£17,500 Costs Order on the Small Claims Track: Poor Mr Boswell

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Lee Reed v Carl Boswell (2022)

1. Consider the following: what track should these proceedings be allocated to?

   (a) a claim brought on the basis of dishonesty and fraud;

   (b) disputed text messages for which one party has claimed that the other manufactured their existence;

   (c) three expert reports commissioned (only one actually having expert status at trial) regarding the aforementioned disputed text messages;

   (d) one and a half day trial with four witnesses cross-examined;

   (e) written closing submissions running to 22 pages for the Defendant; and

   (f) written reserved judgment handed down about 8 months after the final hearing.

2. A multi-track claim? Perhaps a fast-track on steroids? No this was a small claim heard in the County Court sitting at Oxford. Judgment was given on 6 December 2022.

3. This is the tale of poor Mr Boswell which is a small claims matter that is worth sharing. The author represented Mr Carl Boswell, the Defendant in a claim brought by Mrs Lee Reed who is a criminal solicitor and acted in person. You can read the judgment here.

4. Of note in this matter is that the Defendant obtained a costs order of £17,500 (out of a bill just shy of £25,000) against the Claimant which is rather unusual given its allocation to the small claims track.

Basis of the Claim

Factual Background

5. Mrs Reed brought a claim against Mr Boswell alleging that he gave a 'favourable' reference for a prospective tenant called Mr Fernandes. Mr Fernandes was a tenant of Mr Boswell occupying a flat above one of his businesses, a funeral home.

6. As it happened, Mr Boswell was an inexperienced residential landlord and busy local businessman who delegated tasks to his staff. Mr Fernandes' deposit was partially released and paid directly to Mrs Reed before the checkout inspection of the funeral home flat had occurred. This turned out to be a grave error.

7. During his occupation of the funeral home flat, there was a one-off issue of loud music during business hours, a disagreement about the parking of his motor vehicle, an issue about the dustbins and rubbish being left in communal arears. Mr Fernandes was not a model tenant but most of the problems with him were not discovered until he vacated.

8. The tenant told Mr Boswell that he needed somewhere more affordable to live and Mrs Reed's property was cheaper.

9. Mr Fernandes vacated the flat before his first tenancy inspection and upon vacating the premises it was discovered that he had caused damage to the flat and furnishings within it. As well, Mr Fernandes was in rent arrears which was not picked up on possibly due to turnover of administration staff at Mr Boswell's company.

10. It was Mrs Reed's case that the Defendant wanted Mr Fernandes out of the funeral home flat because he was a troublesome tenant and wanted to dump him on Mrs Reed instead. Mrs Reed asserted that Mr Boswell had telephoned her (*which was denied entirely by Mr Boswell*) to give a 'favorable' reference for Mr Fernandes. On the basis of this alleged oral reference and the payment of a deposit (*forwarded from Mr Boswell's company*), Mrs Reed allowed Mr Fernandes into her property.

11. Once Mr Fernandes had left the funeral home flat and a check out inventory was done, Mr Boswell realised what sort of tenant Mr Fernandes was. It was his case that he telephoned Mrs Reed (*having obtained her contact details from another person*) to warn her about Mr Fernandes. Mr Boswell then emailed the Claimant the check out inventory report which set out the extensive damage fully with photographs.

12. Thus, Mr Boswell's case was that there was only one telephone call between the parties (*after Mr Fernandes had vacated his flat*) whilst the Claimant said there were two telephone calls (*the first one giving an alleged 'favourable' reference and the second one which Mr Boswell sought to warn Mrs Reed*).

13. At this point there was an exchange of text messages which became the centre of a hotly disputed point of fact between the parties which is expanded upon below.

14. During the course of the tenancy, Mrs Reed also had issues with Mr Fernandes. However, he was not in rental arrears until about four months into the tenancy and eventually she obtained a possession order on that basis. Bailiffs were sent in to remove Mr Fernandes.

15. Mrs Reed's property had been heavily damaged, and there was evidence that it was used to manufacture illegal substances. Holes were cut in the ceiling; the electric meter was tampered with amongst other destruction to the property. The loses were not particularised in the claim form and became a point of contention for the Defendant.

The Claim

16. Mrs Reed brought a claim against Mr Boswell claiming various unparticularised losses including the costs of repairing her property and rental arrears amounting to £8,833.92. The claim form was brief and contained the following:

> ***Brief details of claim***
> *Mr C.S.Boswell knowingly made an untrue statement of fact which induced Mrs L Reed to enter into a contract with Mr M Fernandes from which contract she suffered financial damage.*
>
> ***Particulars of claim***
> *Mr C.S.Boswell gave Mrs L Reed a favourable reference and a sum of money purporting to be a deposit relating to Mr M Fernandes knowing it to be false and which induced her to give Mr Fernandes possession of Flat 61 Spencer Avenue, Yanton OX5 1NQ and which resulted in substantial financial damage to her. Such financial damage was reasonably foreseeable by Mr Boswell given his prior experience with Mr Fernandes as a tenant of Mr Boswell's flat at 364 Banbury road, OX27PP.*

17. Mr Boswell initially acted in person and filed a 'defence response' to the claim. He then retained Bower Bailey for legal representation who then in turn instructed the author.

18. The claim form did not identify a cause of action, and none was ever expressly articulated by the Claimant, so it was assumed she was relying on the tort of deceit which does not form part of the usual diet of a County Court judge.

Text Messages

19. A hotly disputed point of fact between the parties centered around the sending of various text messages mentioned above. It was Mr Boswell's case that they were sent to the

Claimant, and it was the Claimant's case that not only were these messages never received (*or even sent*) the screen shots provided as evidence of the text messages were fraudulent. According to Mrs Reed the text messages were concocted, a lie and Mr Boswell was totally dishonest about them. She never waivered from this position even in the face of the subsequent single joint expert's evidence.

20. The disputed text messages were brief. They start with the Claimant giving Mr Boswell her personal email address (*presumably to receive the check out report*) and then Mr Boswell sending a lengthy reply expressing disappointment that Mr Fernandes had crossed both of their paths. He then sought to try and recover some of Mr Fernandes' deposit which was declined by Mrs Reed who wanted to hold onto it just in case she had problems with him- which she ended up having.

21. As a side note, when the bailiffs removed Mr Fernandes from Mrs Reed's property, she returned the deposit in full to him despite him being in rent arrears and having caused substantial damage her flat.

Final Hearing

22. At the start of the final hearing in November 2021, District Judge Lumb expressed concern about the lack of particularity in the claim form and also that the matter was allocated to the small claims track. The Defendant's skeleton argument contained comprehensive submissions regarding the unsatisfactory nature of the Claimant's statement of case.

23. The court was directed to the ingredients for the tort of deceit as set out in *Connolly v Bellway Homes* [2007] All ER (D) 182. It was submitted that the particulars of claim were totally defective because they failed to plead what the alleged misrepresentations or statements were. A 'favourable' reference was not an alleged statement from Mr Boswell. The court's attention was then drawn to Practice Direction 16 paragraph 8.2.

24. It's the author's view that the court was sympathetic to these submissions, and it appeared initially that District Judge Lumb was tempted to adjourn the hearing with directions that the Claimant was to amend her particulars of claim. However, by this point the final hearing had already been vacated for lack of judicial availability, there had been 3 application hearings for the expert evidence and there were numerous witnesses in attendance.

25. Frankly, both the Claimant and Defendant were in complete agreement that the matter should proceed instead of being adjourned with directions. As such, the hearing went ahead on the basis of the statements of case as they were.

Evidence

26. Three witnesses for the Claimant were cross-examined. One other witness for the Claimant attended but was not required for cross-examination. The Claimant had produced one other witness statement which had limited value and the witness was not in attendance. Rather unexpectedly (*at least from the Defendant's point of view*) Mr Fernandes himself was at the final hearing and gave oral evidence.

27. The first day of the final hearing concluded with the Claimant's evidence leaving a half day hearing for the Defendant's cross-examination which occurred in April 2022.

Expert Evidence

28. Once the disputed text messages were disclosed to Mrs Reed she immediately denied their validity and sought to obtain expert evidence to prove that. She wanted a single joint expert to inspect both mobile phones. Mr Boswell initially declined on the basis that it was not proportionate for a small claims matter. As such, Mrs Reed made the first application for expert evidence to inspect the mobile phones.

29. The author was instructed to represent the Defendant at the hearing whose position was that an expert should not be instructed because it was not proportionate but if one was to be ordered then both mobile phones would be needed. The application hearing was listed by telephone and unfortunately the court failed to call the author. As such, Mr Boswell was not represented at that hearing.

30. The Deputy District Judge granted the Claimant's application in part but only ordered that the Claimant's mobile was to be examined. He declined to order the Defendant's mobile also be examined which was disappointing. This led to an unsatisfactory and unhelpful expert report ('the Jackson Report') because it was inconclusive having not examined the Defendant's mobile.

31. After receiving the Jackson Report, the Defendant sought his own expert and submitted his phone for inspection ('the Griffin Report'). The Griffin Report did find evidence text messages being sent from Mr Boswell's mobile to the Claimant's which was contrary to her position. The Griffin Report was disclosed to the Claimant who refused to accept it. A

further application was made to the court for a single join expert to examine both parties' mobile phones in light of inconclusive and unhelpful nature of the Jackson Report.

32. The application was granted and the mobile phones from both parties were examined by MD5 Ltd who then produced a comprehensive report. Some of the key takeaways from the MD5 Ltd report were:

    (a) that the disputed text messages were not found on Mrs Reed's mobile but they were found on Mr Boswell's. The expert confirmed that the located messages were the same that were found in the Griffin Report;

    (b) that there was nothing to indicate that either mobile had been jailbroken or had Cydia (*or similar applications*) previously installed. The expert also wrote *'Relationships identified within the within the "sms.db" appear consistent for the messages. This does not appear to have been altered by the user. No other messages contained the same chat ID.' The significance of which meant 'this indicates that no additional messages have been inserted into the database and the numbers reflect each other'*.

33. The conclusion of the MD5 Ltd heavily favoured the Defendant's position over the Claimant's assertion that the disputed text messages were 'fake' and or were 'ghosted in' which in turn harmed her credibility.

Judgment

34. District Judge Lumb opted to reserve judgment and delivered a written judgment on 6 December 2022. The claim was dismissed, and in the author's opinion, the judgment was critical of the Claimant. The starting paragraph acts as a warning:

    1. This small claim is a cautionary tale for litigants in person who consider that they have been wronged by another person and, perhaps encouraged by a popular perception that the Small Claims Court is an easy way to seek redress, launch into court proceedings without specialist guidance or a proper understanding of what may be required to enable the court to determine the matter.

35. Regarding the disputed text messages, District Judge Lumb said the following:

    28. I also accept the account given by the Defendant in relation to the disputed text messages. The Claimant has maintained throughout an almost obsessional assertion that the disputed text messages were never sent to her and were "ghosted" onto the

Defendant's mobile phone before it was examined by the single joint expert. The evidence of that expert simply does not support this assertion.

29. A possible explanation as to why the Claimant could not find the text messages on her own phone may be that they were initially moved into a spam folder and then automatically deleted before she read them.

30. The court has to decide the issues in the case on the basis of the evidence. The expert evidence quite simply does not support the Claimant's case. For that reason, I find that the Defendant's account is more likely than not to be the correct one. The Claimant's case is inherently unlikely in the absence of clear corroborative evidence to support her assertions. There is no such corroborative evidence.

31. The Claimant invites the court to accept her case that the statement of a favourable reference was made by the Defendant to her by effectively saying that her word should be preferred to that of the Defendant as she is a woman of impeccable character being a solicitor of many years standing who would not dream of lying.

36. Then regarding the conduct and basis of the claim itself:

43. The evidence with regard to the cost of the repairs to the flat was also extremely unsatisfactory given invoices were raised from a company run by the Claimant's partner that was no longer trading and had not traded for a number of years and the invoices were made out to a separate legal entity other than the Claimant herself and therefore arguably were not her losses. It is also potentially telling that a copy of the tenancy agreement with Mr Fernandes has never been produced by the Claimant and maybe this is because the tenancy was in the name of a company controlled by the Claimant and not in the name of the Claimant herself and therefore the losses were not truly hers. This, I am afraid, is just a further example of how chaotic and disorganised this claim has been.

44. In conclusion, the Claimant's claim fails. I do not find that she has deliberately misled the court but in many respects the claim was misconceived and unclear. It was unreasonable to continue to run the argument with regard to the disputed text messages given the findings of the single joint expert and there were aspects of the quantum of damages claimed that were also inconsistent, unsupported and on the face of it, not losses that were sustained by the Claimant herself.

£17,500 costs order

37. Most readers will be aware that costs on the small claims track are severely restricted and subject to the fixed costs as set out in CPR 27.14. There are a couple of ways to escape the fixed costs, one common method is by way of a contractual entitlement but that was not applicable in this matter.

38. The only option was to make an application under CPR 27.14(2)(g) for unreasonable behaviour. These applications rarely succeed because there is a high threshold to meet. They are not wasted costs application, but they are akin. In *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 it was suggested that the wasted costs jurisdiction was the 'acid test'.

39. Importantly, if the court is minded to make an award, it is only the costs incurred because of the unreasonable behaviour that are awarded. It is done by summary assessment and applying a rough and ready broad-brush approach.

40. Unfortunately, the draft judgment was not emailed to the parties until the morning of the hearing. Having read the judgment at court, the following 5 heads of submissions for a CPR 27.14(2)(g) application were prepared:

    (a) the Claimant brought a fundamentally defective claim and refused to amend her particulars of claim;

    (b) the Claimant continually referring to the disputed text messages as 'fake' and that they were 'ghosted in' despite the position of the MD5 Ltd report and agreeing that the expert's report was a good one. As well, alleging that the Griffin Report itself was a fraud and that there was some sort of collusion between Bower Bailey and that expert;

    (c) claiming that the solicitor for Mr Boswell was a witness to the Defendant's case (*having prepared a witness statement for an interim application*) and threatening, more than once, to make a complaint to the SRA on that basis;

    (d) continually ignoring the civil procedure rules and bringing a third witness statement without permission and well out of time; and

    (e) failing to accept an offer made by the Defendant and making a counteroffer which was worth more than the value of the claim recorded on the claim form.

41. Out of the 5 heads, the fourth was the weakest and it would not be sufficient to make an application on its own. It is frustrating when opposing parties, particularly litigants in

person, do not comply with the civil procedure rules. Often this causes an increase in costs with limited hope of recovering the increased amounts.

42. Further, by virtue of CPR 27.14(3) a party's rejection of an offer to settle the claim is not unreasonable behaviour but it is a fact which can be taken into consideration when applying the unreasonable test. In this matter, the Defendant made a commercial/nuisance offer to the Claimant which was rejected by Mrs Reed.

43. Mrs Reed then made a counteroffer for £12,096.28 which was £2,807.36 more than what she had initially claimed. This was rightfully refused by Mr Boswell.

44. District Judge Lumb fell short of making findings of dishonesty against the Claimant in his judgment, but he did find that Mrs Reed had acted unreasonably for the purposes of CPR 27.14(2)(g).

45. The judge was particularly troubled by the Claimant's refusal to take remedial action regarding her statement of case despite the numerous warnings, her allegations that the Griffin Report itself was a fraud and that there was some sort of collusion between the solicitors and that expert, the misunderstanding of a witness statement by a solicitor in support of an interim application and the threats of reporting that solicitor to the SRA.

46. All these actions had the effect of significantly increasing the time expense and legal cost payable by Mr Boswell.

47. As such, District Judge Lumb awarded £17,500 to the Defendant out of a total bill of £24,991.80.

Summary

48. This is a County Court decision so is not binding and nor does it carry any real weight to it. However, it is an interesting case and one worth sharing for those of us in the coalface of the County Court. It is a useful reminder and warning to litigants in persons with legal qualifications. You must follow the civil procedure rules and properly plead your claims. There are cost risks, even on the small claims track if you fail to do that.

49. It is common knowledge that litigants in person are given a certain amount of judicial patience that represented parties do not benefit from. The problem for Mrs Reed is that she knew enough about the law to get herself into difficulties and then refused to correct her shortcomings because of a general mistrust of her opponent. Frankly, if she had

listened and amended her particulars of claim when she was warned by Bower Bailey in early correspondence she might not have been liable for the significant legal costs.

50. Bringing claims rooted in dishonesty and fraud is incredibly serious even on the small claims track. Mr Boswell is a local businessman with an excellent reputation to defend. If one is going to bring a claim for dishonesty, the particulars of claim must be drafted as precisely as possible. The Claimant's refusal to amend her particulars of claim was ultimately her downfall. Her insistence that the reference was 'favourable' without expanding on more was simply not good enough.

51. Details about what a 'favourable' reference meant only came to light during careful cross-examination and consideration of her three witness statements. By then it was far too late and that is reflected in the judgment of District Judge Lumb. You can read it here if you have not already clicked the link.

52. If a legal representative is thinking about making an application under CPR 27.14(2)(g), having a bundle of correspondence evidencing the unreasonable behaviour is critical. The bundle for the application was 56 pages having been pruned back from about 300 pages of inter-parties' correspondence. It was a tedious task but worthwhile.

53. Identifying each head of unreasonableness, why the conduct was unreasonable and why it increased the costs for the applicant significantly increases the chances of an order being made under CPR 27.14(2)(g).

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