

Court of Appeal decision in *Lorna & Justin Howlett v Penelope Davies & Ageas Insurance Limited* [2017] EWCA Civ 1696.

The Court of Appeal confirmed that there was no obligation to expressly plead fundamental dishonesty in order to invite the court to make such a finding at trial.

Following an alleged road traffic accident, the Defendant insurer advanced a put to proof defence only. Although it must be recognised that the defence did plead that the Second Defendant 'did not accept that that the accident occurred as alleged or at all'. Credibility had been expressly put into issue. The defence pleaded that Ageas 'did not assert a positive case on fraud at this time.'

Delivering judgment, Newey LJ found that whilst statements of case are crucial to identification of the issues between the parties and what falls to be decided by the Court, 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.

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 defendant had positively alleged fraud in its defence.

Whether or not a claimant has been given fair warning will be determined by the trial judge in each case. A defendant that pleads, for instance, that it is denied that a claimant was injured in an accident will probably have done enough. However, a brief recital of the key facts that a defendant relies upon for rejecting the claim, and a warning that, dependent upon the oral evidence given at trial, the court may be invited to make a finding of fundamental dishonesty, will put a defendant in a much stronger position.

Bernard Pressman / 18th Dec 2017

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