Trinity Term
[2012] UKSC 26
On appeal from: [2010] EWCA Civ 1300

JUDGMENT

Fairclough Homes Limited (Appellant) *v* Summers (Respondent)

before

Lord Hope, Deputy President
Lord Kerr
Lord Clarke
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

27 June 2012

Heard on 18 and 19 April 2012

Appellant	*Respondent*
William Norris QC James Todd Sadie Crapper (Instructed by Berrymans Lace Mawer LLP)	Craig Sephton QC Hugh Davies (Instructed by SAS Daniels LLP)

LORD CLARKE, DELIVERING THE JUDGMENT OF THE COURT

Introduction

1. This is the judgment of the Supreme Court. The principal issues in this appeal are whether a civil court ("the court") has power to strike out a statement of case as an abuse of process after a trial at which the court has held that the defendant is liable in damages to the claimant in an ascertained sum and, if so, in what circumstances such a power should be exercised. The driving force behind the appeal is the defendant's liability insurers, who say that fraudulent claims of the kind found to exist here are rife and should in principle be struck out as an abuse of the court's process under CPR 3.4(2) or under the inherent jurisdiction of the court.

The facts and judgment at first instance

2. The claimant was born on 16 June 1976. On 13 May 2003, while employed by the defendant, he was injured in an accident at work. He fell from a stacker truck and suffered both a fractured scaphoid bone in his right hand and a comminuted fracture of his left calcaneum, or heel bone. On 28 October 2003, the defendant admitted liability through its insurers. On 10 May 2006 the claimant issued a claim form which alleged breach of duty or negligence on the part of the defendant but did not contain detailed particulars of quantum. On 7 July 2006 the defendant applied for permission to withdraw the admission of liability after seeing medical records which appeared to cast doubt on the claimant's account of the accident. In March 2007 the defendant served an amended defence on liability. On 28 August 2007, after trial, His Honour Judge Tetlow ("the judge") gave judgment for the claimant on liability, with damages to be assessed. He made an interim award of £2,000 on account of costs. The defendant subsequently made a voluntary interim payment of £10,000 on account of damages.

3. On 4 October 2007 the defendant for the first time obtained images of the claimant by means of undercover surveillance. Until then the defendant's case had not been based upon abuse of process. On 5 October 2007 the claimant signed a witness statement which included the assertion that he was not able to stand for more than 10 to 15 minutes. The defendant continued to subject the claimant to undercover surveillance, the last such surveillance being on 25 September 2008. On 17 November 2008 the parties' orthopaedic experts met and prepared a joint statement without either expert seeing the surveillance videos. On 9 December 2008 the claimant served his first schedule of loss. It was in the sum of £838,616.

4. On 23 December 2008 the defendant disclosed the surveillance evidence to the claimant and served a re-amended defence alleging that the claimant's claim was grossly and dishonestly exaggerated and asserting that it should be struck out in its entirety. Detailed particulars of the dishonesty were given. The defendant also served a counter-schedule setting out a secondary case on quantum. On 29 January 2009 the claimant made a Part 36 offer to settle for £190,200. On 9 February 2009 the orthopaedic experts, who had by now seen the surveillance material, met again and prepared a second joint statement. In May 2009 the Department of Work and Pensions ("DWP") disclosed surveillance showing the claimant apparently working without difficulty in 2009. On 29 June 2009 the claimant served a second schedule of loss valuing the claim at £250,923. He made a Part 36 offer to settle for £150,000. On 22 July 2009 the trial of quantum was adjourned because of the DWP disclosure. On 24 November 2009 the claimant's solicitors invited the defendant to attend a joint settlement meeting but the defendant declined to do so. On 14 December 2009 the claimant served a third schedule of loss in almost the same sum as the second schedule. The claim was put at £251,481. All the claimant's pleadings and schedules of loss were supported by statements of truth.

5. That claim was maintained at the trial which took place between 25 and 27 January 2010. In the light of the joint statement, neither of the orthopaedic experts was called to give oral evidence and the surveillance evidence was not challenged. Indeed, the principal, if not the only, witness to give oral evidence was the claimant. There was however a good deal of written medical evidence before the judge, together with extracts from the claimant's wife's diary which appeared to show him working and playing football. On 23 February 2010 the judge handed down a 27 page judgment which analysed the facts and the issues in considerable detail and with impressive clarity.

6. The critical findings of facts are set out in paras 54 to 61 as follows:

> "54. Having rehearsed the evidence at some length it is time to come to some conclusions. Firstly as to the nature and extent of the disability caused by the injury. There is no doubt that the Claimant suffered a fracture of the right scaphoid and a serious ankle fracture which required at least two operations for an arthrodesis. The schedule of loss prepared on 9th December 2008 and signed with a statement of truth by the Claimant maintained the Claimant was at that date still in constant pain taking pain killers, needing to use crutches outside and to wear an ankle brace at all times. Standing and sitting was limited due to pain; he was still suffering psychiatrically from the effects of the accident. He had not worked since the accident and was unlikely to do so for the

foreseeable future. In the light of the surveillance evidence the subsequent two schedules opted for a sum of £30,000 instead of the original £47,500 put forward for general damages. Further the loss of earnings in the second schedule of the 19th June 2009 ran up to 13th October 2008 only, in effect accepting that the orthopaedic experts' conclusion as to the Claimant's fitness for work was correct. That said the Claimant by his evidence does not accept that that is correct and that position was maintained from the witness box.

55. I am prepared to accept that the Claimant's ankle injury was sufficiently serious as to require the first arthrodesis; further that the first operation failed necessitating the second one. Although I accept in the light of subsequent events that the second operation also failed to create complete fusion, the result of that second operation was to render the Claimant asymptomatic to all intents and purposes as is disclosed by the surveillance videos from October 2007 onwards. I can accept as Messrs O'Connor and Hodgkinson conclude that the Claimant would not be fit for heavy work and would find walking over uneven ground uncomfortable but those are the only outstanding disabilities. I can also accept their conclusion that the Claimant would have been weight bearing without crutches within six months of the second operation i.e. by March 2007. Since the Claimant was clearly fit for work in early October 2007 I conclude that the Claimant was fit for work some months earlier than that and capable of getting a job including a job as a site supervisor as he had pre-accident, that not being heavy work. I conclude that the time when the Claimant was fit and should have got back to work as being at the end of June 2007. I accept that he would not have been able to work before then. There is no evidence that the ankle even though not properly fused was likely to give rise to problems in the future.

56. Although the Claimant was not fit for work between the date of the accident and the end of June 2007, in my judgment, I do not conclude he was in that period as housebound and incapable of activity as the Claimant maintains. The recorded incident of June 2003 of the Claimant, upset at being told that the effects of the injury might be permanent, going out to the pub to drown his sorrows demonstrates greater agility than the Claimant maintains and sounds more probable than the Claimant's now explanation that it all happened at home. It is rather similar to the Claimant's curious denial of having been convicted of an offence.

57. I have also concluded that the psychiatric problems alluded to by the psychiatrist were genuine initially and were materially contributed to by the effects of the accident. I agree with the conclusion of Dr Wood with which Dr Thomas does not appear to disagree that such problems had settled to all intents and purposes by about June 2007. It is interesting that that conclusion was come to in ignorance of what the surveillance evidence showed. That ties in nicely with my conclusion as to when the Claimant was able to resume and should have resumed work.

58. Those conclusions must mean that I reject what the Claimant said to his treating doctors and the medical experts as to ongoing symptoms in and after March 2007. I do so because;

(a) What is seen on the video tapes is absolutely inconsistent with such disabilities; it is also absolutely inconsistent with what is contained in the DWP application form.

(b) The Claimant's explanation that when he was being filmed he was taking strong pain killers in order to force himself with the object of getting back into work is just not credible in particular when he is seen on two separate occasions going to and from two separate medical experts' consulting rooms without crutches when leaving and returning home and with crutches when entering and leaving the doctors premises.

(c) The Claimant's wife's diary belies any such protestation of ongoing symptoms.

59. 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. The Claimant was clearly able to work without difficulty or pain when filmed in October 2007 driving and loading a van with kitchen fitting components and again in 2009 when filmed with the mobile food van. His wife's diary confirms he was working at various other times. I can only infer he was working for reward; the diary confirms such a conclusion; the explanations of helping out for free, of pushing himself and of learning the business of a mobile food van with a view to purchase is deliberate falsehood and an attempt to explain away what cannot be explained away. Messrs O'Connor and

> Hodgkinson's final opinion already referred to is in my judgment absolutely right. I am not able to say on what days the Claimant was gainfully employed but that matters not. He was fit for work and able to get work and was in a position to do so, as I have found, since the end of June 2007.
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> 60. I am also satisfied that the Claimant was able to do cooking, washing and other housework and most activities involving DIY and decorating by March 2007 when Mr Hodgkinson considered the Claimant no longer needed crutches. Any residual disability as regards DIY and decorating would have ceased by the end of June 2007. He was certainly fit enough to play football by early 2009.
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> 61. It is urged upon me that the third arthrodesis is attributable to the accident. In my judgment it is not. It is attributable to the lies he told Mr Dalal that he was in continuous horrible pain; there can be no doubt that if he had told Mr Dalal the truth namely that he was to all intents and purposes better the surgeon would never have advised him to undergo a further procedure. The Claimant has got stuck with his own lie; had he told the truth he would be admitting this claim is grossly exaggerated and that he has been claiming benefits under false pretences; this he is not prepared to do as is evidenced by his testimony before me, false as I find, that he is still in pain and needing to use crutches."

7. In para 62 the judge rejected the claimant's evidence that he suffered psychiatric problems after June 2007, except in January 2009 when he was distraught at having been found out. The judge further rejected any suggestion that any such illness then was caused by the accident. In para 63 he allowed the loss of earnings claim for the period from the date of the accident to 30 June 2007. In para 64 he rejected the claimant's evidence as to the prospects of promotion. He did so on the basis that, in the light of the unreliability of the claimant's evidence, he would not accept that there were such prospects in the absence of independent evidence. He accordingly found no future loss. At para 65, for similar reasons he refused to make a *Smith v Manchester* award. He held that the claimant was at no greater disadvantage in the open labour market than he had been before the accident. He so held on the basis that it behoved the claimant to prove such a disadvantage and that he had only himself to blame for failing to do so. As to care, he analysed the figures in some detail in para 66 and again said that, if he had been less than generous to the claimant, the claimant had only himself to blame. He reached similar conclusions as to services, DIY and decorating in paras 67 and 68.

8. In short, it is plain from the judgment that, because of the behaviour of the claimant and the unreliability of his evidence, the judge drew a series of inferences

adverse to him. It was not suggested that the judge was not entitled to do so. Indeed none of his conclusions is challenged in this appeal. It seems almost certain that, if the claimant had advanced an honest claim and given reliable evidence, the measure of damages would have been greater, perhaps significantly greater, than found by the judge.

9. As to general damages, by the time of the trial the claimant had reduced the figure he had originally contended for to £30,000. The defendant argued for £10,000. The judge awarded £18,500. The parties subsequently agreed that, on the basis of the judge's findings of fact, namely that he was fit to return to work by the end of June 2007, the claimant's loss of earnings caused by the accident was £63,776.76. In addition care and assistance were assessed at £5,400 and other services at £1,040. The total figure found by the judge was thus £88,716.76 before deduction of various benefits and the interim payment of £10,000.

10. At the end of his principal judgment the judge noted in para 72 that the defendant wished to argue that the court had power to strike out the claim on the ground that it was tainted by fraud and was an abuse of process and that *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 WLR 616, which was followed in November 2009 by *Widlake v BAA Limited* [2009] EWCA Civ 1256 ("*Widlake v BAA*"), was wrongly decided. The judge further noted that it was recognised on behalf of the defendant that those decisions were both binding on him. At a subsequent hearing on 16 April 2010 the judge granted permission to appeal on the basis that there was a real prospect that this court would take a different view from the Court of Appeal in those two cases. He contemplated that the Court of Appeal would dismiss the appeal leaving the defendant to take his chances here. The judge also granted a stay of the order in favour of the claimant pending appeal.

11. At the hearing in 16 April the judge heard argument on interest and costs and considered an application on behalf of the defendant for permission to commence contempt proceedings against the claimant. As appears below, in our opinion, his decisions in these respects are of some significance in resolving the issues in this appeal. It is important to note that the defendant did not challenge any of those decisions in its appeals to the Court of Appeal or to this court.

12. As to interest, it was contended on behalf of the defendant that no interest should be awarded on general or special damages after 30 June 2007. It relied on the finding that the claimant had lied about the extent of his injuries, about his ability to work and about his need for care and assistance. It further relied upon the fact that the claimant maintained the lie up to and during the trial. The judge accepted the defendant's submissions as to the claimant's behaviour but nevertheless awarded interest over the whole period. The judge set out the position relating to the claimant's Part 36 offers and noted that the defendant did not make

a Part 36 offer of its own. He also observed that the defendant refused to attend a joint settlement meeting saying that its attendance would not change its position regarding the dishonest and fraudulent behaviour of the claimant. While recognising that the claimant maintained his dishonest stand in his later witness statement and at trial, the judge had regard to the fact that his solicitors were taking a realistic position as to the court's likely findings and were willing to negotiate on that basis. The defendant, on the other hand, was not willing to negotiate because it wanted more out of the litigation than a settlement, which would probably have been on advantageous terms both as to quantum and as to costs. In particular it wanted an opportunity of persuading the Supreme Court to strike out the whole claim. The judge held that, as a result, the claimant was locked in, he had a valid claim and discontinuance was not a sensible option. He found that in these circumstances the claimant's lies as to continuing disability did not affect the defendant's attitude to negotiation or settlement. He referred to the law as stated in *Ul-Haq v Shah* and, in the exercise of his discretion, directed that the claimant should have interest on the damages to which the court had held he was entitled over the whole period.

13. As to costs, the defendant's primary submission before the judge was that the claimant should pay all the defendant's costs from the date of the judgment on liability. In the alternative it contended for no order for costs on the basis that the claimant's fraudulent conduct had increased the costs.

14. The judge correctly directed himself as to the relevant principles by reference to the decision of the Court of Appeal in *Widlake v BAA* and in particular to paras 36 to 44 of the judgment of Ward LJ, with whom Smith and Wilson LJJ agreed. He identified these five propositions as relevant to this case. (1) If, as here, the conduct of the claimant is unreasonable the court must take it into account. (2) As regards such conduct, the court should principally enquire into its causative effect. To what extent did the claimant's lies and gross exaggeration cause costs to be incurred or wasted? (3) In addition, the court is entitled in an appropriate case to say that the conduct is so egregious that a costs penalty should be imposed on the offending party. There is, however, a considerable difference between a concocted claim and an exaggerated claim and the court must be astute to measure how reprehensible the conduct is. (4) Defendants have the means of defending themselves against false or exaggerated claims by making a Part 36 offer. (5) Where the facts are well enough known for the defendant to make a Part 36 offer, failure to make a sufficiently high offer counts against the defendant.

15. At para 13 of his second judgment the judge summarised the principal factors in this way. If the claimant had come clean there would have been an earlier trial on quantum. The claimant persisted in his lies up to and including trial. On the other hand, unbeknown to the claimant, by October 2007 the defendant knew that he was grossly exaggerating his disability. The judge said that he

understood that the defendant would wish to obtain further evidence to demonstrate the claimant's falsity rather than prematurely disclose what it had discovered. However he recognised that it could be argued that it should have disclosed the video evidence earlier than January 2009. On the other hand, the defendant did not want to let the claimant off the hook once the video evidence was disclosed, even though the claimant's solicitors were eager to come to terms. It wanted to obtain, as the judge put it, a clarification of or advance in the law.

16. The judge added this at para 13(6):

> "Despite the Defendant's pleas to the contrary the Defendant had the means of assessing the true value of the Claimant's claim so soon as they got the video evidence in October 2007 and by obtaining as they did further medical advice from Mr Hodgkinson. The Defendant was not deflected from ascertaining the true position by the Claimant's continued lies. They saw through them. The Claimant was living in a fools' paradise until January 2009. Thereafter his continued denials of recovery fooled no one; it is difficult to tell why he did so; it may be he could not bring himself to own up in part because of the action of the Department of Work and Pensions in investigating his benefit fraud and the Defendant's insurers reporting the Claimant's dishonesty to the police; that is speculation since I do not know when the Claimant became aware of such investigations or complaints."

17. The judge further added that, in spite of the claimant's solicitors wishing to negotiate and making Part 36 offers, which in the event were too high, the defendant was not willing to negotiate and deliberately decided not to make any counter offer when it could have done so. As a result, although the claimant's dishonesty caused the proceedings to be extended, the defendant by its 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 would in all probability have been achieved if the defendant had been willing to take part in negotiations. Moreover the defendant was not fooled by the claimant's dishonesty.

18. The judge ordered the defendant to pay the claimant's costs up to February 2008, save that the claimant was to pay the defendant's costs of obtaining the surveillance evidence. He made no order for costs after March 2008. The defendant has not challenged the judge's decision on interest or costs on appeal. Nor has it challenged the judge's refusal to give it permission to bring proceedings for contempt against the claimant.

19. As to contempt, by CPR 32.14(1), proceedings for contempt may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. However, by CPR 32.14(2), such proceedings may only be brought by the Attorney General or with the permission of the court.

20. The judge held at para 18 that, given his findings, there was a strong prima facie case for believing that the defendant would be able to show that the claimant was guilty of contempt to the criminal standard. He added that the same was true of the criminal offences of attempting to pervert the course of justice, or to obtain property or a pecuniary advantage by deception. The only question was whether it was in the public interest that these proceedings should be brought to an end or whether the court should exercise its discretion to give the permission sought. He held that it was not in the public interest. He took into account broadly the same considerations as led him to his conclusions on interest and costs. He further noted that the claimant's wrongdoing had been publicly recognised by the judgment in the action. Finally he said that, if the defendant was dissatisfied, it (or the insurers) could try to persuade the Attorney General to take up the baton. So far as we are aware, no such attempt was made. We were informed that the CPS considered whether to prosecute the claimant but concluded that it was not in the public interest to do so.

The Court of Appeal

21. The appeal to the Court of Appeal came on before Ward and Smith LJJ on 7 October 2010. They held that they were bound by *Ul-Haq v Shah* and *Widlake v BAA* to hold that the court had no power to strike out the claim in its entirety. The Court of Appeal refused permission to appeal to this Court, which subsequently granted it.

Jurisdiction

22. As stated at the outset, it was submitted on behalf of the defendant that the court has power to strike out the claim both under CPR 3.4(2) and under its inherent jurisdiction.

23. CPR 3.4(2) provides:

> "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."

Attention was also drawn, both to the overriding objective stated in CPR 1.1 and 1.2 that the court must deal with cases justly, and to the court's general powers of case management in CPR 3.1(2), which includes a power in CPR 3.1(2)(m) to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

24. It was submitted that under those rules the court has ample power to strike out the claimant's claim as an abuse of process. It was further submitted that CPR 3.4(2) should be seen as a codified expression of the pre-existing inherent jurisdiction to strike a claim out as an abuse of process. It was correctly accepted on behalf of the claimant that, in making false statements of truth which he knew to be false and in presenting a dishonest case as to the effect of his injuries and on quantum, he was guilty of a serious abuse of process. It was initially submitted on his behalf that there was nevertheless no power to strike the claim out for the reasons given by the Court of Appeal in *Ul-Haq v Shah* and *Widlake v BAA*. In the alternative, it was submitted either that the court has no power, or that it would be wrong in principle, for the court to strike the claim out after a trial at which the court has held that a defendant is liable to the claimant in an ascertained sum. In the further alternative, it was submitted that the court should not strike the claim out on the facts of this case.

25. Reliance was placed in particular upon *Ul-Haq v Shah* and *Widlake v BAA*. In *Ul-Haq v Shah* there had been a collision between a car driven by Mr Ul-Haq and a car driven by Mrs Shah. Mrs Shah caused the collision by negligently driving into the back of Mr Ul-Haq's car. Mr Ul-Haq claimed for damage to the car and for minor whiplash injuries. His wife also claimed for minor whiplash injuries. It was common ground that Mr Ul-Haq, his wife and their two children were in the car when the accident occurred. However there was an issue as to whether Mr Ul-Haq's mother was also in the car. She too made a claim in respect of alleged whiplash injuries. Her claim was defended on the basis that she was not in the car and so could not have suffered whiplash or any injury as a result of the accident. At the trial before the recorder, after hearing evidence from Mr Ul-Haq, his wife and his mother, the recorder held that Mr Ul-Haq and his wife had suffered injury and awarded each a modest sum. However he held that Mr Ul-Haq's mother had not been in the car and that her claim was fraudulent. He dismissed her claim and ordered her to pay costs on an indemnity basis. He

concluded that Mr Ul-Haq and his wife had conspired to support the fraudulent claim and ordered them to pay two thirds of Mrs Shah's costs. In the result all the claimants incurred a net loss.

26. Before the recorder it was submitted that the claims of Mr Ul-Haq and his wife should be struck out as an abuse of the process of the court under CPR 3.4(2). It was conceded on behalf of the claimants that the court had power to make such an order under that rule. The recorder had some doubts as to his jurisdiction but accepted the concession. On an appeal to Walker J, he held that there was power to strike out a genuine claim, even after the trial of an action, but declined to do so. In the Court of Appeal, although it was again conceded that there was such a power, the court disagreed and dismissed the appeal for want of jurisdiction.

27. The principal judgment was given by Smith LJ, with whom Ward and Toulson LJJ agreed. Toulson LJ added a valuable judgment of his own. The case was argued entirely on the basis of CPR 3.4(2). It was not suggested that the substantive rights of Mr and Mrs Ul-Haq to damages were affected by their abuse of process in supporting his mother's claim. Smith LJ noted at para 17 that in nearly 40 years' experience she knew of no case in which a judge had refused to award damages for a genuine injury on the ground that the claimant had dishonestly sought to exaggerate the injury or its effects.

28. As we read the judgments of Smith and Toulson LJJ, their reasoning can be summarised in this way. It is the policy of the law and the invariable rule that a person cannot be deprived of a judgment for damages to which he is otherwise entitled on the ground of abuse of process (paras 16, 17, 20 and 36).

29. The Court of Appeal rejected the submission that the principles of insurance law should apply in this context. As Toulson LJ explained in para 37, there is a special rule of insurance law that an insured cannot recover in respect of any part of a claim in a case where the claim has been fraudulently exaggerated or where a genuine claim has been supported by dishonest devices: *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469; *Agapitos v Agnew* [2003] QB 556; and *Axa General Insurance Ltd v Gottlieb* [2005] 1 All ER (Comm) 445. The principle relates only to fraudulent insurance claims: see *Axa* per Mance LJ at para 31. In addition, it is restricted to the period prior to the issue of proceedings: see *Manifest Shipping* per Lord Hobhouse at para 77 and *Agapitos v Agnew* per Mance LJ at paras 47-53.

30. In *Ul-Haq v Shah* the submission that the court should not have proceeded to give judgment on the claims but could and should have struck out the whole claim as an abuse of process under CPR 3.4(2)(b) was rejected (para 43). The

inclusion of a false claim with a genuine claim or claims does not of itself turn a genuine claim into a false one or justify the striking out of the genuine claim or claims. To do so would be to deprive a claimant of his substantive rights as a mark of disapproval, which the court has no power to do (para 46). It was not a case, like *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167, where the conduct of a litigant put the fairness of the trial in jeopardy, even in the broadest sense, in which case the claim might be struck out as an abuse, but a case in which it was not suggested that there could not be a fair trial of the claims of Mr Ul-Haq and his wife (paras 25-28 and 47-49).

31. Further the Court of Appeal said that CPR 3.4 is directed at the control of the process of litigation and is not apt to describe the decision that a judge makes at the end of a trial; at that stage the judge either upholds the claim or dismisses it, he does not strike it out (paras 24 and 29 per Smith LJ). The point was concisely summarised thus by Toulson LJ in the course of para 50:

> "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."

The principles in *Ul-Haq v Shah* were restated by the Court of Appeal in *Widlake v BAA*.

32. We recognise that there have been many cases in which claimants dishonestly inflate their claims or even, as in the case of Mr Ul-Haq's mother, fraudulently invent them. In the last sentence of his judgment referred to above Toulson LJ said that if, as has been suggested, such fraudulent claims have reached epidemic proportions, it may be that prosecutions are needed as a deterrent to others. We see the force of that. The first question in this appeal, however, is whether we should decline to follow *Ul-Haq v Shah* and hold that there is power to strike out a claim under CPR 3.4(2), even where there has been a trial of an action and, as here, the judge has been able fairly to assess the damages. It is striking that there is no appeal from the judge's assessment of the claimant's damages, namely

£88,716.76. Nor, as explained above, is there any appeal from the judge's decisions on interest or costs, or indeed from his decision refusing the defendant's application for permission to take proceedings against the claimant for contempt.

33. We have reached the conclusion that, notwithstanding the decision and clear reasoning of the Court of Appeal in *Ul-Haq*, the court does have jurisdiction to strike out a statement of case under CPR 3.4(2) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum. However, we further conclude, for many of the reasons given by the Court of Appeal, that, as a matter of principle, it should only do so in very exceptional circumstances.

34. We are conscious of the fact that there are now many cases decided since the advent of the CPR where it has been held that the court should approach the CPR as a code and that it should decline to have regard to decisions under the RSC. However, this is an exceptional class of case and it seems to us that it is appropriate to have regard to the way in which the inherent jurisdiction of the court was exercised in cases of abuse of process before the CPR came into force.

35. The pre-CPR authorities established a number of propositions as follows:

i) The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was "intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court": *Birkett v James* [1978] AC 297 per Lord Diplock at p 318F-G. In the latter case it was not necessary to show that a fair trial was not possible or that there was prejudice to the defendant. See also, for example, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, per Lord Woolf MR (with whom Waller and Robert Walker LJJ agreed) at p 1436H.

ii) In a classic, much followed, statement in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 Lord Diplock described the court's power to deal with abuse of process thus at p 536C:

"This is a case about abuse of the process of the High Court. It concerns the 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. The circumstances in which abuse of process can arise are very varied. … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

iii) The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in *Birkett v James* that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order.

iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2959 (Comm), where he summarised the position thus in paras 27 and 28:

"27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.

28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR 3.4 or 24.2 and determined well in advance of the trial."

v) We agree with Colman J. His conclusions are consistent with *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293, *Webster v Bakewell RDC* (1916) 115 LT 678, *Harrow LBC v Johnstone* [1997] 1 WLR 459, *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 per Latham LJ at para 75 and *The Royal Brompton Hospital NHST v Hammond* [2001] EWCA Civ 550; [2001] Lloyd's Rep PN 526, per Clarke LJ at paras 104 – 109, especially at para 107.

36. As we see it, the present position is that, whether under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances. Some assistance is to be derived from *Masood v Zahoor* [2009] EWCA Civ 650, [2010] 1 WLR 746, where the judgment of the Court of Appeal (comprising Mummery, Dyson and Jacob LJJ) was given by Mummery LJ. It had been argued that the judge should have struck the claim out as an abuse of process on the ground that some at least of the claims were based on forged documents and false written and oral evidence.

37. The Court of Appeal referred extensively to the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* and held at para 71 that it was 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. It noted that in the *Arrow* case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. It held that the question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It added that it was not necessary to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. It then referred to what this Court agrees is a valuable discussion by Professor Zuckerman in a note entitled "Access to Justice for Litigants who Advance their case by Forgery and Perjury" in (2008) 27 CJQ 419.

38. The Court of Appeal expressed its conclusions of principle as follows:

> "72. We accept 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. We say 'in theory' because it must be a very rare case where, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.
>
> 73. One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and

> determining the issues in the usual way. If he finds that the claim is based on forgeries and fraudulent evidence, he will presumably dismiss the claim and make appropriate orders for costs. In a bad case, he can refer the papers to the relevant authorities for them to consider whether to prosecute for a criminal offence: we understand that this was done in the present case."

39. In para 74 the Court of Appeal stressed the importance, if possible, of making an application to strike out at an early stage in order to preserve court resources and save costs. However, it also appreciated that in a complex case it might not be possible to avoid a full trial.

40. It appears to us that the approach identified in paras 71-74 of *Masood v Zahoor* is somewhat different from that in *Ul-Haq v Shah*. It recognises the possibility of striking out a claim at the end of a trial, whereas, as we read *Ul-Haq v Shah*, it was there held that such a course was not permissible. We prefer the approach of *Masood v Zahoor*. We can summarise what we see as the correct approach in this way.

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 only restriction is that contained in CPR 1.1 and 1.2 that the court must decide cases in accordance with the overriding objective, which is to determine cases justly.

42. Under the CPR the court has a wide discretion as to how its powers should be exercised: see eg *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926. So the position is that the court has the power to strike out a statement of case for abuse of process but at the same time has a wide discretion as to which of its many powers to exercise. The position is the same under the inherent jurisdiction of the court, so that in the future it is sufficient for applications to be made under the CPR. We can see no reason why the conclusion reached should be any different, whether the application is made under the CPR or the inherent jurisdiction of the court.

43. We agree with the Court of Appeal in *Masood v Zahoor* at para 72 quoted above 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. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability.

44. We have considered whether the possibility is so theoretical that it should be rejected as beyond the powers of the court. However it was ultimately accepted on behalf of the claimant that one should never say never. Moreover we are mindful of Lord Diplock's warning in *Hunter* quoted at para 35 above that it would be unwise to limit in advance the kinds of circumstances in which abuse might be found. See also the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 31.

45. It was submitted that an ascertained claim for damages could only be removed by Parliament and not by the courts. We are unable to accept that submission. 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.

The European Convention on Human Rights

46. The right to a fair and public hearing in the determination of civil rights is enshrined in Article 6 of the European Convention on Human Rights ("ECHR"). The right includes a right of access to a court: *Golder v United Kingdom* (1975) 1 EHRR 524. The court must act compatibly with Article 6: Human Rights Act 1998 section 6(1). The court is of course itself a public authority: section 6(3). The right of access is not absolute: *Golder* at para 38. In *Ashingdane v United Kingdom* (1985) 7 EHRR 528 the European Court of Human Rights accepted at para 57 that the right might be subject to limitations. Contracting States enjoy a margin of appreciation. However, the essence of the right of access must not be impaired, any limitation must pursue a legitimate aim and the means employed to achieve the aim must be proportionate.

47. In the instant case the claimant obtained judgment on liability for damages to be assessed. We accept that that judgment is a possession within the meaning of Article 1 Protocol 1 of the ECHR and that the effect of striking out his claim for damages would be to deprive him of that possession, which would only be permissible if "in the public interest and subject to the conditions provided for by

law …" The State has a wide margin of appreciation in deciding what is in the public interest, but is subject to the principle of proportionality: *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301 at paras 31-39.

48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission 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.

The exercise of the power

49. As noted at para 42 above, the court has a wide discretion as to how to exercise its case management powers. These include the power to strike out the whole or any part of a statement of case at whatever stage it is made, even if it is made at the end of the trial. However the cases stress the flexibility of the CPR: see eg *Biguzzi* per Lord Woolf MR at p 1933B, *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792; [2002] CPLR 111 per Clarke LJ at para 49 and *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894, where Rix LJ said at para 92:

> "Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in *Biguzzi v Rank Leisure plc*."

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.

50. It was submitted on behalf of the defendant that it is necessary to use the power to strike out the claim in circumstances of this kind in order to deter fraudulent claims of the type made by the claimant in the instant case because they are all too prevalent. We accept that all reasonable steps should be taken to deter them. However, there is a balance to be struck. To date the balance has been struck

by assessing both liability and quantum and, provided that those assessments can be carried out fairly, to give judgment in the ordinary way. The reasons for that approach are explained by the Court of Appeal in both *Masood v Zahoor* and *Ul-Haq v Shah.*

51. We accept that such an approach will be correct in the vast majority of cases. Moreover, we 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.

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.

53. As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the Court that the prospect of such orders is likely to be a real deterrent.

54. There was much discussion in the course of the argument as to whether the defendant can protect its position in costs by making a Part 36 offer or some other offer which will provide appropriate protection. It was submitted that a Part 36 offer is of no real assistance because, if it is accepted, the defendant must pay the claimant's costs under CPR 36.10. We accept the force of that argument. However, we see no reason why a defendant should not make a form of *Calderbank* offer (see *Calderbank v Calderbank* [1976] Fam 93) in which it offers to settle the genuine claim but at the same time offers to settle the issues of costs on the basis that the claimant will pay the defendant's costs incurred in respect of the fraudulent or dishonest aspects of the case on an indemnity basis. In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 the Court of Appeal correctly accepted at para 45 that the parties were entitled to make a *Calderbank* offer outside the framework of Part 36. The precise formulation of such an offer would of course depend upon the facts of a particular case, but the offer would be made

without prejudice save as to costs and, unless accepted, would thus be available to the defendant when the issue of costs came to be considered by the trial judge at the end of a trial.

55. The court can also reduce interest that might otherwise have been awarded to a claimant if time has been wasted on fraudulent claims.

56. As to contempt, we do not accept the submission that it cannot be an effective sanction for the kind of behaviour evidenced in this case. We were referred to a number of examples. In *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) an application was made to commit the defendant to prison for contempt of court on the ground that, having been injured at work as a fireman, he made a false claim that since his accident he had been unable to work. The case thus has some similarities to the instant case. The Divisional Court sentenced him to 12 months imprisonment for the contempt. The sentence was suspended for 12 months on certain terms because of the particular circumstances of the case, notably the delays since the offence.

57. However, the case is of some importance because it set out the general approach of the courts to this type of case. In giving judgment, with which Dobbs J agreed, Moses LJ said this at paras 2-7:

> "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."

58. We have set out those paragraphs verbatim because we agree with them and in order to make clear to all what is the correct approach to contempt of court on the facts of cases such as this. The approach in that case was followed by the Divisional Court in *Nield v Loveday* [2011] EWHC 2324 (Admin) and in *Lane v Shah* [2011] EWHC 2692 (Admin), where sentences were imposed of between three and nine months imprisonment. Although contempt proceedings have to be brought in the High Court whereas the underlying proceedings may be in the county court, there should be no practical difficulty in that regard: see eg *Ali v Esure Services Ltd* [2011] EWCA Civ 1582.

59. The defendant indicated some reluctance to proceed by way of proceedings for contempt. We, however, see no difficulty in proceedings by way of contempt in such cases, provided of course that the relevant facts can be proved. It was submitted in the course of argument that there might be difficulties in inviting the trial judge to hear applications for permission to bring proceedings for contempt. However, in the absence of special circumstances, we cannot see any difficulty in the trial judge hearing both the application for permission and, if permission is granted, the proceedings themselves. On the contrary, it seems to us that the trial judge is likely to be best placed to hear both. Such an approach is likely to be both the most economical and the most just way to proceed. The only circumstances in which that would not be the case would be where there was apparent bias on the part of the judge: see eg *Wilkinson v S* [2003] EWCA Civ 95; [2003] 1 WLR 1254, per Hale LJ at para 25.

60. Finally, the possibility remains of criminal proceedings being brought. It would be open to the judge to refer the matter to the CPS or the DPP in an appropriate case.

61. The test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial. The more appropriate course in the civil proceedings will be that proposed in both *Masood v Zahoor* and *Ul-Haq v Shah*. Judgment will be given on the claim if the claimant's case is established on the facts. All proper inferences can be drawn against the claimant. The claimant may be held entitled to some costs but is likely to face a substantial order for indemnity costs in respect of time wasted by his fraudulent claims. The defendant may well be able to protect itself against costs by making a *Calderbank* offer. Moreover, it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful. It seems to us that the combination of these consequences is like to be a very effective deterrent to claimants bringing dishonest or fraudulent claims, especially if (as should of course happen in appropriate cases) the risks are explained by the claimant's solicitor. It further seems to us that it is in principle more appropriate to penalise such a claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability.

62. We note two points by way of postscript. 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. As the Court of Appeal put it in *Masood v Zahoor* at para 73 (set out above) in a passage with which we agree, one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. 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.

Application to the facts

63. If the approach set out above is applied to the facts of this case, we conclude that this is not an appropriate case in which to strike the action out instead of giving judgment for the claimant. It would not be proportionate or just to do so. It would therefore be wrong in principle to do so. We accept the submission that this is a serious case of abuse of process. The claimant persistently maintained his claim on a basis or bases which he knew to be false, both before he was found out and thereafter at the trial. Nevertheless, as a matter of substantive law, he had suffered significant injury as a result of the defendant's breach of duty and, on those findings of fact, subject to the deductions referred to below was entitled to damages amounting to £88,716.76. The judge then made the orders for costs and interest referred to above which he explained in detail and which the

defendant does not challenge on appeal. He further refused the defendant permission to bring contempt proceedings for the reasons explained in his judgment. The defendant has not appealed against that decision. But for the particular circumstances of this case, which the defendant (or its insurer) was determined to bring as a test case, it seems likely that permission would have been granted to bring proceedings for contempt, which would have had every prospect of success.

64. We note by way of further postscript that substantial sums fall to be deducted from the sum of £88,716.76 referred to above before any money is paid to the claimant. The interim payment of £10,000 must of course be deducted. So must the value of the various state benefits which the claimant received. That value is not agreed but we were a given a figure of over £63,000. Whatever the true figures turn out to be, it seems unlikely that the claimant will receive much, if anything, out of the award of £88,716.76.

CONCLUSION

65. Although we have accepted the defendant's submission that the court has power under the CPR and under its inherent jurisdiction to strike out a statement of case at any stage of the proceedings, even when it has already determined that the claimant is in principle entitled to damages in an ascertained sum, we have concluded that that power should in principle only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances. We have further concluded that this not such a case. Submissions upon the precise form of the order and on costs should be made within 28 days.