***London Organising Committee of the Olympic and Paralympic Games (LOCOG) v Sinfield* [2018] EWHC 51 QB.**

Summary

1. In January 2018, Mr Justice Knowles provided the first High Court decision addressing section 57 of the Criminal Justice and Courts Act 2015 (**"s. 57"**). The impact on fundamental dishonesty (**"FD"**) within otherwise valid and truthful claims is significant. The following is an analysis of the facts, decision at first instance, and the appeal.

2. Key points to note:

   - S.57 now offers defendants the opportunity to have an entire claim dismissed, notwithstanding the claimant's entitlement to damages relating to valid and truthful aspects of the claim, in circumstances where the claimant is found to have been fundamentally dishonest in respect of the primary claim or a related claim.

   - It is sufficient for the dishonesty to go only to a particular head of damage, which itself is not the major part of the claim. The court will look to whether the dishonesty potentially adversely affected the defendant in a significant way.

   - The definition and application of what is fundamentally dishonest should be approached with reference to HHJ Moloney QC's 'common sense' approach, in *Gosling v Halo* (29 April 2014), and the decision in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] 3 WLR 1212.

   - There is an 'escape clause' for the claimant, if it can be shown that denial of damages would amount to 'substantial injustice', but the denial of damages to which a claimant would otherwise have been entitled is not, in and of itself, sufficient to establish 'substantial injustice'.

- S. 57 operates where the court finds that the claimant is entitled to damages in respect of the claim. Thus, if the claimant is held not to be entitled, s. 57 does not apply, but the court may go on to separately consider FD and the disapplication of QOCS.

- The court must record the amount of damages that would have been awarded to the claimant in respect of the primary claim, and deduct that amount from the costs that it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

Section 57

3. S. 57, as is relevant, is as follows:

(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.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

…

(8)In this section—

"claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counter-claim;

"personal injury" includes any disease and any other impairment of a person's physical or mental condition;

"related claim" means a claim for damages in respect of personal injury which is made—

(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

(b) by a person other than the person who made the primary claim.

(9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force."

The facts

4. Understanding of the factual background to the case and the judgment at first instance is crucial to a meaningful analysis of FD within this context, as it now appears to stand.

5. Mr Sinfield was a volunteer at the 2012 Olympics. In the course of his volunteering on 09/09/2012, he fell onto his left arm and fractured his distal radius and the ulnar styloid of his left wrist. The injuries had some long term consequences in terms of Mr Sinfield's physical ability.

6. Proceedings for personal injury were brought against LOCOG and on 07/12/2015 Mr Sinfield served a Preliminary Schedule of Special Damages (**"Preliminary Schedule"**), verified by Mr Sinfield with a statement of truth and signed by him. Part of those special damages included a claim for gardening expenses, both in respect of past and future losses. Of relevance was the statement at paragraph 5 of the Preliminary Schedule that:

"*Prior to the accident the Claimant looked after the garden himself with his wife. Post accident his wife continues to do some of the gardening but they had to employ a gardener for 2-4 hours per week at a cost of £13 per hour.*"

At paragraph 8 it was stated that:

"*The Claimant would probably at some point have required assistance with gardening and employed a gardener in any event whilst continuing to do some work himself.*"

7. The total value of the claim for gardening came to £13,953.31. The total value of the claim for special damages came to £33,340.86. The claim for gardening represented 41.9% of the special damages claim.

8. In due course liability was admitted and damages for pain, suffering and loss of amenity were agreed at £16,000. The gardening claim represented 28% of the overall value of the claim.

9. LOCOG then served its Defence, following which Mr Sinfield filed his List of Documents stating that:

> "*I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I further certify that the list of documents set out in or attached to this form, is a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose.*
>
> *I understand that I must inform the court and the other parties immediately if any further document required to be disclosed by Rule 31.6 comes into my control at any time before the conclusion of the case.*"

10. Within those documents were invoices from two gardeners covering periods between October 2012 and July 2016. In September 2016 Mr Sinfield updated his Schedule, maintaining the claim for gardening, with a slight increase.

11. In October 2016, Mr Sinfield filed his first Witness Statement, which at paragraph 30 read as follows:

> "*Pre-accident Christine and I did all the gardening. We have a 2 acre garden which needs a lot of upkeep. Christine still does some of the garden but it is impossible for her to do it alone and so we now employ a gardener. Over the winter months the gardener only does a couple of hours per week but in the summer months this increases to 4 hours per week.*"

12. LOCOG were not convinced, and approached the gardener, Mr Price, who provided a Witness Statement and gave oral evidence at trial. He confirmed that he had worked for Mr Sinfield since May 2005 and that the invoices allegedly produced by him had in fact not been issued by him and contained the wrong address. He confirmed that between May 2005 and March 2014 he worked four hours per week, 11 months of the year, and that this did not change after Mr Sinfield's accident. Damningly, he stated that:

> "*I do not know why Mr Sinfield says that prior to his accident in September 2012 he and his wife looked after the garden themselves but following the accident he had to employ a gardener. This is just not true and I felt that it was important to provide this statement to set out the correct position*."

13. In light of this, LOCOG amended its defence to allege FD and relied upon s. 57. LOCOG pleaded that FD arose as a result of:

a) The assertions in paragraphs 5 and 8 of the Preliminary Schedule of Damages. LOCOG contended that at the time the Claimant made the assertions in those paragraphs, verified as they were by a statement of truth, he knew them to be false.

b) The invoices identified in the List of Documents purporting to come from Mr Price. LOCOG contended that Mr Sinfield's claim to have received invoices from Mr Price in relation to gardening work in the periods identified was false and that the documents were created by Mr Sinfield to support 'a dishonest claim for expenditure on commercial gardening assistance'.

c) Paragraph 30 of Mr Sinfield's Witness Statement. LOCOG contended that Mr Sinfield's claim that by reason of this accident he had to employ a gardener to do gardening which previously he would have done in conjunction with his wife is false.

14. The Amended defence averred that:

> "*Accordingly, the Claimant's claim that as a consequence of this accident he has incurred expenditure on gardening assistance that he would not otherwise have incurred is false. In this regard the Claimant has been fundamentally*

dishonest in relation to his primary claim for damages for personal injury and his entire claim should be dismissed."

15. The Claimant sought to row back via a Supplementary Witness Statement in which he admitted preparing the invoices himself. He stated that:

    a) Mr Price never gave him an invoice but that in an effort to comply with his solicitor's request for proof did what he deemed to be usual in his business, which was to 'self bill' by writing one's own invoice where payment had been by cheque. He was, he said, only trying to show what he had paid, and saw nothing wrong in so doing.

    b) While he accepted that the initial statement had been wrong, it had been worded badly insofar as prior to the accident a gardener *had* helped, and what he had intended to convey was that post-accident he had been prevented from doing any gardening. As such, he was seeking to claim on the basis that the choice had now been taken away from him.

16. In something of an attempt to strengthen his credibility and re-orient his moral compass, he highlighted that he was not claiming the full amount that he had been paying for gardening, but had claimed an amount to reflect a reasonable sum given that he was now unable to carry out any gardening at all.

17. A further Schedule of Damages was served which reflected the truth, and revised the gardening claim down to £1,643.99.

First instance

18. Mr Recorder Widdup held that Mr Sinfield was dishonest in relation to paragraph 30 of his Witness Statement, insofar as it created the impression that Mr Price had only been employed post-accident. In respect of the invoices, the judge found them to be 'true in part', but dishonest nevertheless. In relation to the Preliminary Schedule, the Judge held that it had been 'muddled, confused and careless', but not dishonest. The judge found that the dishonesty was fundamental to the gardening claim, but that it did

not ‘contaminate the entire claim’. The height of the Claimant’s dishonesty was stated to be to ‘conceal and get away with the muddled and careless presentation of his case in the past’.

19. The judge went on to find that it would be potentially unjust to deprive Mr Sinfield of damages to which he was entitled for his injury where the claim for gardening was enhanced and muddled, but still a genuine claim. Mr Recorder Widdup concluded that:

> “*Dishonesty which goes to the heart of a claim is fundamental. Peripheral exaggeration or embellishment or something incidental or collateral is not. The dishonesty in this case related solely to the gardening claim. He had a genuine claim which he failed to present in a proper manner. He exaggerated this claim, but it was peripheral to the main claim. There was a genuine claim for personal injury which 'went wrong' when Mr Sinfield was careless and then dishonest.*”

20. On that basis, Mr Sinfield was not held to have been fundamentally dishonest. Even if he was wrong about that, Mr Recorder Widdup held that it would be substantially unjust for the entire claim to be dismissed where the dishonesty related to a peripheral part of the claim, the remainder of which was genuine.

The approach on appeal

21. LOCOG appealed, on the basis that the judge was wrong in three respects:
    1) It was wrong to find that Mr Sinfield had not been fundamentally dishonest in relation to paragraphs 5 and 8 of his Preliminary Schedule.
    2) It was wrong to conclude that the dishonesty found did not constitute FD in respect of the claim for damages for personal injury.
    3) It was wrong to conclude that even if there had been FD there was substantial injustice to Mr Sinfield if the claim was dismissed pursuant to s. 57.

22. The appeal was successful on all three grounds, but the significance of the judgment is found in the discussion of how and why this aspect of FD has shifted. The judgment notes that prior to s. 57, having a claim struck out under CPR 3.4(2)(b) as an abuse of process was inherently difficult, not least following *Summers v Fairclough Homes Ltd*

[2012] 1 WLR 2004. Parliament, through s. 57, appears to have responded by taking the opposite approach to Lord Clarke in *Summers* and provided that notwithstanding a defendant's substantive liability, it should nevertheless be relieved in circumstances where a claimant is fundamentally dishonest in his exaggeration of the claim. This, it would seem, gives effect to the 'fraudulent claims rule' within the personal injury context – the rule that a genuine claim supported by fraudulent evidence should fail, despite being valid in law.

23. The question becomes, what is FD within this civil context? The concept was introduced by CPR 44.16(1) in creating an exception to QOCS where the claim is found to be FD (note 'claim' rather than 'claimant' as per s.57) and has created some difficulty in application since. Thankfully, *Sinfield* addresses it in detail. Positive reference was made to *Howlett v Davies* [2017] EWCA Civ 1696, which had confirmed HHJ Moloney QC's 'common sense' approach, sitting in the County Court at Cambridge, in *Gosling v Halo* (29 April 2014), which reads at paragraphs 44 and 45:

> "*It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.*
>
> *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.*"

24. A number of other County Court level decisions were referred to in an attempt to expound upon the meaning of 'dishonesty' and 'fundamental'. It is recommended that paragraphs 57-59 are considered for the sake of fullness, but in summary, Mr Justice Knowles reverted to the recent and comprehensive approach of the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] 3 WLR 1212, and summarised at paragraph 27 that:

> "*…whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards.*"

25. If there is any uncertainty as to whether a claimant has been 'dishonest' for the purposes of a s. 57 application, recourse should be had to *Ivey*.

26. Thus, Mr Justice Knowles concluded that fundamental dishonesty within this context is where a defendant proves, on a balance, that the claimant has related dishonestly (judged according to *Ivey*) in relation to the primary claim and/or a related claim and that in so doing he has substantially affected the presentation of his case, either in respect 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. At first blush, this must be seen as a significant shift from *Summers*.

27. Looking more closely and at what 'substantially affects' means, Mr Justice Knowles clarified that it was intended to convey the same idea as expressions such as 'going to the root' or 'going to the heart'. He provided the following approach to s. 57 that a court should adopt (paragraph 64):

    a. *Firstly, consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.*

b. *If the judge concludes that the claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;*

c. *If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s 57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s 57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.*

28. Crucially, substantial injustice must mean more than the fact that the claimant will lose his damages for heads of claim that are not tainted with dishonesty. That, he said, was plainly Parliament's intention. S. 57 is to be both punitive and a deterrent. Thus, losing those damages *per se* will not be sufficient, there must be some substantial injustice which can be pleaded *as a result* of losing those damages.

29. Thus, as a result of Mr Justice Knowles' judgment, the definition of dishonesty within this context has been made as clear as it can be, albeit with reference to *Ivey*. The definition of fundamental has been clarified. Guidance has been given on the concept of substantial injustice. Overall, a framework to apply s. 57 has been provided, which must be seen as presenting defendants with a new avenue for pursuing FD, and one with greater prospects than those existing for claims issued before s. 57 came into force (13/04/2015).

30. However, given that threshold for '<u>fundamental</u> dishonesty' appears to remain high, insofar as the dishonesty must go to the 'heart' or 'root' of the claim, the question arises as to just how far *Sinfield* and s. 57 depart from *Summers*. The answer is provided in the practical application to the facts in *Sinfield*, which demonstrates the reality of the shift that this new avenue for FD provides. The practical application of the legal analysis also provides useful clarification in respect of assessing dishonesty within the civil context.

FD and s. 57 applied to the facts – the true picture

31. In respect of ground 1, Mr Justice Knowles reminded himself of paragraph 74 of *Ivey*:

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

32. The question therefore became whether Mr Sinfield genuinely believed the facts stated in paragraphs 5 and 8 of his Preliminary Schedule to be true. Mr Justice Knowles held at paragraph 75 that:

> "*It seems to me that the only reasonable meaning to be attached to paras 5 and 8 is that what Mr Sinfield was saying was that before the accident the gardening was done solely by him and his wife, whereas his accident had - for the first time - necessitated the employment of a gardener, thus generating the recoverable losses which were then set out in the tables under each paragraph. The phrase in para 8 'The Claimant would probably at some point have required assistance with gardening …' referred to the mere probability of an event (the employment of a gardener) which was, in fact, the actuality, long before the accident. It was therefore obviously a misleading statement.*"

33. Thus, it was held that the only reasonable conclusion was that what Mr Sinfield was trying to convey was that as of the date of the accident, it was only himself and his wife who did the gardening, and nobody else. Mr Sinfield knew this to be untrue, knew that the statements were made in support of a claim for damages, and the only conclusion could therefore be that they were dishonest misrepresentations. The judge at first instance should, but did not, ask himself what the relevant paragraphs in the Preliminary

Schedule meant and whether Mr Sinfield could genuinely have believed that meaning. In failing to ask those questions (i.e. apply the test for dishonesty), he came to the wrong answer.

34. It was not of any persuasive relevance that Mr Sinfield had 'under' claimed in respect of the number of hours of gardening he was actually paying for. Further, it was not relevant that there had, arguably, been a decision by Mr Sinfield not to pursue a potential claim for loss of earnings. In other words, a conclusion of dishonesty could not be undermined by some tangential moral high ground.

35. Thus, it was held on appeal that the judge was wrong to conclude that paragraphs 5 and 8 of the Preliminary Schedule were not dishonest.

36. In respect of ground 2, Mr Justice Knowles held that the judge was wrong to conclude that while Mr Sinfield had been dishonest in respect of paragraph 30 of his Witness Statement and by creating false invoices and had been fundamentally dishonest in his gardening claim, he had not been fundamentally dishonest in relation to the claim. This aspect of the judgment is of particular relevance when weighing up whether to pursue a s. 57 application, and I can do no better than to repeat Mr Justice Knowles' succinct conclusions at paragraphs 83-86:

> "*As I have set out, in my judgement a claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) 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, 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.*
>
> *Even on the findings made by the judge, according to that test, what Mr Sinfield did was fundamentally dishonest. He presented a claim for special damages in a significant sum, and the judge found that the largest head of damage was evidenced by the dishonest creation of false invoices and by a dishonest witness statement. Both pieces of dishonesty were premeditated and maintained over many months, until LOCOG's solicitors uncovered the true picture. As presented on the*

Preliminary Schedule, items 5 and 8 made a total of £14 033.18 out of a total claim for special damages of £33 340.86. Mr Sinfield therefore presented his case on quantum in a dishonest way which could have resulted in LOCOG paying out far more then they could properly, on honest evidence, have been ordered to do following a trial.

I reject Mr James' argument that the claim was not fundamentally dishonest because, by comparing multiplicands, the overstatement was less than £3000, and so any dishonesty cannot be said to go to the heart or root of the claim. The fact is that Mr Sinfield dishonestly maintained a claim for £14 033.18 which he was not entitled to. The fact that a later medical report showed that a gardener would have been employed within three years, thereby limiting future losses to three years, is neither here nor there. For all Mr Sinfield knew, LOCOG might have been willing to settle the case at or near the dishonestly claimed figure of damages long before the medical report was served. The dishonesty therefore potentially impacted it in a significant way.

The judge should have concluded that Mr Sinfield had been fundamentally dishonest in relation to the claim and therefore, prima facie by virtue of s 57(3), the entire claim fell to be dismissed unless, by s 57(2), that would result in substantial injustice to Mr Sinfield. Instead, he asked himself the question (para 22): 'If the greater part of the claim is genuine and honest, is the dishonesty fundamental ? I answer that by considering s 57(2)'. In my respectful opinion, that was the wrong question and the wrong answer. If the claimant has been fundamentally dishonest in the way I have indicated then the fact that the greater part of the claim might be honest is neither here nor there (subject to substantial injustice): by enacting s 57(3) Parliament provided that the entire claim, including any genuine parts, are to be dismissed."

37. In respect of ground three, and again of significance, Mr Justice Knowles clarified that it was, and would be, wrong to make a finding of substantial injustice simply because the dishonest aspect of the claim was peripheral, while the remainder was genuine and honest. Something more is required than mere loss of damages to establish substantial injustice. Parliament's shift to what had gone before by way of the introduction of s. 57 made that clear.

Conclusion

38. A shift has taken place in relation to FD. While it is necessary to roll out the usual caveat, that cases turn on their own set of facts and circumstances, it is telling that despite adopting HHJ Moloney QC's approach to FD, that if dishonesty goes to a self-contained or minor head of damage it will not be fundamental, Mr Justice Knowles was prepared to make a finding of FD in the present case. The gardening claim *was* a self-contained head of damage. While not minor, it was, overall, just 28% of the claim. Further, Mr Sinfield had, arguably, under-claimed and provided some (albeit poor) explanation for his dishonesty which in some respects did mitigate its moral repugnancy. Despite that, it was deemed to have substantially affected the presentation of the claim in a way which potentially adversely affected the defendant in a significant way. The fact that the dishonesty could have resulted in LOCOG paying out far more than that which honest evidence would have entitled Mr Sinfield to, was crucial. The fact that the dishonest evidence *may* have led LOGOG to settle the case inclusive of a large portion of the dishonestly claimed figure was similarly crucial, and provided the 'significant impact' necessary. The fact that the greater part of the claim was honest was irrelevant. Thus, s. 57 must be seen as having substantially shifted the approach to FD.

Application of Mr Justice Knowles' approach in *Razumas v Ministry of Justice* [2018] EWHC 215 (QB)

39. The approach in *Sinfield* has already been reinforced at by Mrs Justice Cokerill, in her judgment of 12/02/2018. The factual background is complex and the judgment is lengthy (and recommended for guidance on the duty of care owed to prisoners in respect of medical treatment) and it is not necessary to repeat it in detail here. Further, the case ultimately failed in respect of breach of duty (and would also have failed on causation), and hence discussion of s. 57 was obiter. However, the *Sinfield* approach to FD and s.57 was endorsed from paragraphs 212 to 215:

> "*I gratefully adopt the test set out by Julian Knowles J and ask myself first: Did Mr Razumas act dishonestly in relation to the primary claim and/or a related claim? To this the answer must be yes. He has one main claim, and the dishonesty went to one route to succeed on it in full. Has he thus substantially*

affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the defendant in a significant way? Again the answer must be yes. The argument which he advanced went to an entire factual section and pleaded occasion which would have entitled relief on the main claim. Thus the first part, fundamental dishonesty is made out.

I do not consider that there could be any way out for Mr Razumas via the argument on substantial injustice. It cannot in my judgement be right to say that substantial injustice would result in disallowing the claim where a claimant has advanced dishonestly a claim which if established would result in full compensation. That would be to cut across what the section is trying to achieve.

In the ***Sinfield*** *case Julian Knowles J had no difficulty in dismissing this argument in the context of a dishonesty which went only to part of the quantum claimed. At [89] he stated that it was plain from section 57(3):*

> *"….something more is required than the mere loss of damages to which the claimant is entitled to establish substantial injustice. Parliament has provided that the default position is that a fundamentally dishonest claimant should lose his damages in their entirety, even though ex hypothesi, by s 57(1), he is properly entitled to some damages. It would render superfluous s 57(3) if the mere loss of genuine damages could constitute substantial injustice."*

This, it seems to me, must be right. Something more is required. That something more is not made out here and so, if there were a claim it would fail at this stage."

40. Thus, within the relatively murky waters of FD, some clarity has been provided, specifically and especially in relation to s. 57 and the framework for approaching the same.