FUNDAMENTAL DISHONESTY – DEVELOPMENTS IN 2016/17

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Despite QOCS and s57 Criminal Justice and Courts Act 2015 having been with us for some time now we still await a 'big decision' on fundamental dishonesty. This should perhaps come as no surprise given that it has been emphasised from the beginning that the concept is inevitably fact specific. We also, of course, must bear in mind that claimant lawyers are going to be reluctant to appeal decisions where there is a strong chance that the costs will not be recoverable.

However, there have been a few decisions over the last year predominantly at Circuit Judge level that help us to understand further how the courts at first instance are grappling with the issue.

The starting point remains the guidance given by His Honour Judge Moloney in Gosling v Hailo with which you will be familiar; reference to "the heart" or "the root" of the matter".

In Rizan & Rilshad v Hayes & Allianz [2016] EWCA Civ 481 the Court of Appeal considered what for some has always been something of a conceptual problem: where the court finds that on balance of probability that it cannot conclude that an accident occurred, does it follow that, on balance of probability, the court has found that any claim to the contrary is dishonest? His Honour Judge Harris QC, following a trial of an action relating to a road traffic accident, dismissed a claim for damages finding "I cannot possibly be satisfied that the account given by the Claimant is a satisfactory account and in those circumstances this claim fails." Fraud had been pleaded in the Defence. Unprompted, the judge than went on: "Do you want me to say whether or not I find positively that there is fraud here? I think more likely than not. Whether I am satisfied on the criminal burden of proof is perhaps more material since it is akin to a criminal burden of proof….If it were necessary to do so, which it isn't, I would find that this was a fraudulent claim…". He went on to award indemnity costs against the Claimants.

The Court of Appeal set aside the finding of fraud and observed that the judge had not asked himself:

> "…whether there were any inherent improbabilities in that conclusion which needed to be overcome or explained, such as the good character of the actors involved, their different ethnic, cultural and linguistic backgrounds, the recent acquisition of the BMW and its use for chauffeuring or taxi services, the potentially modest size of any away for whiplash injury, all of which might at first blush *tell against* a fraudulent conspiracy, or against one including all three actors." (emphasis added)

Counsel for the Claimant then went on to argue that the judge was wrong to reject the claims: if there was no 'fraud' on the part of the Claimants, how else did the vehicle get damaged if not in the road traffic accident? Tomlinson LJ rejected that approach stating that it was not a 'binary choice' between the accident as alleged and a conspiracy. It is not for the court or the Defendant to determine how the

damage occurred. Note within the judgement the reference to Lord Brandon's speech in Rhesa Shipping v Edmunds [1985] 1 WLR 948 and His Lordship's consideration of the dictum of Sherlock Holmes(!).

Although the age of the claim was such that QOCS was not invoked, the principles can be applied equally to any QOCS/s57 argument; to ensure a FD finding is safe from appeal (together with the consequences flowing), the judge must deal with a) not only the reasons why s/he rejects the claim but then go on to consider b) why findings suggest on balance a finding of fundamental dishonesty weighing up the competing claims and the evidence with a positive assessment of why the same goes beyond 'not coming up to proof' but instead amounts to (conscious? Probably to get over the discretion element) dishonesty.

The decision has not gained much coverage thus far. But in Meadows v La Tasca (Lawtel, 16/06/16) HHJ Hodge QC considered the judgment in the context of a claim arising out of an alleged slip in the Defendant's premises. His Honour was critical of the District Judge at first instance for failing to address the evidential points that weighed so heavily on the Court of Appeal.

In Meadows the District Judge dismissed the claim finding that the evidence of the Claimant and her witness were so riddled with inconsistencies when tested against objective and contemporaneous evidence. He proceeded to set out a long list of flaws in the evidence. On the issue of fundamental dishonesty, the District Judge concluded that he did not believe an accident had occurred as alleged and he did not believe either the Claimant or her witness. He accordingly found for the Defendant on the issue and disapplied the protection afforded by QOCS. In overturning the decision regarding fundamental dishonesty, HHJ Hodge QC observed:

- He would follow the guidance given in Gosling;
- There is a distinction to be drawn between a lie told to bolster an honest claim (that will not necessarily tell against the liar) and a lie that goes to the whole root of the claim;
- The question in the appeal was whether the District Judge was right to conclude that the accident had never happened at all;
- The District Judge had erred in not addressing the inherent probabilities of the Claimant getting together with a longstanding friend to concoct a claim, particularly given their good character and the low value claim. "There was nothing to suggest that either the Claimant nor her witness were other than honest individuals…";
- The District Judge should have limited his decision to a finding that the Claimant had not made out her case. The inconsistencies and curiosities highlighted by the District Judge did not entitle him to go further and to find that the claim had been fabricated; finally
- There was no appeal from the decision of the DJ to find FD despite it not being pleaded. The judgement did not deal with the question of whether the Defendant ought to have put to the witnesses that this was a concocted claim / both were 'fundamentally dishonest'.

The decision (subject to all the caveats of it being fact-specific and so forth) does raise an interesting question: if the court has to find not only that the case has not been proved but also that the evidence demonstrates that there has been a 'conspiracy' or an intent to lie (effectively), such that the 'inherent probability' of the same is overcome, does the fundamental dishonesty provision differ in any way to fraud? Is the difference in fact that fraud is identified before trial on the pleadings whereas fundamental dishonesty is something that emerges during the course of the evidence at trial?

In Menary v Darnton (Winchester County Court, 13/12/16, Lawtel) His Honour Judge Iain Hughes QC overturned the decision of a Deputy District Judge not finding fundamental dishonesty notwithstanding his finding that no accident had occurred.
In doing so, His Honour observed that it is *the claim* that has to be fundamentally dishonest, not necessarily the claimant. An example would be where "a credulous and other worldly claimant might be used by dishonest lawyers to advance a fundamentally dishonest claim."

Pausing there – can this analysis be sit to fit comfortably with the discussion in Meadows regarding the claimant's bona fides / improbability of entering into a conspiracy?

Fundamental was taken to mean a characteristic striking at the root of the claim with dishonesty interpreted as some deceit going to the root of the claim; this is to be contrasted with exaggerations, concealments and the like that accompany personal injury actions from time to time. Such exaggerations may be dishonest but they do not go to the root of the claim

Is the latter point right? If it is taken as *a blanket statement* surely it blows a significant hole in s57?

In Rayner v Raymond Brown (Oxford, 03/08/16, Lawtel) the Claimant discontinued her claim for damages arising out of a road traffic accident. The Defendant sought to set aside that decision and argued for permission to enforce the order for costs. The judge at first instance found that the accident circumstances had been accurately recounted by the claimant but that there had been fundamental dishonesty in respect of her evidence as to injury. That exaggeration was dishonest and was fundamental to the claim for damages. Accordingly QOCS protection was lost. HHJ Harris QC upheld the finding directing himself that fundamental dishonesty means a *substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery*.

The Future?

Many of the questions I raised at a previous Defendant Personal Injuries Seminar remain unanswered. It must surely only be a matter of time before the appeal courts have to deal with the question of 'fundamental dishonesty' but it will take a sufficiently aggrieved Defendant or brave /

foolhardy Claimant. I anticipate that an appeal in the context of s57 rather than QOCS is the more likely, but we wait and see. One of the interesting developments in respect of s57 is the impact it will have upon an application to strike out before a trial pursuant to the inherent jurisdiction of the court. In reality, of course, those cases ripe for an application tend to fall away before the application can be made when the claimant realises the writing is on the wall.

If we look at the issue of insurance fraud in a wider context, one would be forgiven for thinking that the higher courts are likely to take a hard-line when the opportunity arises to tackle the issue of fundamental dishonesty / fraud / strike out. In the case of Verslott Dredging v HDI Gerling [2016] UKSC 45, the Supreme Court had to grapple with the impact of a lie on a loss claim in circumstances where, as it turned out, the entire claim was in fact genuine for reasons unrelated to the lie. Following an extensive review of case law, the majority concluded that such 'collateral lies' did not entitle the insurer to avoid the claim. However, where part of the claim had been exaggerated, the entire claim could fail. Of importance to us, many of their Lordships were keen to highlight the endemic nature of fraud – in personal injury claims in particular –underscoring that insurers were not 'fair game' for those who wish to make bogus or exaggerated claims. Moreover, s57 was considered in similar terms to the Insurance Act 2015 which extends the duty of good faith in insurance contracts and provides for the voiding ab initio of the entire claim brought by a fraudulent claimant, including the unexaggerated/genuine elements. I anticipate that if parallels are drawn between the fundamental dishonesty provisions and the dishonesty provisions to be found elsewhere within insurance litigation, we will see less of a 'balancing' performed by the courts (in money terms) and more an assessment of the egregiousness of the lie or exaggeration.

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