Zurich Insurance Company PLC -V- Colin Hayward

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1. The Supreme Court today handed down judgment in *Zurich -v- Hayward*. This has been a 'Ropewalk Chambers' case throughout, Jayne Adams QC having been junior counsel from the issue of the original action as long ago as May 2001 and Patrick Limb QC for the purposes of the first Court of Appeal decision (a decade later) and in the Supreme Court. What started off as a relatively standard personal injury action has, by reason of the unusual factual development of the evidence and its journey through the Courts, now given rise to an important decision of principle in relation to personal injury actions involving fraud.

The Facts

2. On 9 June 1998 Mr Hayward, then aged 35, suffered an accident in the course of his work as a machine technician in which he injured his back. In May 2001 he started proceedings against his employers, David S Smith Packaging Ltd. He claimed that his injury continued to cause him serious lumbar pain which restricted his mobility; that he had also in consequence developed a depressive illness; and that his ability to work was so seriously impaired that he was only capable of light work. In his Schedule of Special Damages he claimed nigh on £420,000, as well as general damages for pain and suffering. This was served with the Particulars of Claim and supporting medical reports from Mr Bracegirdle, Consultant Orthopaedic Surgeon.

3. The employers' defence was conducted by their employers' liability insurers, Zurich Insurance Company plc ("Zurich"). Liability was admitted with a 20% deduction for contributory negligence agreed early on. As regards quantum, however, it was contended that Mr Hayward had exaggerated his difficulties. Reliance was placed on video surveillance evidence, which appeared to show him doing heavy work at home.

4. The Defence pleaded that:

> "6 …*As a result of video surveillance obtained, Mr Sharp [the insurers' nominated orthopaedic expert] formed the view that the Claimant's disability was not as great as he had described and he was capable of working full time even if not with heavy lifting. In view of the Claimant's lack of candour in relation to his physical condition it is not possible to accept that his depressive state, as described, has been consistent, is continuing or will continue into the future.*
>
> *7 The Claimant has exaggerated his difficulties in recovery and current physical condition for financial gain.*"

5. During the course of the proceedings Zurich disclosed the surveillance evidence that had been obtained. It was reviewed by the orthopaedic experts for the purposes of their joint statement. Whereas they

considered the surveillance evidence called for "*clarification*" they concluded that the low back pain was attributable to the index accident and exacerbated by depression in turn caused by chronic pain and disability, albeit that it related to degenerative changes of the spine which would not otherwise have prevented Mr. Hayward from physical work until the age of 55.

6. On the basis of the symptoms and disability described by Mr. Hayward, the orthopaedic experts further both agreed he was unfit to return to physical work, such as a machine technician, for the foreseeable future. Rather, they agreed his job prospects were limited to part-time light duties only and work which did not involve working from ladders, repetitious stooping, lifting or carrying or driving for prolonged periods of more than 1 hour. In answer to questions asked of both experts following their joint statement, Mr. Sharp revised his opinion as to the period of acceleration to 5 years post-accident. Mr. Bracegirdle maintained his view that the period was 15 years and, whilst accepting that Mr. Hayward was not limited to part time light work, still considered him unsuited to heavy manual work.

7. Very shortly before the issue of quantum was due to be tried, the parties reached an agreement, embodied in a Tomlin order, under which the employers (in practice Zurich) agreed to pay nearly £135,000, in full and final settlement of Mr Hayward's claim. The settlement figure, from Zurich's point of view, reflected the medical evidence by allowing loss of earnings to the date of settlement and a future partial loss of earnings based on the mid-point between Mr. Sharp's opinion of 5 year acceleration and Mr. Bracegirdle's of 15 years, together with a lump sum for disadvantage on the open labour market. It also allowed Mr. Hayward some DIY, gardening and decorating costs.

8. In 2005 Mr Hayward's neighbours, Mr. and Mrs. Cox, approached the employers to say that they believed that his claim to have suffered a serious back injury was dishonest. From their observation of his conduct and activities, they believed that he had recovered in full from his injury at least a year before the settlement. They were referred to Zurich and gave full witness statements to like effect.

9. In February 2009 Zurich commenced the present proceedings against Mr Hayward claiming damages for deceit. It was pleaded that both written statements by him or on his behalf, and his statements of case in the Particulars of Claim and the Schedule(s) of Loss as to the extent of his injury, as well as his accounts given to the medical experts, constituted fraudulent misrepresentations. Damages were claimed equivalent to the difference between the amount of the settlement and the damages that should have been awarded if he had told the truth. The claim was subsequently amended to claim in the alternative rescission of the settlement agreement and the repayment of the sums paid under it.

10. Whereas no point was taken about the action being brought in the name of Zurich rather than the employers, Mr Hayward applied to strike out the proceedings, or for summary judgment. He contended

that the Tomlin order created an estoppel *per rem judicata*, alternatively that the action was an abuse of the process because the issue of fraud had been compromised by the settlement.

11. Following a successful first appeal by the Clamant, on Zurich's further appeal to the Court of Appeal (Maurice Kay, Smith and Moore-Bick LJJ) [2011] EWCA Civ 641, it was held that the settlement gave rise to no estoppel of any kind and that the action was not an abuse of process. It was decided that the fact that the Zurich had alleged deliberate exaggeration prior to the settlement did not preclude them from relying on it subsequently as a ground for rescission. The result was that the claim was enabled to proceed.

12. The action came on for trial before HHJ Moloney QC in the Cambridge County Court in November 2012. He heard evidence for Zurich from the solicitor (Ms. Winterbottom) and claims manager (Mr. Birkenshaw) who were responsible for the conduct of the litigation, from Mr and Mrs Cox and from Mr Sharp. For his part, Mr. Hayward denied any suggestion that his condition was anything other than genuine or that there was any element of exaggeration. He maintained throughout that he was a seriously disabled individual whose disability arose from the original accident and was such that, ever since, he had not been able to work or carry out normal activities of daily living without assistance. As with the first series of witness statements, Mr. Hayward signed the appropriate statements of truth setting out in detail the extent of his disability and presented to the medical experts as such.

13. Following a 4-day trial, HHJ Moloney QC found Mr. Hayward had deliberately and dishonestly exaggerated the effects of his injury throughout the court process. Of Ms. Winterbottom and Mr. Birkenshaw, the judge stated (at para 2.6 of his judgment) both that: "Neither can be said to have believed the representations complained of to be true" and "They may not themselves have believed the representations to be true; but they did believe that they would be put before the Court as true, and that there was a real risk that the Court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate". HHJ Moloney QC found that although Zurich was aware at the time of the settlement of the real possibility of fraud, Mr Hayward had continued his deliberate misrepresentations even after the disclosure of the 1999 video, and those continuing misrepresentations did influence Zurich into agreeing a higher level of settlement than it would otherwise have made. HHJ Moloney QC therefore set aside the compromise.

14. It followed that the issue of quantum in the original action remained to be tried culminating in HHJ Moloney QC awarding Mr Hayward damages in the sum of £14,720 (roughly 10% of the settlement figure), having found that Mr Hayward had made a full recovery from any continuing physical disability associated with the accident by October 1999.

15. Mr Hayward then appealed to the Court of Appeal against the decision that the settlement should be set aside - essentially on the issue of reliance on the fraudulent misrepresentation. There was no appeal against the assessment of quantum in the original action or (contingent on whether the settlement was set aside) against the order for re-payment. The judge's findings of fact were not challenged.

16. Mr Hayward's appeal was allowed: [2015] EWCA Civ 327: Underhill LJ and Briggs LJ both gave judgments reaching the conclusion that the judge had been wrong to set aside the settlement; and King LJ agreed with both. Zurich appealed.

The primary issue

17. Before the Supreme Court, the parties agreed that the appeal raised two issues :-

    i. "In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite inducement by the misrepresentation, must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?"

    ii. Under what circumstances, if any, does the suspicion by the Defendant of exaggeration for financial gain on the part of the Claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?"

18. Zurich's position was that if the first issue was determined in Zurich's favour i.e. 'suspicion' (as shown by having the Claimant put under surveillance or pleading conscious exaggeration for financial gain in the original claim) does not in law defeat a subsequent claim for deceit, such a determination would be for nought if evincing that very suspicion nonetheless, in and of itself, precludes pursuit of the subsequent claim.

19. As Lord Macnaghten put it in *Reddaway -v- Banham* [1896] A.C. 199 at 221:

> "…*fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court*."

20. In *Zurich -v- Hayward*, the fraud perpetrated by Mr Hayward was at the audacious end of the spectrum. The trial judge HHJ Moloney QC concluded of Mr Hayward that he wanted: "… *the maximum compensation he could obtain, and to get it he was dishonestly willing to exaggerate his symptoms to the doctors, and to conceal his real level of ability from them and from the world, so as to give the false impression that he was not capable of heavy work when in fact he was*". Following the liability trial of Zurich's claim, the damages actually due to Mr Hayward were assessed in the sum of £14,720 – and not the £134,973 settled on or the £420,000 claimed by the Claimant's Schedule. These figures, Zurich argued, spoke for themselves in terms of the 'detriment' to Zurich if the trial judge is not upheld.

21. Faced with Zurich's claim, and with an unblushing degree of chutzpah, it initially formed part of Mr Hayward's defence to Zurich's claim to put in issue whether the 'fresh evidence' from his neighbours could and should have obtained when defending the original claim. A further response to Zurich's claim was to maintain a counterclaim supported by a Counter-Schedule contending for a value of £325,000 - and reserving the position to claim still more.

22. Albeit in a different litigation context (namely preliminary issues ordered to be tried in the Commercial Court in respect of the correct interpretation of a 'truth of statement' clause in film finance insurance policies), in *HIH Casualty and General Insurance Ltd & Ors -v- Chase Manhattan Bank & Ors* [2003] UKHL 6, [2003] 1 C.L.C. 358 Lord Bingham of Cornhill had stated at para 15:

> "… *fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: fraus omnia corrumpit. It also reflects the practical basis of commercial intercourse. Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever': Lazarus Estates Ltd v Beasley [1956] 1 Q.B. 702 at 712, per Denning LJ."*

23. That fraud is a "*thing apart*" should inform, it was submitted, the responses to both of the Issues. As regards the first issue, this is because fraud bears on assessing materiality, the presumption of inducement and proof of causation. As regards the second issue, fraud should trump finality because: fraud subverts the administration of justice; fraudsters should not gain from their wrongdoing; and, conversely, victims of fraud should be entitled to protection of their economic interests.

24. The argument of Zurich on the first issue was, in essence, to the effect that belief in the misrepresentation is not required and in that respect both the authorities and the leading textbooks all spoke with one voice.

25. It was argued as follows:-

a. 'Inducement' is then a critical ingredient of the cause of action in deceit. It is at that point of time that the constituent elements of the fraud must operate to impose a legal liability upon the fraudster.

b. It is again settled law that to establish 'inducement' requires proof not only that the representation was made with the intention of causing the representee to alter his position (after receiving the representation), but also that it had that effect. The former is approached from the perspective of the representor; the latter from that of the representee.

c. As to the representor's position, Mr. Hayward's made his fraudulent misrepresentations about his alleged lack of recovery in the context of pursuing a 'workplace accident' claim for damages. There can be no issue about their intention - or indeed materiality - as tending to induce his employers' insurers to pay more than he was justly due.

d. As to the representee's perspective, the narrow question that arose for determination on the appeal is whether the defrauded representee must prove it *believed* the misrepresentations, or does it suffice that those misrepresentations *influenced* the representee to enter into settlement reached i.e. they were a material cause of Zurich doing so.

26. Zurich submitted that belief was not required for the following, summary reasons –

i. Inducement is concerned with causation – not the representee's credulity. Although one may infer that a representee who believes a misrepresentation has been induced to rely on it, an absence of belief does not mean there was no inducement. This is because what is required for there to be inducement is a causal connection between the misrepresentation and the representee making a decision or undertaking a course of action on the basis of that representation. That does not require belief in the misrepresentation itself.

ii. Just as belief in the misrepresentation is not required, so also belief in other inducing causes is irrelevant.

iii. There is a "*presumption of inducement*", particularly where there is an intention to induce by means of fraud. If the defrauded representee first had to show he *believed* the misrepresentation, there would be little (or no) utility in having the presumption.

iv. That presumption should not be rebutted merely because the representee is sceptical. Otherwise, the doubting representee would be placed in a worse position than the gullible or trusting one.

Given that misgivings and suspicion might be more likely to arise where there is fraud, it would be perverse for the prospects of redress to be extinguished on account of those very doubts. Of all representees, it may be thought the defrauded representee (whether believing or not) should be the most deserving of protection.

v. There is no duty upon the defrauded representee to exercise 'due diligence' to determine whether there are reasonable grounds to believe the representations made. Conversely, the fact that the representee does not in fact wholly credit the fraudster and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light.

vi. Whereas proof that the representee had knowledge (or 'blind eye knowledge') of the falsity will suffice, nothing short of that avails the misrepresentor.

27. On the second issue the approach taken was that if the first issue was determined in Zurich's favour i.e. 'suspicion' (as shown by having the Claimant put under surveillance or pleading conscious exaggeration for financial gain in the original claim) does not in law defeat a subsequent claim for deceit, such a determination would be for nought if evincing that very suspicion nonetheless, in and of itself, precludes pursuit of the subsequent claim.

28. On the facts as found, such an outcome would have been perplexing given that the Court of Appeal in the first appeal ([2011] EWCA Civ 641) agreed this subsequent claim could be pursued. In the first appeal, Moore-Bick LJ stated the issue of fraud (so far as raised) was not compromised (para 60). Moreover, paragraph 3 of the Re-Amended Defence to Zurich's claim read: "*The defendant accepts the judgment of the Court of Appeal and accepts that the current action is not an abuse of process in the form permitted by DDJ Bosman*".

29. Zurich accepted there was a public policy interest in finality of settlement. As Professor Zuckerman states in his Editor's Note to the Civil Justice Quarterly Volume 27, issue 2 p. 151 at 154: "… *justice can be maintained only under an effective rule of law. For the law to govern, rights established by law must be certain. This means that the outcome of court adjudication must be certain too, i.e. immune to future challenge short of proof of fraud by a party*". Accordingly, whilst the finality of litigation is "*no mere technicality*" and "*an inseparable feature of the rule of law*" (p. 151 of that Note), the 'fraud of a party' rule is a matter of fundamental justice derived from the principle that a person should not be allowed to profit by his own wrong. It was submitted there was a greater public interest - in terms of justice – in not tolerating fraud.

The Decision

30. As will be seen from the Judgment, in respect of which all five members of the Supreme Court agreed, the decision very closely follows the Zurich argument and approach. The Court was very taken with the first instance analysis of HHJ Moloney QC (following Zurich's consistent argument throughout) and re asserted it. Indeed both Lord Clarke and Lord Toulson, with which the others agreed, paid tribute to the "admirable" first instance judgment.

31. Lord Clarke rejected the analysis of Briggs LJ in the second Court of Appeal decision upon the basis that:-

> "*As I see it, the representee's reasonable belief as to whether the misrepresentation is true cannot be a necessary ingredient of the test, because the representee may well settle on the basis that, at any rate in a context such as the present, he thinks that the representation will be believed by the judge. But it is centrally relevant to the question of inducement and causation. Logically, the representee is more likely to settle for a different reason other than the representation, if his reasonable belief is that it is false. One of the extraneous factors in this case, for example, was the fact that the insurers expert Mr. Sharp had failed to produce, in their view, a report which set out the extent of the misrepresentation with sufficient clarity*…" [**32**].
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> "*As explained above, the questions whether Zurich was induced to enter into the settlement agreement and whether doing so caused it loss are questions of fact which were correctly decided in its favour by the judge. I accept the submission that the fact that the representee (Zurich) does not wholly credit the fraudster (Mr. Hayward) and carries out it's own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light. That depended only on the fact that Mr. and Mrs. Cox subsequently came forward. Only then did Zurich find out the true position. As Mr. Hayward knew, Zurich was settling on a false basis*." [**40**].

32. With those findings, the basis of Mr. Hayward's argument, namely that belief in the misrepresentation was required and in any event Zurich "*knew the truth*" (as in full knowledge of the truth) was undermined.

33. Lord Clarke, having followed and accepted Zurich's argument, concluded on the second issue that the answer seemed to follow from the first question and that it was difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established.

34. Lord Toulson succinctly sets the appeal in context and, indeed, appreciated the importance of the decision. The essence of his view is at [**71**]:

> "*I agree with HHJ Moloney's analysis in para 2.5 of his judgment. The question whether there has been inducement is a question of fact which goes to the issue of causation. The way in which a fraudulent misrepresentation may cause the representee to act to his detriment will depend on the circumstances. He rightly focused on the particular circumstances of the present case. Mr. Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurance purposes is that which the court is likely to put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was*."

35. This decision now has implications beyond the particular circumstances of this case. It undoubtedly establishes that "belief" is not a necessary component of a misrepresentation claim if the other bases of the test are made out. More importantly it establishes that an insurer who has done all it reasonably can to investigate a claim and who settles pragmatically, notwithstanding suspicions, can reopen that settlement (depending on the factual scenario) if fraud can then be proved.

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