Fundamental dishonesty and wasted costs: *Williams-Henry v Associated British Ports* [2024] EWHC 2415 (KB)

Do claimant lawyers who continue to act on a CFA after the defendant serves evidence of fundamental dishonesty thereby expose themselves to a wasted costs order? No, according to Ritchie J in a judgment which also reminds practitioners that applications for wasted costs must be focussed, demonstrate causation, and capable of being dealt with proportionately.

Facts: The PI case

C fell off Aberavon Pier in Port Talbot on 21 July 2018 and suffered a moderately-severe brain injury, a skull fracture, mildly reduced hearing in her left ear and various minor fractures and abrasions. C sued D, the owner/occupier of the pier. Liability was admitted in part and the trial proceeded on quantum only. C showed a remarkable recovery and in January 2019, a neuro-psychological assessment noted that C's intellectual abilities, memory and cognition were undamaged. She returned to work, received excellent feedback in her annual performance reviews, had an active social life and went on various holidays including a hen-do to Benidorm. In C's witness statement, however, she stated that she had "*no nights out, no holidays and no social life*". She also claimed disability benefits (PIP) on the basis, inter alia, that she was deaf in her left ear and could not prepare meals, dress herself or walk further than 50 metres. D advanced a case of fundamental dishonesty , relying on evidence including video surveillance, social media and employment and DWP records.

The Court found that C had been "*thoroughly dishonest*" in her presentation of her symptoms and disabilities and had "*sought to mislead clinicians, medico-legal experts and this Court about [her] health, functioning, activities of daily living and her work abilities*". The Court therefore had to dismiss the whole claim, pursuant to section 57 of the Criminal Justice and Courts Act 2015, including any honest elements of the claim unless C would thereby suffer substantial injustice. Of the approximately £2.3 million claim, Ritchie J held that just under £600,000 worth of the claimed damages were "honest" but that the remainder was fundamentally dishonest and dismissing the claim would not cause substantial injustice. The claim was dismissed with costs against C unenforceable against her up to the level of the assessed "honest" damages. D recovered no costs from C and C's solicitors, HJ, will not be paid for their work.

The Wasted Costs Application

Unable to enforce their order for costs against C, D pursued a wasted costs order against HJ under CPR r.46.8. The parties agreed that this was a 'stage 1' hearing and so the question was whether D had established prima facie grounds for such an order, i.e. that:

a) HJ has acted improperly, unreasonably or negligently;
b) HJ's conduct has caused D to incur unnecessary costs, or has meant that costs incurred by D prior to the improper, unreasonable or negligent act or omission have been wasted;
c) it is just in all the circumstances to order HJ to compensate D for the whole or part of those costs.[1]

The application was advanced on various grounds of alleged unreasonableness or negligence, but for which D asserted the case would have been settled or C's retainer terminated, avoiding the trial and associated costs. Most significantly:

- Failure to provide standard disclosure – it was claimed that C's social media accounts which revealed the fundamental dishonesty ought to have formed part of standard disclosure. Ritchie J held that standard disclosure does not normally include social media accounts unless dishonesty is in issue (when D did later raise dishonesty, HJ had worked hard to meet its disclosure requests); solicitors cannot be expected to trawl through their client's entire social media to identify relevant material. HJ's conduct on this front was therefore not unreasonable (para.38, 48).

- Drafting and/or allowing C to sign a witness statement containing the assertion that she had "*no nights out, no holidays and no social life*" when there were documents in HJ's possession demonstrating that C had in fact been to Benidorm before she signed the statement (para.24). Ritchie J considered this was "*poor practice and prima facie unreasonable or negligent",* but it was not clear how this alone could have caused any wasted costs as C had also lied to medical experts and on DWP forms; rather, the statement gave D "*a large stick with which to beat the Claimant*" (para.40, 44, 52).

- Approach to settlement – D asserted that HJ should have advised their client to settle and been more engaged in ADR. However, as C had not waived privilege, HJ was given the full benefit of

[1] CPR PD 46 5.5

the doubt and it was assumed that they had acted on instructions when rejecting offers and that their advice was not improper, unreasonable or negligent (para. 39, 50).

- Finally, D alleged that HJ ought to have terminated their retainer when it became apparent that C had been dishonest and that the continued CFA funding amounted to "maintenance" of the claim. Ritchie J rejected these arguments. The fact that HJ continued to act under a CFA did not displace the principle that a lawyer is not liable for running a 'hopeless case' where the client's instructions are to proceed (para.51). And C's case was not hopeless. Liability was admitted and she had some genuine injuries; the "honest damages" assessed at trial exceeded D's valuation of the claim. She also had a clearly arguable point on substantial injustice. CFA funding actually increased pressure on solicitors to terminate retainers where dishonesty became an issue and HJ's decision not to "dump" C in these circumstances spoke to their "*humanity and bravery*, *not of their negligence or unreasonableness"* (para.45, 51).

As well as failing to establish a prima facie case of unreasonableness or negligence that caused wasted costs, the presentation of the application was relevant to Ritchie J's decision. First, the allegations were wide-ranging and insufficiently particularised, such that Ritchie J considered they probably did not fall within the summary jurisdiction of wasted cost orders (para.22, 37, 41). Secondly, D failed to identify the time period or amount of costs claimed, even in oral submissions. The amount of costs claimed was relevant to proportionality; absent particularisation from D, Ritchie J estimated the costs sought were up to £300,000 and that the total costs of the application might amount to £200,000 if it proceeded to the second stage (para.34, 54-56). In the circumstances, Ritchie J found that an order to proceed to a second stage hearing was not evidentially supported, appropriate, proportionate or just (para.56).

Conclusion

Williams-Henry supports the maxim that lawyers are not their clients, and not to be punished because the client is found to have told lies or had a hopeless case. This applies equally to the lawyer who continues to act on a CFA after fundamental dishonesty is alleged. *Williams-Henry* demonstrates that such lawyers should not be vulnerable to a wasted costs order just because they continue to act in a case which is not settled and then fails at a trial where fundamental dishonesty is established. It also emphasises the importance of access to justice and the undesirability of claimants' lawyers being put under undue pressure to terminate their retainers where fundamental dishonesty is in issue. However, lawyers must not present evidence or indeed a pleaded case which they know to be untrue. The possibility that their conduct may be challenged, by way of an application for wasted costs or

otherwise, is likely to be heightened in such a case and claimants' lawyers would be well advised to take all possible care to try and ensure that obvious untruths in the presentation of the case are avoided. At the same time, whilst "negligent" – in the realm of wasted costs – means failing to act with reasonable competence, this is not an invitation to make broad professional-negligence-type allegations against the other side's lawyers. Such allegations cannot be proportionately investigated and (unlike in a professional negligence claim) the evidence required to particularise and substantiate them will normally remain hidden behind the veil of privilege.

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