Neutral Citation Number: [2023] EWHC 3233 (KB)

Case No: KA-2022-000247, KA-2023-000031, KA-2023-000032

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2023

Before :

MR JUSTICE JOHNSON

- -

Between :

AXA INSURANCE UK PLC	**Appellant**
- and -	
(1) FATJON KRYEZIU **(2) SHABAN KRYEZIU** **(3) HURME KRYEZIU** **(4) ORINA KOPSHITI** **(5) SONILA HALILI**	**Respondents**

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- -

Paul Higgins (instructed by Clyde & Co LLP) for the Appellants
Piers Taylor (instructed by Sebastian Rowe) for the First Respondent
Tim Sharpe (instructed by Amin Haque) for the Second to Fifth Respondents

Hearing date: 8 December 2023

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Approved Judgment

This judgment was handed down by release to The National Archives
on 15 December 2023 at 10.30am.

Mr Justice Johnson:

1. The appellant paid out on insurance claims made by the respondents for a road traffic accident. It subsequently decided there had been no genuine accident and the claims were fraudulent. It brought proceedings in deceit and conspiracy against the respondents. It initially held back part of its case until after the respondents had committed themselves to an account in their witness statements. Thereafter, it sought permission to amend its case. HHJ Lethem refused permission to amend, declared that the appellant was estopped from seeking adverse findings against the second to fifth respondents, and struck out the claim. The appellant appeals against each of these three orders, with the permission of Soole J.

2. The appeals raise these (among other) issues:

   (1) What is required to plead an allegation of fraud?

   (2) Was the appellant entitled to hold back details of its case until after the respondents had committed themselves to an account in their witness statements?

   (3) Did the settlement agreement restrict the findings that the appellant could seek in its action against the respondent?

The background

3. The appellant was the road traffic insurer of a white transit van that was used as a hire vehicle. On 6 October 2018, the van was hired by Louis Fraser. The first respondent ("the respondent") was the owner of a white Range Rover car with the registration number F4 TJN. On 15 October 2018, the respondent issued a claim notification form. He alleged that a road traffic accident had occurred at 9.30pm on 6 October 2018 in Ashford Drive, Ilford. He said that Louis Fraser drove the van from a side road into collision with his car. He said that the second to fifth respondents were passengers in his car. He claimed to have suffered personal injuries and damage to his car, and losses arising from a need to hire a replacement vehicle. Over the next 2 weeks, the second to fifth respondents each submitted claims for personal injuries. Medical reports were provided to substantiate claims for personal injuries in relation to each of the respondents. The appellant paid out a total of £44,214 in respect of the claims.

4. On 28 August 2019, the appellant emailed the respondent's solicitor to "ask your client(s) and particularly the driver (with whom we assume details were exchanged at the scene) whether or not they hold any details or contact details for [Louis Fraser] that may have been obtained either at the scene or some other time".

5. In September 2019 internet searches were carried out on the appellant's behalf. These showed that the appellant and Mr Fraser were "Facebook friends". In November 2019 further internet searches were carried out. At this point, the public friendship link between the respondent and Mr Fraser had been removed – it had either been hidden from public view, or else deleted.

6. On 6 January 2020, the appellant's solicitor emailed the respondent's solicitor and set out concerns about the provenance of the claim, including that the alleged accident

might have been staged and noting that it involved "two groups of apparent strangers [who] live relatively close to each other, having an accident miles away late at night."

7. The appellant issued proceedings seeking recovery of the sums it had paid out on the insurance claims. The particulars of claim, drafted by leading counsel, are dated 12 August 2020. They state:

> "The Claimant alleges that the Defendants have conspired with each other and put forward a false claim for damages. It is the Claimant's case that no genuine accident as alleged by the Defendants took place and that none of them suffered personal injury. They have all deceived the Claimant into making the payments [that were made on the insurance claims].
>
> In support of its case the Claimant will rely upon the expert engineering evidence of Dominic Harris. In addition the Claimant relies upon the following:-
>
> [Discrepancies as to the damage caused to the vehicles which was said to be inconsistent with each other and with the alleged mechanism of the accident.]
>
> The described collision has not occurred in the manner alleged.
>
> The Claimants will seek a declaration to the effect that no genuine accident occurred as alleged by the Defendants and none suffered personal injury.
> …
> The Claimant claims:-
>
> (a) A declaration to the effect that:-
>
> i. No genuine accident occurred between the First Defendant's Range Rover and the Ford Transit van insured by the Claimant on 6th October 2018 as alleged by the Defendants.
>
> ii. No Defendant suffered genuine injury in the alleged accident of 6th October 2018.
>
> (b) Damages against the Defendants for conspiracy to cause financial loss and/or deceit.
>
> (c) Indemnity costs."

8. The appellant deliberately did not make any mention of the evidence that the respondent and Louis Fraser were "Facebook friends" ("the Facebook point"). It did not wish to show its hand on that issue at that stage.

9. There was no request for further information, and no complaint that the claim was inadequately pleaded. The respondent filed and served a defence and counterclaim dated 17 December 2020. The defence responds, in some detail, to the claim. It states that a collision took place which was a genuine accident caused by Mr Fraser and for

which the appellant was liable to compensate. It denies that the insurance claim was false or that there was a conspiracy by the respondents to put forward a false claim for damages. It states that the appellant had failed to produce sufficient evidence in support of their allegations. The counterclaim seeks damages for car hire (£29,276), recovery and storage (£5,556) and physiotherapy (£75).

10. On 3 November 2021, DJ Bishop made case management directions. She ordered the parties to give each other standard disclosure by 29 December 2021, and to exchange witness evidence by 13 July 2022.

11. Disclosure took place. Neither party disclosed documents relating to the Facebook point. The appellant did not disclose these documents because it did not wish to alert the respondent that it knew of the point.

12. On 8 February 2022, HHJ Lethem made an order requiring the respondent to disclose documents in support of his counterclaim, specifically in relation to the claim for car hire. The respondent did not comply with the order.

13. On about 18 February 2022, the appellant served a reply and defence to counterclaim. It maintained its stance that there was no genuine accident. The respondent was put to proof as to the precise mechanism of the collision, and as to the identity and presence of all the occupants of both vehicles at the time of the collision.

14. The appellant agreed to a request from the respondent to extend the date for exchange of witness statements, initially to 27 July 2022, and then to 10 August 2022.

15. On 28 July 2022, the court notified the parties that there would be a pre-trial review on 4 November 2022 and that the trial would start on 28 November 2022 with a time estimate of 4 days.

16. Witness statements were exchanged on 10 August 2022. In his statement, the respondent set out the route he said that he had taken to the scene of the collision. He does not refer to Mr Fraser by name and does not suggest he knew him. He says “The driver was a black, tall, skinny guy.” The appellant says that the impression the respondent gave in his statement was that Mr Fraser was a stranger.

17. The appellant told a medical expert that at the time of the accident he was waiting to turn right. In his statement, he says that he had stopped to give way to oncoming traffic as there was a large vehicle parked in the road, and that his intention was to drive straight on for a short distance before turning right at the next junction. The appellant says that the respondent has thereby changed his account.

18. The appellant served two statements:

    (1) A statement from the director of the van hire company, confirming the identify of Mr Fraser, and stating that Mr Fraser refused to co-operate with the van hire company’s enquiries, and that when an employee was sent to Mr Fraser’s address the director received a call from Mr Fraser who threatened to kill him.

(2) A statement from Darren Delahunt, the Head of Intelligence at Clyde & Co, who exhibited to his statement intelligence material including that relating to the Facebook point.

19. On 7 September 2022, the second to fifth respondents made an application to strike out various paragraphs of the statement of Darren Delahunt on the grounds that they relied on documents that had not previously been disclosed.

20. On 30 September 2022, the appellant applied to amend its particulars of claim, to rely on additional factors (including the Facebook point) in support of its claims in conspiracy and deceit. The appellant also sought additional directions.

21. On 1 November 2022 (so 4 weeks before the trial was due to start), the appellant and the second to fifth respondents agreed terms of settlement. The settlement agreement provided for the second to fifth respondents to make payments to the appellant, but without any admission of liability on their part. In return, the appellant agreed:

> "not to take any further action and/or bring any further claims and/or actions and/or proceedings against the second and/or third and/or fourth and/or fifth defendants in relation to or arising out of this accident and/or proceedings and/or, including and not limited to any contempt proceedings."

22. A consent order was approved by the court. That order provides that the claim against the second to fifth respondents is stayed:

> "All further proceedings between the claimant and the second and/or third and/or fourth and/or fifth defendants in this action shall be stayed upon the terms set out in the attached Schedule, except for the purpose of enforcing those terms.
>
> The claimant and second, third, fourth and fifth defendants shall have permission to apply to the Court to enforce those terms without the need to bring a new claim."

23. A pre-trial review took place on 4 November 2022. HHJ Lethem decided that the appellant's outstanding application of 30 September 2022 meant that the trial could not go ahead. He vacated the trial and re-listed it for 23 January 2023. He directed that the appellant's application should be heard on 28 November 2022 (that is, on what would otherwise have been the first day of the trial).

24. On 7 November 2022, the respondent made an application to strike out various paragraphs of the statement of Darren Delahunt on the grounds that they relied on documents that had not previously been disclosed (mirroring the application made by the other respondents on 7 September 2022).

25. Following the hearing on 28 November 2022, the judge refused to permit the appellant to rely on the Facebook point or rebuttal engineering evidence, refused permission to rely upon the evidence as to route (although he allowed photographs and maps of the alleged route to go into the trial bundle on the basis that the trial judge would decide whether to permit cross-examination of the respondent on the route) and refused all of

the proposed amendments to the particulars of claim. The judge allowed the respondent's application and directed the redaction of various paragraphs of Mr Delahunt's statement. The judge also made an order requiring the respondent to provide further information under Part 18 of the Civil Procedure Rules in respect of an allegation as to the respondent's impecuniosity.

26. On 5 December 2022, the respondent applied to strike out the Particulars of Claim.

27. The trial was due to start on 23 January 2023. On Sunday, 22 January 2023, the second to fifth respondents served an application for the removal from the trial bundle of documents which related to them.

28. On 23 January 2023, HHJ Lethem heard the application of the second to fifth respondents that had been served the previous day. He refused the application to remove documents from the trial bundle, but granted a declaration that the appellant was estopped from seeking adverse findings against the second to fifth respondents.

29. On 24 January 2023, HHJ Lethem heard the respondent's application to strike out the particulars of claim. He acceded to the application. The trial was to continue in respect of the counterclaim.

30. On 25 January 2023, after hearing submissions, HHJ Lethem held that there had been wholly inadequate disclosure by the respondent in respect of issues relating to the counterclaim. He held that, as a result, the trial could not proceed. He therefore adjourned the trial.

31. On 4 May 2023, the appellant issued an application to vary the order of HHJ Lethem dated 28 November 2022 due to a change in circumstances. The appellant's case is that the amendments to the particulars of claim were refused, in part, because that would lead to the vacation of the trial date. Given that the trial had now been vacated in any event, the refusal to permit the amendments fell to be reconsidered. This application has not yet been listed for hearing.

What is required to plead an allegation of fraud?

Submissions

32. Paul Higgins, on behalf of the appellant, submits that it is only necessary to plead the ingredients of the tort. It is therefore sufficient to plead (1) the defendant made a false representation to the claimant, which (2) he knew to be false (or was reckless as to is veracity), (3) intending that the claimant rely on the representation, and (4) the claimant acted in reliance on the representation and thereby suffered loss. Mr Higgins says it is not necessary to go any further, and in particular it is not necessary to plead the facts relied on to establish fraud. His clear and stark position appears from an extract of the transcript of the hearing before HHJ Lethem:

> "JUDGE LETHEM: Whichever way you cut it, they are putting forward a version of events, but what they do not know, is on what basis you are refuting that version of events.

> MR HIGGINS: They do not need to know for the purposes of the law."

33. Piers Taylor, on behalf of the respondent, accepts that the particulars of claim set out the ingredients of the torts of deceit and conspiracy. He says this is insufficient because they merely allege that the accident was "not genuine". He says that it was necessary for the appellant to specify why the accident was not genuine. He relies on *Kasem v University College London Hospitals NHS Foundation Trust* [2021] EWHC 136 (QB) and *Michael Wilson & Partners Ltd v Emmott* [2022] EWHC 1481 (Comm).

Discussion

34. Like HHJ Lethem, I reject the appellant's submission. Where a party alleges fraud, that party must plead the facts on which reliance is placed:

(1) CPR 16.4(1) requires that particulars of claim include a concise statement of the facts on which the claimant relies. This, in itself, provides a sufficient basis to reject the appellant's submission.

(2) Where a party makes an allegation of dishonesty, he must set out the facts on which he relies to substantiate the allegation. Otherwise, the allegation will be struck out: *Three Rivers District Council and others v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 *per* Lord Hobhouse at [161] and Lord Millett at [183] – [190]. No more than a concise statement of the facts relied on is required: *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699 *per* Arnold LJ at [23] – [24].

(3) The King's Bench Guide (2023) states at paragraph 5.32 that allegations of fraud will require to be particularised, meaning that the relevant allegations are set out (which may include listing the facts from which the court is asked to infer dishonesty). Similar statements appear in the Commercial Court Guide (at paragraph C1.3(c)) and the Chancery Guide (at paragraphs 4.8-4.9).

35. I also reject Mr Taylor's submission. It is permissible for a party to allege fraud if that party has a proper evidential basis for establishing each of the ingredients of the tort. The party must set out the facts on which it relies, including the facts which show that the representation was false. It does not, however, have to go further and set out the true underlying facts (which is what would be required to plead why the accident was not genuine). A party is not prevented from alleging fraud if it does not know the true underlying factual position (other than that the representation was false). Take three examples that were discussed during argument:

(1) A claimant who has been fraudulently induced to purchase a watch on the basis that it was manufactured by Rolex is not required to establish who in fact manufactured the watch. It is sufficient to establish that the defendant knew that it was not manufactured by Rolex.

(2) A claimant who has been fraudulently induced to purchase a painting on the basis that it was painted by Picasso is not required to establish the identity of the true artist. It is sufficient to establish that it was not (to the defendant's knowledge), Picasso.

(3) In the present type of case, an insurer that has been fraudulently induced to pay out on a claim for a road traffic accident may be able to show that the claim is not genuine, without being able to set out precisely what had happened. For example, the defendant may have made many identical previous claims, and may have been overheard boasting about making fraudulent claims, to the extent that the court is able to find that the claim is fraudulent. It does not matter that the insurer is unable to show precisely what in fact had happened (for example, whether no collision at all had occurred, or whether there was a staged collision and, if so, which vehicles were involved, where and when the staged collision occurred and who was in each vehicle at the time).

36. In each of these examples, if the claimant can establish the ingredients of a legally recognised wrong it is, in principle, entitled to judgment even though it does not know the details of the underlying facts.

37. The two first instance judgments on which Mr Taylor relies do not support the suggestion that it is necessary to explain why (or the respect in which) a claimed accident was not "genuine".

38. In *Kasem* Saini J said at [42]:

> "…the Trust's Particulars of Claim should in my judgment have contained at least the following:
>
> i) The precise representations made by Mr Kasem in the course of his civil claim (and whether they were express or implied);
>
> ii) The precise respects in which representations made by Mr Kasem were factually false;
>
> iii) The state of knowledge of the Trust at the point of making the Part 36 offer and how the Trust relied upon the representations;
>
> iv) The material received by the Trust subsequent to the acceptance of the Part 36 offer which showed that Mr Kasem had provided false information, identifying when such information was received and the precise respects in which the information subsequently received showed the falsity of the representations; and
>
> v) The facts relied upon to the effect that Mr Kasem made the representations knowing the same to be false and/or reckless as to the truth of the same."

39. In *Michael Wilson* HHJ Pelling said, at [71]:

> "…if a claim in deceit is to be made against the 2nd to 5th defendants, it is necessary to identify each costs order under challenge and then in relation to each plead (a) who it is alleged made the implied representation relied on, by what means and to

> whom it was made, (b) the terms of the implied representation allegedly made, (c) the facts and matters relied on from which it is alleged the implied representation is to be implied, (d) that it is alleged the representation was false, (e) any facts or matters relied on to support the contention that the representation relied on was false, (f) assuming it is so alleged, that the representation was made knowing it to be untrue or recklessly as to whether it was true or false, (g) all the facts and matters relied on from which it is alleged that deceit in this sense is to be inferred, (h) what if any reliance was placed on the representation, by whom and with what result and (i) what loss is claimed to have been caused. No attempt has been made to grapple with these requirements in the VFI. It is simply not good enough to make generalised allegations of wrong doing against the defendants without descending to this level of detail …"

40. In *Kasem*, the critical element (for present purposes) is (ii) – the need "to set out the precise respects in which representations made by Mr Kasem were factually false." That does not mean that in every case it is necessary to set out precisely the true underlying factual position. Instead, it is sufficient to set out the facts relied on to show that the representation was false. In *Michael Wilson*, the critical elements are (e) and (g) – the need to plead any facts and matters relied on to show the representation was false and was dishonestly made. Again, that does not mean that it is necessary precisely to establish the true underlying facts. It is sufficient if the pleaded facts are capable of establishing that the defendant knew that the watch was not a Rolex, or that the painter was not Picasso, or that there had been no genuine accident.

41. Mr Taylor also relied on precedents from Atkin's Encyclopaedia of Court Forms in Civil Proceedings, Vol 27(2) Misrepresentation (2017) at §611, and Bullen, Leake and Jacob's Precedents of Pleadings (19th edition, 2020) at 58-P2. In each case, the true underlying position is pleaded. That does not, however, mean that it is necessary to plead the true underlying position where that is not known by the party, and where the party is able to establish falsity and dishonesty by other means. Nothing in the narrative commentary in Bullen, Leake and Jacob suggests that is necessary.

Was the appellant entitled to hold back details of its case until after the respondent had committed himself to an account in his witness statement?

42. The appellant has always intended to rely on the Facebook point as part of its case to establish fraud. The underlying fact is that the appellant and Mr Fraser knew each other. If they had not known each other then it is not so easy to see how the claim could have been fraudulent in the sense of there having been no genuine accident at all. But if they had known each other then (1) there is the scope for them to have conspired to commit fraud, and (2) if there was no conspiracy there is an apparent coincidence that the two people who were involved in a collision (and who were both several miles away from their homes) were known to each other.

43. Arguably, this is the primary fact on which the appellant seeks to rely. Because this was a fact on which it relied to support its claim, it was required to plead this fact (albeit not, necessarily, the underlying evidence): CPR 16.4(1). It failed to do so.

44. The appellant was in possession of a document which shows that the appellant and Mr Fraser were Facebook friends. The appellant relies on this document. The appellant says it adversely affects the respondent's case. It is therefore a document that falls within the ambit of standard disclosure: CPR 31.6(a), CPR 31.6(b)(ii). There was no question of the appellant seeking to claim privilege in respect of this document. It was always the appellant's intention to rely on the document.

45. DJ Bishop's order required the appellant to give standard disclosure. The appellant was therefore required to include the document in its list: CPR 31.6, CPR 31.10. The appellant was also required to provide a disclosure statement, unless the parties agreed to dispense with this requirement: CPR 31.10(5), 31.10(8). That is a statement certifying that the person signing the statement understood the duty to disclose documents, and certifying that he had carried out that duty to the best of his knowledge: CPR 31.10(6). Proceedings for contempt of court may be brought against a person who knowingly makes a false disclosure statement: CPR 31.23(1). A party may not rely on any document which it fails to disclose unless the court gives permission: CPR 31.21.

46. The appellant accepts that the document fell within the ambit of standard disclosure, and that it knowingly and deliberately breached the court's order.

47. It advances three claimed justifications.

48. The first justification is that the document was "the respondent's document". This is incorrect. The document was a printout that the appellant obtained of information that was (then) publicly available. The document belonged to the appellant. In any event, ownership of the document is irrelevant. The appellant was in physical possession of the document. That is sufficient to give rise to a duty to disclose: CPR 31.8(1), 31.8(2)(a). The appellant's real point was that the documents recorded information which was known by the appellant. Again, however, that does not provide any exemption from the duty to disclose. Nor does it provide any justification for non-disclosure in breach of a court order and rules of court.

49. The second justification is that the courts permit late disclosure of surveillance evidence, and this is analogous. This was put forward more on the basis of assertion than reasoned argument. I was not taken to any of the applicable authorities. The principles are summarised in *Muyepa v Ministry of Defence* [2021] EWHC 2236 (QB), *Douglas v O'Neill* [2011] EWHC 601 (QB) and *Rall v Hume* [2001] EWCA Civ 146; [2001] 3 All ER 248. At the point that surveillance evidence is obtained, it is, generally, privileged. The defendant may not have decided, at the point at which the evidence is obtained, whether or not to rely on it. That may depend on the medical evidence and/or what the claimant says in their witness statement. If and when the defendant decides to rely on the evidence it must be provided to the claimant. If it is provided timeously, so that it "does not amount to trial by ambush" then it may well be in the interests of justice to permit the evidence to be deployed at trial. There is nothing in the authorities that suggests that a party is entitled to breach a court order or rules of court.

50. The position here is that the appellant intended from the outset to rely on the Facebook point. Its intention to rely on the evidence was not dependent on what the respondent said in his statement. Its only reason for withholding the evidence until after the exchange of witness statements was in the hope that the respondent would be caught out in a lie in his statement. The appellant accepts that it should have been disclosed

and does not suggest it was covered by privilege. It made a deliberate decision to act in breach of a court order and the rules. *Muyepa* itself concerned both surveillance evidence and Facebook evidence. HHJ Auerbach held (at [22]) that the Facebook evidence was "subject to the ordinary, ongoing duty of disclosure." It was not disclosed immediately, with the result that HHJ Auerbach decided whether it should be admitted by reference to the test for relief from sanctions.

51. I do not therefore accept that the so-called "surveillance analogy" provides any justification for a breach of the court's order or the court rules. The appellant thereby required relief from sanctions to rely on the Facebook point.

52. The third justification is that this is said to be "asymmetric litigation" where there is a strong public interest in enabling insurers fully to investigate allegations of fraud. Mr Higgins relies on judicial observations as to the prevalence of bogus damages claims, and the public interest that is thereby engaged: *Kearsley v Klarfeld* [2005] EWCA Civ 1510; [2006] 2 All ER 303 *per* Brooke LJ at [32], *Singh v Habib* [2011] EWCA Civ 599 *per* Sir Anthony May PQBD at [15], *Hussain v Sarkar* [2010] EWCA Civ 301 *per* Toulson LJ (quoting observations of Smith LJ when she granted permission to appeal in that case) at [27]. He says that this justifies "a purposive approach to the rules", which I take as a euphemism for "permitting a deliberate breach of the rules". Again, I disagree. There is no doubt that there are fraudulent insurance claims, and that these are difficult for insurers to investigate. Where a claim is indeed fraudulent, then the subsequent litigation may be asymmetric in that the insurer is left having to prove a negative in circumstances where it may only be the fraudster that knows the true position. None of that remotely justifies a deliberate breach of rules of court or a court order simply because the appellant decides for itself that it has been defrauded and that the public interest requires it to keep its cards close to its chest.

53. That does not necessarily mean that the appellant was obliged to disclose its evidence before the respondent committed himself to an account. The appellant could have sought to press the points it had raised in pre-action correspondence by asking the respondent to provide further information as to whether he had previously known or had any dealings with Mr Fraser (and the appellant came close to doing just this). The appellant could have pleaded reliance on there having been some form of relationship between the respondent and Mr Fraser without necessarily setting out, at that point, the evidence on which it relied. The respondent would have been required to respond to that plea in his defence. The appellant could have sought to persuade the court to order sequential disclosure, or a form of disclosure other than standard disclosure, so as to require the defendant to show his hand first. Even if the appellant could not have avoided disclosure of the Facebook document before the respondent made a witness statement, the risk that the respondent would thereby dishonestly tailor his account to the evidence in a way that could not be detected is overstated. For example, it is likely that Facebook hold electronic records which provide further detail of the extent of the relationship between the respondent and Mr Fraser, such that anything said by the respondent may have been capable of being checked.

54. Accordingly, I unhesitatingly reject the appellant's assertion that it was entitled deliberately to breach a court order and rules of court.

The meaning of the settlement agreement, and whether it restricted the findings that the appellant could seek in its action against the respondent

55. The meaning of the agreement depends on what the parties meant by the words they used. That depends on what a reasonable person (with all the background knowledge which would reasonably have been available to the parties) would have understood the words to have meant: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 *per* Lord Clarke at [14], [21].

56. The key background knowledge which was available to the parties was that:

(1) This was a settlement between the appellant and the second to fifth respondents.

(2) The parties will have wished to ensure that all issues between them were resolved by the settlement agreement.

(3) The second to fifth respondents are likely to have also wished to ensure that the appellant did not seek to initiate any form of contempt proceedings, or criminal investigation or prosecution.

(4) The fifth respondent was a police officer. She is likely also to have wished to ensure that the appellant did not seek to initiate any form of police disciplinary investigation or proceedings.

(5) The agreement did not seek to settle the action between the appellant and the respondent.

(6) The parties contemplated that the action between the appellant and the respondent would continue.

(7) The second to fifth respondents had provided witness statements in the proceedings. At the time of the settlement agreement (and right up to the hearing on 23 January 2023) there had been no indication that they would not give evidence. It was only at the hearing on 23 January 2023 that Mr Taylor informed the court that "they're not likely to give evidence". That came as a surprise to both the judge and Mr Higgins.

(8) The second to fifth respondents could give evidence that was relevant to the issues between the appellant and the respondent. Most obviously, they could give evidence as to whether there had been a genuine accident.

(9) The parties to the agreement are unlikely to have intended that the appellant would not be able to challenge any evidence given by the second to fifth respondents in the proceedings.

(10) In its defence to the respondent's counterclaim, the appellant was relying on the defence of fundamental dishonesty: section 57 of the Criminal Justice and Courts Act 2015. Such a defence would apply if there had been a genuine accident but the appellant had lied when he had said that the second to fifth respondents were in the vehicle: section 57(1)(b) and (8). It is unlikely that the parties intended their agreement to prevent the appellant from relying on its section 57 defence.

57. The words "not to… bring any further claims and/or actions and/or proceedings against the second and/or third and/or fourth and/or fifth defendants…" are clear enough. They amount to a binding agreement by the appellant not to initiate any further action or claim or proceeding, including contempt proceedings. The issue between the parties concerns the effect of the words "not to… take any further action…" This is likely to mean something other than not bringing any further claim or action or proceedings, because that is covered by the rest of the clause.

58. It was submitted to the judge by counsel on behalf of the second to fifth respondents (not Mr Sharpe) that this meant that the appellant was not able to invite the court to conclude (in the proceedings between the appellant and the respondent) that there had not been a genuine accident. It was submitted that seeking such a finding would amount to "taking further action against the second, third, fourth and fifth respondents". Like HHJ Lethem, I reject this submission.

59. Just as a matter of language, asking the court to make a finding on the central issue in the extant proceedings against the (first) respondent, does not amount to "taking action" against the second to fifth respondents.

60. Having regard to the background set out above, it is highly unlikely that the parties would have intended to fetter the appellant's prosecution of its claim against the respondent, or its defence of the respondent's counterclaim. The construction contended for by the second to fifth respondents in the hearing before the judge would have the effect of making it impossible for the appellant to succeed in its claim or its defence of the counterclaim.

61. The agreement not to "take any further action [against the second to fifth respondents]" involves the use of simple and straightforward language. It is probably not possible exhaustively to list out all the different actions that might be taken by the appellant against the second to fifth respondents which are captured by the agreement. In the light of the context, it is likely that the parties intended that the words should mean that the appellant would not take steps such as making a report to the police or the Independent Office for Police Conduct. The wording also naturally covers an application for a witness summons against the second to fifth respondents.

The appeal against the order of 28 November 2022

The application

62. The order of 28 November 2022 was made following the appellant's application dated 30 September 2022. That application sought to amend the particulars of claim to include:

    (1) Reliance on the Facebook friendship between the respondent and Louis Fraser.

    (2) Reasons as to why the respondent's account of the route he took was not credible.

    (3) Reasons as to why the respondent's account of the positioning of his car was not consistent with him waiting to turn right, or for oncoming traffic.

    (4) Reliance on anomalies and discrepancies in the medical evidence.

(5) An allegation that the timing of the attendances for medical treatment indicated that the attendances were for the purposes of laying a paper trial, not genuine treatment.

63. The appellant also sought:

(1) Permission to rely upon a statement from Damian Rourke dealing with the respondent's evidence as to route, and mirroring the proposed amendment to the particulars of claim.

(2) Permission to rely on an addendum expert report from Dominic Harris dealing with the respondent's account as to the positioning of the appellant's car in the road, and mirroring the proposed amendment to the particulars of claim.

(3) Relief from sanctions in respect of Facebook and other material which was exhibited to Mr Delahunt's witness statement and had not previously been disclosed, if such relief was necessary (the appellant's primary case being that the documents belonged to the respondent and so relief from sanctions was not necessary).

(4) An order that the respondent provide further information under Part 18 of the Civil Procedure Rules (including whether he knew Mr Fraser before the accident).

(5) An order that the respondent's expert answer questions submitted under Part 35 of the Civil Procedure Rules.

The judgment

64. The judge identified two matters which he considered were important. The first was the lateness of the amendment application. The second was the requirements that apply to a pleading that alleges deceit and conspiracy. As to lateness, the judge reviewed relevant authorities, and said:

> "…lateness is not an absolute concept, but a relative one; it depends on a review of the nature of the proposed amendment, the quality of the explanation and a fair appreciation of the consequences in terms of the work wasted…. It is not sufficient to argue that loss of time in amendment can be cured by the cheque book… a much stricter view is taken nowadays of non-compliance with the civil procedure rules and directions of the court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct litigation proportionately in order to ensure their own costs are kept within proportionate bounds, but also the wider public interest in ensuring that other litigants can obtain justice efficiently and proportionately…"

65. The judge was willing to accept that the appellant was entitled to withhold the Facebook evidence up until the point of exchange of witness statements, but said:

> "…the moment that witness statements were served, the reason for withholding the evidence had disappeared and there ought to have been additional disclosure at that stage. That does not seem to have occurred. Indeed, I observe that there is no explanation whatsoever from the claimant as to the delay in making its application, and as the authorities make clear, that alone can tip the balance in favour of refusing an application."

66. As to the appropriate approach to pleading deceit and conspiracy, the judge had been referred to *Kasem*, from which he took what was said to be a quote from Lord Millett's speech in *Three Rivers* at [186]:

> "It is well established that fraud or dishonesty... must be distinctly proved; that it must be sufficiently particularised... The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him... this involves knowing not only that he is alleged to have acted dishonestly but also the primary facts which will be relied on at trial to justify the inference...this is only partly a matter of pleading. It is also a matter of substance."

Mr Higgins relies heavily on the fact that these words did not in fact appear in quite this order in Lord Millet's speech, or in an unbroken sequence. What Lord Millett said at [184] – [186] was:

> "184. It is well established that fraud or dishonesty… must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence… This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since

> dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

67. Mr Higgins is strictly right about this, but the quotation (which had been presented to the judge second-hand) does not seem to me to misstate the effect of Lord Millet's speech.

68. Immediately after his reference to Lord Millet's speech, the judge said:

> "Turning, then, to my decision, I am firmly of the view that the case as originally pleaded in the particulars of claim did not meet the aspiration in *Three Rivers* as I have just recorded it."

69. The judge's reason for this conclusion was that the pleading was "somewhat ambiguous" because the allegation that there had been "no genuine accident as alleged by the defendants" was "pregnant with a number of different innuendo". It could mean that there was no collision at all, or it could mean that that the collision did not occur in the way in which was suggested. He considered that this ambiguity was contrary to the pleading requirements explained in *Kasem* and that "much greater precision should have been applied to the original case." He considered that the same objection applied to the amended case in that "the pleading does not make a necessary connection between the factual averments and the fraud alleged, and to a certain extent some of the pleading is left hanging in the air."

70. The judge also considered that the amended case was significantly different:

> "The sheer magnitude of the allegations perhaps testifies to this. It is, in my judgment, inconceivable that the case could go to trial without there being an amendment to the defence, without there being additional disclosure by both the claimant and the defendant, that that disclosure may involve, certainly as far as the defendant is concerned, trying to obtain documents from third parties which can be notoriously time-consuming. It will require at least one witness statement from the defendant, and perhaps more, and certainly if I allow the Harris evidence in, additional expert evidence. I do not consider that it was hyperbole on behalf of Mr Taylor to say that the case was being set back to square one."

71. The judge considered that if he granted permission to amend, the respondent would have to redo much of the work that he had already done. He said that there was insufficient time before that trial date for the work to be done. He was, in particular,

concerned that the respondent would be unable to make the necessary enquiries of third parties before the trial date. He concluded that it would be inappropriate to grant permission to amend.

Grounds of appeal

72. Mr Higgins advances 14 grounds of appeal. They can be distilled into the following six propositions:

(1) The judge was wrong to conclude that the particulars of claim did not validly plead a claim in deceit.

(2) The judge was wrong (impliedly) to conclude that the respondent did not have a duty to disclose documents relating to his Facebook friendship with Mr Fraser.

(3) The judge erred in his approach to delay.

(4) The judge erred in not dealing with the proposed amendments individually.

(5) The judge was wrong to conclude that if he granted permission to amend the trial date would have to be vacated.

(6) The judge should have concluded that the public interest required that permission to amend should be granted.

Submissions

73. Mr Higgins submits that the judge was wrong to criticise the pleadings. He maintained that it was sufficient that the elements of the torts of deceit and conspiracy had been pleaded. He said that the *respondent* had breached his disclosure obligations by failing to disclose the "Facebook friend" document. There was therefore no legitimate basis for the judge to prevent the appellant from relying on the document at trial. The remaining matters had arisen after the particulars of claim had been pleaded and there was no basis for refusing to permit the appellant to rely on them. The judge was wrong to describe the application as "very late". It could only be made once witness statements had been exchanged. The respondent had sought and been granted a 4 week extension of time for witness statements. Otherwise, the appellant would have disclosed its statements 4 weeks earlier. Although the application was not made until 7 weeks after exchange of statements, it had been necessary for the appellant to analyse the respondent's statements and, in particular, his account of the route. The 7-week delay did not make any practical difference – the hearing would not have been any earlier. In any event, as it transpired, the trial was adjourned anyway because the respondent had given inadequate disclosure. The judge was wrong to consider that the amendments "set the case back to zero" and that the trial date could not be met. Most of the amendments were by way of rebuttal. The exception was the Facebook material, but that had been served on the respondent 3 months before the hearing of the application, and 22 weeks before the trial date. At the time of the hearing of the application, there remained a further 8 weeks before the trial. That was sufficient time for the respondent to file any evidence on the Facebook point. The further engineering evidence was also on a narrow point, and could have been answered within he time available. The judge was wrong to deal with the proposed amendments compendiously – he should have considered each

proposed amendment on its merits. If any individual amendment would have caused the trial date to be lost then the judge should have refused permission to rely on that amendment, rather than refusing all of the amendments. The judge was wrong to refuse the amendment to seek exemplary damages. The jurisdiction to award exemplary damages was clearly engaged, and there would be no need for any additional disclosure or evidence.

74. Mr Taylor submits that the judge was right to find that the appellant had failed to give proper particulars of fraud. It was not sufficient to assert that "no genuine accident as alleged by the Defendants took place" and to rely on the damage caused to the vehicles as being inconsistent with the account of the accident. The inconsistency of the damage was not logically connected to the generic assertion that there was "no genuine accident as alleged". The judge was entitled to find that this generic assertion was bland and ambiguous and that it was "pregnant with a number of different innuendo," meaning both that the respondent had no idea what it was said that he had done wrong. The appellant's pleading did not disclose reasonable grounds for making the fraud allegations. The proposed amendments were also defective. Rather than setting out a concise statement of facts, they were unnecessarily long and unwieldy (particularly in relation to the analysis of the respondent's route) and they still did not draw a connection between the alleged facts and the claim of fraud. As a result, the proposed amendments did not stand a real prospect of success.

75. By way of a respondent's notice, Mr Taylor submits that the judge was wrong to find that the appellant was entitled to hold back the Facebook point until exchange of witness statements. The appellant was in breach of its obligation to plead at the outset the full factual case it was proposing to advance. This was compounded by the appellant's ongoing disclosure failing which, in itself, justified refusal of the application to amend and permission to rely upon the document. The judge was right to find that the application was "very late" and was entitled to conclude that this imperilled the trial date. This was, alone, sufficient to refuse the application to amend.

Discussion

76. The highly experienced judge had case managed the claim throughout. He was faced with parties that had, in certain respects, singularly failed to comply with their obligations to comply with court orders and assist the court to further the overriding objective. The appellant had deliberately breached the court's order in respect of disclosure. The respondent had waited until the pre-trial review to ventilate complaints about the way in which the claim had been pleaded. He had failed to provide any instructions as to the Facebook point. He had also (as it later turned out) failed to comply with his own disclosure obligations. The judge was left to do what he could to further the overriding objective. He gave a clearly reasoned, detailed and thorough ex tempore judgment following submissions from the parties that had lasted for almost the entire court day.

77. An appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity: CPR 52.21(3). Here, there is no suggestion of any irregularity. The appellant says that the judge's decision was wrong. Part of the judge's judgment involved the exercise of a case management discretion. The fact that an appeal court would have exercised the discretion in a different way does not mean that the judge was wrong. It must be shown that the judge's

decision erred in fact or law or reached a conclusion which falls outside the generous ambit within which reasonable disagreement is possible: *Commissioner of Police of the Metropolis v Abdulle* [2015] EWCA Civ 1260; [2016] 1 WLR 898 *per* Lewison LJ at [28].

78. I do not consider that there is any merit (on the evidence that is presently available) in the complaint that the respondent should have disclosed the Facebook document. It is possible that the Facebook friendship post-dated the accident. If so, it is not clear that it fell within the respondent's obligation of standard disclosure (even if the respondent is properly regarded as being in possession of the document).

79. As to the balance of the issues, the judge's critical conclusions are that:

(1) The appellant's pleaded case in deceit was defective.

(2) The appellant was entitled to withhold the Facebook material until the exchange of witness statements, but should then have disclosed it without further delay.

(3) Even after exchange of witness statements, the appellant had delayed in providing the material on which it relied for a further 7 weeks without any justification.

(4) It would take the respondent a great deal of time and effort to respond to the new material. The case had effectively been set back to square one. There was not sufficient time to respond before the trial date, so if the amendments were allowed the trial would have to be vacated.

80. In principle, if these premises had been well-founded, the judge's decision to refuse permission to amend could not have been faulted. However, I do not think that these premises were well founded. As to the four critical points:

(1) Adequacy of the pleaded case: For the reasons I have given at paragraphs 34 - 41 above, it was sufficient for the appellant to allege that it was not (to the respondent's knowledge) a genuine accident and to set out the facts on which the appellant relied. Those facts were (in principle) capable of supporting the allegation that there had not been a genuine accident: if the physical evidence is incompatible with the account given then that is capable of supporting an allegation that the account was dishonest and untrue. The same applies to the proposed amendments. To take the Facebook point, if it were the case that the respondent and Mr Fraser knew each other before the accident then there is, on the respondent's case, potentially a remarkable (the appellant would say incredible) coincidence. That is also capable of supporting an allegation of fraud. It was not necessary for the appellant, which did not and could not know what in fact had happened to cause the damage to the vehicles, to set out its case as to the true underlying facts. The elements of the tort had been pleaded and (aside from the proposed amendments) the facts on which the appellant relied had been pleaded. Those facts were capable of supporting the claim in deceit.

(2) Facebook point: for the reasons at paragraphs 42 – 54 above, the appellant was not entitled to hold its case back until exchange of witness statements. It should have pleaded the facts on which it relied, and it should have disclosed the documents on which it relied.

(3) Delay in provision of material: The appellant had not delayed in the provision of the Facebook material for 7 weeks after the exchange of witness statements. The material had been exhibited to one of the statements exchanged by the appellant, so there was no delay at all. It is regrettable that this clear (but entirely understandable) factual error was not picked up by the advocates at the time.

(4) Whether sufficient time to respond: It has not been shown that it would have taken the respondent a great deal of time to respond to each and every one of the amendments, such that each amendment would, in itself, put the trial date in jeopardy. The plea of exemplary damages would not have required any further work at all. The plea as to the route taken may not necessarily have required any further work: it may simply have been a matter of cross-examination of the respondent. I deal with the Facebook point separately at paragraphs 85 – 89 below.

81. For each of these reasons, I consider that there were flaws in the underlying assumptions on which the judge exercised his discretion to refuse the amendments. I recognise that the judge made reference to the separate amendments that were sought, but there is force in the point that the proposed amendments were considered compendiously rather than each being considered on its own merits.

82. It is therefore necessary to decide afresh whether permission to amend should be granted. I do so by reference to what the parties appeared to agree were the five most significant amendments (see paragraph 62 above).

83. The route: The appellant could not have known before exchange of witness statements what route the respondent was going to have claimed to have taken to have reached the scene of the accident. The respondent's explanation in his statement is that he was travelling from Croydon (where he lived) to Barking (where his partner's parents lived). The alleged accident scene was in Wanstead. That is not between Croydon and Barking. It is several miles away from any obvious route between Croydon and Barking. The appellant is clearly entitled to rely on these matters, which derive from the respondent's own evidence. It is understandable that it took a little time to analyse the exchanged evidence and, in particular, the respondent's account of the route. The application to amend the particulars of claim was made within a relatively short period of time of the exchange of witness statements (which had been delayed at the respondent's request). I do not consider it is reasonably likely that this amendment would have put the trial date in jeopardy, or that it will now cause substantial delay or additional cost. It has not been suggested that this amendment would cause any further disclosure or even, necessarily, any supplementary statement. The respondent has already set out, in some detail, his rationale for the route that he took.

84. The form of the proposed amendment is undesirable and unwieldy. It amounts to 5 pages of pleading which has been lifted from a witness statement. It includes maps, argument and evidence. The amendment is introduced with the words "the route taken by the Defendant to the location of the alleged collision is so illogical and improbable as to be incapable of belief." That is all that is required concisely to identify the facts on which the appellant relies (which is all that is required). I will grant permission to amend to that extent, whilst refusing permission to amend to include all of the detail that has been lifted from a witness statement.

85. Facebook point: The respondent, by way of a Respondent's Notice, contends that the appellant should have pleaded the Facebook point, and that the document should have been disclosed. I agree. The appellant breached the court's disclosure order, and the rules relating to disclosure. He is not entitled to permission to amend unless he first secures relief from sanctions. The test for granting relief from sanctions is set out in *Denton v White* [2014] EWCA Civ 906; [2014] 1 WLR 3926 *per* Sir Terence Etherton MR and Vos LJ at [25] – [38]: the judge must identify and assess (1) the seriousness or significance of the breach of the rule or court order, (2) why it occurred, and (3) what is required to deal with the case justly.

86. Here, the breach was serious and significant. It amounted to a deliberate breach of a court order and rule of court on a matter that lay at the heart of the appellant's case. The breach was deliberate, and was to seek to catch the respondent out in circumstances where the appellant considered that it was facing asymmetric litigation which required it to adopt what it terms a "purposive" approach to the rules to ensure fairness. The nature of the breach, and the reasons for it, militate significantly against the grant of relief from sanctions, but that does not necessarily mean that relief must be refused. It is necessary to consider how to deal with the case justly to both parties.

87. Refusing relief would deprive the appellant of a (possibly the) key part of its case in a claim for fraud. Granting relief would not mean that the respondent is facing any additional headline allegation. Either way, he will face a simple binary case as to whether the accident had genuinely occurred as he described, or not. If relief is granted he will have to deal with an additional piece of evidence. It is difficult to see why that will cause any significant evidential prejudice or why he would not have been able to deal with the point in the time that was available before trial. He would first need to give his lawyers instructions as to the true position. Inexplicably, even this basic step had not been taken, despite the fact that he had been aware of the point for 3½ months before the first instance hearing. Mr Taylor told the judge that he had the "luxury" of not having instructions.

88. One possibility is that the Facebook friendship only arose after the accident. If that were the case, then it is difficult to see why that basic fact could not have been communicated to the court and the respondent, with perhaps a document from the respondent's private Facebook account to establish when they had become Facebook friends. That may then have been a complete answer to the point. Alternatively, if the Facebook friendship pre-dated the accident then the respondent would be left to give any explanation he could as to the apparent coincidence that the person who had collided with him when they were both several miles away from their homes happened to be a Facebook friend. Again, it is difficult to see why it would take a long time to produce such an explanation, or why it would need extensive enquiries of Facebook.

89. Part of the overriding objective of dealing with a case justly involves enforcing compliance with rules, practice directions and orders: CPR 1.1(2)(f). Here, the appellant's breach of the rules can be marked by way of the imposition of an appropriate sanction. In particular, significant costs sanctions can be applied. The precise ambit of these can be the subject of further submissions but, in principle, they are likely to include at the very least the payment of the costs of the application and any cost consequences of the late disclosure. I also consider, for the reasons given further below, that the appellant's breach of the rules can be marked by refusing to entertain an exemplary damages claim.

90. Having regard to the sanctions that can be imposed for the appellant's conduct, and to the respondent's ability to deal with the amended case, I do not consider that the ultimate sanction of refusing to permit the appellant to advance the central strand of its case would be justified. I will therefore grant permission to amend on this point, which also includes an amendment (which was at least partly implicit in the original pleading) to the effect that Mr Fraser was a co-conspirator who had failed to co-operate with the appellant's investigation.

91. Anomalies in the medical evidence: This proposed amendment effectively alerts the respondent to points that are likely to be taken in cross-examination (such as the fact that in his claim notification form he said that he had no time off work and did not mention any eye injury, yet later he said he had 3 days off work, had reduced his working hours for 4 weeks, and that he had injured his left eye). It is difficult to see that this necessitates any further significant work on the respondent's part other than, perhaps, responding to questions in cross-examination.

92. Positioning of the vehicles: The respondent told his medical expert that at the time of the collision he was "stationary and about to turn right" whereas the account he now gives is that he was stationary and waiting for oncoming traffic to pass before carrying on up the road and taking the next right hand turn. The judge did not consider this apparent discrepancy was particularly significant. I agree that it is unlikely that this discrepancy would, in isolation, be capable of sustaining an allegation of fraud. It does not, however, stand alone. It falls to be considered in the context of the other matters on which the appellant relies. In that context, without overstating its significance, there is some prospect of it having a material impact. It is not something that will require any further work to be done in advance of trial – again it will be a matter for the respondent to address in the course of cross-examination. If this issue stood alone then, like the judge, I would have refused permission to amend. As it is, as part of the constellation of other facts which will go forward, I grant permission to amend to deal with this issue as well.

93. Exemplary damages: The basis for the claim in exemplary damages is said to be that the respondent's conduct in intimating dishonest claims was calculated to make a profit that would exceed the compensation payable to the appellant. That does not depend on anything that was discovered after the claim was started. The claim for exemplary damages should have been made, if it was to be made at all, when the claim was initially pleaded: CPR 16.4(1)(c). No reason has been given for the failure to make the claim at the outset. On the other hand, no prejudice would be caused to the respondent. The claim for exemplary damages would not require any further factual investigation, and would not have put any trial date in jeopardy, and would not now cause any delay or substantial additional cost. Were it not for the appellant's conduct in deliberately breaching the court's order, it may have been appropriate to grant permission to amend.

94. That said, for a claimant, exemplary damages are a windfall: *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 *per* Lord Woolf MR at 517B. Where a claimant is guilty of improper conduct then that can reduce or eliminate an award of exemplary damages where that contributed to the tortious behaviour: *Thompson* at 517D. That is not the case here, but the appellant can, nonetheless, justly be deprived of any prospect of an exemplary damages windfall in order to mark its conduct. I therefore refuse permission to amend to claim exemplary damages.

Conclusion on the appeal against the order of 28 November 2022

95. I allow the appeal. I grant the appellant relief from sanctions (on terms that will be determined following any further submissions). I grant the appellant permission to amend the Particulars of Claim save that (a) permission to claim exemplary damages is refused, and (b) the reliance on the respondent's claimed route is to be recast in the form I have directed.

The appeal against the order of 23 January 2023

The application

96. The order of 23 January 2023 was made in respect of the application made by the second to fifth respondents on 22 January 2023. That application sought:

> "an order that all documents (medical reports, witness statements, claims notification forms) be struck out from the trial bundle because the claimant's inclusion of those documents, submissions made against d2 – d5 of any involvement in any fraud is contrary to the agreement reached between the parties in prejudicing the claims. The Claimant agreed as part of the compromise that it would not take any further action against d2 – d5."

97. The solicitor for the second to fifth respondents provided evidence in support of the application. The evidence relied on the compromise agreement (see paragraph 21 above). The solicitor said:

> "the compromise was understood to be the end of my clients involvement in the claimant's claim. There was effectively an undertaking by the claimant that they would not take any further action against my clients. It is evident to my clients that the claimant has knowingly breached the terms of that agreement. It would be contrary to the interest of justice for the claimants to be allowed to rely on documents pertaining to my clients and to advance arguments against them in support of their claim in the tort of deceit without any notice being provided to them and without any opportunity to respond. This is especially and affront to the litigation process when my clients were induced into achieving a compromise on the firm belief that no further action will be taken.
>
> I respectfully request that the court strike out the documents pertaining to D2 – D5 from the bundle. I also invite the court to restrict any attempts to draw any adverse inferences or findings against D2 – D5 in their absence.
> …
> …The claimant is seeking a finding of whether D2 – D5 were "present and injured"… This cannot and should not be done in their absence. The very nature of this request is taking action against my clients to elicit a finding of fraud or dishonesty in

> absentia. This offends the very fabric of our legal system and is in breach of the terms of agreement reached to compromise their claims."

The judge's judgment

98. The judge noted the use of the word "action" twice in the critical sentence in the settlement agreement. He pointed out that the first reference was to "taking" any further action, and the second was to "bringing" any further action. The context was that the case was concerned with the settlement of the proceedings. The judge considered that "take no further action" must mean "take no further action in relation to the claims that are before the court." He considered that seeking an adverse finding against the second to fifth respondents would amount to taking action against those respondents, and would be inconsistent with the compromise agreement. The judge then said:

> "The question then is what is the effect of that finding? The first is that the issues between the parties, between the claimant and the second to fifth defendant, have been compromised. In those circumstances it would be inappropriate for Mr Higgins to seek findings as against the second to fifth defendants. If that has made his life more difficult in relation to section 57, then that is a consequence of an order which was arrived at by the claimant in the knowledge that they would be continuing as against the first defendant. Even if I had not made the findings that I have, I would be of the view that the Tomlin order had reasonably extinguished in the second to fifth defendants' mind the need to be involved in the proceedings and therefore the notice of the position of the claimant was very late. The corollary of what I have said is that I consider that Mr Higgins may deploy such evidence as is relevant to the case against the first defendant as is available to him. If, for some reason, the medical reports in relation to the second to fifth defendants were relevant, then he may rely upon those. What he may not do is rely upon those in order to have findings against the second to fifth defendants.
>
> It is open to the court, and this must have been in the contemplation of the parties when they entered into the Tomlin order, that this court can make a finding against the first defendant that there was no genuine accident. In a somewhat bold submission, Ms Hughes suggested that that was not open to the court because it was inconsistent with the Tomlin order. The first defendant was not a party to that Tomlin order, and it does not therefore bind the action as between the claimant and the first defendant. In those circumstances, subject to any submissions on minutia, my view is that the trial bundle can stay as it is, but I will make a declaration that no adverse finding can be made as against the second to fifth defendants. Again, I make it clear that I consider it is open to Mr Higgins to invite me to draw an adverse inference as against the first defendant out of the failure to call that evidence. The weight that that submission makes will

> depend of course upon the evidence that is available to the court at that time. ”

Grounds of appeal

99. The appellant’s three grounds of appeal can be distilled into the following single proposition: the judge erred in concluding that the effect of the settlement agreement was that the appellant was estopped from seeking adverse findings against the second to fifth respondents.

Submissions

100. Mr Higgins submits that the settlement agreement prevents the appellant from taking any further action against the second to fifth respondents, but that it does not prevent the appellant from pressing its claim against the (first) respondent in any respect, or from submitting in that claim that, on the evidence, the respondents were neither present nor injured. Litigating the claim against the first respondent does not involve taking action against the second to fifth respondents.

101. Tim Sharpe, on behalf of the second to fifth respondents, says that by “seeking to obtain findings adverse to [his clients]”, the appellant was “taking further action” in these proceedings, contrary to the wording of the Tomlin Order. He says this interpretation is “the only proper one”. He says that if the appellant had wanted an agreement in which the claims against the second to fifth respondents were brought to an end, but in a way which allowed the appellant to “seek to destroy their reputation at a trial at which [they] would not be represented”, then it ought to have made that clear in the settlement agreement. The settlement agreement did not preserve for determination the issue of whether the second to fifth respondents had done anything wrong. Quite the contrary, it brought those issues to an end.

102. Mr Sharpe also relies on the part of the settlement agreement which, in effect, provided that the appellant would not take any further action against the second to fifth respondents “in relation to or arising out of the accident and/or proceedings.” He submits that this prevents the appellant from asking the court in these proceedings from making the sort of findings that the appellant seeks.

103. Further, independently of the interpretation of the settlement agreement, Mr Sharpe contends that elementary common fairness prevents the appellant from seeking findings against the second to fifth respondents now that they are no longer parties to the proceedings.

Discussion

104. I have set out above (at paragraphs 55 – 61) my conclusions as to the general effect of the settlement agreement. The narrow issue that arises on the appeal is whether it prevented the appellant from seeking adverse findings against the second to fifth respondents.

105. Part of the difficulty is that the phrase “adverse findings against the second to fifth respondents” is, itself, ambiguous. There are (at least) three different levels of meaning that it might convey.

106. The first is "adverse findings that are determinative of the second to fifth respondents' civil liability". An example might be a finding that the second to fifth respondents are liable to the appellant in the tort of deceit. It is clear that (irrespective of the settlement agreement) such findings could not be sought in the claim against the respondent, simply because the second to fifth respondents are (no longer) parties to that claim. Nothing in the appellant's approach to the case suggests that it is seeking findings that will determine the second to fifth respondents' civil liability.

107. The second is "findings that when considered in context imply that the second to fifth respondents have acted unlawfully". One such finding might be that there had been no genuine accident. Such a finding does not determine the civil liability of the second to fifth defendants. Nor does it, in isolation, have any impact on them. However, when put together with the fact that the second to fifth defendants have made insurance claims on the basis that there had been a genuine accident it might amount to an implicit finding that they have acted unlawfully or, at least, dishonestly. The judge rightly rejected the suggestion that the settlement agreement precluded this type of finding. There is no cross-appeal on that issue.

108. Another such finding might be that the second to fifth respondents were not present, or that they were not injured. Again, such a finding does not determine their civil liability or have any other direct impact on them. Such a finding is no different in nature than a finding that there had been no genuine accident. Indeed, it might be thought to be the logical consequence of there not having been a genuine accident. The approach of the second to fifth respondents on this appeal is self-contradictory. On the one hand they (now) agree that the appellant can seek a finding that there was no genuine accident. On the other hand they maintain that they cannot seek a finding that the second to fifth respondents were uninjured. Nothing in the settlement agreement prevents the appellant from seeking either type of finding. Doing so does not amount to taking action against the second to fifth respondents.

109. The third is "findings which are adverse to the reputation of the second to fifth respondents without determining their civil liability." Examples might be that they lied when giving evidence, or that they lied when completing their insurance claim forms. At the time the settlement agreement was made, the second to fifth respondents had exchanged witness statements which maintained that there had been a genuine accident. There had not been any suggestion that they would not give evidence. It would be surprising if the parties had intended that the appellant would not be able to challenge any evidence that they gave. Nothing in the settlement agreement has that effect. Nor does it prevent the appellant from contending that the insurance claims were untruthful. That does not amount to taking action against the second to fifth respondents.

110. Accordingly, there is no question of the appellant seeking a level one type finding, and there is nothing in the settlement agreement to prevent the appellant from seeking a level two or level three type finding.

111. The second to fifth respondents also rely on "elementary common fairness." In *Vogon v Serious Fraud Office* [2004] EWCA Civ 104, a judge had made a finding of dishonesty against the claimant even though that had not been alleged by the defendant and the allegation had not been put to the claimant by either the defendant or the judge. The judge had not given any indication that he was thinking of making such a finding. The claimant therefore had no opportunity of dealing with the matter. The finding was,

anyway, unnecessary. Unsurprisingly, the Court of Appeal said this was unfair. At [29] May LJ said:

> "…the judge was entirely wrong in the circumstances of this case to make these unnecessary findings. It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."

112. If the second to fifth respondents give evidence, then there is, in principle, nothing unfair in the appellant seeking a finding that their evidence is dishonest, so long as that allegation is properly put to them and they are given a sufficient opportunity to respond. Clear notice has been given in the appellant's skeleton that it "does not accept that any of [the] passengers are witnesses of truth." For that reason alone, it cannot be said, at this stage, that it would necessarily be unfair for the appellant to seek a finding that the second to fifth respondents have been dishonest.

113. If they do not give any evidence, then it is not at all clear that the appellant will seek an explicit finding that the second to fifth respondents have acted dishonestly. Such a finding is not sought in the appellant's trial skeleton. The furthest that goes is to suggest that the second to fifth respondents were not present and injured. A finding to that effect does not involve any finding of dishonesty against them. It would not involve any unfairness.

114. It is always conceivable that a trial develops in such a way that there is a risk of unfairness. If that happens then it is the judge's job to ensure fairness. It is neither necessary nor appropriate, in advance, to make a declaration that would, in effect, prevent the appellant from seeking to prove its case.

115. Accordingly, neither the settlement agreement, nor common fairness, justifies the declaration that was made. I therefore allow the appeal and set aside the declaration.

The appeal against the order of 24 January 2023

The application

116. The respondent applied on 5 December 2022 to strike out the claim or, alternatively, for summary judgment on the claim.

The judge's judgment

117. The judge reprised the arguments between the parties as to what was required to allege fraud. Mr Higgins maintained his earlier stance that all that was necessary was to plead the ingredients of the tort. The judge rejected that submission.

118. It was clear from the appellant's skeleton argument that it sought to rely on all the matters that had been contained in the draft amended particulars of claim, even though permission to amend had been refused. The judge found that the appellant was not

entitled to rely on those matters. The only surviving pleaded allegation was that the damage to the vehicles was not consistent with the alleged circumstances of the accident. The agreed position of the expert witnesses was that they were unable to say, by reason of the damage, that it was a staged accident.

119. Accordingly, the judge concluded that there were no reasonable grounds for bringing the claim. He therefore struck out the particulars of claim. He indicated that he would also have granted summary judgment.

Discussion

120. The judge was entirely right to reject the submission that it was sufficient simply to plead the ingredients of the tort. As the judge said:

> "…Mr Higgins' approach confuses the bare assertions [as to the ingredients of the tort] with the primary facts that underpin those assertions of fact, and I challenged him on a number of occasions during his submissions to tell me what the primary factual issues alleged were, and he was unable to provide me with an adequate answer in that respect."

121. The judge's decision to strike out the claim (or alternatively to grant summary judgment) was right in the circumstances that then pertained. There was, effectively, a single pleaded ground for alleging dishonesty (the damage to the vehicles being inconsistent with the account of the accident) which was not adequately supported by the evidence. It was therefore inevitable that, at the very least, summary judgment would be entered on the claim. The appellant itself recognised that the claim was "unwinnable."

122. There is therefore no basis for criticising the judge's judgment.

123. However, that judgment proceeded on the basis of the claim as it was then presented. I have found that permission to amend the claim ought to have been granted. It is highly unlikely that the application to strike out would then have been made. If it had been made, it would have been untenable. The Facebook point taken together with the route point provided, in themselves, a sufficient basis for alleging fraud. It cannot be said that there are no reasonable grounds for bringing the claim or that the appellant has no real prospect of success on the claim.

124. The respondent, by way of a respondent's notice, submits that the statement of case was an abuse of the court's process and that the appellant's conduct prevented the just disposal of the dispute. I agree with the respondent that the appellant's failure to plead the facts on which it relied, and its breach of the court's order, are unjustified. It means that the appellant requires relief from sanctions. I have dealt with that above, and have granted the appellant relief from sanctions. If it had been impossible for the respondent to have a fair trial I would not have granted relief from sanctions. The claim is not an abuse of the court's process.

125. Accordingly, I allow the appeal against the order of 24 January 2023.

Outcome

126. I allow each of the appeals with the result that:

(1) The appellant's claim is not struck out.

(2) The appellant has permission to amend its Particulars of Claim, subject to the sanctions and limitations I have explained above.

(3) The settlement agreement with the second to fifth respondents does not prevent the appellant from advancing any of the allegations set out in its draft amended particulars of claim, or its reply and defence to counterclaim (so far as that is directed to the respondent's defence and counterclaim), or from advancing a defence under section 57 of the 2015 Act.