Attacking fraudulent claims

3 July 2012

Learning the lessons from *Fairclough Homes v Summers*

On 27 June 2012 the Supreme Court handed down its Judgment in the case of *Fairclough Homes v Summers* [2012 UKSC 26], a decision that had been hailed as a potentially "game changing" case in the insurance industry's fight against fraudulent claims. This alert provides analysis on the case and suggests how insurers can use it to assist in their fight against exaggerated and fraudulent claims.

Background facts

In May 2003 Summers was injured in a genuine accident at work resulting in fractures to his right hand and left heel. He issued a claim against his employers, Fairclough Homes, and after liability was established, only quantum remained in dispute.

In 2008, Summers served a schedule of loss claiming damages totalling £838,616 including a substantial claim for loss of earnings and future losses. In response Fairclough Homes disclosed surveillance evidence taken over a one year period proving that Summers was grossly exaggerating the effect of his injuries and his incapacity for work. At this point Fairclough Homes served a re-amended defence asserting that Mr Summers' claim was dishonestly and grossly exaggerated and should be struck out in its entirety for being an abuse of the Court process.

At the damages hearing (in January 2010) the Court held that the evidence put forward by Fairclough Homes established beyond reasonable doubt that Mr Summers had fraudulently misstated the extent of his injuries and deliberately lied both to the medical experts and the Department of Work and Pensions. As a result the Judge awarded Summers £88,716.76, just over 10% of the amount originally claimed.

Fairclough Homes appealed on the basis that the Court had the power to strike out the claim in its entirety because it was tainted by fraud. The Court of Appeal refused to strike out the case on the basis that previous Court of Appeal decisions (*Ul-Haq v Shah* [2009] EWCA Civ 542 and *Widlake v BAA* [2009] EWCA Civ 1256) had found that the Court had no jurisdiction to strike out a case in these circumstances. Fairclough appealed to the Supreme Court seeking clarification of the Court's power to strike out the entirety of the claim, and the striking out of the award to Summers.

The Supreme Court decision

The Supreme Court ruled that the court does have jurisdiction to strike out any claim for abuse of process. However it declined to exercise its powers in the Summers case; despite the fraudulent exaggeration of his claim, he had still suffered "a significant injury".

Any comments or queries

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In ruling as it did the Supreme Court overturned *Ul-Haq v Shah* and held that the language of the CPR 3.4 (2) (b) 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.

However in making this decision the Supreme Court also made it clear that as a matter of principle, the courts should only exercise this power in very exceptional circumstances. Unfortunately no guidance was offered as to when "exceptional" circumstances would exist and when it would be "just and proportionate" to strike out a claim in its entirety.

The Court rejected Fairclough's submission that unless exaggerated claims are struck out in their entirety, dishonest claimants will not be deterred. It highlighted the following ways in which such deterrence should still be achievable:

- Drawing adverse inferences against a dishonest Claimant, resulting in no award on liability:
- Imposition of costs sanctions (including indemnity costs):
- Reducing awards of interest (for example denying interest for relevant periods); and
- Civil proceedings for contempt and criminal proceedings, which could result in imprisonment.

Commentary

In the current economic climate the number of fraudulent and exaggerated claims are believed to have increased dramatically. As a result of this, Insurers do need to develop and maintain strategies to deter such claims.

Zurich have announced that, despite spending over £1m taking this action to the Supreme Court, they are happy with the Judgment as they "*won the argument on the legal principles involved in this case, if not the application of those principles... we will continue to lead the fight against insurance fraud, and the court's support for jail sentences for people convicted should be an eye-opener for anyone thinking of attempting to defraud an insurer*."

Establishing that a court has the power to strike out an entire claim for abuse (even the legitimate part) is helpful clarification of the law. However, as the Court failed to give detailed guidance on the sort of exceptional case this power will apply to, advising on its implications remains problematic. Nevertheless there are key lessons that can be taken from reading the detailed judgment. These underline that the key tactics to combat fraudulent claims remain:

- Careful screening of cases to detect fraud markers (including data-sharing with others);
- Investigation by experienced staff/third party suppliers;
- The importance of using surveillance to help detect exaggerated claims;
- Well-pitched Part 36 offers (made as early as possible in proceedings);
- Striking out of vulnerable parts of a claim (rather than the whole claim as in Fairclough);
- Encouraging Courts to impose costs sanctions by reference to the decision in *Fairclough v Summers*;
- Reference of appropriate cases to law enforcement and publicity of successful prosecutions.

The full judgment can be read at http://www.supremecourt.gov.uk/docs/UKSC_2010_0212_Judgment.pdf

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