Non-Party Costs Orders

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Civil Fraud Update

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Jurisdiction & Procedure

Section 51(3) Senior Courts Act 1981

The court shall have full power to determine by whom and to what extent the costs are to be paid."

Procedure

CPR 46.2(1)

Dymocks Franchise Systems (NSW) Pty v *Todd*

[2004] UKPC 39, [2004] 1 WLR 2807

'exceptional' case is whether in all circumstances it is just to make the order …. fact specific jurisdiction…. different considerations in play…

Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice would ordinarily require that, if proceedings fail, he will pay the successful party's costs'

Deutsche Bank AG v Sebastian Holdings Inc & oth [2016] EWCA

"As Lord Brown observed in Dymocks, whether it is appropriate to exercise the jurisdiction to make an order for costs against a third party depends on the particular facts of the case, but in a case where the court is satisfied that the third party is effectively controlling the litigation, supporting it, whether ***financially or by giving evidence, and is doing so with a view to obtaining a personal benefit of some kind if it is successful****, it will usually be entitled to regard him as the real party to the action. If that is the case, it will normally provide strong grounds for making an order that the third party bear some or all of the other side's costs if the litigation is unsuccessful."*

Travelers Insurance Company Ltd v XYZ [2019] UKSC 48

Caused costs incurred

NPCOs and Credit Hire Claims

Farrell v Direct Accident management Services Ltd [2009]

CPR 44.16

The Costs Practice Direction then provides (para 12.2)

Select Car rentals (NW) Ltd v Esure Ins. [2017] EWHC 1434 (QB)

On-Hire Ltd v Smithson (handed down 20.5.22) Newcastle CC

An insurer v A CHO, Wakefield County Court, 17.8.22

Rehabilitation Fraud and NPCOs

Elvidge v Covea Insurance [2021] 1WLUK 576
Skipton CC Judgment 15.1.21; NPCO 11.8.21

"…. a very clear message to be sent to anyone presenting a fraudulent invoice, who can expect to receive an adverse costs order against them …"

1 CHANCERY LANE

Two themes

- 'Adequate warning'

: *Howlett, Mustard, Jenkinson*

- 'Substantial injustice'

: *SInfield, Iddon, Woodger*

ADEQUATE NOTICE

- Procedural fairness
- Claimants must be given ‘adequate notice’ / ‘adequate warning’ of an allegation of FD, otherwise finding can’t be made and QOCS won’t be dislodged by CPR 44.16
- What do Defendants need to do?

Howlett & anor v Davies & anor [2018] 1 WLR 948

- RTA PI claims, first instance FD, appealed on basis FD not pleaded, Court of Appeal dismissed appeal
- The Defence
  - stated that Def did "not assert a positive case of fraud at this stage"
  - did not accept the accident had occurred as alleged or at all
  - raised a number of suspicious problems with C's case i.e. "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" (per Newey LJ)
  - expressly stated credibility was in issue
  - stated that if any elements of fraud were found it would seek to reduce damages payable and seek appropriate costs order

Howlett….

- Court of Appeal upheld FD
- "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 a conclusion that a claim had been fundamentally dishonest"

  1) Was sufficient notice given in advance of trial?

  2) Were the relevant points sufficiently explored during oral evidence?

Mustard v Flower & ors [2021] EWHC 846 (QB)

- Contingent/provisional pleas of FD
- Master Davison
- Defendant applied to amend its Defence to a PI claim to include the following paragraph:

"4.4 The Claimant's accounts of the RTA and its immediate aftermath, and the nature and severity of her symptoms both before and after the accident have varied over time, are unreliable and are in issue. They have been exaggerated (or in the case of her pre-RTA history minimised) either consciously or unconsciously – the Third Defendant cannot say which absent exploring the issues at trial. In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate."

Mustard….

“Mr Audland QC's response to this was that the defendant was not making a "positive averment of dishonesty" but was simply alerting the claimant to the nature of its case at trial. It intended to explore in cross-examination whether the claimant was consciously exaggerating her symptoms for gain and, if appropriate, make an application under section 57. The contentious areas of her evidence had been identified; the detail was for cross-examination. Prior to that, the defendant was "not sure" whether any exaggeration was conscious or unconscious. The purpose of the amendment was to ensure that the claimant was not being "ambushed”.”

: “… provisional plea proposed is simply giving the claimant fair warning that the defendant may, if the evidence turns out a certain way, make an application under section 57 “

Mustard…

- Master Davison refused the application (it didn't cut the mustard):

1) The proposed amendment serves no purpose. The ability to make the application under s57 can be made without it having been foreshadowed in a pleading. It is not a "right" which can be reserved.

2) At present on the evidence a plea of FD has no real prospects of success.

3) It causes prejudice to the Claimant. An FD plea has to reported to C's legal expenses insurers and opens up a theoretical possibility of them avoiding the policy ab initio. Added burden of admin and costs. Causes further fears and anxieties.

Mustard…

…. “24. I emphasise that nothing in the foregoing is intended to detract from the modern "cards on the table" approach. Where the defendant does have a proper basis for a plea of fundamental dishonesty and intends to apply under section 57 , then, subject to the direction of the judge dealing with case management or the trial judge, that should ordinarily be set out in a statement of case or a written application and that should be done at the earliest reasonable opportunity. What I am intending to discourage are pleas of fundamental dishonesty which are merely speculative or contingent.”

Jenkinson v Robertson [2022] EWHC 756 (Admin)

- Recent high court guidance (Choudhury J)
- D raised FD for the first time at trial, not having previously given express notice of its intention to do so. Its pleaded case merely put the Claimant to proof on the injuries and symptoms. However in correspondence D had asserted that the claim was “exaggerated” and “unreasonable”.
- Correspondence asserting that the claim was “exaggerated” and “unreasonable” and referring to s.57 does not constitute sufficient notice.

Jenkinson…

- Not enough just to put to C in cross-examination at trial that he had not been suffering from the pain alleged at the points in time that he claimed he was
- “A vague and deliberately unparticularised allusion to the possibility of a s.57 application” did not suffice
- The fact that the Claimant is a litigant in person is a factor to be taken into account in assessing adequacy of notice

Jenkinson… useful guidance:

"It is clear from these authorities that in an application under s.57 of the 2015 Act:

i) The burden is on the defendant to establish on the balance of probabilities that the claimant has been fundamentally dishonest;

ii) An act is fundamentally dishonest if it goes to the heart of or the root of the claim or a substantial part of the claim;

iii) To be fundamentally dishonest, the dishonesty must be such as to have a substantial effect on the presentation of the claim in a way which potentially adversely affects the defendant in a significant way

iv) Honesty is to be assessed by reference to the two-stage test established by the Supreme Court in Genting;

v) An allegation of fundamental dishonesty does not necessarily have to be pleaded, the key question being whether the claimant had been given adequate warning of the matters being relied upon in support of the allegation and a proper opportunity to address those matters.

vi) The s.57 defence can be raised at a late stage, even as late as in closing submissions. However, where the claimant is a litigant in person, the Court will ordinarily seek to ensure that the allegation is clearly understood (usually by requiring it to be set out in writing) and that adequate time is afforded to the litigant in person to consider the defence."

If you're really keen…

Also worth reading *Pinkus v Direct Line* [2018] EWHC 1671

: did the claimant have "sufficient notice" of the issues raised and the opportunity to deal with those issues by way of additional evidence, if necessary, including from his experts?

Section 57 - Substantial injustice

- Section 57(2): “The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.”
- Established now that the mere loss of the damages to which C is genuinely entitled does not satisfy (*Sinfield*)

Steven Lee Woodger v Reece Hallas [2022] EWHC 1561 (QB)

- High Court: Mr Justice Knowles
- Reiterated that "Substantial injustice" had to mean more than the claimant losing damages to which they were genuinely entitled
- The care provided by third parties should not feature in the assessment because section 57(2) makes clear that it has to be the Claimant personally who would suffer the injustice.
- Applied *Iddon*

Iddon v Warner [2021] EWHC 587 (QB).

- Clin neg claim for missed diagnosis of breast cancer: valued by C at c£1m
- C said pain from accident left her unable to run or swim
- Social media evidence of her taking part in endurance runs and swims
- Upon D disclosing evidence, C attempted to explain… the cannabis defence
- The only way she was able to take part was by using cannabis oil, and if she admitted to participating in these events then she'd have to explain her secret

Iddon…

- C admitted recruiting her husband and friend into supporting her dishonest account
- In C's supplementary statement the part dealing with her previous statement was headed "omissions and lies" (not a great start…)
- HHJ Sephton QC (sitting as a High Court Judge) valued the genuine part of the claim as c£70k
- FD finding made, so assessment turned to whether dismissal would lead to SI…

Iddon…

- C raised a number of arguments:

1) She had apologised for her dishonesty and shown remorse

2) If the claim is dismissed C won't be able to obtain the therapy she needs

3) A tortfeasor will escape a liability that is rightfully hers

4) C used interim payments to purchase her current home, which she'd have to sell

Iddon….

- All four arguments were dismissed:

1) Her apology was not a genuine one. It was only offered because she had been caught out, and she did not actually provide a truly honest account. Rather she simply substituted a dishonest account with another dishonest account

2) & 3) Being unable to afford the therapies, and D not having to pay damages, are "inevitable corollaries of the operation of the statute"

4) "… any claimant who receives an interim payment runs the risk that the court will exercise the power to order repayment… does not have a defence to an order to repay merely because he has changed his position"

Iddon…

The Judge in *Iddon* performed what was described by Knowles J in *Woodger* as a "balancing exercise":

"103. I regard Mrs Iddon's dishonesty in this case to be very grave. She lied repeatedly about her injuries, she continued to lie after she had been found out and, most seriously, she persuaded others to lie on her behalf. In my judgment, the culpability and extent of her dishonesty far outweighs any injustice to her in dismissing her claim; the dismissal of this claim seems to me to be exactly the evil to which Parliament directed its mind in enacting section 57 . I do not believe that she would suffer substantial injustice if her claim were dismissed."

Is this the correct approach?

Iddon…

Para 96 quotes a useful summary of Moses LJ in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) about the "toxic effects of dishonest claims".

Thank you for listening

Farewell 1CL, hello Deka

Next webinar: 6th October 12pm
"Consent in Clinical Negligence Claims"
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