Neutral Citation Number: [2017] EWCA Civ 1696

Case No: A2/2016/2401

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT SWINDON
HIS HONOUR JUDGE BLAIR QC
3YS19228

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2017

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEATSON
and
LORD JUSTICE NEWEY

- -

Between :

LORNA HOWLETT	**Appellant (1st Claimant)**
- and -	
JUSTIN HOWLETT	**Respondent (2nd Claimant)**
- and –	
(1) PENELOPE DAVIES **(2) AGEAS INSURANCE LIMITED**	**Respondents (Defendants)**

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Mr Darren Bartlett (instructed by **Ross Aldridge Solicitors Limited**) for the **Appellant**
Mr Tom Vonberg (instructed by **Weightmans**) for **Ageas Insurance Limited**

Hearing date : 11 October 2017

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Approved Judgment

Lord Justice Newey :

1. "Qualified one-way costs shifting" ("QOCS") was introduced following the publication of Jackson LJ's "Review of Civil Litigation Costs: Final Report". In that report, Jackson LJ recommended that after-the-event insurance premiums and conditional fee agreement success fees should no longer be recoverable from an opposing party under a costs order but that "[t]hose categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting" (paragraph 7.1(ii) of chapter 9 of the Final Report). More specifically, Jackson LJ proposed that a regime of QOCS should apply in personal injury litigation (chapter 19). By that, he meant that the claimant in such a case should "not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful" (paragraph 2.6 of the executive summary). He noted, however, that a claimant "must be at risk of some adverse costs, in order to deter (a) frivolous claims and (b) frivolous applications in the course of otherwise reasonable litigation" (paragraph 4.6 of chapter 19).

2. QOCS is now provided for in CPR 44.13 to 44.17. This appeal concerns CPR 44.16, which deals (as its heading indicates) with "Exceptions to one-way costs shifting where permission required". The key part for current purposes is CPR 44.16(1), which states:

> "Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."

3. In the present case, the trial judge, Deputy District Judge Taylor, sitting in the County Court at Portsmouth, held that the claim was "fundamentally dishonest" and so granted the second defendant, Ageas Insurance Limited ("Ageas"), permission to enforce a costs order against the claimants, Mrs Lorna Howlett and her son Justin. The Howletts appealed against that decision, but without success: their appeal was dismissed by His Honour Judge Blair QC, sitting in the County Court at Swindon. Mrs Howlett now further appeals to this Court.

The County Court proceedings

4. The Howletts brought the proceedings to recover damages for personal injuries and financial loss that they claimed to have suffered as a result of a traffic accident on 27 March 2013. It was their case that they were passengers in a car driven by the first defendant, Ms Penelope Davies, when it struck a parked vehicle and that the collision was caused by negligence on the part of Ms Davies.

5. The claim was resisted by Ageas, which was Ms Davies' insurer. Ageas' defence said that it did "not accept the index accident occurred as alleged, or at all" and required the Howletts "to strictly prove" that they "were involved in the index accident", that it was caused by negligence of Ms Davies, that they suffered injury and loss in consequence and that the accident, injury and loss were reasonably foreseeable. The relevant part of the pleading continued:

> "If, which is denied, there was an accident as alleged, [Ageas] will aver that it was a low velocity impact unlikely to cause injury with injury being unforeseeable in any event."

6. Credibility was expressly stated to be in issue, and paragraph 6 of the defence asserted that the Howletts must prove their case "on a balance of probabilities, set against the backdrop of the following facts and/or contentions":

> "(i) The Claimants [i.e. the Howletts] contend that on 27th March 2013 they were passengers in the First Defendant's vehicle when the First Defendant [i.e. Ms Davies] seems to have reversed down her drive way and into collision with a parked and unoccupied X3 belonging to a Sharon Tutton.
>
> (ii) They claim to have been injured as a result, yet the damage to the X3 was de minimus.
>
> (iii) Just 3 months prior, on 7th December 2012, the Claimants contend they were passengers in the First Defendant's vehicle and the First Defendant was involved in another road traffic accident wherein she was the at fault driver and the Claimants contend they were yet again injured.
>
> (iv) The Second Defendant [i.e. Ageas] avers that this is beyond coincidence and, instead, is indicative of a staged/contrived accident and injury.
>
> (v) This is corroborated by the fact that the Second Claimant failed to disclose this earlier accident to his medical expert.
>
> (vi) Moreover, the First Defendant has been involved in at least 4 road traffic accidents between 2011 and 2013. Again, the Second Defendant avers that this is beyond coincidence.
>
> (vii) This is also corroborated by the lack of full co-operation from the First Defendant, in particular as regards an inspection of her vehicle.
>
> (viii) The Claimants and the First Defendant give an unlikely/uncorroborated journey purpose and have given inconsistent/unlikely accounts as to injury.
>
> (ix) The locus of the purported index accident is large and unlikely to have obscured/hidden the presence of the said X3.

> (x) Despite there being damage and multiple injuries, there would appear to have been no witnesses and neither were the emergency services involved.
>
> (xi) Despite being recommended physiotherapy, the Claimants have failed to avail themselves of the same. Adverse inferences will be sought at Trial.
>
> (xii) The Claimants instructed geographically remote solicitors either before or at the same time as they sought medical advice."

7. It was stated in paragraph 2 of the defence that Ageas did "not assert a positive case of fraud at this stage", but required the Howletts "to prove their case". Paragraph 11 said:

> "Should the court find any elements of fraud to this claim, the Second Defendant will seek to reduce any damages payable to the Claimants to nil together with appropriate costs orders therein."

8. The matter was allocated to the fast track and proceeded to a trial before Deputy District Judge Taylor which, in the event, occupied four days. Mr Darren Bartlett, who appeared for the Howletts (as he did before us), and Mr Tom Vonberg, who represented Ageas (as was again the case before us), each provided the District Judge with written closing submissions in advance of the final day of the trial, at the end of which the District Judge gave a lengthy oral judgment.

9. At the start of the trial, Mr Bartlett made an application to strike out Ageas' defence. Judge Blair QC said this about the application in paragraph 7 of his judgment:

> "At the beginning of the trial an application to strike out this Defence of [Ageas] was considered by the Deputy District Judge. The claimants' counsel was essentially arguing that [Ageas] should not be allowed to sit on the fence, but instead must either plead a positive case of fraud, or must accept that the accident occurred as alleged, as a result of which consequential injuries were caused. [Ageas'] counsel argued that he was not going to allege fraud, but he would challenge the credibility of the claimants as witnesses, pursuing the lines of argument advanced in the pleaded Defence. The Deputy District Judge refused to strike out the Defence and permitted [Ageas] to conduct its case as it said it would. That is what I am told happened; counsel being careful to avoid expressly accusing the claimants of fraud."

10. Mr Bartlett argued in his written closing submissions that it was more likely than not that there had been an accident caused by the negligence of Ms Davies and that the Howletts had suffered injury. He also contended that Ageas had not pleaded a case of dishonesty or cross-examined on that basis and that the Court could not, therefore,

make findings of dishonesty. He further submitted that it would be impermissible for the Court to find that the claim was "fundamentally dishonest".

11. For his part, Mr Vonberg pulled few punches in his written closing submissions. He suggested that this was "one of those unusual cases in which both [the claimants] and [the first defendant] have actively sought in their evidence to deceive the Court into a finding that there was an accident in which [the claimants] were injured". The "overwhelming likelihood", he said, was that neither of the Howletts was in Ms Davies' car when the alleged accident occurred and that their claims were "simply opportunistic ones". "[E]very detail" about the alleged accident was, Mr Vonberg submitted, "the stuff of fantasy and liable to be shown to have been a lie". In the circumstances, the Court (so it was said) "should have no hesitation in finding that the claims are both dismissed and that there was no such accident in which they sustained injury". Further:

> "If, as anticipated, the Court finds that the [Howletts] have sought to deceive – because they were not in the car or in the alternative that they were in the car but simply did not suffer injury as alleged (although this alternative finding is unlikely …) on either account the dishonesty by them has been fundamental and they should lose the costs protection of QOCS."

12. The District Judge decided that the claim should be dismissed. He concluded (in paragraph 109 of his judgment):

> "The claim is dismissed because I do not believe the evidence of Mr and Mrs Howlett or any evidence that was sought to pray in aid of that case from Ms Davies can be relied on. In support of the description of the circumstances of the day in question, 27 March 2013, I have been told so many contrasting stories about the circumstances surrounding the accident, what led up to the accident, the accident itself, what happened after it, and then the evidence that was given by Mr and Mrs Howlett to the medical professionals (or rather not given to them) and then the misleading statements that have been made in documents that have been supplied to this court as the evidence-in-chief of the various witnesses, the reports that were made to their own solicitors about what happened in accidents, and in the oral evidence that has been given to me, that I am afraid that there is not one part 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. Consequently I find that no injury was suffered by them as a result of any accident and any claim they make in respect of damages must of course fail in addition."

13. The District Judge's judgment included these passages:

    i) In paragraph 16:

> "[Mr Bartlett] has said that [Ageas] has not pleaded a case of dishonesty, nor did he cross-examine on that basis. I have to disagree with him. In my judgment the defence (and I will go into detail in a moment) does make it clear that it is suggesting in the clearest possible terms to the claimants that they have not been honest and that a great deal of what they have written in their evidence is questionable and that those comments in the defence are justified by an analysis of the substantial documentations that has been prepared for the purposes of these proceedings";

ii) In paragraph 28:

> "In paragraph 26 of the judgment in [*Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104] it is pointed out to me that it was never the defendant's case that Vogon were opportunistic let alone dishonest. Well, in this case I find that there are allegations of dishonesty. There was no cross-examination to that effect in the *Vogon* case, it says, but clearly there was cross-examination to that effect in this case, so the claimants knew what they were facing. We are told that the judge gave no indication to Vogon's witnesses or to their counsel that he was thinking of making findings of this kind. Well, I have made it perfectly plain from the get go in this case that these are matters which I have in mind and will be considering (in other words, matters of dishonesty and exaggeration), and it is submitted that the findings, in particular the findings of dishonesty, were unfair. Well, in my judgment it is not possible to say that if I come to the conclusion that there has been dishonesty in this case that I have taken anyone by surprise and therefore there is any unfairness, I have to remind Mr Bartlett that the issue of honesty was something which he put into question in these proceedings, particularly with regard to the evidence of Lorna Howlett, because after the cross-examination of her by Mr Vonberg (and there is a question mark in my mind as to whether this is a question that arose out of the cross-examination of Mrs Howlett but I allowed it in the circumstances) he asked in re-examination, 'Has the evidence you have been giving honest?'. And she said, 'Yes, I have told the truth in my evidence'. So clearly that is an issue which is thought important for the court by the claimant to resolve having considered the evidence of all parties";

iii) In paragraphs 30-32:

> "30. I find that there has been every opportunity given to the claimants to defend themselves and to make their case as they see fit.
>
> 31. At paragraph 30 [of the *Vogon* judgment], the last sentence:

> 'More importantly, however, findings of this kind ought not to have been made when those involved have not been put on notice that they might be and have not been given the opportunity to defend themselves.'
>
> 32. Plainly that opportunity has been given to Mr Bartlett on behalf of the claimants";

iv) In paragraph 33:

> "I find that in this case the matters that are to be decided by the court will come as no surprise to either party and have been more than sufficiently pleaded and become clear to the parties as the proceedings have developed so that there is no unfairness to either the claimant nor the first defendant in any respect";

v) In paragraph 35:

> "the case put by [Ageas] has been put fairly and squarely and so that the [Howletts] might understand and answer that case being made against them";

vi) In paragraph 36:

> "[*Haringey v Hines* [2010] EWCA Civ 111] also dealt with the issue of fraud. It is not an issue I am invited to find in this case, and I will not be using that expression because the importance about the word 'fraud' is that it is a legal definition and unless it is something that is specifically pleaded, I do not believe that I have the right or the power to use it in my judgment. People may say if I come to certain conclusions in this case, 'Well, you might as well say that there has been fraudulent behaviour' but I specifically resile from using that expression in this particular case. But the important elements of that case, again, were that allegations that amounted to fraud and dishonesty and deceit were not put, they were not pleaded, but in this case, as I have found, there has been sufficient explanation and description of the allegations made in the defence and in the way the case has been conducted on behalf of [Ageas]";

vii) In paragraph 38:

> "So I specifically reject the submission made by Mr Bartlett that the defence and the way this case has been conducted on behalf of [Ageas] has been insufficiently clear to enable this court to reach the conclusions that there has been dishonesty in both the case that is put by the claimants in their documentation but also in their oral evidence, but I have not at this stage made any judgment as to whether in fact they have been dishonest and misleading in their statements";

viii) In paragraph 67:

> "Mr Bartlett on behalf of his clients had said to me that the honesty or rather the dishonesty of the claimants and perhaps the first defendant was not something that I should be deciding upon in this case because it was a matter that had not been specifically pleaded. Mr Bartlett … asked Mrs Howlett whether [she] was being honest in her evidence, and she said, 'I am not lying to this judge'. So by asking that question, despite the fact I have decided that I am able to consider the honesty of the witnesses because it is the central tenet of the job that this court has to undertake, has brought into question the issue of honesty, certainly as far as this witness is concerned, by asking that question. I am afraid I cannot agree with what Mrs Howlett said to me, that she was not lying to this judge. In my view, while she may be very confused about what she said to different people during the course of the preparation for these proceedings and giving her evidence, it is my view that she has not been telling the truth and she has been firing from the hip answering questions in a way that might benefit her case, this would but when subject to close analysis, demonstrate quite clearly that she has not been telling the truth about the circumstances of the accident or, as she alleges, any personal injury suffered by her subsequently."

14. Moving on to costs, the District Judge observed that he had "in the course of [his] judgment made it perfectly clear that there is fundamental dishonesty that has been present in this case". He explained that he was finding that both the Howletts had been dishonest and that that dishonesty was fundamental. He accordingly ordered that the claim should be "dismissed with costs".

15. The Howletts appealed against the costs order, but, as already mentioned, their appeal was dismissed by Judge Blair QC.

The meaning of "fundamental dishonesty"

16. As noted above, one-way costs shifting can be displaced if a claim is found to be "fundamentally dishonest". The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (29 April 2014). He said this in his judgment:

> "44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim

> which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
>
> 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

17. In the present case, neither counsel sought to challenge Judge Moloney QC's approach. Mr Bartlett spoke of it being common sense. I agree.

Mrs Howlett's case

18. It is Mrs Howlett's case that it was not open to the District Judge to make a finding of "fundamental dishonesty" and, hence, that he could not properly conclude that one-way costs shifting did not apply. Mr Bartlett pointed to the terms of Ageas' defence and the basis on which witnesses were cross-examined at the trial. A judge must not, he argued, make a finding of dishonesty unless such dishonesty has been both pleaded and put to the relevant witnesses. Here, he said, Ageas did not allege dishonesty in its defence and it was not put to the Howletts in cross-examination that they were lying or otherwise dishonest. Accordingly, it was not open to the District Judge either to make any finding of dishonesty in his substantive judgment or to conclude that the claim was "fundamentally dishonest" for the purposes of CPR 44.16(1). Mr Bartlett relied both on general principles and on paragraph 12.4 of Practice Direction 44, which states that, in a case to which CPR 44.16(1) applies, "the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial". That, he submitted, envisages that any allegation of "fundamental dishonesty" will have been raised in the pleadings in advance of the trial.

19. In assessing these arguments, I shall consider, first, Ageas' defence and, secondly, the oral evidence at the trial.

Ageas' defence

20. It is not, I gather, unusual for insurers to file defences comparable to that put in by Ageas in the present case in response to claims in respect of personal injuries alleged to have been caused by low-speed traffic accidents. Mr Vonberg submitted that the approach that Ageas adopted here followed the guidance given by the Court of Appeal (Brooke, Dyson and Carnwath LJJ) in *Kearsley v Klarfeld* [2005] EWCA Civ 1510. In that case, Brooke LJ, giving the judgment of the Court, said that it was "puzzled … by the practice that has started to emerge in low velocity impact litigation of requiring the defence to include a substantive allegation of fraud or fabrication"

(paragraph 41). The defendant, Brooke LJ explained, "does not have to put forward a substantive case of fraud in order to succeed" (paragraph 47): it sufficed that the defendants "set out fully the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted" (paragraph 45).

21. On the facts of that case, the defence had pleaded (in paragraph 3) that the relevant incident had occurred when the defendant's vehicle was travelling at only a few miles per hour and (in paragraph 4) that an expert had concluded, among other things, that it was "very unlikely" that the claimant had sustained injury and, hence, that the defendant's case was that "the claimant is fabricating his symptoms and … no injuries were truly sustained by him". In addition, paragraph 6 of the defence asserted that the claimant was "put to strict proof". Brooke LJ said (in paragraph 48 of the judgment):

> "So long as a defendant follows the rules set out in CPR 16.5 (as this defendant did in [paragraphs 3 and 4 of the defence]) there is no need for a substantive plea of fraud or fabrication. All that is necessary is to make clear that an assertion along the lines of what is now para 6 is based on the assertions in paras 3 and 4."

22. CPR 16.5, to which there is reference in this passage, requires a defendant to identify in his defence which of the allegations in the particulars of claim he denies and, where an allegation is denied, to "state his reasons for doing so" and, "if he intends to put forward a different version of events from that given by the claimant", to "state his own version". It can be contrasted with paragraph 8.2 of Practice Direction 16, which provides that a claimant "must specifically set out" in his particulars of claim "any allegation of fraud" on which he wishes to rely in support of his claim.

23. In *Hussain v Amin* [2012] EWCA Civ 1456, Davis LJ expressed concern (albeit obiter) about "hybrid" defences to road traffic accident claims. He said in his judgment:

> "18. I would, however, wish to add my own comments about the pleaded defence of the second defendant [i.e. the relevant insurer]. It was perfectly proper to join issue on the primary facts alleged in the Particulars of Claim and as to whether there had indeed been negligence and whether the claimed losses had been caused thereby. But the pleaded defence went much further in paragraphs 7 and 9, setting out a number of matters which, it was alleged, raised 'significant concerns' as to whether or not this had been a staged accident requiring further investigation. Possibly, although I have my reservations, such a pleading could be justified as an initial holding defence. But it is a case pleaded on insinuation, not allegation. If the second defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in

> clear and unequivocal terms and with proper particulars. Thereafter the burden of proof would of course have been on the second defendant to establish such a defence.
>
> 19. In the event, as I see it, the claimant was faced with a hybrid, he in effect being required at trial to deal with an insinuation of fraud without any express allegation to that effect pleaded. Realistically, the trial judge dealt with the matter in the round, concluding that the claim was not fabricated or fraudulent and that the accident had not been staged. But this sort of pleading should not be sanctioned."

For his part, Lord Dyson MR said (at paragraph 2):

> "Although the terms of the pleaded defence are not relevant to the issues that have been raised in this appeal, I am bound to register my concern with the way in which what in substance is an allegation of fraud was pleaded."

24. Mr Vonberg suggested four reasons for insurers being slow to include fully-fledged pleas of fraud in their defences: first, that they lack direct knowledge of the relevant events; secondly, that lawyers' professional obligations mean that they must be slow to allege fraud; thirdly, that a case is more likely to be allocated to the multi-track if fraud is asserted; and, fourthly, that a trial judge concluding that a fraud defence has not been proved is liable to find for the claimant without sufficiently considering whether he has made out his case. While the third of these points seems unattractive, the others are easier to understand. With respect to the last of them, it is perhaps worth noting that it can be seen from the decision of the Court of Appeal in *Francis v Wells* [2007] EWCA Civ 1350, [2008] RTR 13 that, whatever the position may be as regards evidential burdens, the legal burden of proof remains on the claimant even where a defendant alleges fraud. Lloyd LJ said (in paragraph 23 of his judgment):

> "There was some debate before us about the burden of proof. Clearly the burden is on the claimants to prove that the collision occurred, by the negligence of [the defendant], and that each claimant suffered damage. Unless that is proved on the balance of probability, the claim of any particular claimant cannot succeed. Even apart from the coincidence of three events involving the third claimant and Mr Senghore there would still be plenty of material on the basis of which to question the reliability of the respective claimants, though no obvious basis for saying that any of them had deliberately invented their story. The judge might dismiss a claim, even in those circumstances, as not proved on the balance of probabilities but equally he might hold that, despite a good deal of inconsistency and internal conflict, there was enough common ground between the parties to find that the case was proved. The legal burden then remains on each claimant, but with the allegation of fraud by way of defence an evidential

> burden would arise on the defendant, and a substantial burden at that."

25. The present case raises the question of whether a trial judge can find that QOCS has been displaced because of "fundamental dishonesty" without fraud having been alleged in terms in the insurer's defence. The authorities on which Mr Bartlett relied in this context included *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1, *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104, *Abbey Forwarding Ltd v Hone* [2010] EWHC 2029 (Ch) and *Haringey LBC v Hines* [2010] EWCA Civ 1111, [2011] HLR 6. To my mind, however, these decisions are of limited assistance on this part of the case.

26. The *Three Rivers* case, where the claimants alleged that the Bank of England was liable for misfeasance in public office (a tort of which bad faith is a necessary ingredient), confirms that a claimant wishing to maintain a claim that depends on a fraud having been committed must both allege it and prove it. The focus was not, as it is in the present case, on what a *defendant* must plead and prove.

27. *Vogon International Ltd v Serious Fraud Office*, a decision of the Court of Appeal, provides an illustration of the principle that (to quote from paragraph 29 of May LJ's judgment):

> "It is … elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."

The case is, however, readily distinguishable from the present one on the facts. In *Vogon*, the trial judge had found the claimants to have been guilty of "an opportunistic attempt to exploit the perceived commercial naivety of the [defendants]" (paragraph 24) even though such observations were "entirely unnecessary to any decision that the judge had to reach" and (paragraph 26):

> "It was never the defendants' case that [the claimants] were opportunistic, let alone dishonest. There was no cross-examination to this effect. We were told that the judge gave no indication to [the claimants'] witnesses or to their counsel that he was thinking of making findings of this kind."

The Court of Appeal thus did not need to, and did not, enter into a discussion of what a defence must contain if fraud is to be suggested.

28. In *Abbey Forwarding Ltd v Hone* [2010] EWHC 2029 (Ch), where the claimant alleged that certain defendants had been dishonestly complicit in excise diversion frauds, Lewison J (as he then was) noted that "before a finding of dishonesty can be made it must not only be pleaded, but also put in cross-examination" (paragraph 47) and, as regards one of these defendants, that "it was not put to [him] that he knew or suspected that the underlying transactions were fraudulent; with the result that a

finding to that effect is not open to me" (paragraph 185). The Court was not, therefore, addressing the question of what a *defence* must contain.

29. In *Haringey LBC v Hines*, the particulars of claim alleged deceit, but the deceit case was not put to Ms Hines when she gave evidence: counsel "never grasped the critical nettle when cross-examining Ms Hines and the judge failed to grasp it when making his judgment" (to quote from Rimer LJ, at paragraph 41). The case turned, not on the pleadings, but on the "basic principle of fairness that if a party is being accused of fraud, and is then called as a witness, the particular fraud alleged should be put specifically to that party so that he/she may answer it" (paragraph 39).

30. Nor, as it seems to me, does paragraph 12.4 of Practice Direction 44 take things any further forward in the present context. As already mentioned, that states that the Court "will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at trial". I do not think this means that, for one-way costs shifting to be displaced because of fundamental dishonesty, there need have been a pleading to that effect in the defence. The point of the provision is, I think, to indicate that such issues should generally be decided at the trial rather than some other stage, not to impose any pleading requirement. Paragraph 12.4 of Practice Direction 44 can be contrasted with paragraph 5.2 of Practice Direction 46, which provides:

> "In general, applications for wasted costs are best left until after the end of the trial."

31. Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the Court. However, the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley v Klarfeld*, has denied a claim without putting forward a substantive case of fraud but setting out "the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted", it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence.

32. Further, I do not think an insurer need necessarily have alleged in its defence that the claim was "fundamentally dishonest" for one-way costs shifting to be displaced on that ground. Where findings properly made in the trial judge's judgment on the substantive claim warrant the conclusion that it was "fundamentally dishonest", an insurer can, I think, invoke CPR 44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings. To my mind, there is force in Judge Blair QC's comment (in paragraph 54 of his judgment):

> "I observe that one does not have to plead a claim for an award of costs on the indemnity basis (as opposed to the standard basis), so why would one have to expressly plead this more remote stage of the costs determination exercise, namely for an order for the enforcement of an adverse costs order?"

33. Turning to the facts of the present case, Ageas' defence, while eschewing "a positive case of fraud at this stage", adverted to the possibility of the Court finding "elements of fraud to this claim"; expressly stated that Ageas did "not accept the index accident occurred as alleged, or at all", that it was denied that "there was an accident as alleged", that credibility was in issue and that the Howletts were required to "strictly prove" the matters specified in paragraph 7; and listed in paragraph 6 various matters casting doubt on the claim, including facts that were stated in terms to be "beyond mere coincidence and, instead, … indicative of a staged/contrived accident and injury". In my view, this pleading gave the Howletts sufficient notice of the points that Ageas intended to raise at the trial and the possibility that the judge would arrive at the conclusions he ultimately did. The Howletts cannot, in the circumstances, fairly suggest that they were ambushed. Assuming, moreover, that the views that the judge expressed in his substantive judgment are not open to objection because of how matters were put (or not put) to witnesses in cross-examination (which I shall consider in a moment), it was proper for Ageas to contend, and the District Judge to hold, that the findings made in the judgment showed the claim to be "fundamentally dishonest" within the meaning of CPR 44.16(1).

The oral evidence at the trial

34. The passages I have cited from the *Abbey Forwarding* and *Haringey* cases include references to the need to put an allegation of dishonesty to a witness. These reflect the somewhat obscurely reported decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67. As was noted in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31 (at paragraph 58), *Browne v Dunn* has been cited for this proposition:

> "Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."

35. In *Markem Corp v Zipher Ltd*, the Court of Appeal cited from *Browne v Dunn* via an Australian decision, *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607. In that latter case, Hunt J said this about, for example, Lord Herschell LC's speech in *Browne v Dunn*:

> "Lord Herschell LC said (at 70–71): 'Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for

> him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.
>
> His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is 'perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling'. His speech continued (at 72): 'All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.'"

36. In the present case, Mr Bartlett argued that the Howletts were not cross-examined at the trial on the basis that their claim was dishonest or even that there were dishonest aspects to it. Accordingly, so Mr Bartlett said, the District Judge was not entitled to make any finding of dishonesty in his substantive judgment, let alone to hold that the claim was "fundamentally dishonest". Mr Bartlett accepted that Mr Vonberg had put inconsistencies to the Howletts in cross-examination and, more specifically, put to them matters mentioned in the various sub-paragraphs of paragraph 6 of Ageas' defence, but he maintained that that was not good enough.

37. For his part, Mr Vonberg accepted that he had not used the words "fraud" or "dishonest" when cross-examining the Howletts, but said that that was not necessary in the context. His recollection was that he had said things like "This is not true" to the Howletts, and he suggested that it was patently clear at the time that he was putting in issue the Howletts' honesty, not just their credibility. He submitted, too, that he had not been obliged to use any particular verbal formulation: what mattered was that it was evident in the context that he was challenging the Howletts' veracity. Mr Vonberg further placed reliance on the fact that Mrs Howlett was asked in re-examination whether the evidence she had been giving had been honest.

38. No transcript of the trial is available. That being so, we must, I think, look to the District Judge's judgment to assess whether the honesty of the Howletts' evidence and case was adequately explored during the oral evidence. In the light of the passages from the judgment quoted in paragraph 13 above, the correct inference is, it seems to me, that it was. Thus, the District Judge, as well as referring to the re-examination question (paragraph 13(ii) and (viii)), said, for example, that he disagreed with the suggestion that Ageas had not pleaded a case of dishonesty or cross-examined on that basis; that there had been cross-examination to the effect that there had been dishonesty, "so that the claimants knew what they were facing"; that he had himself made it "perfectly plain from the get go" that he would be considering matters of

dishonesty and exaggeration; that every opportunity had been given to the Howletts to defend themselves; that the matters to be decided would come as no surprise to either party; that Ageas' case had been "put fairly and squarely and so that the [Howletts] might understand and answer that case being made against them"; and that there had been sufficient explanation and description of the allegations made in the defence and the way the case had been conducted on behalf of Ageas.

39. It is perhaps worth adding two comments. First, where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide. Secondly, the fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying. That must, in fact, be a common occurrence.

Conclusion

40. I would dismiss the appeal. I agree with Judge Blair QC that the District Judge was entitled to find that the claim was "fundamentally dishonest" and, hence, that CPR 44.16(1) applied. The relevant points were, as it seems to me, adequately foreshadowed in Ageas' defence and sufficiently explored during the oral evidence.

Lord Justice Beatson :

41. I agree.

Lord Justice Lewison :

42. I also agree.