JAMES BENTLEY DISCUSSES "PLEADING FUNDAMENTAL DISHONESTY"

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What must be pleaded (if anything at all) if a defendant wishes to obtain a finding of fundamental dishonesty? Similarly, what exactly must be put to the party against whom such an allegation was made? Those were the questions that the Court of Appeal grappled with in *Howlett v Ageas [2017] EWCA Civ 1696.*

The Facts

The case arose out of a low value road traffic accident on the 27th March 2013. The defendant denied liability on the basis that it did, '*not accept that the index accident occurred as alleged, or at all.* If the accident did occur, then it was averred that, '*it was a low velocity impact unlikely to cause injury, with injury being unforeseeable in any event.*'

Although the defence explicitly stated that it was not pleading fraud, it did say that should any part of the case be found to be fraudulent, then they would be seeking to reduce the damages to nil, along with the, '*appropriate costs order*'. The defence also drew attention to 12 facts/contentions that (it was said) cast doubt on the claimants' credibility.

The District Judge dismissed the claimants' case, finding that he could not believe anything that the claimants said, and made a positive finding that there was no injury. Although fundamental dishonesty was not explicitly pleaded, he proceeded to find that the defence was sufficiently clear to put the claimants on notice that such a finding may be made, and as such, proceeded to make an enforceable costs order.

That decision was upheld by HHJ Blair QC.

Judgment

The claimants' appeal was dismissed. Lord Justice Newey, giving the leading Judgment, he stated that (paragraph 31):

"... 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. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in Kearsley v Klarfeld, has denied a claim without putting forward a substantive case of fraud but setting out "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", it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. 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."

As to what needed to put to parties, it was held that on the facts of the case, dishonesty *was* covered both in cross-examination and in re-examination. Nevertheless, Lord Justice Newey added that although it was always best to explicitly put such allegations to the claimant, failing to do so needn't be fatal (paragraph 39):

'...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. Secondly, the fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying. That must, in fact, be a common occurrence.'

Comment

The decision is a victory for common sense. There is nothing magic in the word 'fraud' and indeed, there is nothing magic in the words 'fundamental dishonesty'. When looking at the contents of the defence, it will usually be clear that allegations of dishonesty are going to be raised. Indeed, even where there isn't a long list of inconsistencies pleaded, it is inevitable that LVI cases by their very nature are going to mean that the claimant's honesty is going to be in issue come trial.

The court is unlikely to be impressed by any 'pleading points', and is now far more likely to take a robust and common sense approach so far as fundamental dishonesty is concerned.

On a separate point, it is also worth noting that the Court of Appeal approved the definition of fundamental dishonesty as per *Gosling v Hailo (HHJ Moloney QC, Cambridge County Court, 29th April 2014)* as one that was '*common sense*'.