

Public Sector Update

December 2009

Appeal Court judgement emphasises reluctance to view exaggeration as fraud or contempt, whilst confirming that it creates disputes over costs, not liability.

Martine Wildlake v BAA Ltd, an appeal case in which dishonesty had been proven but its implications disputed, highlights how one judge's "abuse of the court's process" is another's "dishonest exaggeration" and how, either way, it was only costs which were at dispute.

The key point of this appeal – the details of which are given overleaf – is that, whilst the claimant won damages in the High Court and had beaten the defendant's payment-in, because she had deliberately exaggerated her injuries (deceiving retained expert witnesses in the process), she had been ordered to pay the defendant's costs.

The claimant appealed and the Appeal Court ruled that the appropriate order, in all the circumstances, was that there should be no order for costs.

Implications

This case confirms the importance of the distinction between outright abuse of process (deliberate manipulation or fraud) and exaggeration, arguably giving a green light to the latter on the basis that it will not affect the quantum of damages. This is especially true of cases in which exaggeration will be hard to prove, the case in question here being relatively unusual in that physical evidence of the claimant's dishonesty was available.

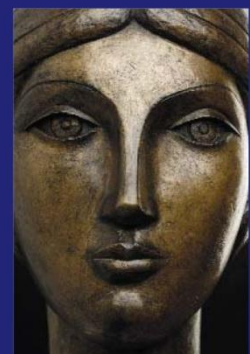
That said, in seeking to clarify the correct procedure where a defendant's payment-in (or, in contemporary terms, a Part 36 offer) is beaten but exaggeration is proven, this judgement should send a clear message to all claimants that the court will impose punitive cost measures – and prompt their solicitors to caution them accordingly.

In an environment in which the widespread use of CFA-backed claims has led many claimants to believe they can act with impunity, any such caution has to have a sobering impact, especially as the potential scale of costs often far exceeds the damages awarded. Over time, this should help to discourage the brazen approach that we have seen all too often in recent years.

For a further discussion on the topic of exaggerated and fraudulent claims see the article in the current issue of Public RM Magazine.

"All too often, it is only when the claim has been settled, that the battle begins."

Jason Burt, Partner
(in *Public RM Magazine*, Winter '09)



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Martine Wildlake v BAA Ltd (2009) **[2009] EWCA Civ 1256**

Court: CA (Civ Div) (Ward LJ, Smith LJ, Wilson LJ)
23/11/2009.

Summary: Where a personal injury claimant had exaggerated her claim but had still beaten the defendant's payment in, the right order in all the circumstances was to make no order for costs.

Abridged details: The appellant (W) appealed against a decision that, although her claim for personal injuries against the respondent (B) succeeded, she should pay B's costs. W was employed by B as a security guard at Stansted Airport. When she was undertaking a foot patrol in the baggage reclaim area of the airport she lost her footing and fell down a staircase. What caused her to lose her footing was a loose rider immediately below the top step. She brought a claim for damages for personal injury and liability was not disputed. As a result of the fall she sustained bruising which resolved itself over time. There was a dispute as to whether the effect of the accident on W's back was simply to aggravate the pain resulting from pre-existing degenerative changes for about 12 months or to advance the inevitable deterioration in her pre-existing low back problem by about five years. W retained a consultant (P) and told her that she had no history of low back pain. She then retained a second consultant (M) and told him that there was no low back problem before the accident. M and B's expert (K) agreed that W had a significant pre-accident history of lumbar symptoms. The judge held that, while W had injured her back in the fall, the consequences were comparatively minor and she had deliberately concealed the previous history of her back from P and then from M, in the hope of increasing the amount of compensation which she would recover. On the basis that W's injuries would have resolved within 12 months of the accident, he assessed the quantum of damages for pain and suffering and loss of amenity at £3,500 and her loss of earnings, about which there was no dispute, at £2,022.38. B had made a payment into court of £4,500 pursuant to CPR Pt 36. Despite the fact that W had beaten the payment in, the judge ordered her to pay B's costs. W submitted that in so far as the claim was exaggerated costs should be disallowed only in so

far as they were attributable to the exaggeration; B should have protected itself by using Part 36 to make a better offer than the judgment which W obtained at trial; thus B should pay the costs because W recovered more than had been offered and any exaggeration should be reflected in a reduction of the proportion of costs she should be entitled to recover.

HELD: (1) The judge erred in characterising W's actions as an attempt to manipulate the civil justice system on a grand scale tantamount to an abuse of the court's process. There was no general rule of law that the dishonest exaggeration of a genuine claim would result in the dismissal of the whole claim. The judge misdirected himself and for that reason the appeal was allowed and it was necessary for the court to exercise its own discretion. (2) It was necessary to go to the CPR and apply the approach which they prescribed. W had been successful in that she had established a claim for damages and beaten the payment into court but the court was required to have particular regard to the conduct of the parties so as to include "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue". The cases could be reconciled by treating exaggeration as an "allegation" relevant to the "issue" of the quantum of damages. The exaggeration of the claim was unreasonable conduct which the court could take into account. Similarly the exaggeration was conduct to be taken into account in disapplying the general rule that the successful party was entitled to its costs. (3) W had beaten the payment in and was the successful party. She should recover nothing in respect of P's reports and B should have some compensation for the wasted costs incurred in having to consider those reports. Pursuing her claim in the exaggerated way W did had the result that the litigation became heavily contested whereas it might have settled. B had been put to unnecessary expense. But B failed to alleviate its predicament by making a better Part 36 offer. W's dishonesty had to be penalised. Her failure to negotiate a claim which was clearly capable of being settled also had to be recognised. Balancing the factors the right order was no order for costs.

Appeal allowed

References: LTL 23/11/2009

Document No. AC0122805

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