NINESTJOHNSTREET
INSURANCE FRAUD

A TASTE OF HEAVEN: Coelum Legal & Exemplary Damages

ABSTRACT

This article considers the impact of the Court of Appeal's decision on exemplary damages in **Axa Insurance plc v. Financial Claims Solutions ('Coleum Legal')** [2018] EWCA 1330 in the context of motor insurance fraud.

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You fooled me with your kisses
You cheated and you schemed
Heaven knows how you lied to me
You're not the way you seemed

You look like an angel
Walk like an angel
Talk like an angel
But I got wise

Elvis Presley, "Devil in Disguise"

The Court of Appeal in **Axa Insurance plc v. 1) Financial Claims Solutions 2) Mohammed Aurangzaib 3) Abdul Mohammed Hakim** [2018] EWCA Civ 1330 has provided the first binding appellate court confirmation of the availability of exemplary damages as a remedy for insurers in road traffic insurance fraud cases.

Foreward

1. In a ground-breaking decision, handed down on 15th June 2018, Axa Insurance UK plc were awarded £60,000 in exemplary damages against three motor insurer fraudsters as an additional punishment upon compensatory damages of £24,000 after Axa thwarted their attempts to defraud it for £85,000. Axa brought claims in deceit not against the third-party claimants seeking compensation against its insured, but against the "lawyers" who brought the claims.

2. Important practice points arise, but most importantly, there is now binding Court of Appeal authority as to the availability of exemplary damages when a fraudster is sued in the tort of deceit by an insurer. The legal heresy of exemplary damages being restricted to 'unreachable profits' made by a wrongdoer has been cast into oblivion.

Background: a taste of Coelum

3. The next time the reader of this article feels despair dealing with an awkward opponent in correspondence, consideration of **Axa v. FCS** may put things in proportion.

4. Axa, the appellant, was the defendant insurer in ultimately four sets of proceedings arising out of two fabricated[1] road traffic accidents. The proceedings were conducted on behalf of five claimants seeking the usual run of whiplash, hire and storage damages by Financial Claims Solutions trading as *Coelum Legal*[2], an entity which was authorised by the Claims Management Regulator as a 'claims farmer' but which was not authorised by the Solicitors Regulation Authority or any other body to conduct litigation. However, to all intents and purposes Coelum Legal acted as solicitors throughout the course of the claims.

5. Not only did Coelum Legal conduct unauthorised litigation, a criminal offence under the *Legal Services Act 2007*[3], they did so in order to perpetrate serious road traffic insurance fraud against Axa. Thus, the abuse of the civil justice system was remarkable even by the usual standards of insurance fraud. It is worth noting that insurers and solicitors involved were not naive dupes: Coelum Legal's correspondence was on plausible headed paper, and the letters were written by persons who had plainly spent time working in a solicitor's office[4], with knowledge of the CPR, legal terminology and even the *Mitchell* case. As the writer pointed out during argument in the Court of Appeal, the fake medical reports of "Dr A. Mbarushimana" were frankly of better quality than a great many genuine GP-prepared whiplash reports.

6. The nature of the Coelum Legal's fraud was wide-ranging. The fake medico-legal expert produced plausible reports to substantiate the claimants' injuries; a non-existent car hire company provided fake credit hire agreements; default judgments were obtained by Coelum Legal despite cynical and deliberate failures to serve proceedings.

7. Once the default judgments and assessments of damages were obtained against Axa's insureds, enforcement proceedings in the judgment sums of around £85,000 damages and costs were issued by Coelum Legal against Axa directly as *Road Traffic Act* insurer. Coelum Legal 'proved' they had served documents on Axa and their solicitors (everything from section 152 RTA notice to the Claim Form to bundles of documents) by producing evidence of sending by registered post. Coelum's devious technique was to send by registered post not the documents

[1] Investigations showed that the 'accidents' were very unlikely to have happened at all. The third parties were probably fictitious inventions. Coleum Legal had other 'accidents' waiting in the wings. It is almost certain that some other insurers were victims and may never have realised until seeing the Court of Appeal's decision.
[2] The translation from Latin of "Coelum" is heaven, and hence the apposite burst of Elvis Presley at the opening of this article.
[3] Section 14: an offence to carry on a reserved legal activity if not entitled, punishable on indictment for imprisonment up to 2 years and/or a fine. Also a contempt of court under s.14(3), something often missed.
[4] It would be interesting to learn which solicitors Abdul Hakim (known as "Abbie") had gained his experience with – their claims record might be worth analysing.

alleged but items of random junk mail[5]. Of course, those working in the post-rooms recorded that the letters had been received, but not the contents. Coelum argued that the lack of awareness on the recipients' part of, for example, the section 152 notice was mere administrative inefficiency on the part of insurers.

8. Axa were then forced to pay £85,000 over to the High Court Enforcement Office pursuant to a Writ of Control obtained by Coelum Legal to keep the bailiffs at bay. The HCEO were under daily pressure to hand the money over, whereupon as Sharp LJ pointed out in the Court of Appeal, it would never have been seen again. The extraordinary conduct was brought to a halt only when Axa obtained an injunction in the High Court restraining the Coelum Legal and two men operating the scam from continuing with the proceedings, having uncovered their fraudulent activities[6].

9. The claimants' cases were ultimately struck out, with Axa subsequently seeking to recover its losses by way of a Part 20 claim in the torts of deceit and conspiracy against Coelum Legal and others, having expended considerable financial and personnel resources on defending and investigating the attempted fraud. Axa also sought exemplary damages on the basis of the serious and outrageous nature of Coelum Legal's actions. Tellingly, no defences were filed in response, and judgment was entered in favour of Axa on the deceit claims.

10. The case went before HHJ Keyser QC, sitting as High Court Judge, to assess damages. Axa sought exemplary damages against Coleum Legal on the basis of Lord Devlin's well-known words in the House of Lords decision in **Rookes v Barnard**[7]:

> "Cases in the second category[8] are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ... where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not

[5] Pizza delivery leaflets, Talk Talk and Virgin Media leaflets, even some supermarket receipts. Whatever came to hand out of the paper recycling bin no doubt.

[6] This demonstrates why involvement of regulated professionals subject to ethical codes in litigation is vital. The lack of interest from regulators was unfortunate - it was "someone else's" problem. The claims management regulators did some investigation but ultimately took no action. Axa had to spend private money to enforce fundamental principles of the regulatory framework for the civil justice system.

[7] [1964] AC 1129

[8] The first category relates to abuse of power by the state eg. False imprisonment by police officers etc and so is plainly not relevant to actions brought by insurers against common insurance criminals.

> confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay".

At First Instance

11. HHJ Keyser QC, sitting in the Wrexham District Registry, awarded compensatory damages in favour of Axa, inclusive of interest, of £25,141.47. Those damages arose from Axa's own lawyer's costs, disbursements and internal management time in defending and dealing with the four main sets of proceedings. The costs orders obtained against the non-existent claimants were of course redundant.

12. In relation to the claim for exemplary damages, HHJ Keyser QC held that such damages were not available in this scenario. His view on exemplary damages was entirely at odds with what insurers were seeking to achieve. In the judge's view, exemplary damages were only suitable for cases where there was "unreachable profit". An example would be where a newspaper published a salacious story about a pop star, knowing that many more papers would be sold but that the profits from such sales could not be confiscated by ordinary defamation damages. Another example would be a case of trespass to property, where the trespasser might make profits from say operating a business on someone else's land, but the property owner could only obtain damages for the interference with his enjoyment of the property, which might only be modest.

13. In fact, HHJ Keyser QC's views had some support in authority, which had not been explored (or even it seems referred to) in the three first instance High Court decisions where exemplary damages had been awarded in favour of insurers[9]. In **Borders (UK) Ltd v. Commissioner of Police for the Metropolis** [2005] EWCA Civ 197, the Court of Appeal had given potentially conflicting interpretations of **Rookes v. Barnard**. Sedley LJ appeared at paragraph 26 to explain exemplary damages in a way consistent with the index first instance decision:

[9] **Direct Line Group plc v Akramzadeh** (2016) (High Court, unreported); **Direct Line & ors v Suleman** (2010) (High Court, unreported); and **Hassan v Cooper** [2015] EWHC 540 (QB)

> "…the rationale of the second category of exemplary damages is, precisely, the confiscation of profits which cannot be got at through the ordinary compensatory mechanisms…"

14. HHJ Keyser QC was also concerned that Axa were seeking to utilise exemplary damages as a form of social policy and said so somewhat critically in his judgment. He disapproved and opined that applications for contempt of court and private prosecutions would be the primary tools of an insurer who required punishment.

The Appeal – exemplary justice

15. In essence, Axa argued that HHJ Keyser QC had failed to apply the correct underlying principles in the House of Lords' decision in **Rookes v. Barnard**.

16. There were 3 grounds of appeal:
    a. The decision was incompatible with decisions of general principle in the House of Lords.
    b. The judge had erred by determining that exemplary damages may only be awarded in cases in which some of the wrongdoer's gain cannot be matched by compensatory damages ie. "unreachable profits".
    c. The judge gave inappropriate weight to the availability of criminal prosecution and proceedings for contempt of court as alternatives to deter and punish those committing fraud.

17. On the first ground, Lord Justice Flaux, delivering the leading judgment of the Court of Appeal, held at paragraph 26 that the present case did fall within the second category of cases identified by Lord Devlin in **Rookes**:

> "In my judgment that criterion is clearly satisfied here, as in other similar fraudulent insurance claims which have come before the Courts where exemplary damages have been awarded. The respondents' object was to extract large sums from the insurers through fraudulent insurance claims in circumstances where if the fraud was discovered before it succeeded, any compensatory damages would be limited to the costs of investigating the fraud, which would in all probability be a much lesser sum, as proved to be the case"

18. On the second ground, Lord Justice Flaux went on to say that HHJ Keyser QC's approach that the Axa's entitlement to exemplary damages as only for "unreachable damages" was

inconsistent with the decision of the Court of Appeal in the little-known authority of **Ramzan v Brookwide**[10]**.** That was a case the author cited to the court but which had not been analysed in any High Court or county court decision dealing with exemplary damages in the insurance fraud context, though it contained important observations of wider application.

19. In respect of Sedley LJ's judgment in **Borders (UK) Ltd**[11], which may be read as being consistent with the index first instance decision, Lord Justice Flaux said:

> "I do not read Sedley LJ at [26] of his judgment in the Borders case as saying that the second category is limited to such cases of "unreachable" damages, but even if he were, the wider analysis of Rix LJ is to be preferred. It is clear from [47] of the judgment of May LJ in that case that he too did not consider that the availability of an award of exemplary damages was affected by whether the claimant could have claimed the disgorgement of the tortfeasor's profit as compensatory damages."

20. The learned Lord Justice at paragraph 29 went on to cite paragraph 43 of Rix LJ's judgment in **Borders**:

> "Exemplary damages no doubt remain a controversial topic. In my judgment, however, Kuddus indicates, if anything, that, controversial as they are, they are not to be contained in a form of straight-jacket, but can be awarded, ultimately in the interests of justice, to punish and deter outrageous conduct on the part of a defendant. As long therefore as the power to award exemplary damages remains, it is not inappropriate in a case such as this, where the claimants have been persistently and cynically targeted, that they, rather than the state, should be the beneficiaries of the court's judgment that a defendant's outrageous conduct should be marked as it has been here. They are truly victims, and, for the reasons given by Master Leslie himself, there is no question at all of the award becoming a mere windfall in their hands".

21. Approving that approach, Lord Justice Flaux went onto state at paragraph 32:

> "Applying that approach, in my judgment the present case (in which, as I have stated, the criterion which Lord Devlin identified is satisfied) is a paradigm case for the award of exemplary damages. This was a sophisticated and sustained fraud involving deceit and fraudulent misrepresentation from the outset. The accidents were faked. False documentation, such as the hire agreements and

[10] [2011] EWCA Civ 985. The first instance decision appears to have been briefly mentioned by HHJ Butler in **Hassan v. Cooper** (see footnote 9, above)

[11] See above at paragraph 13 of article

> medical reports, was created. The claimants themselves may not have existed. The third respondent conducted proceedings on the basis that it was authorised to do so as a firm of solicitors when it was not, thereby committing a criminal offence. Its conduct of those proceedings was cynical and abusive and through its dishonest manipulation and misuse of the court process, falsely representing that court documents had been served when they had not, the fraud very nearly succeeded. There is little doubt that if the respondents had managed to enforce the judgments they obtained against Axa, Axa would never have seen its money again."

22. On the third ground, Lord Justice Flaux held that the judge at first instance was wrong to give weight when determining the Axa's entitlement to exemplary damages to the fact that criminal prosecution and contempt of court proceedings could have been brought.[12] These options were not exclusive and the choice of procedure would depend on the case.

23. In light of the seriousness of the conduct of the respondents, and the need for a deterrent to those engaging in 'crash for cash' fraud which adversely affects all those in society who are policyholders, the court allowed Axa's appeal and awarded exemplary damages of £20,000 each against the first, second and third respondents, so totalling £60,000.

Commentary and Practice Points

24. As **Axa v. FCS** is a Court of Appeal authority, there is no longer any room for a reluctant Recorder or dubious Circuit Judge to say (as they have occasionally been known to do) that exemplary damages are inappropriate to the personal injury fraud context or to complain that not all authorities were cited to the High Court judges in the first instance decisions like **Direct Line v. Akramzadeh** and **Hassan v. Cooper**.

25. The measure of damages has been clarified in one important respect. As Lord Justice Flaux observed, exemplary damages should not to be calculated with reference to the profit which the fraudster would have made.[13] That is important. Just because a successful fraud would have made £100,000 does not mean that exemplary damages should make up the difference between the latter sum and say £10,000 compensatory damages. Thus, the basis on which HHJ

[12] And in terms of a CPS driven prosecution *were* brought against the third respondent
[13] Para 28, with reference to Arden LJ's speech in **Ramzan**.

Butler awarded exemplary damages in **Hassan v. Cooper** is incorrect.[14] The Court of Appeal refrained from providing a yardstick for assessment and in effect has left calculation to the good sense of first instance judges. From the author's experience in practice, one would expect exemplary damages even in a serious case ordinarily to be worth under £50,000[15]. Many county court cases involve awards in the range of £5,000 to £10,000. In the old county court decision in **Eagle Star v. Dean** (2006)[16], the Circuit Judge awarded £10,000 exemplary damages against each of 3 defendants totalling £30,000. In **Axa v. FCS**, as noted above the insurer did better obtaining £20,000 each, so totalling £60,000. It is particularly important for practitioners to heed that the Court of Appeal itself assessed the figure of £20,000 each and so this sum bears greater weight than any of the sums awarded in the number of county court decisions regularly bandied about.

26. Also, it is vital for insurers to realise that while compensatory damages will usually be awarded on a 'joint and several' basis in a typical fraud scenario (that is each fraudster will be liable for the whole of the loss), exemplary damages will usually be particular to each individual fraudster, to reflect the extent of individual culpability.

27. Exemplary damages are 'parasitic' upon compensatory damages.[17] There must be a claim in deceit[18] brought, whether by a free-standing claim or by way of counterclaim. Actual loss must be proven, and this necessity is sometimes lost sight of by insurers and their solicitors unaccustomed to proving loss as claimants.[19] Without loss, there is no tort. Without a tort, there can be no exemplary damages. Hence, specialist advice must always be sought in deceit claims to assist with presentation of evidence for compensatory loss never mind the rarefied nature of exemplary damages.

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[14] Unfortunately, it appears that HHJ Butler only had the first instance decision in **Ramzan v. Brookdale** cited to him, as the judge said that £60,000 had been awarded. In fact the Court of Appeal in **Ramzan** reduced the award from £60,000 to £20,000.

[15] In **Direct Line v. Akramzadeh,** Mr Justice Flaux (as he then was) observed that most awards of exemplary damages were worth £10,000 to £15,000 in his experience (para 18).

[16] HHJ Tetlow determining my first exemplary damages case. Case report can be provided on request.

[17] Compensatory damages are damages to remedy actual loss, no more, no less.

[18] Or conspiracy or trespass.

[19] I have seen one report of a county court case where, disturbingly, counsel for an insurer obtained an award of exemplary damages despite no compensatory damages having been proven or awarded. In addition to being obviously wrong in principle, it contravenes comments in the House of Lords' decision in another case on exemplary damages concerning misfeasance in public office: **Kuddus v. Chief Constable of Leicestershire Constabulary** [2002] 2 AC 122 (HL)

28. QOCS does not apply to claims in deceit (they are not claims where an insurer is seeking damages for personal injury). Thus, there is no need for consideration of 'fundamental dishonesty'. For deceit, the fraudster must have made a false representation with an intention of gain and have induced loss.[20] Where a claimant has dropped his claim pre-proceedings, a claim in deceit may be the most effective means of obtaining proper retribution against the fraudster. Exemplary damages mean that where the insurers' actual costs in defending the attempted fraud are relatively modest, a total sum can be sought that makes the claim worthwhile, plus the fraudster will be liable for insurers' costs in bringing the claim in deceit. That will produce a stringent if indirect financial punishment and serve the valuable purpose of deterring like-minded would-be fraudsters in the community.

29. However, as pointed out by Lord Devlin in **Rookes**, all aggravating and mitigating factors may be taken into account by the court in calculation of exemplary damages. A claim in deceit against a man of straw is unlikely to be worthwhile because (a) he cannot pay the compensatory damages (b) the fact he cannot pay compensatory damages likely means that he is so poor that exemplary damages will not be awarded even to signal the court's opprobrium.

30. Practitioners representing insurers must remain realistic and responsible. Lord Devlin warned in **Rookes** that:

> "…exemplary damages constitutes a weapon that, while it can be used in defence of liberty and… can also be used against liberty… and moreover a punishment imposed without the safeguard which the criminal law allows…"[21]

31. Thus, actions in deceit and in particular claims in exemplary damages should be reserved for truly 'outrageous' cases. They are the exception and not the rule. They are appropriate for cases that 'stand out' from the usual run of frauds, whether because of value or the character of the wrongdoing. Responsibility is required because usually the fraudster will be unrepresented and unable to assist the court. If insurers misuse the facility, then the good work done by this Court of Appeal case may be withdrawn or restricted in a later appeal.

32. The nature of Coelum Legal reminds us that claims handlers at insurance companies (and indeed hard-pressed solicitors) must be astute to check that "solicitors" acting for claimants are

[20] See for example, **Zurich Insurance v. Hayward** [2016] UKSC 48, which holds that one does not even need to believe the false representation but merely be influenced to act.
[21] **Rookes,** p1227

who they say they are. They should refuse to deal with representatives who are not regulated by the Solicitors Regulation Authority (or in rare cases by the Bar Standards Board). It is also pertinent to note that representatives who are not authorised to conduct litigation by these bodies are not entitled to costs.

33. If unauthorised representatives go on record for claimants or take steps in legal proceedings, then may be restrained from doing so by an injunction. Though not an aspect of the appeal the Court of Appeal in **AXA v. FCS** had to deal with, the case also made legal history in being the first instance of an injunction being obtained to prevent unauthorised representatives committing a contempt of court by unlawfully representing claimants in this context. It should be noted that the underlying claims do not need to be fraudulent for the purpose of obtaining an injunction. Such an application for an injunction requires specialist knowledge and experience and should not lightly be undertaken.

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Brian McCluggage was called to the Bar in 1995 and has practiced from 9 St. John Street Chambers in Manchester since 1997. He is Government "A Panel" treasury counsel and sits as an employment tribunal judge. He participated in defending many of the leading insurance fraud cases and fraud rings during the 15 years in which he specialised in this area. Though his practice now focuses upon high value personal injury claims (£500k+), he will still accept instructions on points of principle or particular difficulty in lower value insurance fraud, such as claims in deceit, applications for committal and appeals. Please contact his clerks in Manchester (0161 955 9000 and pi@9sjs.com). Brian also practices from London (www.12kbw.co.uk)