Pleadings and Fundamental Dishonesty – By Andrew Wilson

Lorna Howlett (1) Justin Howlett (2) v Penelope Davies (1) Ageas Insurance Ltd (2) [2017] EWCA Civ 1696.

On 30th October 2017, the Court of Appeal finally settled whether fundamental dishonesty needs to pleaded before a Defendant can rely on CPR 44.16(1) to set aside QUOCS.

The One-Way Costs regime gives a claimant protection from an adverse costs order if the claim is unsuccessful. There are a number of exceptions that Defendants can seek to utilise if they successfully defend a claim.

The two most commonly used mechanisms are:

1. CPR 44.14 (c); if the claim is struck out and the claimant's conduct has been likely to obstruct the just disposal of the proceedings;
2. CPR 44.16(1) if the claim is fundamentally dishonest.

This case relates to the latter.

Two interesting issues were dealt with:

1. Does a defendant need to specifically plead fundamental dishonesty in order to obtain such a finding?
2. To what extent does defence counsel need to put dishonesty to a claimant before seeking such a finding?

The Background Facts

The claimants alleged that they were passengers in the first defendant's car. The first defendant allegedly crashed due to her negligence and as a result, the claimants alleged that they were injured. They thus made a claim for personal injury.

The second defendant was the first defendant's RTA insurer and was thus added to proceedings. The second defendant had significant concerns about whether the index accident occurred at all; but there was not enough evidence upon which to found a pleading of fraud: a fairly common situation encountered by insurers.

Matthew Smith of Park Square Barristers was instructed to draft the defence. The Defence specifically excluded a pleading of fraud but outlined all of the matters upon which the second defendant sought to rely in furtherance of its case to dismiss the claims. Fundamental Dishonesty was not dealt with.

Since the inception of QUOCS the civil fraud team at PSQB have been of the view that there is no requirement to plead any potential interaction with 44.16 and fundamental dishonesty in order to obtain such a finding. It is a costs issue not a trial issue. Notwithstanding our internal view, a number of claimants have sought to resist such applications on the basis that fundamental dishonesty has not been pleaded.

Although I am not aware of a decision where that submission has been specifically successful I have heard that some Judges have been put off by the lack of pleading and thus shied away from making such a finding.

The District Judge dismissed the claims. He did not believe the evidence of either claimant. It seems that their evidence was undermined during cross examination in relation to most of the pertinent facts and allegations.

It was on that basis that the District Judge acceded to the application to find fundamental dishonesty and set aside QUOCS. This was opposed by the claimants. The basis of the opposition was maintained on appeal to HHJ Blair QC and to the Court of Appeal. The bases of the appeal were:

1. Fundamental dishonesty had not been pleaded;
2. Fundamental dishonesty and/ or fraud had not been put to the claimants under cross examination.

Held by Court of Appeal:

1. A trial judge is entitled to make a finding of fundamental dishonesty in the circumstances whereby fraud has not been pleaded.
2. The honesty of the claimants had been fully explored and they had been given the opportunity to defend themselves against such allegations and findings.

Discussion

The detail of the defence is important. There are many cases and, indeed, many trials where the pleadings will play second fiddle to the written and live evidence. That does not mean that they are less important. It is always difficult to predict the potential legal implications of a case. The District Judge and the Court of Appeal scrutinised the defence; if it had been less fully drafted then the court may have made a different decision. What is important is that any issues/ facts upon which a defendant may seek to rely are included in such a defence. If credibility is likely to be an issue, then it should be pleaded.

Also scrutinised was the manner of the cross examination of the claimants. There was no transcript of the trial before the Court but it was clear from the comments of the District Judge that the claimants' honesty had been placed in issue; primarily because of the extensive defence but also by the nature of the cross examination.

Counsel for the second defendant was criticised, by the claimants, for not squarely putting that they were fundamentally dishonest. The Court concluded that that was not a requirement for a finding to be made. What was required was that the claimants had had fair notice of the challenge to their honesty. In this case this had come about firstly by the pre-trial application in relation to the defence, secondly when the District Judge said that honesty was an issue and thirdly by the extensive cross examination (whether not the words "lying" or "dishonesty" were used).

It is good practise in cross examination to explore each specific piece of evidence. If it can be shown, on balance, that the witness has given two accounts of the same occurrence (whether in a document or orally) then they should be asked whether they are telling the truth or whether they are lying about one or both of those accounts.

The Judge should then be invited to make findings on each of those small issues. Unless specifically asked to, it is unlikely that fundamental dishonesty will be dealt with in closing submissions; it is a costs issue. But if the pieces of inconsistency and/ or dishonesty add up to a finding that the claimant has not been honest and thus the claim is dismissed, the appropriate fundamental dishonesty submissions will be made.

Andrew Wilson has in-depth knowledge of all aspects of potential Road Traffic Act fraud, from low-velocity impacts (LVIs) and phantom passengers all the way to up to multi-accident fraud rings.