court resources.

Ensuring that dishonesty does not inflate damages

The first measure of deterrence just mentioned, ensuring that the court is not taken in by deceit, does not amount to a special deterrence strategy as it merely reflects the court's universal duty to determine the truth according to the evidence. It is the court's task in every case involving a factual dispute to determine the true facts. On its own, there is little the court can do to make it difficult for fraudulent claims to succeed. In an adversarial system the court is bound to leave it to defendants to seek evidence of dishonesty. But not all defendants have access to detection facilities. True, insurance companies have the means to carry out undercover surveillance. But they too cannot do so in every case and it is not always easy to pick out the suspect cases. Furthermore, the surveillance is costly and the cost falls ultimately on the insured public (for a discussion of this aspect see: William Norris QC, "Look out: I've got a power … but I am not going to use it" [2012] J.P.I.L. 169).

Perhaps conscious of such shortcomings the Supreme Court sought to come to the assistance of defendants faced with fraudulent claimants by inviting judges to draw adverse inferences from dishonesty. It stated:

> "[52] A party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted. This may affect either liability or quantum. In the instant case, as explained above, the claimant's fraud and dishonesty led the judge to reject his evidence except where it was supported by other evidence. The judge naturally refused to draw any inferences of fact in his favour. It is likely that, if the claimant had told the truth throughout, his damages would have been assessed at a somewhat larger figure than they were in fact. This is often likely to be the case."

This approach is highly problematic. By insisting on corroborating evidence where deceit has been revealed, the Supreme Court seems to suggest that trial judges need not look for corroboration in other cases where the claimant alleges continuing disability. One would have thought that at a time when fraud and exaggeration have become commonplace, the court should always look for corroboration when the claim relies predominantly on the claimant's testimony.

There is another puzzling aspect to this encouragement to draw adverse inferences against deceitful claimants. Since the court must always draw factual inferences dictated by logic and common sense, whether or not deceit is involved, such encouragement states the obvious. But the context suggests a different kind of adverse inference. The Supreme Court stated that

> "if the claimant had told the truth throughout, his damages would have been assessed at a somewhat larger figure than they were in fact."

It would therefore appear that the Supreme Court had in mind not a factually based inference but a punitive inference. If the Supreme Court believed, as it seems to, that the true damages would have been higher, and since there does not appear to be any factual basis for a deduction, it must follow that a deduction was made on other than factual grounds.

The invitation to draw adverse inferences as a means of disapproval raises a further question about the Supreme Court's approach. If the Supreme Court approved of denying the claimant some of the damages to which he would otherwise be entitled, one must ask why the Supreme Court considered it wrong to deny the fraudster all his damages. It seems that the adverse inferences that the court had in mind are at odds with the Supreme Court's insistence that trial courts should determine the true facts and award the claimant what is due under the law.

Lastly, although the Supreme Court assumed that had the claimant been truthful from the start his damages would have been assessed at a somewhat larger figure than they were in fact, there seems to be no factual basis to this assumption. The issue was whether the claimant was able to work beyond a certain date. The claimant denied that he was able to work at that time, but the surveillance evidence proved otherwise. After careful consideration of the evidence Judge Tetlow decided that the claimant was able to work from that date. The claimant's earlier lies made no difference therefore.

Adverse costs orders

A further deterrent measure advocated by the Supreme Court was adverse costs orders. This measure is complicated by the requirement, which the Supreme Court endorsed, that defendants should agree to settlement negotiations and in any event should make CPR 36 offers or *Calderbank* offers. If the defendants had made a CPR 36 offer and if it had been accepted, they would have been liable to the claimant's costs. In such an eventuality, the jurisdiction of making an adverse costs order against the claimant for having attempted to cheat would therefore not come into play.

Conscious of this difficulty, the Supreme Court advised the making of *Calderbank* offers subject to costs, so that the claimant's fraudulent behaviour could be taken into account when ordering costs (at [54]). However, it is not clear

how this would help in cases such as the present. If the claimant had beaten a *Calderbank* offer, he would have been entitled to a costs order similar to the one made in this case, i.e. deduction would have been made of costs thrown away as a result of making fraudulent allegations. If the claimant had failed to improve on a *Calderbank* offer, he would have been liable to the defendants' costs. Either way, it seems, such offers would not have any special adverse effect against deceitful litigants.

Far from adding to the deterrence effects of costs order, the Supreme Court's insistence that defendants who wish costs protection should make an offer to settle undermines it. For a fraudulent claimant would then reason:

> "If I am rumbled, I would accept the defendant's offer and walk away with my true compensation plus costs, subject to costs thrown away by fraudulent evidence. If I am not exposed, I stand a good chance of a windfall. Either way I stand to lose little."

This calculation is encouraged by the fact that in cases such as the present any surveillance is likely to be carried out and disclosed before the trial on quantum, thus giving the claimant an opportunity to accept the offer to settle in good time. One may retort by saying that in such cases defendants would be free to withdraw the offer, but if they do so they could well be in the position of the defendants in the present case who found themselves with a costs liability. (For a discussion of this aspect see: Norris, "Look out: I've got a power … but I am not going to use it" [2012] J.P.I.L. 169).

As for settlement negotiations, one must deprecate the court's insistence that the defendants in this case should have agreed to participate in settlement negotiations. It is an affront to the public conception of justice and fair play to require defendants who have discovered that the claimant was bent on defrauding them to enter into settlement negotiations with him. Honest people do not treat with fraudsters, if they can possibly help it.

Contempt proceedings

The Supreme Court devoted considerable attention to committal for contempt which it considered to be an effective sanction against fraudulent litigants. As will be recollected, the judge refused the defendant permission to bring proceedings for contempt, which decision they did not appeal. However, the Supreme Court was of the view that permission should have been given. It drew attention to the recent trend to commit fraudulent litigants for contempt. It endorsed the approach in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin), where Moses L.J. said:

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.
>
> 3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those

claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.

4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.
5. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice.
6. The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined.
7. But the prevalence of such temptation and of those who succumb to that temptation is such that nothing else but such severe condemnation is likely to suffice."

While Moses L.J. spells out the harm done to the administration of justice by fraudulent litigants, he too considers that there is no way other than contempt proceedings to deter fraudsters. Yet this very judgment demonstrates the shortcomings of this deterrence strategy.

The contemnor in the *South Wales Fire and Rescue Service* was not sentenced to imprisonment because of a delay of nearly a year in bringing the proceedings. Instead, he was given a 12 months sentence suspended for 2 years, provided that he repaid £10,000, which he owed to the Fire Service as reimbursement for the ill gotten judgment award. The costs incurred by the Fire Service in the contempt proceedings amounted to £24,000, but the court awarded only £1,000 because the costs included an element of a learning curve as the claim was a novel one. Although the case served an important public function, the court considered that it would be unfair that the contemnor should pay for all of it. The court exhorted legal representatives to find a way of dealing with such claims speedily and locally so that costs could be kept to a minimum. It is highly unlikely though that the costs would ever be as low as £1,000.

Contempt proceedings are costly, however hard the court may press for lowering costs. This is likely to dampen the appetite for bringing such proceedings. The South Wales Fire Service had the incentive of recovering the money it had lost as a result of a damages award, which the claimant had been unable to repay and

which it may now recoup with the help of a suspended sentence hanging over the claimant's head. But even if it recovered that amount, it would still end out of pocket as a result of its failure to recover the full costs of the contempt proceedings. Defendants who have not lost money would be less likely to seek contempt proceedings and thereby increase their outlay. Even if defendants could recover realistic costs for contempt proceedings, they would not be sure of recovering them, since persons who make false claims do not tend to have much spare cash.

There are more weighty reasons for doubting whether contempt proceedings are a sensible weapon for combating fraudulent claims. First, the prison population in England and Wales is already excessively high, so much so that the Government has been desperately seeking ways of reducing it. Sentencing persons to significant terms of imprisonment for contempt, runs counter to the policy of reducing the prison population and bringing down the unsustainable cost of the prison service. It seems extravagant in these times of strained public resources to adopt a measure that increases the taxpayer's burden by adopting a policy that is bound to increase the prison population.

There are also humanitarian reasons for exercising restraint in sending false claimants to prison. The court noted in the *South Wales Fire and Rescue Service* case that sending a person to prison may spell ruin not just for him but also for his entire family. We have seen that the Supreme Court in *Summers* insisted that dismissing a claim for abuse of process would be disproportionate in most instances. We may therefore question why imprisonment of the claimant and possible ruin to his family, which may include young children or elderly dependants, is considered by the Supreme Court to be a proportionate response. It is quite possible that the trial judge in *Summers* got it right when he refused permission for contempt proceedings believing that they would not be in the public interest.

One must not of course exclude the possibility of contempt proceedings. They may well be justified and proportionate where the attempt to defraud was on an industrial scale, as where a party has organised a network of cheats. But in the run of the mill case contempt proceedings impose too heavy a burden on the defendant, on the court which has to hear them and on the taxpayer who has to pay for the cost of imprisonment and possibly for welfare payments to dependants, not to mention the social harm that may ensue. It is notable that in extreme cases striking out for abuse of process would be available even under the Supreme Court's strictures.

Criminal proceedings for perjury and fraud

Finally, the Supreme Court voiced support for criminal proceedings in such cases, which presumably include perjury and various fraud offences. The arguments against using the contempt jurisdiction apply equally to criminal proceedings too. Again, there will be some cases where it would be justified to have recourse to criminal proceedings, thereby involving the police and the prosecuting authorities. But criminal proceedings absorb considerable resources as a result of the need for police investigations, the cost to the prosecuting authorities and very likely the cost of legal representation by a legally aided accused. But given the resource burden created by criminal proceedings, criminal prosecutions are likely to be rare.

An ill thought out strategy for dealing with fraudulent claims

The Supreme Court overruled Court of Appeal decisions that held that the court had no jurisdiction to strike out a claim for abuse of process once an entitlement to damages has been established in respect of part of the claim. The Supreme Court held that, as a matter of general principle the court had the power to strike out such a claim. This power, it stressed, was "not a power to punish but to protect the court's process" (at [45]). In so doing the court was implicitly applying the well established principle of ex turpi causa which requires the court to withdraw its assistance from claims, which are seriously tainted by crime or other illegality, in order to protect the legitimacy of the administration of justice. For public confidence in the judicial process would be diminished if the court were seen to turn a blind eye to crime and illegality. Most members of the public would find it difficult to understand why a claimant who set out to defraud the defendant should be allowed to recover even the small proportion that represents his real loss.

It is important to distinguish between different kinds of harm that fraudulent claims cause. In *South Wales Fire and Rescue Service*, quoted above, Moses L.J., drew attention to harm that widespread fraud inflicts on honest claimants who will be tainted by suspicion, and to the waste of court resources. But these have nothing to do with the protection of the court's process from falling into disrepute. There is only one reason why fraudulent claims could harm the court's public standing: by resulting in judgments that cannot command public respect. It offends public opinion to see a claimant walking away with some compensation where he had been shown to have set out from the start to defraud the defendant of a much larger sum of money.

The Supreme Court was conscious of the harm to the court's standing in public opinion because it invited courts to draw adverse factual inferences against fraudulent litigants and to try to ensure that any legitimate compensation they receive would be cancelled out by adverse costs orders. As we have seen, both measures suffer from serious shortcomings. It is contrary to principle to reach decisions which are factually suspect in order to punish for attempted fraud. The inferential process on questions of fact is designed to ensure that the court arrives at the correct conclusion on the evidence before it, not to reach an incorrect factual conclusion as a mark of disapproval.

The Supreme Court's view that adverse costs sanctions should be used is also flawed. The practical difficulties of doing so were discussed earlier. There is one further difficulty though to which consideration should have been given. The Supreme Court insistence that defendants protect themselves by making *Calderbank* offers and by entering into settlement negotiations cuts right across the possibility of punitive costs orders. As the defendant is bound to disclose the evidence of fraud beforehand, it is probable that once this evidence of fraud has been disclosed the claimant would accept the offer or otherwise settle. There would therefore be few, if any occasions, where the court could use costs as a means of reducing the claimant's compensation. Since costs are meant to be compensatory not punitive it is doubtful whether costs orders may be used to remove from the fraudulent litigant the fruits of his legitimate compensation.

The strike out jurisdiction was reserved by the Supreme Court to a minority of exceptional cases. As an example it mentioned the situation "where there had been

a massive attempt to deceive the court but the award of damages would be very small" (at [49]). The thinking behind this suggestion is mystifying, because where the amount of damages would be small, refusing to award them to the claimant would not be a particularly painful sanction, and certainly not one that would encourage public confidence. On the contrary, ordinary persons are likely to be surprised, and not best pleased, to learn that the larger the damages award, the more likely is the cheat to walk away with it.

Conscious presumably of the limitations of these measures the court places its hope in contempt proceedings and in criminal prosecutions. There is doubtless room for such measures, but they are not designed to shore up the court's standing in the public eye. They are purely punitive and deterrent measures which can in no way safeguard the court's image. Members of the public would be rightly puzzled why the court permitted a fraudulent litigant to walk away with substantial damages, even if the contemnor is later committed for contempt or convicted for fraud. If the court expects that a fine for contempt would cancel out the award of damages, then members of the public would wonder why expensive and resource hungry contempt proceedings were needed when the result could have been achieved by a dismissal of the action in the first place.

If the court is to protect its process it must do so itself and should not expect others to do it on its behalf. Defendants must not be obliged to spend even more resources for this purpose, nor should the prosecuting authorities. Furthermore, at a time of strained public resources it is difficult to justify an increase in the prison population, especially when imprisonment may inflict suffering on the fraudulent litigant's family with a further consequential burden on the social services.

The Supreme Court's ruling on the manner in which the strike out jurisdiction should be exercised applies only to situations where the application is made "when it has already determined that the claimant is in principle entitled to damages in an ascertained sum" (at [65]). It stressed that

> "[62] … First, nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. Secondly, nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim. In that event, if the court is aware of it before the end of the trial, judgment will be given for the defendant and, if it comes to light afterwards, it will be open to a defendant to raise the issue in an appeal."

It is unclear what the court had in mind making these qualifications. As for the first qualification, if taken literally it should have applied in the instant case because the application to strike out was made before the trial on quantum and at a time when the claimant persisted with his false claim. Since the court found that striking out in this case would have been disproportionate, it is difficult to see in what circumstances striking out could take place before the end of the trial.

The second qualification is also problematic because it is unclear what the court meant by a "case where the fraud or dishonesty taints the whole claim". It would be trite to say that where the court has found a claim to be fraudulent in its entirety, it should dismiss it. What else can it do? And the same goes for the suggestion

that if the fraud comes to light after judgment the defendant may raise the issue on appeal. But perhaps the court meant to make a more significant observation. That is to say, that if the fraud affected most of the claim, it may be struck out. But again, if it meant that, it should have allowed the appeal since 90 per cent of the claim was fraudulent.

It would perhaps be unfair to say that the Supreme Court was indifferent to the public reaction at the sight of a fraudulent litigant walking away with substantial damages because it was at pains to observe that "it seems unlikely that the claimant will receive much, if anything, out of the award of £88,716.76" due to various deductions (at [64]). But if the court thought that justice required that the claimant will not recover, one may ask, why was the court so firmly opposed to striking out the claim?

Reading the Supreme Court's reasoning for limiting the exercise of the abuse of process jurisdiction to the rare exceptional case it is hard to avoid the impression that the entire court's strategy for dealing with fraudulent claimants was inadequately thought out. The statement of principle, that the court has jurisdiction to strike out a fraudulent litigant's claim in its entirety is welcome, but the courts strictures on its exercise largely emasculates the jurisdiction and the court's own ability to protect it process from falling into disrepute.

Closed material procedure: An alternative approach—Fair allocation of burden

The debate surrounding the Justice and Security Bill, and the court decisions that prompted it, assumed that in a straight and unavoidable conflict between the interests of national security and the interests of justice one or the other has to be sacrificed.

In support of the Bill it has been said that a closed material procedure, CMP, would avoid denial of justice while safeguarding national security. This view is untenable since CMP violates the most basic requirement of due process under English law.

It is a fundamental principle of justice that each party should be informed of the allegation against him, given an opportunity to rebut the evidence presented by the other side, and notified of the reasons for the court's decision.

CMP breaches each of these due process requirements and thereby denies one of the parties a meaningful opportunity of vindicating his rights. For fuller discussion of this see, A. Zuckerman, "Closed Material Procedure — Denial of Natural Justice" (2011) 30 C.J.Q. 345.

The special advocates themselves have gone on record to say that their role in CMP cannot compensate for this denial of due process (see M. Chamberlain, "The Justice and Secruity Bill" in this journal at p.424).

This proposal seeks to ensure that neither national security nor the opportunity to vindicate rights is wholly harmed.

The case of *Duncan v Camel Laird* [1942] 1 All E.R. 587 helps illustrate the proposed approach.

In this case, 99 men lost their lives during submergence trials on a submarine built to a secret design. Claims were brought by the families of the deceased. If we ask whether the court should have ordered disclosure of the blueprints to enable

the claimants to prove negligence issue and thereby risk undermining the war effort the answer must be: clearly not. But equally, if we ask whether the widows and orphans should have been left without compensation, the answer is again: clearly not.

Plainly, while national security demands protection of sensitive information, the burden of national security should be borne by the community as a whole and not just by the unfortunate few.

The following proposal ensures that national security is protected while the burden is fairly shared.

A scheme for fair allocation of national security burden

- A compensation scheme will be established to deal with cases which are non-justiciable on grounds on national security.
- This scheme would apply to any civil proceedings.
- Once the Government has established to the court's satisfaction that disclosure would be contrary to national security, and the court has concluded that a fair trial is therefore impossible, the court may declare the proceedings to be non-justiciable.
- A public body would be authorised to award modest and proportionate compensation for the loss of a trial opportunity in such cases.
- The applicant for compensation would be required to show that his claim is not frivolous or vexatious. Namely, that he would have had a reasonable prospect of success.
- A court making a non-justiciable order would have discretion to certify that the applicant had, or did not have, a reasonable prospect of success.
- An award of compensation will involve no finding of liability. It will therefore give no rise to adverse inferences about the probity of the security services.
- The amount of compensation will be limited and proportionate since liability has not been established by the ordinary judicial standard.
- No detailed legalistic inquiry of quantum will take place, since compensation will be based on a rough and ready assessment of a proportionate amount.

Benefits

- National security will be protected from damaging disclosure.
- There will be no finding of liability against the Government.
- Applicants could receive some recognition for their grievance following the denial of a trial opportunity.
- The proposed scheme would be cheaper than the CMP procedure.
- If CMP proceedings were held, the taxpayer would have to pay for three legal teams: the Government team, the special advocates' team, and the applicant's team where he is legally aided.
- The proposed compensation scheme will avoid these costs.

- The overall amount of compensation under the scheme would be small given the rarity of such cases and the limitation on individual awards.
- Given the size of CMP costs, savings would therefore be achieved even taking into account the cost of the compensation body, the compensation awards.
- There will still be the cost of initial court process to certify non-justiciability, but this should be no greater than the cost of court proceedings to obtain a CMP declaration under s.6(1) of the Bill.

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