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Howlett the dogs out ?

Guidance from the Court of Appeal on pleading and practice in fundamental dishonesty cases

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Since its introduction in 2013, the concept of fundamental dishonesty in personal injury claims has, in many ways, resembled an elephant. Firstly, it can often seem like something whose presence in the room is being studiously ignored, particularly when that room is a court room and defendant practitioners are trying to persuade a judge of its presence. Secondly, it is something which is not always easy to describe, but is usually fairly easy to recognise. This second feature of fundamental dishonesty is something which may lie behind the guidance provided by the Court of Appeal in, its first consideration of he FD issue, the case of *Howlett and Howlett v Davies and Ageas Insurance Ltd* [2017] EWCA Civ 1696.

Given the trial judge's findings, "the facts" may not be the most apt way to describe the background in this case. Briefly, the Claimants alleged that they had been passengers in the First Defendant's car, when she collided with a parked vehicle, and that they had suffered injury as a result. The Second Defendant, the First Defendant's RTA insurer, begged to differ. It filed a Defence which "did not accept the index accident occurred as alleged, or at all", and which variously put the Claimants to strict proof that an accident had occurred involving them as alleged, and denied that it had, and, in the alternative, pleaded that any accident had occurred at a low velocity, with injury as a result being unlikely and / or unforeseeable. For good measure, the Defence required the Claimants to prove their claim against the following "background" factors:

a. the damage to the vehicle with which the First Defendant allegedly collided was de minimus

b. 3 months prior to the index accident, both Claimants alleged that they were injured in another RTA, when they were travelling as passengers in the First Defendant's vehicle, and the First Defendant was the at-fault driver, something which the Second Defendant pleaded was "beyond coincidence

and, instead, is indicative of a staged/contrived accident and injury", corroborated by the Second Claimant failing to disclose this earlier accident to the medico-legal expert in the present case

c. the First Defendant's involvement in at least 4 road traffic accidents between 2011 and 2013 was also averred to be "beyond coincidence"

d. the First Defendant failed to "fully" co-operate with the Second Defendant's investigations

e. the Claimants and the First Defendant gave an "unlikely / uncorroborated journey purpose" and "inconsistent / unlikely accounts as to injury"

f. it was said to have been unlikely that the vehicle the First Defendant collided with was obscured at the accident locus

g. neither any witnesses, nor the emergency services, got involved

h. the Claimants failed to undertake physiotherapy which had been recommended

i. "The Claimants instructed geographically remote solicitors either before or at the same time as they sought medical advice."

While the Defence expressly did "not assert a positive case of fraud at this stage", it did invite the Court to "reduce any damages payable to the Claimants to nil together with appropriate costs orders therein", in the event that it found "any elements of fraud to this claim".

The Second Defendant's Defence seems to have been a classic example of the sort of thing discussed in the sadly never-published textbook, *Middleton on Hinting at Fraud*. Or to put it another way: if fraud was not pleaded, it seems as near as damnit. It is also the sort of "hybrid" defence heavily criticised by Davis LJ in *Hussain v Amin* [2012] EWCA Civ 1456, para 18:

> "the pleaded defence went much further…. setting out a number of matters which, it was alleged, raised 'significant concerns' as to whether or not this had been a staged accident requiring further investigation. Possibly, although I have my reservations, such a pleading could be justified as an initial holding defence. But it is a case pleaded on insinuation, not allegation. If the second defendant considered that it had sufficient material to justify a plea that the claim was based on a collision which was a sham or a fraud, it behoved it properly and in ample time before trial so to plead in clear and unequivocal terms and with proper particulars.

Either way, in the view of the trial judge, the Defence suggested "in the clearest possible terms" that the Claimants had been dishonest.

The case proceeded to trial, with the Claimants applying unsuccessfully at the outset to strike out the Second Defendant's Defence. The district judge dismissed both claims after trial. He did not mince his words (at para 109):

> "The claim is dismissed because I do not believe the evidence of Mr and Mrs Howlett or any evidence that was sought to pray in aid of that case from Ms Davies can be relied on. In support of the description of the circumstances of the day in question, 27 March 2013, I have been told so many contrasting stories about the circumstances surrounding the accident, what

> led up to the accident, the accident itself, what happened after it, and then the evidence that was given by Mr and Mrs Howlett to the medical professionals (or rather not given to them) and then the misleading statements that have been made in documents that have been supplied to this court as the evidence-in-chief of the various witnesses, the reports that were made to their own solicitors about what happened in accidents, and in the oral evidence that has been given to me, that I am afraid that there is not one part of the stories explained to me by Mr and Mrs Howlett that gives me any confidence that the accident as described by them and Ms Davies on 27 March 2013 happened as described or at all. Consequently I find that no injury was suffered by them as a result of any accident and any claim they make in respect of damages must of course fail in addition."

The judge also commented that it had been clear from the "get go". He felt that the Claimants had clearly been cross-examined "to the effect" that they had been dishonest. In his view, the Second Defendant's case has been put "fairly and squarely and so that the [Howletts] might understand and answer that case being made against them". "Every opportunity" had, in his view, been given to the Claimants to "defend themselves", and to make their case as they saw fit. He had, he thought, made it "perfectly plain from the get go" that he was considering findings of dishonesty. Oddly, though, the judge expressly declined to use the word "fraud" in describing the Claimant's conduct in his judgment, holding that the had neither "right [nor] the power to use it".

After both Claimants' appeals to a circuit judge were dismissed, the First Claimant alone appealed to the Court of Appeal.

The central issue considered by the Court of Appeal was whether a trial judge could find "fundamental dishonesty" without fraud having been alleged in terms in the insurer's defence. (No particular distinction seems to have been drawn in their judgment between pleading fraud, and pleading fundamental dishonesty, and I will make no such distinction in this aricle.) The Court's judgment went on to consider the interaction of this "pleading point", and the conduct of the defence at trial.

While acknowledging that statements of case are crucial to the identification of the issues between the parties and what falls to be decided by the Court, Newey LJ (in a judgment with which Beatson and Lewison LJJ agreed) held that "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" (para 31). This passage might raise questions about why the "mere fact" was referred to (and what other factors might justify a defendant being debarred from arguing fundamental dishonesty, apart from failing to plead it). The use of the words "not necessarily" might also imply that there are at least some circumstances in which a failure to plead fundamental dishonesty would prevent it from being raised.

The overall tenor of the Court of Appeal's judgment, however, tends to suggest that the phrase "not necessarily" was being used in the same sense that Eric Morecambe used it, when he informed "Mr Andrew Preview" that he was playing all the right notes, but *not necessarily* in the right order. This is most apparent in para 32:

> "I do not think an insurer need necessarily have alleged in its defence that the claim was "fundamentally dishonest" for one-way costs shifting to be displaced on that ground. Where findings properly made in the trial judge's judgment on the substantive claim warrant the

> conclusion that it was "fundamentally dishonest", an insurer can, I think, invoke CPR 44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings."

This passage then shifts attention to what must be done, or what must occur, for the judge's findings to be made "properly", in the absence of a pleading of fundamental dishonesty.

A narrow interpretation might be that a defendant should obviously have the chance to raise fundamental dishonesty at the end of trial when the evidence justifying it has only arisen in the course of trial. Comments that "judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud" (para 31), and that "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" (para 39) would seem consistent with this approach.

The Court did not, however, limit the possibility of arguing fundamental dishonesty without a pleading to this situation (or indeed make any reference to a defendant making a late application to plead it, as it might have done in this context). And it is clear from the Second Defendant's Defence that its concerns about the Claimants did not arise by happenstance during trial, but were readily apparent by around the time proceedings were issued, not least because (it would seem) of specific evidence it had gathered about the parties' accident histories and the like, as well as inconsistencies in the evidence the Claimants had adduced to date.

In finding that the fundamental dishonesty argument had been permissible in this case, the first matter the Court relied on was the Defence. While it was noted to "eschew 'a positive case of fraud at this stage'", the Court did note references to the Court potentially finding elements of fraud, the Second Defendant's stated refusal to accept that the accident happened (and its subsequent denial that it had), references to credibility being in issue, the putting of the Claimants to "strict proof", and the specific "background" matters pleaded (including the facts that were stated to be "beyond mere coincidence and, instead, … indicative of a staged/contrived accident and injury".) "In my view", said Newey LJ (in para 33)

> this pleading gave the Howletts sufficient notice of the points that Ageas intended to raise at the trial and the possibility that the judge would arrive at the conclusions he ultimately did. The Howletts cannot, in the circumstances, fairly suggest that they were ambushed."

The Court of Appeal does not, therefore, seem to have concluded that fundamental dishonesty may be raised in any case, no matter how it was pleaded. Its decision placed considerable emphasis on the actual contents of the Defence in the present case, which seem to have left no-one in any doubt that the Claimants' honesty was being called into question, and which removed any scope for them to argue that they had been "ambushed". The Court, it seems, agreed with the trial judge that the suggestion of dishonesty had been made in "the clearest possible terms" in the Defence. It does not, therefore, seem safe to rely on *Howlett* as authority that nothing beyond a plain vanilla put-to-proof needs pleaded if a defendant wishes to raise fundamental dishonesty, though the decision leaves tremendous scope for argument (and discretion to an individual judge) about how much needs to be pleaded to avoided a claimant legitimately complaining that he or she has been "ambushed".

In argument, the Court was referred to *Kearsley v Klarfeld* [2005] EWCA Civ 1510, in which it had considered the question of whether a fraud pleading was required in an LVI case. In judgment, the following was cited from para 48 of *Kearsley* (per Brooke LJ):

> "So long as a defendant follows the rules set out in CPR 16.5 (as this defendant did in [paragraphs 3 and 4 of the defence]) there is no need for a substantive plea of fraud or fabrication."

Newey LJ commented that it was not – he "gathered" – unusual for insurers to file defences comparable to the Defence filed by the Second Defendant in LVI cases. However, as acknowledged by the Court, the Defence filed in fact went some way beyond the usual sort of put-to-proof pleading that *Kearsley* envisages in an LVI case.

Where reliance on the decision in *Kearsley* may be easier to understand becomes apparent in para 31:

> "it seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley v Klarfeld* [in para 45], 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.

The common thread between *Kearsley* and *Howlett* therefore seems to be the absence of any requirement for a specific pleading of fraud in personal injury cases where the claimant's dishonesty arises as an issue, so long as the defendant's pleaded case gives sufficient warning of the case that it will (or perhaps may) ultimately run.

When the terms of the Defence pleaded by the Second Defendant are considered, the Court of Appeal - with some support from the guidance in *Kearsley* about pleading the facts from which the judge would be invited to infer that no injury had occurred - appears to have to endorsed exactly the sort of "hybrid" defence which was criticised so strongly in *Hussain v Amin*. If anything, the Defence in the present case seems to have gone somewhat beyond what was pleaded in *Hussain*, containing not just a list of "concerns" in the "background" section, but also express comments that some of these these "concerns" were indicative of a staged accident, or a bogus claim for injury, and specific denials which seem to go beyond the put-to-proof elements elsewhere in the Defence, and indeed logically are hard to interpret except as at least suggestions of fraud.

It is hard to avoid the conclusion that, while the Court of Appeal cited the relevant passages from *Hussain v Amin* (without comment), its decision substantially, if not completely, undermines what was said in that case about "hybrid" defences. This impression is reinforced by the extensive references to the Jackson reforms, and the circumstances in which QOCS and fundamental dishonesty arose, at the very beginning of Newey LJ's judgment. It is also reinforced by the Court's explicit

endorsements of the Second Defendant's arguments that a hesitant approach to pleading fraud is justified by insurers lacking direct knowledge of the relevant events, and by the professional obligations of legal representatives alleging fraud. In contrast to the rather more purist approach taken pre-Jackson in *Hussain*, the decision in *Howlett* may reflect the rather more "economical" approach which is expected in all litigation, post-Jackson.

As is apparent from para 31 as cited above, the other element relied upon by the Court of Appeal in finding that the finding of fundamental dishonesty had been legitimately made was the conduct of the Second Defendant's claim at trial. Having discussed some venerable case law in relation to the general obligation on a defendant to put its case in crosss-examination, Newey LJ then considered the question of "whether the honesty of the Howletts' evidence and case was adequately explored during the oral evidence" (para 38). Despite the absence of any transcript of the cross-examination, the Court was satisfied that it had been, on the basis of the judge's comments on the matter. The Court also seems (in para 39) to have accepted the Second Defendant's submission that it was not necessary to use any particular verbal formulation in cross-examination (as, it seems, its counsel was not), so long as clear in context challenging Cs' veracity

> " where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness…. But 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".

Bearing in mind how trials involving issues of dishonesty often pan out, with lengthy and detailed consideration of the veracity and consistency of reams of written and oral evidence being the rule rather than the exception, it is perhaps unsurprising that the Court of Appeal seems to have taken an even more informal (or lenient) approach to how cross-examination should be undertaken than it took to how defences should be pleaded.

In any case, the issue received less consideration in the Court's judgment, which might itself reflect greater importance being attached to the foundations for the case being set out in a defence, than to what questions are asked at trial, in making sure that any "ambush" of claimants with issues of dishonesty is avoided. So long as the issues are apparent from the defence, in good time before trial, it will probably be difficult to argue that dishonesty has not been put if questions are asked on the basis of the issues raised in the defence, even if not every question is framed in terms of the claimant telling lies.

The Court touched only briefly on the appropriate test for a judge considering if fundamental dishonesty has been established. Reference was made to the now well-known, and widely-accepted, test in para 44 and 45 of *Gosling v Screwfix Limited and Teilo* (unreported, 29th April 2014, Cambridge County Court, HHJ Moloney QC:

> "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."

Newey LJ's only comment was to agree with the view of the First Claimant's counsel that this definition was "common sense" (para 17).

No consideration was given to what conduct may come within the scope of fundamental dishonesty, for example, whether exaggeration is sufficient or fabrication is required, or whether the dishonesty must relate to the substance of a party's evidence, or may relate to broader aspects of the conduct of a case. Nor did the Court consider any issues about the procedure to be adopted in determining issues of fundamental dishonesty. These issues, which have been the subject of numerous decisions at first instance and on appeal to circuit judges, must await the attention of the senior courts on another occasion.

At first blush, the decision in *Howlett* seems a considerable fillip to defendants raising fundamental dishonesty issues in personal injury claims, as it seems to remove any obligation to plead fraud (with all the procedural and costs consequences of doing so) before raising fundamental dishonesty. However, it is clear from the facts of the case that the trial judge's approach was upheld on the basis of a defence which went a long way beyond a simple putting-to-proof, and which, at the very least, provided a clear signpost towards the findings of dishonesty that the Court was going to be invited to make, and the specific facts which the Second Defendant was going to use as the basis for its invitation. The Court's decision also leaves very open the question of what exactly must be pleaded to avoid "ambushing" a claimant, and indeed the option remains open to a judge to interpret this quite strictly if he or she is so inclined.

If anything, the decision in *Howlett* reinforces the importance for defendants of pleading clear, detailed defences, setting out unequivocally everything within their knowledge which they will be relying upon to support a fundamental dishonesty argument (quite apart from the advantages of such defences in any case, in scaring away the more nervous claimants, and in making clear the defendant's case when interlocutory orders and the like are being considered). Proper consideration should still be given to pleading fraud (and / or fundamental dishonesty) where the evidence available to the defendant justifies it, or at the very least the sort of "hybrid" defence which *Howlett* appears to have brought back into favour. Perhaps *Middleton on Hinting at Fraud* is due a trip to the publisher's after all.