FUNDAMENTAL DISHONESTY

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Dishonesty and fraud. While commentators, politicians, lawyers, insurers, trade unions, and claimants disagree as to the extent to which personal injury litigation is blighted by dishonesty and fraud, all agree that something needs to be done to deter dishonest claims succeeding at trial.

A dishonest claimant can find himself to be at the receiving end of various measures available to the courts; some with the aim of restoring the defendant to the position he would have been in but for the dishonesty/fraud, some intended to deter future would-be fraudsters. The measures include:

a) Contempt proceedings;
b) An adverse costs order – CPR 44.2 (in particular (5)(d): conduct includes whether a claimant who has succeeded has exaggerated the claim);
c) A claim for exemplary damages? See the fairly recent decision of *Hassan v Cooper & ACC* [2015] EWHC 540 (QB).
d) Unpicking any settlement / judgment? *Hayward v Zurich*;
e) Losing QOCS protection if the Claimant has been "fundamentally dishonest";
f) Having the entire claim dismissed (including the non-fraudulent bits) for "fundamental dishonesty".

Each could easily form the basis of a separate talk. These notes (and the talk that accompanies the notes) will focus on the latter two, and in particular the question of what "fundamental dishonesty" actually means.

The Relevant Provisions

Qualified one-way cost shifting has been around for a couple of years. As practitioners we will be familiar with the provisions of CPR 44.15 – 44.17. Our focus is on 44.16:

> *(1) 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 on the balance of probabilities to be fundamentally dishonest.*

PD44.12(4) supplements the Fundamental Dishonesty provision:

> *In a case to which rule 44.16(1) applies (fundamentally dishonest claims) –*
>
> *(a) the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;*
>
> *(b) where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;*
>
> *(c) where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4;*

(d) the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.

On 13 April 2015, s57 of the Criminal Justice and Courts Act 2015 came into force:

(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.

Why Now?

The QOCS provisions were brought in as part of the raft of reforms that hit the industry in 2013. The fundamental dishonesty provision was included in an effort to allay fears that QOCS would see insurers overwhelmed by claimants "trying it on" having determined that neither they nor their lawyers have anything to lose.

As to s57, the history is a little more involved.

A number of cases considered whether a court could strike a claim that had been based in part on fraud (and, if there is a difference, gross exaggeration). While the cases are of interest, for the purposes of this paper we need go only to the decision of the Supreme Court in *Summers v Fairclough* [2012] UKSC26.

Summers

Following surveillance evidence the claimant was awarded £88,716 against a pleaded Schedule seeking over £800,000. While the claimant had sustained a genuine injury in the index accident and he had some ongoing limitation, there was no doubt on consideration of the surveillance footage that the claimant was grossly exaggerating the extent of his disabilities and losses flowing.

The defendant refused to negotiate. The matter went to a final hearing and the judge made observations that left one in no doubt that he felt that the claimant was exaggerating and deliberately attempting to mislead the court for gain. The defendant applied for strike out of the entire claim (good and bad bits) on the basis that the claim was an abuse of process given the claimant's conduct.

The Supreme Court observed that a 'judgment' for the honest/genuine parts of the claim is a possession, and a court should be slow to deprive a claimant of his substantive rights (cue eye-rolling and utterance of the words "ooman rights" by some, a vote for the HRA and ECHR for others). There are a number of other steps available to the court (costs orders, contempt proceedings etc). Striking out is a draconian step, especially so where there has already been a trial:

> "*The draconian step of striking a claimant is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small.*"(per Lord Clarke para 49).

And so the effect of *Summers* was to make it very difficult for defendants to successfully strike out claims at the conclusion of a trial even where the overwhelming majority of the claim was demonstrably false. While there were some exceptions where strike out was successful (see for example Scullion v RBS (HHJ Cotter QC) - available on Lawtel – where the court concluded that it could not weed out the good bits from the fraudulent bits of the claim) what the successful cases seem to have in common is an inability of the court on the particular facts to separate fact from fiction. The decision in Summers was the subject of much criticism and consternation. The Government concluded that something had to be done and so s57 came into being.

Fundamental Dishonesty: Different Interpretations?

Will FD be interpreted as meaning the same thing whether it is a QOCS case or a s57 case? Probably. During debate on s57 in the House of Lords, reference was made to the fact that a similar provision existed in respect of QOCS. There was no suggestion that the term should have a different meaning dependent on which provision was being considered. Given that both go to the same issue and both involve depriving the claimant of a benefit as a means of punishment and a wider deterrent, it is likely that the term will be interpreted in the same way.

So…What does it mean?

Despite QOCS having been around for some time, there are surprisingly few reported cases in which the concept or definition of Fundamental Dishonesty has been considered. A quick search of Google reveals that pretty much every major Defendant firm lays claim to having been "one of the first" to have established fundamental dishonesty against the claimant. However, it doesn't take much more than a cursory glance to identify that these cases seem to have been decided by a District Judge in a

County Court following a fast track trial in which the claims damages were small and the apparent dishonesty as plain as a pike staff.

The only reported decision of any authority as at the date of print (05/06/15) is that of His Honour Judge Moloney QC in *Gosling v Hailo & Screwfix* (Cambridge CC, 29/04/14). It has become a well-known decision no doubt because it is the only one of its kind at present.

Facts of Gosling

The claimant experienced a serious injury to his knee. Of that there was no doubt. He had to undergo a knee replacement which was attributable to his accident. However, he claimed that he required continued use of a crutch, experienced ongoing significant symptoms, and that his ability to work was compromised as a result.

The defendant obtained surveillance evidence. That evidence showed him walking around a "warehouse superstore" without a crutch (and bending, lifting etc) and walking around Asda, pushing a trolley, loading his van, not using a crutch etc. That same day he attended on the defendant's expert for examination. He was seen just prior to the examination going to the back of his van, removing a crutch from the van, and walking into the appointment with the crutch supporting him.

Having seen the surveillance evidence, the medical experts in the case concluded that in their view the claimant was not being honest about his symptoms and problems.

C settled with D1 (on terms far less advantageous than he was claiming) and discontinued against D2. Ordinarily D2 would be entitled to costs however QOCS bites. An application was therefore made to disapply QOCS pursuant to CPR44.16.

Fundamental Dishonesty Made Out

HHJ Moloney concluded that excluding the claimant's exaggerated/fabricated symptoms (and losses said to be attributable to those made-up symptoms) the special and general damages claims were reduced by around 50%. His Honour went on the say (at para 49):

> "*Overall, I therefore conclude that in relation both to that very substantial element of his claim, future care, and in relation to an even larger part of his claim, general damages for pain, suffering and loss of amenity, the dishonesty in question here, if established, is fundamental to those heads of damage, and thus to around half of the total claim in damage terms. It appears to me to be very clear that on any sensible definition of a "fundamentally dishonest claim", dishonesty crucial to such a large part of the claim under those two heads is sufficient to enable the claim to be characterised as fundamentally dishonest.*"

His Honour was of the opinion that:

- The term has to be interpreted "purposively and contextually in the light of the context";
- There will be a consideration of whether the claimant is "deserving" (see Jackson LJ's introduction to CPR44 in The White Book);
- There are two levels of dishonesty – dishonesty in relation to the claim which is not fundamental, and dishonesty which is;
- The corollary term to fundamental would be a word with such meaning as "incidental" or "collateral". And so:

> "*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 <u>to the root</u> of either <u>the whole</u> of his claim <u>or a substantial part</u> 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."

Any Further Guidance?

There is very little. The absence of guidance, both in respect of QOCS and in respect of s57 is intentional. In the third Implementation Lecture, Jackson LJ referred to the issue of satellite litigation (para 2.3) and observed that:

> "*Any major civil justice reform is followed by litigation in which parties test the boundaries of the new rules. A view robust Court of Appeal decisions are needed to deal with the points raised. If the rule is supplemented by an elaborate practice direction, opportunities for satellite litigation will increase exponentially, as practitioners explore the relationship between the provisions, possible interstices in the language, and so forth. One lesson from the costs war is that lawyers leave no stone unturned when it comes to arguing about costs*."

In s4 of the lecture he deals with QOCS:

> "*What conduct will deprive the claimant of costs protection? This issue is discussed in the workshop materials. I agree that if the claimant's claim is fraudulent or is struck out as an abuse of process, the claimant should forfeit costs protection. However, I do not believe that either litigants or the court will be assisted by practice direction which gives guidance on the borderline cases. Any such guidance is likely to generate increased satellite litigation for the reasons set out in para 2.3 above. There is a whole Costs Bar out there just waiting to sink its teeth into the new provisions*."

And in respect of s57, Lord Faulks (Minister of State and the representative of the Government in the House of Lords), conceded that (Hansard, 23/07/14, Lords, Column 1268):

> "*Of course "fundamental" has an echo in the Civil Procedure Rules and the qualified, one-way costs shifting. An adverb to qualify such a concept as dishonesty is not linguistically attractive, but if we ask a jury to decide a question such as dishonesty, or ask a judge to decide whether someone has been fundamentally dishonest, it is well within the capacity of any judge. They will know what the clause is aimed at – not the minor inaccuracies about bus fares and the like, but something that goes to the heart. I do not suggest that it win many prizes for elegance, but it sends the right message to the judge*."

Criticisms and Observations of the Term "Fundamental Dishonesty" and s57

1. *Aside from the absence of any clear guidance, many question why the use of the term 'fundamental' is used. Either a person is dishonest or they are not. It is an absolute term.*

While it was conceded that term is inelegant, the use of fundamental is intended to demonstrate that the dishonesty goes, as Lord Faulks put it, to "the heart". During debate in the House of Lords, Lord Beecham proposed that there is a possible interpretation of the phrase so that it is the effect of the dishonesty being fundamental to the claim, rather than the nature of the dishonesty. If this interpretation is correct it would underscore the fact that the dishonesty has to go to the heart of the claim or something substantial.

2. *It has been suggested that the section should be permissive so as not to fetter judicial discretion.*

In *Summers* the Supreme Court observed that "It was submitted that an ascertained claim for damages could only be removed by Parliament and not by the courts. We are unable to accept that submission. It is for the court, not for Parliament, to protect the court's process. The power to strike out is not a power to punish but to protect the court's process."

In fact, what we now have is Parliament 'protecting the court's process' and introducing a provision that is four-square intended to punish a (fundamentally dishonest) (dishonest on fundamental points?) claimant.

During debate, it became clear that the provision was a response motivated (whether in whole or in part) to *Summers*. Arguing against a proposed amendment introducing the term 'may' rather than 'must', Lord Faulks observed that any such amendment would considerably weaken the effect of the clause by giving the court a wide discretion were it satisfied that the claimant had been fundamentally dishonest which would enable it to either dismiss the claim, reduce the amount of damages or to do neither. That would make it much less likely that the provision [dismissal] would be used even in case where the claimant has clearly been fundamentally dishonest.

3. *Section 57 is expressed to be on balance of probability. The burden of proof should be beyond reasonable doubt*

Again, the fear was by setting the bar too high, the provision would not be used. The message is clear: those who are fundamentally dishonest (or dishonest in respect of a fundamental aspect of the claim?) run the risk of their claim being dismissed.

However, undoubtedly as with allegations of fraud (and as with burdens of proof generally) the more serious the allegation and the more significant the consequences, the more cogent the court will expect the evidence to be. Certainly this seems to have been the approach adopted by courts in Ireland (see below for the similar provision in force in Eire).

4. *The saving provision in s57 "...unless it is satisfied that the claimant would suffer substantial injustice..." makes no sense*

Again, there is no guidance as to what 'substantial injustice' actually means. Will the court look to the reason behind the dishonesty? If there was some form of coercion? Will the court look to the heads of loss such that, for example, the provision will not be used where there is a substantial claim for future care needs?

It is likely to be this provision that will attract the most satellite litigation and, surprisingly, little has been written about it and there was little debate. .

It is also odd that the saving provision should be personal to the claimant. As was noted in debate, if a person has been fundamentally dishonest, how can there be any injustice to them given the aims of the provision?

5. *Section 57 is not an end of Summers.*

The provision only applies where "the court finds that the claimant is entitled to damages in respect of the claim." Will this lead to tactical admissions where there has been clear dishonesty on the issue of quantum? Also ss4 and 5 clearly relate to the court determining quantum which can only really be done at a final hearing.

Thus interim applications applying the 'old' guidance are still live. No doubt s57 will be referred to in order to strengthen any such application.

6. *It will lead to otherwise meritorious claims not being brought*.

Some commentators argue that claimants and/or their solicitors will be put off pursuing otherwise meritorious claims. Much may depend on the approach of the courts. If a firm line is taken by the higher courts and *ostensibly slight* exaggeration (at the risk of another inelegant term) is caught, it might lead to 'underegged' schedules, perhaps.

<u>The Approach in the Republic of Ireland</u>

Ireland is a long way ahead of England and Wales. In 2004 the Civil Liability and Courts Act was passed. Section 26 provides as follows:

26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—

(*a*) is false or misleading, in any material respect, and

(*b*) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under *section 14* that:

(*a*) is false or misleading in any material respect, and

(*b*) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions:

(*a*) brought on or after the commencement of this section, and

(*b*) pending on the date of such commencement.

A search of Bailii reveals a number of cases in which the provision has bitten. For the most part, these are fairly obvious examples where a similar result would be reached under s57. However, what does come through is that the court embarks on a far wider examination of dishonesty such that even trivial matters have led to dismissal (but where there has nonetheless been a clear attempt to deceive). The High Court of Ireland has expressed the view that it might be an injustice to deprive a Claimant of his claim where, for example, that claim comprises significant future care costs and the dishonesty related to a very trivial matter that by comparison would affect a modest part of the claim. Perhaps such an approach proves the critics of s57 right when they argue that 'fundamental dishonesty' renders the saving provision meaningless or, looked at another way, the term fundamental is meaningless if there is to be a saving provision?

Of interest, s28 of the Civil Liability and Courts Act 2004 provides that undeclared earnings shall not be considered by the court is a claim for lost earnings unless the court considers it would be unjust not to do so. The next step here, perhaps?

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