QUEEN SQUARE
CHAMBERS

# *An analysis of the recent Court of Appeal decision in Howlett v Davies and Ageas insurance Ltd [2017] EWCA Civ 1696*

On 30th October this year Lord Justice Newey gave the leading judgment of the Court of Appeal in this latest case that sought to clarify the exception to the general rule that a losing Claimant is not liable for the Defendant's costs in a personal Injury claim (referred to as Qualified One Way Costs Shifting or "QOCS"). As all PI practitioners will know, a major exception to the QOCS rule is where there has been a finding by the trial judge that *"the claim is found, on the balance of probabilities, to be fundamentally dishonest"* – CPR 44.16(1). If such a finding is made then the winning Defendant can seek their costs.
In this case, although there had been no pleaded defence of fraud or express pleading of fundamental dishonesty, the Court of Appel upheld the Deputy District Judge's finding of fundamental dishonesty and his award of costs against the Claimant.

## The background facts

Mrs Howlett and her son alleged that they were passengers in a car driven by the First Defendant, Ms Davies, when it struck a parked vehicle and they suffered injuries. The insurers Defence did not accept that an accident had occurred, put the Claimants to proof and asserted that credibility was in issue. It then set out 12 features which they asserted cast doubt on the credibility of the Claimant's case including that only 3 months previously they had again been in the First Defendant's car when it was involved in an accident and it asserted that the current claim was a staged accident. Importantly however it specifically stated that *"it did not assert a fraud at this stage."*

The matter was allocated to the Fast track and heard by Deputy District Judge Taylor. At the start of the trial counsel for the Claimant sought to strike out the Defence on the basis that it was equivocal and did not allege fraud. Defence counsel said he was not going to allege fraud but was going to challenge the credibility of the Claimants on the lines set out in the Defence. The application to strike out was refused and the trial went ahead.

In fact the one day trial eventually took a total of 4 days, with the DDJ giving a long oral judgment following written submission by both counsel. The claim was dismissed with the trial Judge stating at paragraph 109 of his judgment

*"….I am afraid that there is not one part of the of the stories explained to me by Mr and Mrs Howlett that gives me any confidence that the accident as described by them and Ms Davies on 27 March 2013 happened as described or at all…"*

He went on to dismiss the claim and also awarded the defendants their costs finding that the claim was "fundamentally dishonest" within CPR 44.16 and so did not have the QOCS protection.

## The basis of the appeal

The Claimants contended that it was not open to the DDJ to make a finding of "fundamental dishonesty" where:

1. dishonesty had not been pleaded let alone "fundamental dishonesty"; and
2. it had not been put to the Claimants in cross examination that they were lying
3. **The findings of the Court of Appeal**
4. The Court rejected the appeal. It recognised that the case raised the question whether a trial judge could find "fundamental dishonesty" without fraud having been alleged in the defence. It examined four authorities relied upon by the Claimants, concluding that none of them really dealt with the issue of what a defendant must plead and prove if fraud was to be suggested.
5. It found that there was no support in PD44 para 12.4, for the suggestion that for QOCS to be displaced due to fundamental dishonesty, there needed to be a pleading to that effect (just as there is no such requirement to plead a claim for indemnity costs as opposed to standard costs).
6. The mere fact that the opposing party had not alleged dishonesty or fraud in its pleadings did not prevent a judge from finding a witness to have been lying [paragraph 31]
7. Nor did such an omission in the pleadings preclude a suggestion to a witness in cross examination that they were lying [para 39] providing that the defendant had set out the facts adequately in their defence, upon which they were inviting the Court to infer that no accident (or injury) had occurred
8. There was no requirement to plead fundamental dishonesty in the defence for one-way costs shifting to be displaced on that ground [ paragraph 32]
9. The Court made it clear that *"…what ultimately matters is that a witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it"* [paragraph 39]
10. **Concluding observations**

There was no challenge to what is meant by the term, "fundamental dishonesty" for the purposes of CPR 44.16. All parties accepted (and the Court of Appeal endorsed) the meaning given to it by His Honour Judge Maloney QC in *Gosling v Hailo* (Cambridge County Court 29.4.14), which sought to distinguish between two levels of dishonesty: dishonesty that was not fundamental to the claim ie which was incidental or collateral to it, and dishonesty that went to the root of either the whole or a substantial part of the claim.

**What this case has however clarified is that dishonesty can be alleged even though fraud is not specifically pleaded in the defence.** The court were at pains to point out [para 33] that in this case the nature of the defence, setting out a list of issues casting doubt on the credibility of the Claimants, gave the Claimants sufficient notice of the

dishonesty issues that were to be raised at trial. Issues that the judge was perfectly entitled to accept. Furthermore, they were satisfied that the witnesses had been cross examined on these points in the witness box.

It is clear therefore that when a party (usually a defendant) is going to allege dishonesty they need to spell out the facts in their defence that they contend, support such an allegation AND these issues must be very clearly put to the witness in cross examination so that they have the opportunity to answer them. It will then be for the Judge to determine not only whether the Claimant has made out their case but, for the purposes of shifting QOCS, whether the Judge is satisfied that the claim was "fundamentally dishonesty"

Finally, some mention must be made of the allocation of cases of this nature. The fact that this case was listed for a single day as a fast track trial, where there was clearly going to be much legal argument and the citing of numerous authorities, might raise some eyebrows. In the end it took 4 days before a Deputy District Judge. Perhaps the parties ought to have made earlier representations about this, so that more time could have been allocated to it and, in light of the issues to be determined, consideration given to the matter being heard by a Circuit Judge or Recorder in the multi-track.

**By Christopher Taylor – November 2017**