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Civil litigation update:

'fundamental dishonesty' reviewed by appeal court

It has been a while coming, but for personal injury solicitors and insurers alike there is now clarification about what amounts to fundamental dishonesty.

About the author

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Welcome guidance on the circumstances in which fundamental dishonesty may lead to a claimant losing the benefit of QOCS has been provided. Claimants who seek to hide behind points of pleading may well be disappointed. So long as all the cards are on the table, claimants should expect to pay the price for fundamental dishonesty.

Background

It may be recalled that Jackson LJ's *Review of Civil Litigation Costs: final report* removed the success fee and after-the-event insurance from personal injury claims.* In its place, he recommended the introduction of qualified one-way costs shifting (QOCS). This was implemented in Civil Procedure Rules (CPR) 44.13–44.17, where a claimant would not have to pay the defence costs if they lost the claim, but the insurer would still have to pay the claimant's cost if they lost. There are still some exceptions to the rule contained within CPR 44.16, which states: 'Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found to be fundamentally dishonest.'

The introduction of fundamental dishonesty in primary legislation was through Criminal Justice and Courts Act (CJCA) 2015 s57; however, it fell to HHJ Maloney QC in *Gosling v Hailo* and another (2014) 29 April, unreported, Cambridge County Court for the first explanation as to what amounted to fundamental dishonesty in both the CJCA and the CPR:

... 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 what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental and so as to expose such a claimant to

cost 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-containing head of damage. If, on the other hand, the dishonesty went to the root of the 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 (paras 44 and 45).

There can be a question about whether this approach was correct, but the waiting is now over. The judgment in *Howlett and Howlett v (1) Davis and (2) Ageas Insurance Ltd* [2017] EWCA Civ 1696 has been handed down by the Court of Appeal concerning fundamental dishonesty.

The facts

Mrs Lorna Howlett and her son, Justin, made a claim for damage for personal injuries and financial loss based on an alleged car accident on 27 March 2013. They claimed that they were passengers in a car driven by Penelope Davies (who was the first defendant), and that she negligently collided with a parked vehicle.

The second defendant, Ageas Insurance Ltd, defended the claim on the basis that there was no accident and that even if an accident had occurred, it was at such a low velocity that any personal injury would be unforeseeable. However, what was more indicative of dishonesty was the fact that Ageas discovered that, on 7 December 2012, both claimants were passengers in another

car negligently driven by Ms Davies, which had been involved in another accident in which Lorna Howlett and Justin Howlett were injured. This incident, however, was not disclosed to the medical expert; in addition, Ageas discovered that Ms Davies had been in at least four road traffic accidents between 2011 and 2013.

There were also differing accounts in statements about how the accident occurred. Taking into account that there were no witnesses nor were the emergency services involved; that the claimants refused to undergo physiotherapy; and that they instructed solicitors in a different part of the country, led Ageas to one conclusion, ie, Lorna Howlett and Justin Howlett, and Penelope Davies dishonestly conspired to stage the accident deliberately.

At first instance, Deputy District Judge Taylor heard the case and had no hesitation in dismissing the claim for fundamental dishonesty. The claimants appealed. The appeal was heard by HHJ Blair QC. He upheld Deputy District Judge Taylor's decision, and Lorna Howlett and Justin Howlett appealed to the Court of Appeal.

The lead judgment in the Court of Appeal was given by Newey LJ, with whom Beatson and Lewison LJ agreed. While the court did not hear any arguments regarding the correctness of HHJ Moloney QC's approach, neither counsel sought to challenge it and the appellants' (the Howletts') counsel spoke of it being 'common sense', with whom Newey LJ agreed (para 17).

However, this may not be particularly helpful as it still leaves open the question as to what amounts to dishonesty. The timing of this issue could not be better as the Supreme Court has just handed down the decision in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, where general guidance can be found on the meaning of dishonesty.

No ambush on fundamental dishonesty

In any civil claim, the allegations must be proved; in this case, the burden of proof on the issue of whether a claim is fundamentally dishonest is set out in CPR 44.16. The key consideration in the wording of the Part is 'where the claim is found on the balance of probabilities to be fundamentally dishonest'.

The argument put forward by the claimant was that the trial judge should not have reached the conclusion that fundamental dishonesty had been found on a balance of probabilities, ie, more likely than not, because this had not been specifically pleaded in the defence. The question for the Court of Appeal was whether the second defendant, Ageas, had failed to meet an obligation to include an allegation of fraud in its defence.

In its defence, Ageas said that it did 'not accept the ... accident occurred as alleged, or at all' and was clear in putting

Lorna Howlett and Justin Howlett to strict proof on all aspects of the claim (para 5). The defence stated: 'If, which is denied, there was an accident as alleged, [Ageas] will aver that it was a low velocity impact unlikely to cause injury with injury being unforeseeable in any event' (para 5). The defence went on: 'Should the court find any elements of fraud to this claim, the second defendant will seek to reduce any damages payable to the claimants to nil, together with appropriate costs orders therein' (para 7).

The Court of Appeal took a common-sense approach in considering whether any of the parties would have been surprised at a finding of fundamental dishonesty, based on the defence and the questions put at trial. A long list of facts and contentions made plain that credibility was expressly an issue.

Lord Justice Newey, giving the leading judgment stated:

However, 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 ... 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 insurer had positively alleged fraud in its defence (para 31).

Taking account of the ample opportunity afforded to Lorna Howlett and Justin Howlett to respond to the requirement to 'prove their case', and the clear coverage of this in the first instance judgment, the appeal was dismissed (paras 5 and 7). Deputy District Judge Taylor was clear that there had been cross-examination: 'so that the [Howletts] knew what they were facing'; that he had himself made it 'perfectly plain from the get go', such that the allegations of dishonesty and exaggeration were plain and Lorna Howlett and Justin Howlett could not claim any surprise (Court of Appeal transcript, para 38).

What really matters is clarity and transparency rather than pedantic points of pleading. Lorna Howlett and Justin Howlett made a claim which was clearly and adequately challenged by the defendant insurer, Ageas. Whether or not fraud was specifically alleged was not crucial.

The conclusion of Newey LJ's lead judgment shows that a firm approach should be taken towards the question of fundamental dishonesty: 'the district judge was entitled to find that the claim was 'fundamentally dishonest' and, hence, that CPR 44.16(1) applied. The relevant points were ... sufficiently explored during the oral evidence' (para 40).

* Available at: <http://tinyurl.com/go6s5co>