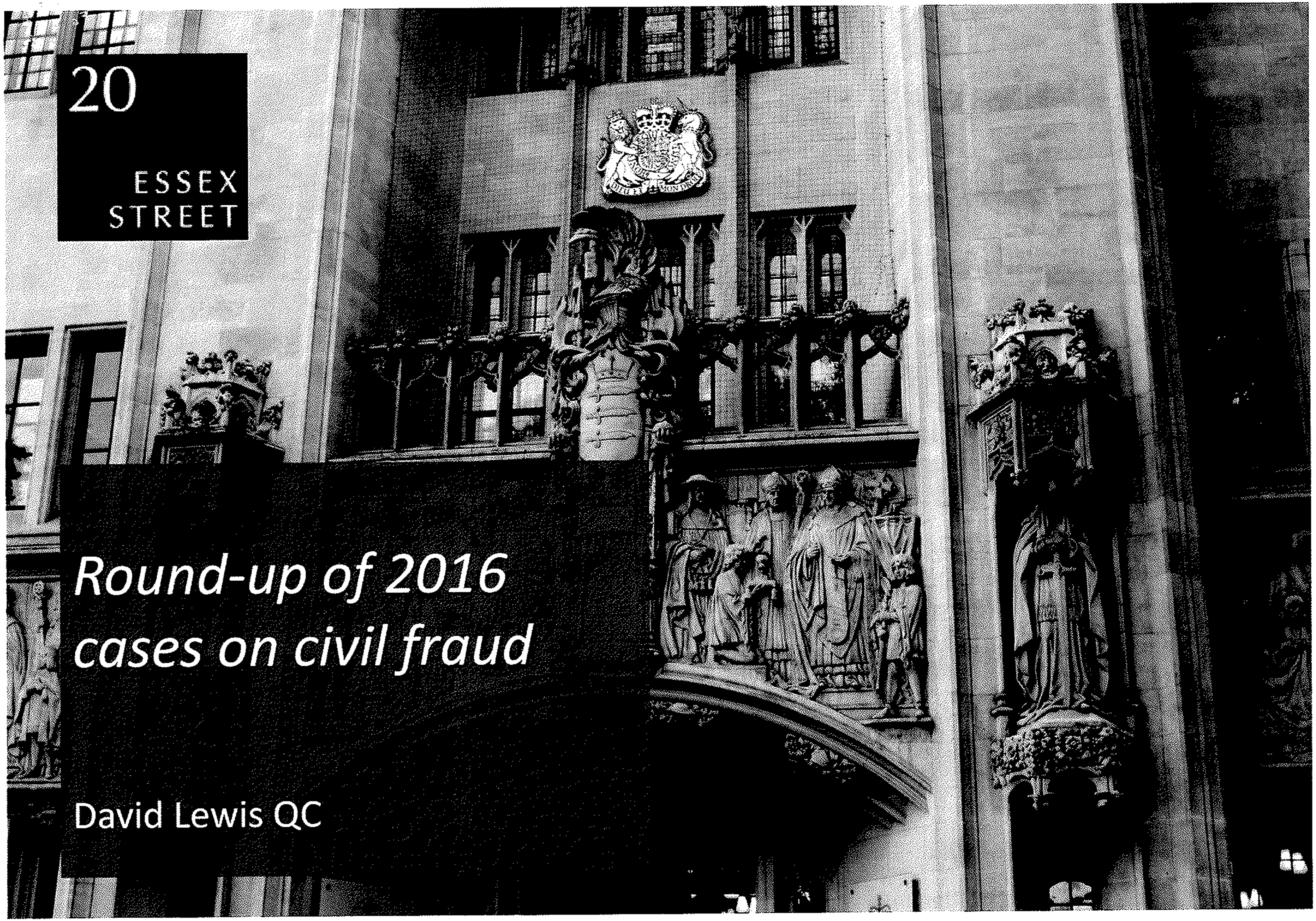
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Round-up of 2016
cases on civil fraud
David Lewis QC

Illegality defence: Patel v Mirza [2016] UKSC 42

Single biggest development on law of illegality since 1994…

- P gave M £620k to bet on a bank's share price using insider information – conspiracy to commit offence of insider dealing
- Insider information did not materialise, M did not place bet, but M instead kept money for himself
- P's claim to recover money rejected by Judge because P had to rely on his own illegality to establish it
- Appeal allowed by CoA – including by reference to *locus poenitentiae* – scheme not executed
- What did the UKSC say…

Patel v Mirza ctd.

- UKSC dismissed appeal – P's claim succeeds - brand new law on illegality – "reliance" rule from *Tinsley v Milligan* [1994] 1 AC 340 no longer to be followed
- Lords Toulson, Kerr, Wilson, Hodge and Lady Hale:
  - Two policy reasons for illegality defence: (i) not profit from own wrongdoing; mainly (ii) coherence of law, viz. integrity of legal system.
  - Whether allowing claim harmful to legal system includes considering: (a) underlying purpose of prohibition transgressed, (b) countervailing policies in favour of allowing claim, and (c) proportionality.
  - A non-exhaustive range of factors relevant: seriousness of conduct, its centrality to the contract, whether intentional, disparity in culpability.

Patel v Mirza ctd.

- The pro: allows the equities of each case to be balanced
- The cons: sufficiently put by powerful dissents of Lords Sumption, Mance and Clarke…
  - Lord Toulson's "range of factors" approach converted a legal principle into an exercise of discretion
  - It required the Court to make value judgments about the respective claims of the public interest and each of the parties; such a change was not necessary to achieve substantial justice in most cases
  - It *would* (for which read *will*) lead to complexity, uncertainty, arbitrariness and a lack of transparency

Materiality (1): Zurich v Hayward [2016] UKSC 48

- Work accident – employer's insurers suspected exaggeration
- Unable to prove suspicions, settled paying a third of his claim
- Two years post-settlement C's neighbours approach employer
- Insurers brought claim in deceit for difference between settlement and amount C would have obtained if truthful
- Judge held C had deliberately/dishonestly exaggerated injury
- Insurer awarded damages for over-payment under settlement
- CoA reversed decision because insurer had not been induced, ie. had not relied on belief C's representations true

Zurich v Hayward ctd.

- UKSC disagreed – insurers' judgment reinstated
- Inducement a question of fact so there cannot be necessary ingredient, ie. a rule of law, that representee believe representation to be true
  - In typical contractual cases, representee will only establish inducement if shows a belief misrep was true
  - Settlement agreements are different: critical question not what representee believes but what view court may take
- Can be inducement where *payor* influenced to value claim more highly because of value *Court* is likely to put on claim
- Not insurance-specific: evidence improves – revisit settlement

Materiality (2): Versloot Dredging [2016] UKSC 45

- During investigation of marine insurance claim, insured otherwise pursuing a sound claim, told a collateral lie, ie. a lie which when facts found had no relevance
- Judge and CoA had rejected claim – UKSC reversed, distinguishing three categories:
  - Whole claim fabricated – fraudulent claim rule applies/adds nothing
  - Amount of genuine claim fabricated – insurer avoids liability entirely
  - Collateral lie told, embellishing unnecessarily/irrelevantly good claim
- Policy of deterrence does not justify invalidating claim based on immaterial lie – support from general law on deceit/misrep
- Insurers may react with express “fraudulent device” clauses

Undue influence: LIA v GS [2016] EWHC 2530 (Ch.)

- LIA claims as "naïve/unsophisticated institution" to set aside 2008 synthetic derivatives with GS – latter says "buyer's remorse"
- LIA failed to establish protected relationship of trust and confidence, but also alleged a specific act of misconduct, viz. GS gifting a prestigious internship to LIA deputy chair's brother
- Unresolved legal issue as to whether improper *inducement* (cf. *threat*) can qualify as the relevant misconduct
- Rose J held it was not improper and did not influence the trades
- Cf. ongoing investigation by SEC in US – BNY Mellon has previously paid US$15m to settle US (Foreign Corrupt) Practices Act case arising from grant of internships relating to Middle East SWF

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Co-Ds (1): Kazakhstan Kagazy [2016] EWCA Civ 1036

- C companies sued Z (former Chairman) and A (former CEO) for fraudulent misappropriation of company assets
- Z filed contribution notice with his defence; A did not
- C settled with Z; A sought (i) permission for belated contribution notice adopting C's allegations against Z, and (ii) freezing order against Z
- Judge rejected - once C had settled with Z there was no case against Z which A could adopt as its alternative position if A found fraudulent
- What did CoA say...?

Kazakstan Kagazy ctd.

- CoA reversed
- A was entitled to argue at trial: (a) primary case no fraud, (b) alternatively, A and Z both fraudulent so Z liable to contribute
- Judge's decision had defeated spirit, if not letter, of Civil Liability (Contribution) Act 1978
- Although contribution claim contingent, freezer also granted
- While the court *"would never order an account between two highwaymen who successfully rob passengers crossing Bagshot Heath"*, A could end up with judgment against Z and not right that Z should be able to dissipate assets in meantime

"Co-Ds" (2): McGill v SEM [2016] EWCA Civ 1063

- Premiership footballer moved from Villa to Bolton
- Bolton paid £300k to SEM, but McGill had set up the deal
- M had previously sued player, who settled for £50k
- M sued SEM for inducing breach of contract/unlawful means conspiracy
- SEM argued settlement with player precluded claim
- Turned on whether by settling earlier action M had fixed the full measure of his loss – question of construction
- M had not done so – entitled to recover for loss of chance

Quantum: OMV v Glencore [2016] EWCA Civ 778

- Contracts for two particular types of crude oil
- Glencore instead supplied blends with false cargo documents
- Deceit damages award: full price paid less credit for value of blends
- Glencore said damages should compare yield from blends with that from the two contractual types
- Glencore's appeal dismissed - basic measure was price less benefits received on date of acquisition – *Smith New Court* applied
- Value of blends reflected a discount at that acquisition date, even if risks to which discount related did not subsequently materialise
- Glencore's approach would earn them a dishonest price

OMV v Glencore ctd.

- A couple of exam questions considered by the CoA:
- (1) Racehorse with latent defect dishonestly concealed goes on to win all its races…can buyer recover damages?
- (2) Painting dishonestly asserted as Van Dyck with no sound basis – buyer pays £10m not £1m for 17^{th} C. painting in "Van Dyck" style – it later turns out to be a Van Dyck after all…can buyer recover £9m in damages?

OMV v Glencore ctd.

- (1) Racehorse buyer has still overpaid and probably can recover difference between the price and what would have paid at time of sale if he'd know the truth

- (2) Van Dyck – unresolved – OMV argued that the £9m "windfall" should accrue to buyer but Christopher Clarke LJ unconvinced a person who says a painting is by Van Dyck must pay damages when can only say his *method* of reaching the right *conclusion* is dishonest

Procedure (1): Da Costa v Sargaco [2016] EWCA Civ 764

- Co-claimants sued for negligent damage to motorbikes
- D's insurer alleged claims were fraudulent
- Judge excluded C1 while C2 giving (first) oral evidence
- CoA held Judge wrong to do so
- Starting point that a party is entitled to be present throughout the hearing of a civil trial
- Situations in which it might be necessary/permissible to proceed without a party did not extend to a case where exclusion only to make more effective cross-examination

Procedure (2): Gentry v Miller [2016] EWCA Civ 141

- Application to set aside judgment in default alleging fraudulent claim
- Principles in *Mitchell* and *Denton* apply notwithstanding fraud allegation
- There must be finality of litigation and rules of court must be obeyed, so a default judgment cannot be set aside just because an arguable fraud is alleged
- At some point – deduced by applying *Mitchell/Denton* etc. – a party must be left to bring a fresh fraud action

Technology: predictive coding for disclosure

- There must be (1) predictive coding protocol – data set, sample size, batches, control set, reviewers, confidence level and margin of error, and (2) criteria for inclusion of documents, ie. custodians and keywords
- A representative sample is then used to “train” the software – human (ideally one) decides relevance for documents in sample set; software analyses those documents for common concepts/language; based on that “training” software reviews all documents; results validated by QC exercises; process re-run over and over

Technology: predictive coding ctd.

- *Pyrrho Investments v MWB* [2016] EWHC 256 (Ch): after de-duplication still 3.1 million emails; parties *agreed* on predictive coding; Master Matthews referred to TCC *eDisclosure Protocol* on predictive coding and leading US and Irish cases; held it promoted overriding objective

- *Brown v BCA Trading* [2016] EWHC 1464 (Ch): Respondent's proposal of predictive coding contested; Registrar Jones held that it must be the way forward, based mainly on cost savings

And for 2017...

- Increasing relevance of technology – not only for use in handling claims but also re underlying content of claims - cyber-crime, eg. man-in-middle frauds
- Large-scale corporate corruption – regulatory cross-over
  - the role of intermediaries in large transactions – eg. Panama papers-based claims re Unaoil – SFO criminal investigation
  - SWF claims against banks, eg. LIA v SocGen 2017 trial
  - Unraveling of graft generally in the O&G sector – eg. Petrobras, Saipem

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Thank You

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