CA on appeal from Bradford County Court (Mr Recorder Barnett) before Moore-Bick LJ; Toulson LJ; Ward LJ. 12th December 2007

Lord Justice Ward:

1. This is an appeal against the order for costs made by Mr Recorder Barnett at the conclusion of the trial of this case which concerned a claim under a policy of motor insurance. The essential facts giving rise to the claim can be summarised very shortly. In October 2005 the claimant acquired and became the registered owner of a Range Rover vehicle. She took out a policy of motor insurance with the defendant in respect of that vehicle, under which she was both the insured and the named driver. In January 2006 the claimant and her brother went to the cinema in Huddersfield. She parked the car in the cinema car-park and went to see a film. When they came out the car had disappeared. Its loss was reported to the police, but it was never traced and has not since been recovered. The claimant therefore made a claim under the policy in respect of the theft of the vehicle. For some reason, the insurers took the view that the claim was fraudulent and declined to accept liability. As a result, the claimant began proceedings in the Bradford County Court to recover the value of the car. The insurers contested the claim every inch of the way. Having learned in the course of their investigations that the money required to purchase it had been provided from a variety of sources within the claimant's family, they put her to proof in minute detail of the allegation in the particulars of claim that she had bought the vehicle herself.

2. They averred in their defence, though without specifically identifying its significance, that her previous car had been an N registered Toyota Corolla that she had given to her sister and had bought back after the Range Rover was stolen. They sought to avoid the policy on the grounds that the claimant had misrepresented the address at which the vehicle was habitually kept and as to the extent to which it was driven by her brother. They denied that she had an insurable interest. They did not admit the theft, and set out in their defence many matters of fact which, they contended, pointed to the conclusion that there had been no theft at all, and they contested the value of the vehicle, if indeed the claimant was able to persuade the court that it had after all been stolen.

3. Although the insurers were not prepared to make the allegation in terms and were not obliged to do so, the whole thrust of their defence was that the claim was fraudulent and was the result of a conspiracy between the claimant, her brother and other members of the family, and indeed the recorder approached it on that basis, as one can see from the terms of his judgment. At the trial a great deal of time was devoted to investigating the circumstances in which the claimant had acquired the Range Rover, but the insurers called no evidence themselves in support of their case. The recorder found that the claimant had lied in her evidence about a test drive which she said she had undertaken some two or three weeks before the vehicle had been purchased. He also found her brother to be a distinctly unimpressive witness, who had difficulty in listening to questions and giving simple and honest answers to any questions he was asked by either side. He did not find his evidence particularly helpful, but he did not find that he had lied. At the end of the day, however, the recorder accepted the claimant's case. He found that the vehicle had been purchased by her brother, with money provided by various members of the family, and that it had been given to her with the approval of the family, so that she became the legal owner as well as the registered owner. It followed that she had an insurable interest.

4. The insurers did not pursue at the trial their argument that the policy was void by reason of misrepresentation and the recorder therefore held that the policy was effective. Finally, and most importantly, he found that the claimant had given a truthful account of the incident at the cinema and the loss of the vehicle and that the claim was therefore well-founded. He assessed damages at £37,408, which was only a little less than the claimant had been seeking. At that point the claimant, who had won her claim and had had her honesty vindicated, no doubt expected that she would be awarded her costs but, even before hearing any submissions, the recorder indicated that he was minded to award her only 60% of her costs. It does not appear that at that stage he had any indication before him of the amount of costs that had been incurred in the case, but, from information now before us, the effect of his order would be to penalise her to the tune of between £7,000 and £8,000. The recorder expressed his views in these terms. He said:

   "… I find that this matter has become a difficult and protracted matter because of the matters of the evidence that I have referred to in my judgment, in other words lies or matters of untruth told, which have clearly put the Defendant to great expense and difficulty and have in some way resulted in the case taking such a long time to conduct."

5. The parties were then permitted to make submissions in relation to costs, the recorder having given them an opportunity to discuss the matter before returning to court. In response to submissions from Mr Pennock for the claimant, the recorder confirmed that he was satisfied that the claimant had lied in relation to her evidence about the test drive, but he also acknowledged that that lie had not caused the proceedings to be protracted. He then, however, referred to a number of untruthful matters which he said had been told to the defendant's investigators. At that point, Mr Pennock pointed out, as indeed was the case, that the court had not heard any evidence from the defendant and that the alleged inconsistencies, in the accounts given by the different persons to the defendants' investigators, were no more than allegations in the pleadings and were unsupported by any evidence. The exchange ended on the following note:

   "Well the investigation and the continued contesting of the case may have been protracted by a number of matters raised in the pleadings, which I propose to mark by way of costs and if you choose to appeal then so be it."

6. A little later on, the recorder explained his thinking in greater detail. When Mr Pennock submitted that the claimant had won on all the issues, he said:

"Well you have and you haven't because your case was that this [which I think means the money] was a gift and the money was in fact paid by her, and I found that that is not the case, that in fact -- maybe I went too quickly, but the judgment is that in fact the car was owned by her brother, which is not your case at all and then gifted to the Claimant, that was not your case, so to say that you have won on all points in effect, you have won on all points and you have got judgment as requested, but not as you pleaded it."

7. Mr Pennock submitted that there was little practical difference between giving the claimant the money to buy the car and arranging the purchase for her and giving her the car; but the recorder was not to be moved, and he wished the claimant all the best if she decided to appeal. She did, and here we are. It is well-recognised that a judge has a wide discretion as to costs and that, in exercising that discretion, he is entitled to take account of the conduct of the parties both before and during the litigation -- that is a matter expressly recognised in rule 44(3) of the civil procedure rule. However, although the discretion is a wide one, it must be exercised judicially, and that means that the judge's decision must be based on facts that are supported by evidence and must involve the justifiable exercise of the discretion based on those facts. In my opinion, the recorder's decision is not one that he could properly reach in the context of this particular case.

8. It is unfortunate, in my view, that he expressed a view about costs before hearing any argument because, having heard the parties, he might have concluded that any initial reaction to which he had come was not well-founded, and he would have the benefit of hearing from counsel for the defendant, directing him to those matters which counsel considered might properly provide the foundation for an unusual order as to costs. However that may be, it appears that, having expressed his initial view, he was determined to stick with it, whatever counsel for the claimant might say. One starts from the position in this case, the claimant had in substance been wholly successful in her claim. She was therefore entitled to her costs, unless there were proper grounds for depriving her of part of them. It should also be borne in mind that the real issue in the case was not such whether or how she had become the owner of the vehicle, but whether the claim was fraudulent because there had not been a genuine loss. One of the main purposes of investigating in detail the circumstances of the purchase was, I think, to gather support for the insurer's argument -- that her evidence could not be accepted in relation to loss because the claim was nothing more than an elaborate fraud.

9. I quite accept that insurers in such cases can be in a difficult position, because they do not have first hand access to the facts giving rise to the claim, and it is undoubtedly easy for dishonest people to make false claims. Insurers are therefore quite entitled to require claimants to prove their case and, if they consider it appropriate, they are entitled to raise the spectre of dishonesty. But if they do impugn the claimant's honesty and fail, it is only right that they should normally be expected to bear the costs of doing so. Moreover, since the claimant's honesty should not really be put in question at all -- unless there are reasonable grounds for doing so -- the fact that the claimant has dealt with enquiries from the insurers, in a way which has led them to question the honesty of the claim, is not, in my view, enough by itself to deprive the claimant of part of his costs if he ultimately succeeds at trial.

10. In the present case, I can see only two grounds on which the recorder might properly have deprived the claimant of a substantial proportion of her costs. First, that she had lied in relation to important aspects of the case, so as to justify a reduction in costs by way of punishment. Second, that she had conducted herself before, or during, the litigation in such a way as to cause the proceedings to be protracted and costs to be incurred unnecessarily. In my view, the evidence before the recorder did not support either of those grounds. It is true that he found that the claimant had lied about the test drive, but it is impossible, in my opinion, to say that that was a matter which went to the heart of the case. Mr Clegg, on behalf of the defendant, referred us to the case of ***Ultraframe (UK) Ltd, Northstar Systems Ltd v Fielding & Ors*** [2007] 2 All EER 983, but that was a very different case in which the party -- which had been successful in the litigation overall in disputes which comprise many different elements --had pursued a dishonest case in relation to one of them. In this case there was only one claim and the recorder found that it was an honest claim. To tell a lie in relation to a collateral matter, in pursuit of what is fundamentally an honest case, is quite different from seeking to pursue what is in fact a fundamentally dishonest case.

11. The recorder did not say that he was depriving the claimant of a large slice of her costs as a punishment for telling that lie and in my view he would not have been justified in doing so. The fact that the claimant's brother was an unsatisfactory witness seems to me to be neither here nor there. The recorder did not find that he had told lies and, even if he had, that would not by itself justify penalising the claimant. That would only be appropriate if the recorder had been satisfied that the claimant had been colluding with her brother in order to put false evidence before the court. The recorder made no such finding. Had he reached that conclusion, it is unlikely that he would have found in favour of the claimant on the claim. The recorder recognised, in exchanges with counsel, that the claimant's lie about the test drive had had no effect on the length or complexity of the proceedings. He appears to have based his decision on what he understood the claimant and other members of the family had said to the insurers' enquiry agents when the claim was first made. The impression I have from his remarks is that he considered that the conduct of the claimant prior to, and perhaps to some extent also during, the trial had made life more difficult than need be for the insurers and that, by doing so, she had caused the proceedings to be unnecessarily complicated and protracted. If the recorder had had a proper basis for reaching that conclusion it might have justified that order. But the difficulty, as counsel pointed out at the time, is that there was no evidence before him properly to support that conclusion.

12. We have been told that there was late disclosure of important documents, but that itself is in dispute and does not, in any event, appear to have featured as part of the recorder's reasoning. The insurers chose to call no

evidence to suggest that the claimant had caused the proceedings or investigation to become protracted, even in relation to questions of costs; so the recorder had very little to go on. Before depriving a successful party of part of his costs, the court should take care to ensure not only that there are proper grounds for taking that step at all, but also that any reduction he makes is proportionate to the wrongdoing itself or to the consequences of that wrongdoing. In the present case it is difficult to see on what basis the recorder reached either aspect of his decision.

13. For these reasons, I am satisfied that the recorder erred in the exercise of his discretion and that his decision must therefore be set aside. There is no application for the matter to be remitted to the recorder, and in those circumstances it falls to this court to exercise its own discretion in the matter. Mr Clegg for the respondents invited us to consider various parts of the evidence given at trial, in order to persuade us that the claimant and her brother gave unsatisfactory evidence which prolonged the hearing. For my own part, however, I doubt whether that would be an appropriate course of a case of this kind, and we had the benefit of the summary of the relevant parts of the evidence provided by counsel. In those circumstances, we do not find it necessary to go through the transcripts line by line. The recorder himself did not shrink from making findings that a witness had lied where the evidence justified it. I doubt whether this court -- which necessarily has access to only part of the evidence and does not have the opportunity of seeing the witnesses give the evidence -- could properly make a finding of that kind, where the recorder himself has not done so. The defendant also sought to put before us evidence from his solicitors, tending to show that the claimant was not open and honest with the defendant in providing details of her claim, and failed to provide timely disclosure in the course of the proceedings. But we do not allow that evidence to be adduced before us in support of the appeal.

14. I think it would be difficult to evaluate such evidence in the context of an appeal of this kind. Complaints are often made that one side or the other has failed to act reasonably in the conduct of the proceedings, but without seeing the whole picture it is very difficult to determine whether there has been a fault of that kind, and certainly of a kind that should attract a sanction and, if so, what that sanction properly ought to be. In the end, it seems to me that the essence of this case was an attack by the insurers on the honesty of the claimant, which totally failed. In those circumstances, I think that the claimant should receive the whole of her costs.

Lord Justice Moore-Bick:

15. I agree.

Lord Justice Toulson:

16. I also agree.

Lord Justice Ward:

17. And so the appeal will be allowed and paragraph 2 of the recorder's order will be varied so that the defendant pays 100% of the claimant's costs, to be subject to detailed assessment unless agreed.

Order: Appeal dismissed

Mr Clegg (instructed by Messrs DWF) appeared on behalf of the Appellant.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED