Editor's Note

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?

Abuse of process; Fraudulent claims; Inherent jurisdiction; Personal injury claims; Striking out

Fraudulent claims—a growing phenomenon

Fraudulent personal injury claims are no longer isolated or rare cases, but seem to turn up with greater frequency. We may speculate whether this phenomenon is linked to the incentives created by the conditional fee agreement system, which has encouraged ever greater volumes of personal injury litigation (PI), particularly in road traffic accidents litigation. What is, however, beyond speculation is the increasing frequency with which these cases now crop up. There have now been a fair number of cases in which the court reached a clear conclusion that one of the parties, usually the claimant, has employed fraudulent means to inflate its claim. His Honour, Judge Hawkesworth QC has said (quoted in *Shah v Ul-Haq* [2009] EWCA Civ 542 at [13]):

> "Unhappily such fraudulent claims are now legion. They occupy the court time of District Judges and Circuit Judges in West Yorkshire literally week in and week out. My own judicial experience reflects, I have no doubt, that of many of my brethren throughout the country. Just about every variant of a fraudulent claim comes before the court, including deliberately staged collisions, damage caused to vehicles which have never been in collision at all, claims deriving from the most trivial touching of vehicles, and claims in which a driver will assert that his car was carrying other members of his family including his children, when in fact none were present but all of whom have reported to a hospital or their General Practitioner that they have been injured, and who are then able to produce an apparently independent expert's report confirming the fact of such injury. The cost to the insurance industry and to other honest policy holders must be very substantial. In addition, and of more relevance to these proceedings, the cost in court time in trying such cases is very high, with the added knock-on effect of casting suspicion onto many genuine claims so that claimants are put to proof of their legitimate and genuine claims for compensation when in other circumstances they might not have been called upon to do so."

These are not situations where a party had an inflated assessment of the damage it suffered or an exaggerated valuation of its consequences. Nor are these situations wyere a party resorted to obfuscation, exaggeration or even downright lying in the heat of cross-examination. Rather, these are cases where a claimant knowingly set out to present a false claim in order to defraud the defendant through legal process. The claimant in these cases employed illegal means to support false allegations, such as falsification or suppression of evidence, perjury and may well have practised deceit on doctors, the public health services and possibly on his own lawyers and experts.

Fraudulent claims present the court with a choice between two courses of action: to carry on with the adjudicative process, try to overcome the litigant's efforts to pervert the course of justice and establish the facts as best as it can, or, alternatively, upon the discovery of the deceit to throw out the offending litigant's case on the grounds that by setting out to pervert of justice the litigant has forfeited the right to court adjudication on the merits.

In *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 (CA) (discussed in Zuckerman, "Access to justice for litigants who advance their case by forgery and perjury" (2008) 27 C.J.Q. 419) the Court of Appeal seemed to adopt the forfeiture option. However, as a result of two recent Court of Appeal decisions the position has been left uncertain. The first is *Shah v Ul-Haq* [2009] EWCA Civ 542, in which the Court of Appeal rejected the forfeiture approach (followed in *Widlake v BAA Ltd* [2009] EWCA Civ 1256). But the later decision in *Masood v Zahoor* [2009] EWCA Civ 650 cast doubt on the correctness of *Ul-Haq*. One of the reasons for the inconsistency of these two decisions is an accident of time; *Ul-Haq* was decided after the end of oral argument in the *Masood*, so that the court did not hear argument about the correctness of the earlier case. Since *Ul-Haq* contains a more extensive discussion of the issue, the aim of this article is to examine the Court of Appeal approach in this case. It is argued that the *Ul-Haq* rejection of the forfeiture approach is flawed and that both principle and policy support the approach articulated by the Court of Appeal in the *Arrow Nominees* and in the *Masood* cases: that the court has the power to dismiss an action in its totality if the court has found that it was predominantly or substantially fraudulent.

The Ul-Haq decision

The *Ul-Haq* case involved claims for personal injuries arising from a road accident. Commonly, such claims involve the fabrication of evidence to establish a much larger harm than the one caused by the accident, or less frequently to fabricate an accident. In this case the claimants fabricated a phantom car passenger. The claimant and his wife were in their car when another car ran into it at low speed. The damage to the car was minor, as was the injury to the couple. But they falsely testified that the claimant's mother was also in the car and supported her claim for damages. When the fraudulent scheme was discovered the defendant applied to have the claimants' statements of case struck out under CPR r.3.4(2).

The claimant's deceit did not relate to their own personal claims. They did not, one has to assume, invent or exaggerate the nature of their own injuries. When dealing with fraudulent litigants there may well be good reasons for differentiating between a claimant who falsifies his claim and one who provides false evidence

in support of another's claim. However, the Court of Appeal ruling did not turn on this aspect, because it decided that, as a matter of principle, a deceitful party does not forfeit his legitimate right unless the deceit has rendered a fair trial impossible, in the sense that the deceit has made it impossible to determine the truth and therefore to establish the claimant's entitlement. The discussion will therefore address this principle rather than the *Ul-Haq* fact situation.

The substantive law basis of the Ul-Haq decision

According to Smith L.J. the fundamental question on appeal was whether under substantive law the court had the power to deny a litigant his otherwise legitimate entitlement by reason of collateral dishonesty ([16]). As will be explained later, the issue in this case is governed by principles of procedure, not substantive law. However, even if the Court of Appeal were right that the answer had to be looked for in substantive law, the solution was there to be found.

The starting point in a search for a substantive law answer must be to identify an analogous situation. That is to say, if a principle had been established to provide a solution to a similar problem in another area of substantive law, the same principle would be expected to apply generally in other similar situations, all else being equal.

A good example is provided by the celebrated case of *Riggs v Palmer* (1889) 22 N.E. 188, familiar to law students. Palmer murdered his grandfather upon hearing that the latter was going to revoke his will in Palmer's favour. He subsequently claimed under the will arguing that there was nothing in the law governing wills which denied a beneficiary his rights under the will. In one of the great classical rulings, the Court of Appeals of New York held that the laws passed for the devolution of property were not intended to operate in favour of one who murdered his ancestor or benefactor in order to speedily come into possession of his estate. Few would doubt today the wisdom of that momentous decision in the annals of the common law.

What is pertinent to note in the present context is that once the principle that a person should not be allowed to profit from his own wrong was applied to deny a claim under a will, it was bound to be extended to other types of claims, as the New York Court of Appeals fully appreciated. For it expressed the view that all laws, as well as all contracts, may be controlled in their operation and effect by these general fundamental maxims of the common law, viz.: no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own inequity or to acquire property by his own crime.

In *Ul-Haq* the defendant drew attention to the established principle that where all or part of a claim brought under an insurance policy was fraudulent, or where fraudulent devices were used to promote a genuine claim, the insured could not thereafter recover in respect of any part of the claim, not even those parts which were not fraudulent. The reason for the rule was explained by Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] A.C. 469 at [62]:

> "Where an insured is found to have made a fraudulent claim upon the insurers, the insurer is obviously not liable for the fraudulent claim. But often there will have been a lesser claim which could properly have been made and which the insured, when found out, seeks to recover. The law is that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made. This result is not dependent upon the inclusion in the contract of a term having that effect or the type of insurance; it is the consequence of a rule of law. Just as the law will not allow an insured to commit a crime and then use it as a basis for recovering an indemnity (*Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197), so it will not allow an insured who has made a fraudulent claim to recover. The logic is simple. *The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing*."(emphasis added)

The Court of Appeal in *Ul-Haq* was of the view that *The Sea Star* and others decisions in the same vein were founded on "a special rule of insurance law" and added that "the operation of the principle is restricted to the period prior to the issue of proceedings" (Toulson L.J., [37]). It is not the case that fraud defeats insurance claims only if it is practised prior to proceedings; advancing fraudulent evidence will suffice to deny the claimant's right to recover under the policy. Be that as it may, the principal reason given by the Court of Appeal was that the *Sea Star* rule confined to claims by insured persons against their insurers.

It is of course the case that a rule has been developed to deal with claims under insurance policies. A considerable jurisprudence dealing with fraudulent claims made by insured persons has now built up. The court has fashioned rules to resolve problems such as whether the insurer can reclaim money already paid in respect of the true loss when the fraud is discovered, or how far other claims under the same policy are infected by the fraud. But none of this alters the fact that the special insurance rule is driven by a principle which applies equally in relation to other fraudulent claims. For it is clear that the reason behind the insurance rule does not arise from the special relationship between insured and insurer. The reason for development of the rule concerning fraudulent insurance claims was explained nearly a century and a half ago by Willes J. in *Britton v Royal Ins Co* (1866) 4 F.&F. 905 at 909, when dealing with an insured who took advantage of a fire to make a fraudulent claim:

> "The law upon such a case is in accordance with justice and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. *Such a condition is only in accord with legal principle and sound policy. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy."(emphasis added)*

Similarly, Mance L.J. said in *AXA General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [31], that the rule is founded on "the policy … to discourage any feeling that the genuine part of a claim can be regarded as safe — and that any fraud will lead at best to an unjustified bonus and at worst, in probability, to no more than a refusal to pay a sum which was never insured in the first place".

To hold, as the Court of Appeal did in *Ul-Haq*, that such decisions are a special substantive law rule confined to claims under insurance policies makes as much sense as saying that the rule in *Riggs v Palmer* is confined to claims arising under wills and does not extend to claims founded on intestacy or on contract. The court in *Ul-Haq* overlooked what cases such as *Riggs v Palmer* and the fraudulent insurance cases share in common: a moral conception about the proper use of legal process. This brings us to the procedural dimension of the *Ul-Haq* case.

The rejection of procedural approach under CPR r.3.4(2)

The real flaw in the in the Court of Appeal's substantive law approach lies in a basic misconception about the nature of the issue. Substantive law establishes rights and their limits. Here the question is not about the underlying rights but whether the conduct of a party in the course of legal proceedings affects his right to recover and enforce his substantive rights. The answer can therefore hardly be found in substantive law.

The great and lasting achievement of the 19th century reforms has been the establishment of one standard procedure for all actions, whether they arise from contract, tort, land or trusts. Whenever a problem of process arises the court seeks to find a solution which will cater for all types of claims, regardless of their substantive law origin.

If the answer to deceit in process had to be found in substantive law, each branch of substantive law would have to devise its own rules. Thus we would be looking for rules of contract, of tort, of trusts, of land and of inheritance that determine what the court should do when a litigant advances a fraudulent claim or defence founded on contract, tort, trusts, land or inheritance law. Such a strategy would encourage a diversity of solutions to a common problem, create waste and confusion. Further, it would bring the law into disrepute if the outcome of deceit were different depending on the right invoked.

One of the hallmarks of English law has been to apply the same principle to all instances in which a problem arises, regardless of the substantive background. Thus, for example, the answer to a defendant's design to avoid payment under a charterparty by putting its assets beyond the reach of the court was not found in maritime law but in procedural law, as Lord Denning explained in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213. Had the absence of precedent been sufficient reason for dismissing a procedural solution, as Smith L.J. seemed to suggest when saying that "I am unaware of any reported case in which a judge has dismissed the whole of a claim because he has found that the claim has been dishonestly exaggerated" ([17]), we would still be without the *Mareva* injunction.

Although the Court of Appeal in *Ul-Haq* held that the absence of a substantive law -rule depriving a fraudulent litigant of his well founded claim was sufficient to dispose of the case, it nevertheless went on to consider the argument that the claim could be dismissed under CPR r.3.4(2).

The defendant's insurers relied on *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 (CA) (discussed in Zuckerman, "Access to justice for litigants who advance their case by forgery and perjury" (2008) 27 C.J.Q. 419). In that case the Court of Appeal ruled that the litigant's deceit made it impossible to have a fair determination of the truth. But Chadwick L.J. went on to put forward a further reason for throwing out the offending litigant's case:

> "[a] litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke" ([54]).
>
> "In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents, and in the interests of the administration of justice generally, to allow the trial to continue. If he had considered that question, then, as it seems to me, he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned: rather it is a proper and necessary response where a party has shown that his object is not to the fair trial which it is court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."([56])

Smith L.J. thought that these comments related only to a situation where it had "become apparent that the petitioner's dishonesty was such that a fair trial had become impossible", and that therefore that case "does not support the proposition that, where, as here, the trial has taken place and the recorder has been able to reach reliable findings, it is open to him to strike a genuine claim out". In such circumstances, Smith L.J. said, "the judge must give effect to his findings. He can mark his disapproval of the way in which the court's time and the parties' money has been wasted by an order for costs. But he cannot … mark his disapproval by depriving the claimant of that which the claimant has proved to be his entitlement" ([28]).

Distinguishing *Arrow Nominees* on this ground alone is unconvincing because Chadwick L.J. indicated that the appeal would have been allowed even if the trial judge had managed to disentangle the truth from the lies and had determined the petitioner's entitlement. It was, therefore, recognised in *Masood v Zahoor* [2009] EWCA Civ 650 that *Arrow Nominees* "is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason" (Mummery L.J., [71]) and that "in theory, it would have been open to the judge, even at the conclusion of

the hearing, to find that Mr Masood had forged documents and given fraudulent evidence, to hold that he had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them" ([72]).

Perhaps conscious of this, Smith L.J. sought a more weighty reason for refusing to follow *Arrow Nominees*. The defendant's application to strike out the claimant's statement case was made under CPR r.3.4(2) which states:

> "(2) The court may strike out a statement of case if it appears to the court —
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

In Smith L.J.'s view CPR r.3.4(2) was incapable of providing the court with the jurisdiction to dismiss the claimants' action because,

> "the expression 'strike out' … not apt to describe the decision that a judge makes at the end of the trial. At that stage, the judge either upholds the claim or dismisses it. He does not strike it out. The rule … is primarily designed to permit a judge to strike out a claim before or at the beginning of the trial. The rule focuses on the statement of case - viz the particulars of claim or defence - in other words a pleading. The main objective seems to be to allow the court to deal summarily with a bad claim or defence before the expense of a trial is incurred. I can see that, in the kind of circumstances as arose in *Arrow Nominees* , the power to strike out may be deployed during a hearing where it becomes apparent either that it will not be possible to have a fair trial or because, without some corrupted evidence, which has to be disregarded, the claim cannot succeed. There again, the objective is to cut matters short so that further costs will not be wasted. I prefer to offer no view as to whether it would be appropriate for the judge to strike out the claim (as opposed to dismissing it) if, at the end of the evidence he concluded that he had been unable to conduct a fair trial, on account of one of the parties' conduct. … But in the present case, there was no suggestion of an unfair trial. There was a great deal of wasted time and money, caused by the claimants' dishonesty but the recorder saw through that dishonesty and reached what are accepted to have been entirely proper findings."([29])

Toulson L.J. gave a similar reason:

> "Where, as in this case, there has been a full trial, the proper course for the judge is to give judgment on the issues which have been tried. To have struck out the claims of the first and third claimants would have been to invoke a case management power not for a legitimate case management purpose (in other words, for the purpose of achieving a just and expeditious determination of the parties' rights, or avoiding an unjust determination where a party's conduct had made a safe determination impossible), but for the very different

> purpose of depriving those parties of their legal right to damages by way of punishment for their complicity in the second claimant's fraudulent claim, which in my judgment he had no power to do. It was open to him to impose costs sanctions on the first and third claimants, which he did, but that is a different matter."([50])

Two distinct points emerge from these passages. The first is that striking out under CPR r.3.4(2) is a case management tool which is designed to spare court and litigant resources and is therefore inappropriate for dealing with a situation where the litigant's deceit emerges only at the end of the trial when the cost has already been incurred and resources used. The second point is that striking out must not be used as punishment for the fraud. Although the points are closely related, they deserve separate treatment.

As to the first point, the Court of Appeal's conception of the nature of case management under the CPR is unduly limited. The court seemed to think that a trial is fair if the court is able to disentangle truth from falsity. Yet, as the overriding objective makes plain, doing justice under the CPR requires more than a process which produces the correct decision on the merits. Doing justice in accordance with the overriding objective is a bi-directional concept that takes account of the interests and opportunities of both parties, not just one of them. As Lord Bingham said that "the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties" (*O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All E.R. 931 at [6]). Laws L.J. was expressing the same idea when he said that the "proper and proportionate use of court resources is now to be considered part of substantive justice itself" (*Adoko v Jemal*, The Times, July 8, 1999, CA). In Laws L.J.'s view substantive and procedural justice are so interlinked that one can no longer think that reaching a correct decision on the merits will necessarily deliver substantive justice.

The overriding objective requires judges to consider not just the substantive rights and wrongs, as Lord Woolf C.J. explained in *Jones v University of Warwick*[1]:

> "A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole."

Even closer to our immediate concerns is Lord Woolf M.R.'s view that[2]:

[1] *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 at [25].
[2] *Biguzzi v Rank Leisure* [1999] 4 All E.R. 934 at 940; [1999] 1 W.L.R. 1926 CA at 1933.

> "In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect o[n] the court's ability to hear other cases if such defaults are allowed to occur."

According to CPR r.3.4(2)(b) the court may strike out a statement of case if it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the case. This power must be interpreted and exercised so as to give effect to the overriding objective (CPR r.1.2). On the Court of Appeal's view, however, the function of the overriding objective has been exhausted by the end of the trial, because there is not more scope for efficiency savings. This view is unsustainable.

First, it is clear that case management powers do not come to an end as soon as trial is over. The practice of making draft judgments available to the parties' legal representatives before pronouncing judgment, under CPR Pt 40, is a management tool designed to ensure that minor errors are corrected without the need for appeal. Second, if, as the Court of Appeal held, case management powers cannot be exercised once the trial is finished it would mean that the more successful the deceit the more likely the deceitful litigant is to get something out of the proceedings.

Suppose, for example, that a claimant suffered a minor injury in a car collision, which he claims caused him permanent disability. To establish his claim he fakes medical records which he produces in disclosure. If the defendant uncovers the forgery and applies for the claimant's statement of case to be struck out, the court would undoubtedly grant the application. If, as the Court of Appeal has held, this cannot be done if the deceit is discovered at the end of the trial, it means that the more successful the deceit has been the better the deceitful party is likely to fare. Consequently it makes little sense to say that the court can strike out a fraudulent statement of case before the trial and during the trial, but not if the fraud emerges only at the end of the trial.

Setting aside a judgment obtained by fraud

There is a further reason for holding that the overriding objective requires the court to give CPR r.3.4(2) a wide enough interpretation to empower it to strike out a statement of case even at the end of the trial. It has to do with the jurisdiction to set aside a judgment obtained by fraud.

At common law, a party may bring an action to set aside a final judgment on the grounds that it had been obtained by fraud: *Jonesco v Beard* [1930] A.C. 289 HL; *Couwenbergh v Valkova* [2004] EWCA Civ 676. Alternatively, the aggrieved party may seek to appeal the judgment on the ground that fresh evidence has come to light establishing a fraud on the court: *Noble v Owens* [2010] EWCA Civ 224.

If the judgment in favour of the claimant has been set aside in a separate action, the claimant is in theory free to bring fresh proceedings to establish his claim by genuine evidence or at least those parts of his claim which were not fraudulent. If the judgment has been set aside on appeal, the appeal court may order a fresh trial to enable the claimant to establish his claim by genuine evidence or at least those parts of his claim which were not fraudulent.

However, in either case, the court would have discretion in the matter and it would be normally inconsistent with the overriding objective to allow a fraudulent litigant to consume yet more court resources in pursuit of his claim. All else being equal, the overriding objective would dictate that if the claimant brings a fresh action it would be set aside as abuse or process. Similarly, the overriding objective would dictate that if the judgment has been set aside on appeal that the court would refuse to order a new trial. It would therefore be absurd not to invest the trial judge with the power to achieve the same result as would be achieved in an action to set aside a judgment obtained by fraud. True, the Ul-Haq fraud did produce a favorable judgment, but the bar to the fraudster's legitimate claim must not be allowed to depend on whether the fraud succeeded or failed.

Striking out is not punishment

As already noted, the Court of Appeal's approach was much influenced by the view that the court had no business to deny a litigant his legitimate rights as punishment for procedural default. This view is derived from the widely held assumption that the consequences of failure to comply with process rules amount to punishment for their infringement. Unfortunately, this assumption has been the source of much trouble because it brings to bear on questions of procedure notions of crime, punishment and just deserts which are quite out of place in the civil litigation context.

It is axiomatic that justice can be done only according to rules. A just process must therefore be conducted according to pre-determined rules. Without rules there can be no just of fair adjudication but only arbitrariness. As adjudication inevitably entails rules of process the parties must comply with the rules. Compliance with the rules is a condition to participation in the adjudicative process. It follows that a party who does not conduct his case according to the rules simply cannot participate in the process.

The exclusion from the adjudicative process of a party who has failed to comply with the rules is not a punishment but a mere consequence of failing to meet the conditions of participation. Striking out a defence where the defendant refuses to obey a disclosure order is not punishment for disobedience; one simply cannot litigate without disclosing relevant documents any more than one can litigate without filing a defence. Yet, no one would consider a default judgment as a punishment for failing to file the defence. This point was made by Rattee J. when he observed (*Canada Trust v Stolzenberg No.96C 4995* Unreported October 13, 1998):

> "I do not accept that it can be said with any degree of sense that a defendant is deprived of such a right by the Court's debarring him from defending only because he deliberately refused to comply with order of the Court made in the self same proceedings. It is he who deprives himself of the right to trial by deliberately acting in contempt of court."

The principle is well understood by the European Court of Human Rights when it said in *Ashingdane v United Kingdom* (1985) 7 E.H.R.R. 528 at [57]:

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals"

It is now accepted that the fact that it is still possible to hold a "fair trial" is not necessarily an obstacle to imposing on a defaulting litigant the consequences of non compliance. Mance L.J. has said that "it does not follow that, where a fair trial is still possible, relief will necessarily be granted. CPR r.3.9 deals generally with relief from sanctions imposed for failure to comply with a rule, practice direction or court order. It could not be the case that, whenever such a sanction had been imposed, and however flagrant or persistent the failure, the defaulting party could have it set aside by showing that a fair trial was still possible" (*Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801 at [27]).

Similarly, striking out for abuse of process is not necessarily a punishment. For example, under the rule in *Henderson v Henderson* [1843–1860] All E.R. Rep. 378 it amounts to abuse of process to start proceeding to advance a claim that could have been prosecuted in earlier proceedings. Such a claim would be struck out not because it is no longer possible to determine the truth (not because a "fair trial" trial is no longer possible), but because it the consequence of a rule that requires all actions arising from the same facts to be brought in one set of proceedings. By no stretch of the meaning of punishment can such striking out amount to a punitive sanction for the failure to bring the action in the earlier proceedings. All that the striking out signifies in such case is that the opportunity for advancing the claim has passed, much the same as the passing of the limitation period brings to an end the opportunity to commence proceedings.

The abuse of process jurisdiction

It has been suggested above that CPR r.3.4(2) confers a jurisdiction on the court to dismiss a statement of case as abuse of process at any stage of the proceedings. However, whether or not this is the case, the court has such power under its inherent abuse of process jurisdiction.

At common law the court has the power to strike out a statement of case, or indeed to dismiss an action, for abuse of process. The power arises from the court's inherent jurisdiction to safeguard its authority and processes from being undermined by disruptive, oppressive or otherwise inappropriate use of court procedures (J.I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) *Current Legal Problems* 23). The jurisdiction is open-ended and capable of being invoked in any situation.

Abuse of process, Lord Bingham C.J. has explained, consists in "using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Att Gen v Barker* [2000] 2 F.C.R. 1; [2000] 1 F.L.R. 759). The jurisdiction to prevent misuse of procedure transcends the rules of court and is therefore independent of CPR r.3.4(2). Lord Diplock described the abuse of process jurisdiction as an "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair

to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" (*Hunter v Chief Constable of West Midlands* [1982] A.C. 529; [1981] 3 All E.R. 727 HL at 729).

The question therefore arises whether the court should strike out the case of a litigant who from the outset embarked on a scheme to defraud the opponent through legal process. One way of approaching the issue is to apply Lord Diplock's test and ask whether it would "bring the administration of justice into disrepute among right-thinking people" if the court were to award the fraudulent litigant the remedy to which he is entitled notwithstanding his attempt to pervert the litigation process.

A hypothetical case situation would help here. The claimant ordered 5000 mobile phones from the defendant. On receiving the consignment he discovers that due to defective packaging there has been some water penetration which damaged 50 phones. The claimant takes an accurate picture of the damage. On learning that the value of the merchandise has plummeted, the claimant submerges the whole consignment in water, and takes a second picture. He brings an action against the defendant for the loss of 5,000 phones, in support of which he produces the second picture as proof of total loss. The case proceeds to trial. Under cross-examination the claimant is forced to own up to his chicanery, admits the fraudulent nature of the second picture, and for the first time produces in evidence the first picture which is indisputably authentic. Should he be able to insist on compensation for the 50 phones?

According to the Court of Appeal in *Ul-Haq* the claimant should be awarded damages for the 50 phones. Yet many right-thinking people may regard it a travesty that a claimant who tried to inflict a massive injustice on the defendant by subverting the legal process should be able to come away with compensation. Applying Lord Diplock's test we may conclude that the abuse of process has been so flagrant that the court is entitled to refuse to deal with the claim any further; or to put it differently, that the claimant has forfeited the right to any court assistance in the proceedings.

Another way of dealing with this example is to consider whether the court should dismiss the action on the grounds that the claimant has failed to prove his entitlement to the remedy he claimed. The action that the claimant prosecuted was not an action for damage to a small proportion of the consignment. It was an action for total loss, which is qualitatively different in kind from a claim in respect of damage to 1 per cent of the consignment. Suppose now that due to experience with other similar shipments, the defendant pleaded in the defence that only 1 per cent of the consignment could possibly have been damaged. On his part, the claimant persisted with the total loss argument and in his testimony denied that the damage was limited to 50 phones. The claimant may therefore be said to have deliberately abandoned his claim for the actual loss.

Even a narrower procedural approach leads to the same conclusion. A statement of case must be verified by a statement of truth: CPR r.22.1(1)(a). A statement of truth is a statement that the party putting forward the document believes that the facts stated in the document are true: CPR r.22.1(4). According to the Glossary, "striking out means the court ordering written material to be deleted so that it may no longer be relied upon". The moment the court reaches the conclusion that the party never believed the facts stated in the statement of case to be true, it is entitled

to hold that the statement of case may no longer be relied upon and strike it out. A similar result can be reached by focusing on the disclosure obligation. The claimant in our example was in breach of his disclosure duty. Had it been known at the time that he was deliberately suppressing crucial documentary evidence his case would have been struck out on that ground. The striking out on the discovery of the claimant's deceit at the end of the trial is no more than a delayed consequence of his breach.

Of course such claimant would be free to seek to amend his statement of case and verify the amendment by a fresh statement of truth, or to seek an extension of time to give disclosure. But granting such an application will be at the court's discretion, which is hardly likely to be exercised in the claimant's favour. To hold, as the Court of Appeal did in *Ul-Haq*, that it is now too late to strike out the claimant's statement of case is to force the trial judge to enter judgment on the basis of a predominantly fraudulent statement of case, and this, as already noted, would reward the claimant for succeeding to maintain the deceit until the end of the trial.

The consequence of fraud on CPR Pt 36 offers

In *Widlake v BAA Ltd* [2009] EWCA Civ 1256 the claimant had exaggerated her loss in a personal injury claim by suppressing relevant information. She nevertheless beat a payment into court made by the defendant. The Court of Appeal held that where a personal injury claimant had exaggerated her claim but had still beaten the defendant's payment in, the right order in all the circumstances was to make no order for costs. It could be argued that a claimant who practiced deceit should derive no benefit whatever from a CPR Pt 36 offer, whether his own or the defendant's. For the whole CPR Pt 36 procedure relies on the parties having access to broadly the same information. A claimant who knowingly fabricates evidence or otherwise sets out to deceive his opponent is effectively denying the opponent the opportunity to make a reliable assessment of the value of the claim and should for that reason alone lose any benefit of a CPR Pt 36 offer to settle.

Conclusion

The question of principle on which Court of Appeal seems to be divided is whether at the end of the trial the court has jurisdiction to strike out a statement of case on the grounds that the party has sought to pervert the course of justice by presenting a fraudulent claim and supporting it by deceitful evidence. In *Ul-Haq* (2009) the Court of Appeal held that there is no such jurisdiction; that as long as the court can separate the legitimate claim or defence from the fraudulent one, the court must reach a judgment according to the evidence and find in favour of the fraudulent party to the extent that the evidence justifies it. By contrast, a differently constituted Court of Appeal in *Arrow Nominees* (2000) and *Zahoor* (2009) was of the view that just as the court has the power to strike out a fraudulent statement of case before and during the trial, it has the power to do so at the end of the trial. On this view, once the court has formed the view that a litigant pursued from the start a

fraudulent case by fraudulent means, the court need not strive to investigate that fraudster's claim or defence any further but may strike out his statement of case on that ground alone at any stage.

The view that a person who sets out to pervert the court of justice by presenting a fraudulent case supported by deceitful evidence has effectively forfeited this right to court adjudication may be justified on moral grounds and on practical grounds. The moral precept that a person should not be allowed to benefit from his own wrong justifies throwing out a claim or defence where the fraud is so substantial or extensive as to render the litigant's claim or defence into a wrong. Practical grounds too point in the same direction. A litigant who has wasted court resources by fraudulent means is not entitled to demand further judicial consideration even if he can show some legitimate cause. Furthermore, the court has recognised in insurance claims that the fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing. The same consideration applies here: the fraudulent litigant must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose none of my entitlement. Willes J.'s words, that "it would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed", apply to any fraudulent litigant.

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