CSCanada
Frontiers of Legal Research
Vol. 1, No. 1, 2013, pp. 87-89
DOI: 10.3968/j.flr.1929663020130101.205

ISSN 1929-6622[Print]
ISSN 1929-6630[Online]
www.cscanada.net
www.cscanada.org

CASE NOTE

FRAUDULENT CLAIMS YET AGAIN – *SUMMERS V FAIRCLOUGH HOMES LTD.* [2012] UKSC 26

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Received 10 February 2013; revised 9 March 2013; accepted 20 March 2013.

Poomintr Sooksripaisarnkit (2013). Fraudulent Claims Yet Again – *Summers v Fairclough Homes Ltd.* [2012] UKSC 26. *Frontiers of Legal Research, 1*(1), 87-89. Available from http://www.cscanada.net/index.php/flr/article/view/10.3968/j.flr.1929663020130101.205 **DOI:** 10.3968/j.flr.1929663020130101.205

'The making of dishonest insurance claims has become all too common. There seems to be a widespread belief that insurance companies are fair game, and that defrauding them is not morally reprehensible'. This quoted passage came from the speech of Lord Justice Millett in the Court of Appeal in *Galloway v Guardian Royal Exchange (UK) Limited* [1999] Lloyd's Rep. I.R. 209 which still holds true today. This is evident in the latest decision in relation to fraudulent insurance claims from the highest authority is that of the United Kingdom Supreme Court in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004. It is needless to say that the decision has a wide ramification as the London Market is still a large and influential market for insurance products, especially commercial insurances and re-insurance. This is not to mention a stipulated English jurisdiction and choice of law clause is frequently seen in commercial insurance policies.

The case arose out of claims by a claimant (Mr. Summers) against the defendant employer (Fairclough Homes Ltd) due to serious injuries caused to him by accident at work. It was established to the satisfaction of the judge at Manchester County Court that defendant was liable. The judge ordered the quantum to be determined separately. From 4 October 2007 up until 25 September 2008, the defendant subjected the claimant to undercover surveillance. On 9 December 2008, the claimant submitted the claims in the sum of £838,616. The statement of truth signed by claimant on the same date indicated that he had to use pain killers, needed to use crutches, and had to wear ankle brace. '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'. However, it was transpired from the surveillance that the claimant was able to work

without difficulty in October 2007. This was in consistent with the claimant's wife diary which showed the claimant was able to work and he could even play football. The surveillance was disclosed on 23 December 2008 which led the claimant to subsequently serve the second schedule of loss reducing the value to £250,923 and the third schedule with the amount of £251, 481. On 23 February 2010, the judge at Manchester County Court found the claims to be substantially exaggerated. He nevertheless refused to strike out the claims as per the defendant's request. Instead, he awarded damages for genuine loss in the sum of £88,716.76.

The issue before the United Kingdom Supreme Court was whether the courts have power either in the Civil Procedure Rules or in their inherent jurisdiction to strike out fraudulent claims in its entirety. According to rule 3.4(2) of the Civil Procedure Rules:

> 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.

The United Kingdom Supreme Court had no doubt that for a situation like this the principles of insurance law relating to fraudulent claims do not come into play. This is so because according to the Court of Appeal in *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co. Ltd and La Reunion Europeene* (*The "Star Sea"*) [1997] 1 Lloyd's Rep. 360 at 372 the duty not to submit fraudulent claims would be supplanted by the Rules of the Supreme Court (or now by the Civil Procedure Rules) once the writ is issued. This point was not rejected by the House of Lords in the same case (See *Manifest Shipping Co. Ltd v Uni-Polaris Insurance Co. Ltd and La Reunion Europeene* [2001] UKHL/1; [2001] 1 Lloyd's Rep. 389).

As to the power to strike out the claims based upon the Civil Procedure Rules, the courts below refused to do so based upon rationale in the recent Court of Appeal case of *Ul-Haq and Others v Shah* [2009] EWCA Civ. 542; [2010] 1 WLR 616 where Lord Justice Toulson explained in paragraph 50 of the judgment:

> Where…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…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…which in my judgment he had no power to do. It was open to him [the judge] to impose costs sanctions…

As noted by the United Kingdom Supreme Court, the same approach was adopted by the Court of Appeal in *Widlake v BAA Ltd* [2009] EWCA Civ. 1256; [2010] 3 Costs L.R. 353.

The United Kingdom Supreme Court, on the other hand, viewed that the courts are not constrained and can strike out the claims at any stage of the trial, even towards the very end. However, striking out a claim at the very end of the trial must be done in extremely exceptional circumstances. To this point, the United Kingdom Supreme Court came to prefer the approach in *Masood and Others v Zahoor*

and Others [2009] EWCA Civ. 650; [2010] 1 WLR 746 to that of the Court of Appeal in *Ul-Haq and Others v Shah* and summarised the power of the courts to strike out the claim in paragraphs 41-43 as follows:

> 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…It follows from the language of the rule that in such a case the court has power to strike out the statement of a 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…
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> 42. Under the CPR the court has a wide discretion as to how its powers should be exercised….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…
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> 43. We agree with the Court of Appeal in *Masood v Zahoor*…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 defendant in this case submitted that the court should exercise the power to strike out the claim in order to deter fraudulent claims. This was however not followed by the United Kingdom Supreme Court because it was established as a fact that the claimant did suffer injuries and the judge at first instance could determine genuine damages. This is supported by Article 1 of the First Protocol to the European Convention on Human Rights, Rome 4 November 1950, on 'Enforcement of certain Rights and Freedoms not included in Section I of the Convention'. This Article states: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law…' The United Kingdom Supreme Court held that the term 'possession' as in Article 1 encompassed a 'judgment'. In the instance case, the claimant obtained a judgment on liability.

The United Kingdom Supreme Court did not overlook the fact that exaggerated claims must be deterred. However, such deterrent measures can be taken in many forms. Apart from that the courts should ensure only genuine damages are awarded and that the courts may make appropriate order as to costs along with reducing interests, it is also open to the other party in litigation to pursue criminal proceedings for contempt.

It is no doubt that fraudulent claims must be deterred. However, most cases on fraudulent claims where the assureds got caught involved consumer assureds. It is submitted here that insurers should draw assureds' attention to submit genuine claims before insurance contracts are concluded.