Editor's Note

Access to Justice for Litigants who Advance their case by Forgery and Perjury

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In recent years there have been a number of cases in which litigants set out to advance their cause by suppressing documents, forging documents or giving false testimony. The question that arises in such instances is whether the court should entertain the case of litigants who have sought to subvert the legal process by fraudulent means or whether the court should strike out their case without a consideration of the merits. Or, to put it another way, does the maxim "he who comes into equity must come with clean hands" have any implications for such cases?

For the sake of clarity it needs stressing that we are not concerned with instances where misconduct only emerges from the tribunal's final findings of fact. There will inevitably be cases where at the end of the trial the judge reaches the conclusion that one of the parties has been untruthful, or that some documents have been suppressed or even forged. Such situations are merely illustrative of the proper functioning of judicial process. The questions addressed here concern only the position where the court has become convinced, well before retiring to deliver judgment, that one of the parties or both have employed fraudulent means to impede the adjudicative process. Such situations present the court with a choice between two courses of action. It could carry on with the adjudicative process, try to overcome litigants' efforts to prevent it from finding the truth and establish the facts as best it can. Alternatively, it could take the position that litigants who set out to undermine the court's fact finding process forfeit the right to a legal determination and therefore strike out the offending litigant's statements of case.

There are three discernible approaches to this problem in the case law. The first is that the court should seek to try the issues between the parties as long as the litigant's fraudulent conduct has not rendered it impossible to hold a

fair trial upon such evidence that has not been contaminated by the litigant's fraudulent practices. We may refer to this as the justice on the merits approach. The second is the forfeiture approach, which holds that a litigant who seeks to subvert the court process by suppression of evidence, forgery and perjury has forfeited his right to an adjudication of his cause and his statement of case should be struck out on this ground alone. A third approach brings to bear on the issue the overriding objective of the CPR. It holds that a litigant who suppresses or forges documents or adduces false testimony is imposing a greater and unjustified burden on court resources, because such subversive practices would oblige the court to devote more time and effort to disentangling reliable evidence from false evidence. According to this approach a litigant who employs such practices does not deserve the investment of the court's scarce resources to his case and it should therefore be dismissed without adjudication on the merits. The third approach is a modern compromise between the two approaches; it allows the court to proceed with the case provided that the contaminated evidence does not necessitate the investment of disproportionate court resources in determining the facts.

All three approaches have received some airing in *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59, CA. A, the petitioner, had a minority shareholding in a company managed by B who was the majority shareholder. A petitioned against B for acting unfairly in connection with the company's affairs to A's detriment. Following the admission by A that he had produced fraudulent documents, B applied to strike out the petition on the ground that a fair trial was no longer possible. A expressed remorse and the judge dismissed B's application on the grounds that fair trial was possible. At the trial before the same judge, further evidence of fraud emerged and B renewed the strike out application. The judge found that A persisted in his fraudulent behaviour, but dismissed the application because a fair trial could still be held in respect of the claims which had not been affected by A's fraudulent conduct. In the event the judge gave judgment for the petitioner on the grounds that the respondents behaved unfairly to the minority shareholders.

The Court of Appeal disagreed. Chadwick L.J. was of the view that once the judge had excluded from consideration the evidence that was contaminated by A's fraudulent conduct, no evidence remained to support the judge's conclusion that B had behaved unfairly to the minority shareholders ([54]). In so doing, Chadwick L.J. seemed to agree with the judge that striking out would not be justified where a fair trial is still possible. He adopted, as a general principle, the observations in *Logicrose Ltd v Southend United Football Club Ltd* [1988] E.G. 114, where Millett J. expressed the view that the court would dismiss a statement of case for fraudulent contract only if it threatened the fairness of the trial ([55]). Indeed, later on Chadwick L.J. stated that the

> "court does not strike out the petition because it disapproves of the petitioner's conduct; it strikes out the petition because it is satisfied that the petitioner's conduct has led to an unacceptable risk that any judgment in his favour will be unsafe" (at [58]).

This approach was also evident in cases such as *Landauer Ltd v Comins & Co (A Firm)*, Unreported, May 14, 1991; *London Borough of Lambeth v Blandford*, Unreported, May 20, 1997; and *Swaptronics Ltd, Re* (1998) 95(36) L.S.G. 33.

However, in *Arrow Nominees Inc* the Court of Appeal went on to found its decision on a broader and different principle. Chadwick L.J. explained that 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" (at [54]).

Finally, he drew attention to the interests of the administration of justice in ensuring that court resources are not wasted:

> ". . . a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was 'hijacked' by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which . . . [A] had forged with the object of frustrating a fair trial and (ii) that, as the judge found, . . .[A] was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the . . . respondents; and it was unfair to other litigants who needed to have their disputes tried by the court" (at [55]).

Ward L.J. too stressed the forfeiture approach and the overriding objective considerations when he said:

> "The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing. The matter has become hugely more expensive . . . The judge did not, however, treat cost and time as elements of the overriding objective. He did not appear to allot to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases. In this day and age they are elements of case management which must not only be seen to have been placed in the scales but also given due and proper weight when assessing how justice is to be done to the parties and to other litigants. . . . Any notion that this was a petitioner coming to the Court of Equity with clean hands is utterly dispelled by the devastating conclusion . . . [of the trial judge about the petitioner's untrithfulness] . . . This was,

> therefore, a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour'' (at [73]–[74]).

The striking out of the petitioner's case was thus justified on three grounds. First, that once the contaminated evidence has been excluded, insufficient evidence remained to support the judge's findings in favour of the petitioners and consequently a fair trial was no longer possible. The second ground was that the petitioner had forfeited his right to a trial of his case because he had not come to court with clean hands but rather determined to subvert the legal process. The third ground was that the petitioner's fraudulent conduct of the proceedings had led to unjustified waste of court resources and his action should have been stopped.

Each of these principles has different implications and may point to different outcomes in a given case. The justice on the merits approach will require the court to give a fraudulent litigant an opportunity to prove his case provided he can do so by evidence which is uncontaminated by his fraudulent practices. By contrast, the forfeiture approach would deny the fraudulent litigant such opportunity. The outcome of the application of the overriding objective would depend on the extent to which the litigant's fraudulent practices have increased the court's burden of determining the truth.

The consequences of this ambivalence about the approach to fraudulent litigants may be seen in Peter Smith J.'s decision in *Masood v Zahoor* [2008] EWHC 1034 (Ch); [2008] All E.R. (D) 170. M claimed to be entitled to shares in a certain company by virtue of promises made to him Z. Throughout the course of the proceedings, both parties produced forged documents and false testimony and caused the judge great difficulty because, as the judge put it, both ''withheld from me truthful and frank evidence about the acquisition of these shares'' (at [94]).

Both parties showed wholesale disregard for the truth and for their obligations to assist the court in discharging its fact finding function. Indeed, they set out to prevent it from doing so. The judge found the claimant's

> ''conduct in producing and relying upon forged documents to the extent that he has and the consequential perjured evidence and false disclosure of documents as being a flagrant and continuing affront to the court'' (at [149]).

About the defendant's conduct the judge said that

> ''the documents . . . [M] forged were done to create a deliberately false impression that documents were contemporaneously executed on the dates put on them. This was done to bolster their case and to deceive the Court'' (at [141]).

And he added that the

> ''relevant documents were . . . given false dates in the disclosure list. . . . This seems to me to be a plain breach of the obligations of disclosure and has led to a false disclosure statement'' (at [142]).

He concluded the evaluation of the parties' conduct with these remarks:

> "[143] . . . this case took place with the major witnesses all having lied and therefore having delivered perjured evidence. In addition the major witnesses on both sides have sought to bolster their case by forged documents.
>
> [144] This is deplorable. It made my task of evaluating the true facts about the dispute difficult if not impossible in some areas. All the parties have abused the process of the Court by the way in which they have presented their cases. . . .
>
> [145] It is therefore distasteful and unacceptable that I am required to determine the dispute between parties who commit such wanton acts of dishonesty."

The judge noted that if he had been confronted solely by the claimant's abuse he would

> "have had no hesitation in striking out the entirety of his claims. He has not made the case impossible but he has very nearly made it so. To remove from the Judge's tools for assessing where the truth lies all significant contemporaneous documents is a very serious act of misconduct. He has made my task virtually unmanageable" (at [150]).

Despite these damning remarks about the claimant's conduct Peter Smith J. carried on the adjudicative process. What persuaded him not to strike out the claimant's statement of case was the consideration that such a course of action would have handed victory to the defendant who was just as culpable of subverting the legal process. He explained:

> "[154] The easy course given the parties conduct would be simply to decline to adjudicate the case and strike out all the pleadings and then leave SM [the claimant] with no remedy. I have come to the reluctant conclusion that that in itself would not be an appropriate action in the present case. At the end of the day everybody (however badly they perform) is entitled to have access to the courts to have disputes resolved. If they abuse their right to access then the court has sanctions. However when all abuse their access as in the present case punishing one to a greater extent than the other would itself in my view create an injustice. I have accordingly therefore come to the reluctant view that despite all my misgivings and (I have to say) the great distaste I feel about this that I must attempt to resolve all the issues doing the best I can but without a great deal of assistance from testimony of the main players and with the need to adopt an extremely cautious approach to contemporaneous documents. Ultimately if I am unable to decide an issue on the uncontaminated material that is left to me that issue will be decided on the burden of proof. The parties will then suffer the consequences of their actions. I have made clear to the parties during the course of the trial that it is extremely likely that I will take further action over their misconduct and I intend so to do."

Even if one accepts the proposition that no matter how much a party tried to subvert the legal process he is still entitled to access to adjudication on the merits, it is hard to see how the judge was justified in trying the case. As we have seen, the justice on the merits approach would sanction the continuation of the process if is still possible to have a fair trial. But given both parties' chicanery it is difficult to see how a fair trial could be held. The impediment to the determination of truth in the circumstances of this case was far greater than that faced by the court in the *Arrow Nominees* case, discussed earlier, where the Court of Appeal held that the judge should have stopped the case. And of course there was the consideration of the overriding objective which received insufficient attention. For it is obvious that the need to deal with forgery and perjury on such a scale must have called for far greater resources than would have been necessary had the parties complied with their process obligations. The judge himself described the extent of court time which the false evidence took when he mentioned that 52 documents were claimed to be forged and extensive handwriting expert evidence had to be given by three handwriting experts (at [256]–[257]).

There is, however, a more fundamental point to be made about the decision and it concerns the implied rejection of the forfeiture approach. What held the judge back from striking out the claimant's case was the fact that the defendant was equally guilty. "The difficulty I have", Peter Smith J. said, "is with the application of an appropriate sanction" (at [151]). To regard striking out as a sanction or a punishment for wholesale and flagrant subversion of the court process is to misunderstand the forfeiture approach.

Striking out in such circumstances does not amount to a denial of access to court, as the judge seemed to think. It is merely an acknowledgement of the litigant's refusal to participate in a properly conducted fact-finding process. By declining to entertain the litigant's case in such a situation the court merely draws the logical conclusion from the litigant's refusal to accept the rules of the institution the protection of which he seeks. Sending away a litigant without adjudicating the merits of his case in this situation is no different from refusing a driving licence to a person who, in order to secure a favourable outcome, distracts and obstructs the driving instructor during the driving test.

The judge was concerned that striking out both parties' statements of case would give the equally culpable defendant an undeserving windfall. This was a misplaced worry given the position that the law adopts in comparable situations. The maxim "he who comes into equity must come with clean hands" bites precisely where a claim of right would otherwise succeed.[1] "It means", as Pollock and Maitland put it

[1] *Halsbury's Laws of England*, Vol.16(2), para.560.

> "that the royal tribunal is not so strictly bound by rules that it can not defeat the devices of those who would use legal forms for the purposes of chicane".[2]

A number of legal rules have developed which implement this maxim of equity by denying relief regardless of whether an undeserving opponent will benefit as a result. Two rules in particular should have provided guidance for dealing with the situation in this case. The first is embodied in the maxim *in pari delicto potior est conditio defendentis*; namely, where both parties are equally at fault the position of the defendant is the stronger. For example, where the parties are on an equal footing as regards an illegal contract neither can recover any property or money transferred to the other in pursuance of the contract. The other is in the maxim *ex turpi causa non oritur actio*; namely, no court will lend its aid to a man who founds his action upon an immoral or an illegal act.[3] Thus the court will refuse to entertain an action founded on an illegal or immoral cause, even if this will benefit an undeserving or even equally guilty defendant. Finally, a defendant may rely on the illegality of a transaction as a defence to a restitutionary claim, when it would otherwise succeed.[4]

Common to these rules is the recognition that justice is best served by refusing to allow court adjudication to be used for disentangling illegal or immoral transactions. Parties who embark on enterprises which violate the law or good public order are not entitled to demand protection from the institutions whose function is to uphold the law. The same should apply to litigants who seek court adjudication but at the same time employ fraudulent means to divert the court from the truth. And there is the further consideration of the overriding objective, highlighted by the Court of Appeal in the *Arrow Nominees* case. Litigants who forge documents and adduce perjured evidence not only discredit the legal process but impose an extra burden on it which diverts resources from more deserving litigants.

There is only one right approach for dealing with litigants who embark on litigation determined to subvert the adjudicative process by fraudulent means: the forfeiture approach. As Chadwick L.J. explained in *Arrow Nominees* (at [54]), 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".

Had the judge adhered to this principle, he would have spared the legal system considerable resources and would have delivered a clear message to those who might be tempted to use suppression, forgery and perjury to advance their cause.

[2] Pollock and Maitland, *The History of English Law*, 2nd edn (1952), p.189.

[3] *Halsbury's Laws of England*, Vol.12, para.174; Vol.9(1) (Reissue), paras 836 *et seq*; Vol.45(2), paras 376 *et seq*.

[4] *Halsbury's Laws of England*, Vol.12, para.174.

The adoption of the forfeiture approach would require the court to be alert to the possibility of fraud on the court and take the necessary measures at an early stage. In the *Arrow Nominees* case Chadwick L.J. made helpful remarks about the appropriate procedural course to be followed (at [64]). Where there has been admitted forgery or destruction of relevant documents and a striking out application has been made, the court should investigate there and then whether the full extent of the fraudulent conduct has been revealed, even if that requires oral evidence at that stage, and should resolve the issue before the trial if possible, or even as a preliminary issue at the start of the trial. Chadwick L.J. was of the view that if at the end of the hearing the judge cannot be confident that there is no substantial risk that the trial would be a fair trial, he should conclude that the trial would be unfair, if only because it would give rise to a detailed examination of issues which ought not, properly, to be occupying the time of the court at the trial. By following this procedure and applying the forfeiture approach the court will save itself much unnecessary trouble and promote more effectively the interests of the administration of justice then it would by trying to adjudicate between liars and forgers.