THE COUNTY COURT AT BRADFORD

Claim No. A28YP882

Exchange Square
Drake Street
Bradford

Friday, 15th January 2016

Before:

HIS HONOUR JUDGE GOSNELL

Between:

WAYNE ROUSE

Claimant

-v-

AVIVA INSURANCE LIMITED

Defendant

Counsel for the Claimant: MISS SHAW

Counsel for the Defendant: MR. BOYD MORWOOD

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE JUDGE: This appeal is brought by Aviva Insurance in proceedings brought by Wayne Rouse. The appeal is brought against the decision of the late District Judge Edwards who dealt with an application and then provided a reserved judgment dated 28th August 2015. This was sent to the parties by e-mail shortly after the hearing took place and no order was actually, I think, drawn up as a consequence of that decision. I am going to deal, very briefly, with the nature of the application which came before the Judge and his decision in relation to it.

2. Mr Rouse had commenced proceedings against Aviva Insurance who were the insurer of the driver of a motor vehicle. The historical background to the case is somewhat unusual. There was an accident which occurred on 12th October 2011 when the claimant was a passenger in a friend's vehicle. They were driving behind a Ford Focus. The claimant's case was that as they drove along the A59 road a bird cage which had been strapped to the Ford Focus broke apart and struck the vehicle in which the claimant was travelling. He suffered soft tissue injuries as a result which, I think, occupied him for about four months. The defendant perhaps understandably took a fairly jaundiced view of this claim given the circumstances and investigated it fully. Not only did the driver of the ford focus which the Defendant insured give a statement that the birdcage had not fallen off his vehicle nor had any constituent parts fallen off it but also that he was prepared to argue that a friend had followed him to the auction he was travelling to and that, therefore, the claimant could not have been behind his vehicle at the relevant time.

3. This, I think, was fixed for trial and either two or three days before trial the claimant discontinued his claim. The defendant's jaundiced view of the case continued, obviously, to be reinforced in the light of that decision by the claimant's decision to discontinue and, as a consequence, the defendant made an application to the court for a finding of fundamental dishonesty against the claimant. The application is dated 22nd June 2015 and the order that was sought was for a finding of the claimant's fundamental dishonesty pursuant to CPR 44.16 so the defendant's costs could be enforced against the claimant. The application stated:

> "It is anticipated that before making this order the court will want to hear from the parties, therefore, the initial order sought is the parties to file availability within 14 days, matter to be listed for a hearing in person with attendance of the parties with an ELH of 3 hours."

Therefore, when the application was issued it was clear that the defendant was envisaging that the first hearing would be some sort of directions hearing and then there would be a subsequent hearing at which witnesses would attend and the court would make a finding as to whether the case was fundamentally dishonest. I have the benefit of a transcript of the hearing which took place on 27th August 2015 at which both parties were represented by the same counsel who appear before me today; Mr Morwood for the defendant and Miss Shaw for the claimant. The position as put forward by Miss Shaw at the hearing was that really there was nothing in the application for fundamental dishonesty; that it was a weak application; that it should be dealt with on paper and dismissed. Mr Morwood's position was, initially, perhaps somewhat neutral in relation to whether it should be done on paper or at a hearing, pointing out that it was a matter for the Judge's discretion. However, in more detailed submissions and discussions which took place throughout the hearing, I think it is fair to say that the

thrust of his submissions was that it would be difficult to reach conclusions as to whether the claimant was, indeed, fundamentally dishonest without hearing the witnesses and so I think it is fair to say that although his initial position – and I think his position throughout – was that the Judge had a discretion as to the procedure to be adopted, his preference was for there to be a hearing at which evidence was taken so that the Judge could make a proper finding. It is fair to say that during the course of the hearing, whilst both counsel were addressing the Judge and he was contributing, that the Judge was leaning towards a hearing being required. I say this because at one point he says in reference to the previous decision of His Honour Judge Maloney in *Gosling v Screwfix* where there had been surveillance evidence undermining the claimant's case, he said:

> "The problem with this case is that there is no smoking gun, as it were, such as that surveillance video. There is no to use an improper expression; the American phrase is 'slam/dunk.' The problem is that the claimant says he suffered an injury and he suffered it as a part of the cage falling off the defendant's vehicle."

Further down, on the same page:

> "I cannot see how it could come to some conclusion as to whether that is fundamentally dishonest or not without hearing evidence."

He also spoke later in the discussions about there clearly being a triable issue in respect of liability. However, he was already expressing some concerns when he said:

> "The problem is this: Miss Shaw's argument that it cannot have been anyone's intention but it does appear to be the effect when amending the Rules that a case which is discontinued nevertheless goes on to be tried."

He expressed at the end of the hearing the fact that he needed to do a reserved judgment and did not have time to deal with it there and then which was obviously sensible. In his judgment he thoroughly dealt with the issues and also the Rules which were relevant.

He asked himself two questions of principle at paragraph 3 of his judgment:

> "3.1 Can (and if so should) the court require a claimant to give an explanation for the discontinuance of the claim. If the claimant does not offer an explanation can the court be invited to draw and adverse inference?
>
> 3.2 To what extent should the court explore the evidence beyond that immediately before it when considering applications relating to qualified one-way cost shifting?

He then deals with the facts of the case and the fact that it is a new area of law. He addresses the fact that:

> "The claimant was taken ill shortly before the date of hearing of the application and was in hospital today."

He outlined the fact that Miss Shaw pressed the court to deal with the matter in his absence and that the defendant's counsel was in favour of a hearing being listed on a

subsequent occasion. He then turned to the relevant law and the starting point is Civil Procedure Rule 38.6(1) which states:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs of the defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

He then set out the qualified one-way costs shifting provisions in Rules 44.13 and Rule 44.14. I should perhaps deal with 44.14 which says:

> "Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

He then dealt with the exception in 44.16 which is:

> "Orders for costs made against a 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."

He then dealt with the Practice Direction under Part 44 in the part which is set out at 44PD12 and it is 12.4(c). It says:

> "Where the claimant has served a Notice of Discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest, be determined notwithstanding that the notice has not been set aside pursuant to Rule 38.4."

Therefore, it seems to me all the relevant Rules are there set out in the judgment and that really sets out the background that in circumstances where the qualified one-way costs shifting applies, if the claimant discontinues and if no other order is made, although the claimant, technically, is liable for the defendant's costs, because the claimant has recovered no damages they cannot be set-off and so the defendant receives no costs. This is, no doubt, the reason why the defendant in this and in other cases has applied for an order that the claim is certified to be fundamentally dishonest because that was the exception to the rule which would enable the defendant to recover their costs.

4. The Judge then goes on with his analysis and I am going to deal with just a few parts of his judgment because I need to perform a similar sort of analysis myself on appeal. He says:

> "I am satisfied that if it was intended that the introduction of QOCS would expand on the procedure for notice of discontinuance to require the claimant or allow the court to require the claimant to offer some reason for the discontinuation, the Rules would have been amended accordingly. Given that I am satisfied the claimant is not required to proffer any reasons for the discontinuance it must follow that, contrary to Mr Morwood's submission, the court cannot be obliged to draw an adverse conclusion from the absence of any such explanation."

I pause there because I disagree with Judge Edwards' conclusion. It seems to me that the new system of qualified one-way costs shifting has been set out relatively clearly in the Rules and also that the previous Rule which has been in place for perhaps 100 years about notice of discontinuance has not been amended to reflect the changes. However, it is clear from the Practice Direction at 12.4 that the service of a notice of discontinuance is not the end of the matter for a claimant. If a defendant thinks they can satisfy a court on balance of probability the claim is fundamentally dishonest, they can ask the court to direct that an issue arising out of that allegation be determined.
Therefore, it is obvious that the court has to make a decision and I think what this appeal is really about is how it does make that decision. If I reach the conclusion that there may have to be a hearing at which parties can give evidence, I think it must be right that where the claimant does not give evidence or does not proffer any reason for the decision to discontinue, then the defendant can invite the court to draw an adverse inference. I think Mr Morwood is right that no-one can compel a claimant to give evidence in these circumstances and similarly no-one can compel him to explain why he discontinued. However, obviously, for the court to find that notwithstanding the somewhat unusual circumstances and his late discontinuance, he is not dishonest. I think that an explanation for the discontinuance would be very helpful to the court in making that conclusion. Therefore, that is why I disagree with that part of the District Judge's judgment.

5. He then goes on to deal with the submissions which were made and, in particular, the decision of his Honour Judge Maloney QC in *Gosling v Screwfix* and, in particular, paragraph 52 which I think is very helpful in this appeal where the Judge said:

> "It would depend on all the circumstances and it will also need to be considered in the context of proportionality. There will be some cases where the evidence is clear and overwhelming, perhaps even the subject of an admission. There will be some cases in which the issue can be justly determined by a limited enquiry. There will be some cases in which the issue can only justly be determined by the hearing of oral evidence and the opportunity for cross examination. In that situation the court would then have to consider whether it was appropriate and proportionate to pursue that enquiry at all having in mind the costs at stake."

Judge Edwards says here:

> "His Honour Judge Maloney has clearly opened the possibility that notwithstanding that a case has been discontinued the court might effectively require that the trial proceed to enable it to determine that it be a 44.16 issue."

He then goes on to say:

> "This is a tempting solution in a case which is like the instant case where the parties are ready for trial and the court need only insist that the trial takes place despite the claimant's reluctance. That would create the best possibility of the court having sufficient evidence at its disposal to deal with the case justly."

Notwithstanding that conclusion he reached, he then goes on to say why he disagrees with the conclusion of His Honour Judge Maloney. The first issue is the issue of proportionality. Judge Edward says:

> "Most of the cases where this issue arises in this way are the low value cases. It is likely that the costs of a trial would exceed the value of the claim. We are now reminded nowadays from numerous sources that proportionality is king. That, for example, it may be that the work is necessary for the proper preparation of a case but may, nevertheless, not be proportionate. It is difficult to imagine the circumstances in which it would be proportionate to require that the parties incur the expense of a trial."

I pause there to ask myself rhetorically is it difficult to image circumstances in which it would be proportionate to require the parties to incur the expense of a trial? Take this case, for example. The defendant says that it has incurred costs of £11,293.36 which, leaving aside the fact that that might well be reduced on a summary assessment, it is a substantial sum of money. What would be the costs of having a somewhat limited enquiry as to whether this was a fundamentally dishonest claim? The answer is it would be, probably, roughly the same in this case as the costs in a fast track trial because of the fact that, perhaps in this case, it would be helpful to the claimant for him to give evidence and his driver and it may be helpful for the defendant's witnesses to give evidence although I am not convinced in this case that would be necessary. I have got to say that if the Rules say that the defendant can seek a direction that the claimant is fundamentally dishonest - and there is going to be some sort of fair procedure for that to happen - it would not necessarily be disproportionate for, perhaps, £2,000 to be spent at a three hour hearing to determine whether there was fundamental dishonesty when the sum of £11,293.36 is at stake. Therefore, my conclusion is that there may be circumstances where it is proportionate to have such an enquiry.

6. The second objection is that most of the claimants in these limited cases are on conditional fee agreements which have been concluded by the discontinuance. Then, says the court, we would be forcing a claimant to act as a litigant in person in a claim he no longer wishes to pursue and the issue to be determined is one of a technical/legal complexity. I have to accept that that is correct but that is what is likely to happen. However, that is exactly what happens when a defendant who was placed in this position before QOCS arose, wanted to seek to apply to commit what they thought was a dishonest claimant. They would need to, firstly, apply to set aside the notice of discontinuance, they would then seek to persuade a court to hear the trial to determine whether, indeed, it was a dishonest claim and then there might be a further hearing to decide whether the claimant should be committed. It often happens that claimants are unrepresented throughout because their conditional fee agreement has been terminated. The court still deals with those cases on the basis that it is appropriate to do so where there is an allegation that a dishonest claim has been made. It seems to me the same argument applies here.

7. The next problem which Judge Edwards alluded to was the difficulty in deciding what procedure to adopt depending on what stage in the litigation the case had reached. Obviously, in this case the notice of discontinuance was filed at the last minute but such a notice could be filed at any time. Judge Edwards said:

> "A claimant may discontinue on first sight of the defence. It cannot be argued that in order to determine the 44.16 issue, the court may require the parties in such case to proceed through discovery *(I think he meant disclosure)*, inspection, exchange of witness statements, questions to experts or even meetings of experts and the production and exchange of statements culminating in a trial that neither wanted and where the case was discontinued at a time when only a few hours worth of costs had been incurred."

He then says:

> "The alternative would be elaborate powers deployed by the court requiring that no steps be taken if the claim is discontinued shortly after inception rising to requiring a full trial of the evidence when the discontinuance was late. This would only invite extensive satellite litigation as to the point on the scale of which the notice was served."

Judge Edwards is right to identify that potential difficulty with this procedure but, in my view, there should not be some sort of satellite litigation about when the notice was served because that will be a matter of fact. Everyone will know the date that the notice of discontinuance is served because it moves from one party to the other. The issue is what difference would that make to the decision and what procedure to adopt in determining the Rule 44.16 problem? I will go back to His Honour Judge Maloney's guidance at paragraph 52 of his judgment and, in my view, given the examples in Judge Edwards' judgment, where the case is virtually ready for trial and all the evidence has already been prepared and exchanged, that might be a strong argument for saying that it would be proportionate to have a trial. Where discontinuance was served just after the defence, in my view, that would mean it will be a strong argument not to have a trial for the very reason that Judge Edwards outlined because you would be forcing both parties to do a lot of costly work which would not be required otherwise. Therefore, rather than it being a problem in favour of the idea that these cases should always be dealt with on paper, in my view, it is an outline of the various factual situations that can arise but if the recommendation followed His Honour Judge Maloney, the court would look to see which of the various categories it falls in. Is it a case where there is clear and overwhelming evidence? Is it a case where there can be a limited inquiry? Is it a case where oral evidence is required? At this point Judge Edwards says:

> "These considerations compel me to the conclusion that despite the guidance given in the judgment of His Honour Judge Maloney irrespective of the point in the proceedings in which a notice of discontinuance has been served, the court must determine any 44.16 issue on the submissions from the parties based on the papers available to the court at that time, be they a bare claim in the defence or a comprehensive trial bundle. Any other approach would be in the face of the thrust of most of the changes to the CPR which have taken place in the last decade which are designed to avoid disproportionate costs, expedite the conclusion of cases and discourage satellite litigation."

Pausing there, I think that is the gist of the judgment and I have in many ways outlined what the appellant's case is.

8. The respondent's case in relation to this hearing is somewhat unusual in that the respondent's case through counsel appears to be that whatever the clear provisions in paragraph 35, District Judge Edwards had heard submissions from both parties and the

transcript shows that he engaged with them considerably and that he was aware of the fact that a trial could take place but on the facts of this case he decided that it was appropriate for there to be a paper consideration only. I have indicated during the course of the hearing that is not how Judge Edwards' judgment clearly reads in paragraph 35 and although it may be that the respondent would wish to put that interpretation on it, I cannot in conscience do so in the light of the clear wording of paragraph 35. Judge Edwards was saying that this is always the right way to conduct Rule 44.16 applications.

9. I have dealt with some of the objections but I think it is right that I should look at, specifically, the points which most concerned the Judge which were that this would be in the face of the thrust of most of the changes to the CPR which are trying to avoid disproportionate costs, I accept that the concern about disproportionate costs is something that a Judge taking this decision is going to have to wrestle with on each occasion. Any Judge is going to be reluctant to encourage satellite litigation and disproportionate costs. Judges are quite familiar with having to do this when dealing with cases of misconduct under CPR 44.11 or dealing with issues such as applications against non-parties and wasted costs orders. It is a position that courts are very familiar with. There is an understandable reluctance to have additional costs incurred unless they are absolutely necessary. The reason I think they are necessary in this case and actually would be necessary in other similar cases is, strangely, not because it is fair to the defendants it is actually because it is only fair to the claimant. The classic example of this type of case is where it is said that a particular claimant is not inside the vehicle or that it is a contrived accident or that it is an accident that never occurred. There may be connections obtained by the defendant between the claimant's and the defendant's motor vehicle which showed that perhaps this was a dishonest or contrived accident. It may be from social media for example. For the court to deal with that issue, which is a very serious issue from the claimant's point of view, he is being condemned as being dishonest on paper. In my view this is fundamentally unfair in that the claimant should be allowed to come to court and say, "Well it might look as if this is a staged accident or a contrived accident but I have genuine reason why I made the claim and I have a genuine reason why I discontinued." It could be any number of those but I think it would be unfair to expect the court to deal with it without that explanation and, more importantly, fundamentally unfair on the claimant not to give him the opportunity to look the Judge in the eye and say, "I am not a dishonest man and these are the reasons why I made the claim and these are the reason why I discontinued." No-one can force him to do so but given that, in a case such as the present one and many other similar cases, there may be a *prima facie* case of dishonesty. It is only fair to allow the claimant the opportunity to convince the court that what may appear the case from the paperwork is actually inaccurate. In this case we have two mature gentlemen, not the most likely fraudsters I have to say, but it may be that they could explain, for example, that even if the bird cage had not hit the car something else hit the car which they thought was a bird cage. That would not mean that they should succeed in the claim if the court were to find that but if they felt they were genuine in thinking that whatever had hit the car was the bird cage then they were justified in making the claim even if, at the end of the day, it was unlikely to succeed. It would however mean they were not fundamentally dishonest but I do not see how that can happen without some contribution in evidence from the claimant and/or his witness.

10. Therefore, my decision in this and other cases is that it is a matter for the court's discretion as to how this procedure should be adopted. In my view, where the Rules do

not say what the procedure should be but direct that issues have to be determined, it is within the court's general discretion how to do that. If it could only be done on paper I would have expected the Rules to say so. Therefore, for the reasons that I indicate, in general terms, the court has the option how to adopt this procedure whether in writing, whether with a limited inquiry or whether with a full trial. In the particular facts of this case it seems to me that either a full trial or a limited inquiry at least giving the claimant and his witness the opportunity to give evidence is the right and fair way to move forward. Therefore, for those reasons I intend to grant the appeal.

(End of Judgment)
