Fundamental Dishonesty: A review of recent authorities

by Joel McMillan

Introduction

In two recent cases, the Senior Courts have provided guidance on findings of fundamental dishonesty.

In **(1) Lorna Howlett (2) Justin Howlett v (1) Penelope Davies (2) Ageas Insurance** [2017] EWCA Civ 1696, the Court of Appeal considered what a defendant must plead and put to a claimant during cross-examination before qualified one-way costs shifting ("QOCS") can be disapplied on the ground of fundamental dishonesty.

In **London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield** [2018] EWHC 51 (QB), the High Court considered applications to dismiss an entire claim pursuant to s.57 **Criminal Justice and Courts Act 2015** ("s.57") on the ground that the claimant has been fundamentally dishonest in respect of an element of the claim.

Howlett & QOCS

Background

QOCS protects an unsuccessful personal injury claimant from any costs liability beyond the level of any sums that he has recovered from the defendant.

Such protection, however, is not absolute, and **CPR r.44.15** and **r.44.16** set out various circumstances in which it may be removed. One of these is *'where the claim is found on the balance of probabilities to be fundamentally dishonest'*.

The CPR provides no definition of fundamental dishonesty and, prior to **Howlett**, practitioners were primarily reliant on the county court case of **Gosling v (1) Hailo (2) Screwfix** (2014), unreported, in which HHJ Maloney QC gave the following definition of fundamental dishonesty:

> *'The corollary term to "fundamental" would be a word with some such meaning as "incidental" or "collateral". Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a*

fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.'

Similarly, until **Howlett** there was no authority, even at county court level, addressing the procedural formalities required for a finding of fundamental dishonesty. Claimants routinely argued, with varying degrees of success, that a judge was precluded from making such finding unless it had been expressly pleaded and/or expressly put to the claimant during cross-examination.

It was these issues with which **Howlett** was primarily concerned.

The Proceedings Below

The Howletts' case was that they were passengers in Ms Davies' car when it collided with a stationary vehicle. They brought claims for personal injury and consequential loss.

In its defence, Ms Davies' insurer, Ageas, pleaded that it did *'not accept the index accident occurred as alleged, or at all'* and put the Howletts to strict proof that (i) they were involved in the index accident; (ii) the accident was caused by negligence of Ms Davies; and (iii) they suffered injury and loss as a consequence of the accident.

Further, the defence set out a number of facts, which Ageas contended were either inconsistent with the Howletts being injured or pointed to the accident being staged.

The matter was allocated to the Fast Track and was heard over four days by DDJ Taylor in the County Court at Swindon.

In closing, counsel for Ageas invited the Court to find that the claims were fundamentally dishonest whereas counsel for the Howletts maintained it was not open to the court to make such a finding in the absence of an express pleading and specific questioning of the Howletts in cross-examination.

DDJ Taylor dismissed the claims on the basis that he did not believe the evidence of the Howletts, concluding:

'I am afraid that there is not one part of the stories explained to me by Mr and Mrs Howlett that gives me any confidence that the accident as described by them and Ms Davies on 27 March 2013 happened as described or at all. Consequently I find that no injury was suffered by them as a result of any accident....'

Further, the Judge rejected the submission that Ageas's defence precluded a finding of fundamental

dishonesty given it made clear *'in the clearest possible terms to the claimants that they have not been honest.'*

Similarly, he concluded that the absence of express cross-examination on fundamental dishonesty did not prevent such a finding in circumstances where the issue had loomed large throughout the trial:

> '*Well, in my judgment it is not possible to say that if I come to the conclusion that there has been dishonesty in this case that I have taken anyone by surprise and therefore there is any unfairness, I have to remind Mr Bartlett* [counsel for the Howletts] *that the issue of honesty was something which he put into question in these proceedings, particularly with regard to the evidence of Lorna Howlett, because after the cross-examination of her by Mr Vonberg* [counsel for Ageas] *… he asked in re-examination, 'Has the evidence you have been giving honest?'. And she said, 'Yes, I have told the truth in my evidence'. So clearly that is an issue which is thought important for the court by the claimant to resolve having considered the evidence of all parties… I find that there has been every opportunity given to the claimants to defend themselves and to make their case as they see fit.'*

Ultimately, the Judge concluded that the Howletts had been dishonest and that the dishonesty was fundamental, and that they should not therefore enjoy the protection of QOCS.

The Howletts appealed unsuccessfully to HHJ Blair QC before taking the matter to the Court of Appeal.

<u>The Decision in the Court of Appeal</u>

The matter came before the Court on 11th October 2017. Newey LJ gave the only judgment, with which Lewison and Beatson LLJ agreed.

Definition of Fundamental Dishonesty

Newey LJ began by considering what fundamental dishonesty meant by reference to HHJ Moloney QC's definition in **Gosling** (see above). Judge Moloney's approach was essentially approved with His Lordship adding that it was really a matter of common sense.

The Defence

Newey LJ then turned to the question of whether fundamental dishonesty had to be expressly pleaded.

In the absence of any case law concerning fundamental dishonesty, His Lordship reviewed the authorities on fraud and concluded that a judge could find a witness was lying without a pleading of fraud; indeed, it was commonplace for a judge to conclude that the evidence of a witness was deliberately untruthful in the absence of any allegation of fraud.

His Lordship noted Brooke LJ's comments in **Kearsley v Klarfeld** [2005] EWCA Civ 1510 in respect of an LVI defence that a defendant *'does not have to put forward a substantive case of fraud in order to succeed'*; it was sufficient to *'set out fully the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted'*.

Newey LJ therefore concluded that it must be open to a judge to find that, for example, a claimant was not injured in an accident or was not present at an accident even if fraud was not pleaded. The key question was not whether the defence positively alleged fraud but rather *'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.'*

Similarly, where a judge's properly made findings on the substance of a claim warranted a conclusion that it was fundamentally dishonest, he was entitled to make that finding irrespective of whether it was expressly pleaded so long as the claimant was on sufficient notice and had an adequate opportunity to address the issue.

In the instant case, Ageas's defence had given the Howletts proper notice of the points that it intended to raise at trial and the possibility of the Judge making the findings that he did. The Howletts could not fairly suggest that they were ambushed and there was therefore nothing about the defence that precluded the judge from finding the claims to be fundamentally dishonest.

The Oral Evidence

Newey LJ then turned to the question of whether the cross-examination of the claimants had been adequate. He noted the long-established principle dating back to **Browne v Dunn** (1894) 6 R 67 and elucidated in **Markem Corp v Zipher Ltd** [2005] EWCA Civ 267 that:

> *'Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.'*

His Lordship observed that, where a witness's honesty was to be challenged, it would be always be best if it was expressly put to him in cross-examination. Nevertheless, he concluded that:

> *'what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words 'dishonest' or 'lying' will give a witness fair warning. That will be a matter for the trial judge to decide.'*

In the instant case, it was clear that the question of honesty was in issue from the outset; that Ageas's case had been put to the Howletts fairly and squarely; that there had been cross-examination to the effect that there had been dishonesty; and that the Howletts had been given every opportunity to defend themselves. The conclusion therefore, was that the Howletts' honesty had been adequately explored in cross-examination.

Accordingly, the appeal was dismissed.

Sinfield and s.57

Introduction

S.57 provides:

> *Personal injury claims: cases of fundamental dishonesty*
>
> *(1)This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—*
>
> *(a) the court finds that the claimant is entitled to damages in respect of the claim, but*
>
> *(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.*
>
> *(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.*
>
> *(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.*
>
> *…*

In other words where a court concludes that the claimant has been fundamentally dishonest in respect of a claim for personal injury, it must dismiss the entire claim including any sums to which the claimant has a genuine entitlement unless there would be *'substantial injustice'*.

Sinfield was primarily concerned with the definitions of fundamental dishonesty and substantial injustice within the context of s.57.

The Proceedings Below

Mr Sinfield broke his wrist in an accident whilst volunteering at the 2012 Olympic Games. He brought a claim against LOCOG who admitted liability. His Schedule of Loss, signed with a statement of truth and totalling around £31,000, included past and future gardening costs of around £14,000. His witness statement stated that he and his wife did all of the gardening prior to the accident but, as a result of the accident, he was no longer able to assist and they had to pay a gardener, Mr Price. He disclosed invoices that he said were from Mr Price.

LOCOG located Mr Price who provided a witness statement stating that he had worked for the Sinfields between May 2005 and March 2014; that his hours had not changed after Mr Sinfield's accident; and that he had not prepared the invoices that were relied upon by Mr Price. LOCOG duly amended its Defence and sought the dismissal of the entire claim under s.57.

In response, Mr Sinfield provided a further witness statement in which he stated:

> *'I fully accept that paragraph 30 of my witness statement dated 19 October 2016 is incorrect. Pre-accident Christine and I did not do all the gardening and I have worded my statement badly…*
>
> *Post-accident I was completely prevented from doing any gardening, lifting, DIY and so on because of my injury. Therefore, the basis of my gardening claim was to claim the cost of something I was unable to continue myself albeit that I did employ someone already. I felt like the choice been taken away from me so although I had been paying someone to do the garden I now had no choice in the matter.*
>
> *I included a claim for a reasonable sum to reflect that I was now no longer able to carry out any gardening at all. In hindsight I agree it was wrong for me to do that and the correct thing would have been for me to claim the extra work that Christine now had to do in the garden because I was unable to help…*

I did prepare the invoices in respect of Mr Price's work myself. I always paid Mr Price by cheque but he never gave me an invoice or receipt. My solicitor asked me to provide proof of the sums paid for gardening. In my business, if we pay someone by cheque but they don't raise an invoice we prepare the invoice for the same amount. This is known as self billing. As far as I was concerned I was only trying to show what I had paid Mr Price. I therefore saw nothing wrong in doing the same here.'

The witness statement was accompanied by an updated Schedule of Loss in which the claim for gardening was reduced to around £1,650.

The trial was heard by Mr Recorder Widdup in August and September 2017. He found in respect of the initial gardening claim that *'the proper inference to draw was that Mr Sinfield was indeed muddled, confused and careless about this part of his claim but there is insufficient evidence from which I can infer that he was dishonest about it.'*

He further found that the invoices were prepared by Mr Sinfield to advance his claim *'to conceal the earlier muddle'*; and that the creation of those invoices and what was said about the gardening in the first witness statement was dishonest.

Nevertheless, whilst the Recorder found that the dishonesty was fundamental to the gardening claim, he took the view that the dishonesty was only peripheral to the claim overall. Consequently, he found that Mr Sinfield was not fundamentally dishonest, emphasising that '*the dishonesty was motivated not by a wish to create a false claim but to conceal and get away with the muddled and careless presentation of his case in the past'*.

He found that, in any event, it would be substantially unjust within the meaning of s.57 to dismiss an entire claim when the dishonesty related only to a peripheral part of the claim and the remainder of the claim was honest.

Mr Sinfield was awarded damages of just under £27,000.

The Decision of the High Court

LOCOG appealed and the matter was heard by Knowles J. His Lordship considered the definition of fundamental dishonesty and concluded that such finding will be justified for the purposes of s.57 if:

'the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a

way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation'.

The test for dishonesty was objective: if by ordinary standards a state of mind was dishonest, it was irrelevant if the defendant judged it by different standards: **Ivey v Genting Casinos Limited (t/a Crockfords Club)** [2017] 3 W.L.R. 1212 applied.

In the instant case, the Recorder was plainly wrong to have found that the inaccurate Schedule of Loss was a result of muddle and confusion, and not the result of dishonesty. In any event, the dishonesty in relation to the invoices and the first witness statement could not be characterised as peripheral: the dishonesty was premeditated and maintained over many months, and could have resulted in LOCOG paying out far more than they would have on honest evidence. The Recorder ought therefore to have found that Mr Sinfield was fundamentally dishonest.

His Lordship then considered the question of substantial injustice and concluded that it could not be established merely by a claimant being deprived of the compensation to which he was otherwise properly entitled, otherwise s.57 would effectively be neutered. Instead, substantial injustice arising as a consequence of the loss of the compensation would generally be required.

There was no evidence that Mr Sinfield would suffer any injustice if the claim were dismissed other than losing those damages to which he had a genuine entitlement. It followed that he could not establish substantial injustice.

Accordingly, the appeal was allowed and the entire claim was dismissed.

Conclusion

There is nothing that is particularly surprising in either judgment and both will provide a degree of encouragement to defendants. Nevertheless, in light of **Howlett**, defendants will have to take care to set out their case fully in their pleadings and in cross-examination, albeit without necessarily making express reference to fundamental dishonesty. Further, experience suggests that many county court judges will continue to display a degree of reluctance to make findings of fundamental dishonesty and that such findings will remain relatively unusual.