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Court of Appeal rules on 'fundamental dishonesty' (Howlett and another v Davies and Ageas Insurance Ltd)

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Personal Injury analysis: Discussing the judgment in Howlett and another v Davies and Ageas Insurance Ltd, Tom Vonberg, a barrister at Devereux Chambers, says this case settles, in the defendant's favour, the uncertainty that had previously existed as to qualified one way costs shifting (QOCS) and pleading requirements.

Original news

Howlett and another v Davies and Ageas Insurance Ltd [2017] EWCA Civ 1696, [2017] All ER (D) 52 (Nov)

The Court of Appeal, Civil Division, ruled that a district judge had been entitled to have found that the claimants' personal injury claim had been 'fundamentally dishonest' and, hence, that CPR 44.16(1) of the Civil Procedure Rules applied. In dismissing the appeal, the court held that the relevant points in relation to dishonesty had been adequately foreshadowed in the insurer's defence and sufficiently explored during the oral evidence.

What were the key issues before the Court of Appeal?

The Court of Appeal was asked to determine whether, for the purpose of the costs exception to QOCS provided for by CPR 44.16(1), a defendant is obliged to specifically plead that a claim is 'fundamentally dishonest' in order for them to seek that finding from the trial judge.

What did the court decide, and to what extent does the judgment clarify the law in this area?

In a unanimous decision, the Court of Appeal rejected the appellant's argument that there must be a pleading of fundamental dishonesty.

Lord Justice Newey gave the leading judgment and he said, at para [32], that:

> '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.'

The court also held that there was no obligation upon a defendant at trial to use words such as 'dishonest' or 'lying' in order for the trial judge to conclude that there had been dishonesty.

At para [33] Newey LJ identified that the key issue was that the party found to have been dishonest had been given fair opportunity to make representations such that a suggestion of dishonesty did not amount to an ambush.

The decision in *Howlett* confirms that there is no magic formula in use of the word 'dishonesty' by a defendant. A trial judge is entitled to make findings in that regard as long as they have been explored properly in the pleadings and in oral evidence.

The Court of Appeal therefore confirmed that the guidance given in *Kearsley v Klarfied* [2005] EWCA Civ 1510, [2006] 2 All ER 303, and the rules in CPR 16.5 apply equally in a post QOCS era.

Finally, the court approved HH Judge Moloney QC's approach to the meaning of fundamental dishonesty in *Gosling v (1) Hailo (2) Screwfix Direct* (Cambridge county court, 29 April 2014) as a sound one. In that case the judge considered that for dishonesty to be deemed fundamental it should be something going to a substantial rather than incidental part of the claim.

What are the practical and/or wider implications of the judgment?

This case settles, in the defendant's favour, the uncertainty that had previously existed as to QOCS and pleading requirements.

The Court of Appeal's approach endorses that which most, if not all, of us had assumed to be correct in respect of the necessary content of a defence.

Equally, lawyers and judges can now proceed on the basis that Judge Moloney's interpretation as to what amounts to dishonesty that is fundamental for the purpose of QOCS is the correct one.

Practically, the decision underscores (as observed by Newey LJ during submissions) that in the personal injury arena there does not appear much practical benefit to a defendant raising a true fraud defence if they can obtain costs protection without so doing.

While the decision did not specifically deal with circumstances where an application is made under section 57 of the Criminal Justice and Courts Act 2015 (CJCA 2015), there is no reason to suspect that the pleading requirements with regard to a fundamentally dishonest claimant in that context should be any different.

I think it is important to remember that the defence in *Howlett* was robust. Similarly, the appellant's evidence at trial had been particularly unconvincing. Also, somewhat unusually in view of his stance on permissible findings open to the trial judge, her own barrister had asked her in re-examination whether she was lying.

For these reasons, it is understandable why the Court of Appeal considered there was no ambush. However, the court has indicated explicitly that findings of fundamental dishonesty should not be made unless properly foreshadowed by suitable pleadings and sufficiently put in cross examination.

To that extent it is not advocating, despite some post-decision commentary, that defendants are free to run mere insinuation defences or may fail to put matters concerning honesty in cross-examination and yet still benefit from a dishonesty finding. The court's reference at paras [34] and [35] to the decision in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] All ER (D) 377 (Mar), is informative in this regard.

What are the takeaway points for practitioners, especially in terms of advising in this area?

Before this decision, sensible claimant lawyers were already giving thorough advice as to the implications of a finding of fundamental dishonesty regardless of the pleadings. Clearly, in view of *Howlett* this needs to continue in any personal injury matter where honesty could be in issue. This in my opinion is likely to be relevant to nearly every case.

Similarly, where a claimant is met with an insinuation defence, it would be sensible to push for clarification as to what exactly is being suggested. This might be in open correspondence or requests under CPR 18. This approach would, in my view, make 'shot to nothing' applications for a dishonesty finding after trial less attractive to the trial judge.

For defendants, I believe the Court of Appeal's decision recognises that insurers often need to test the evidence orally and simply do not have the material to plead a positive case of dishonesty. That said, it will pay dividends to plead a defence as clearly and as unequivocally as possible in any given case.

How does this judgment fit in with other developments in this area of the law? Do you have any predictions for future developments?

The Court of Appeal's decision acknowledges that the policy rationale underlying QOCS was, in the absence of recoverable after the event premiums, to protect 'deserving' claimants while deterring dishonest ones. This is specifically referenced in para [1] of the judgment.

Generally, there is no doubt that the cumulative effect of QOCS and CJCA 2015, s 57, mean that dishonest claimants face a far less forgiving prospect in litigation. This will be, to the general public and insurers' PR machines, an attractive proposition.

However, the flip side is that genuinely honest claimants will be deeply worried and even deterred from litigation, which itself is a stressful prospect, by the fear of unfounded allegations, and the *Howlett* case does nothing to dissuade such conduct by a defendant. Clearly this was not an intended consequence of the reforms.

Are there any other points of interest worth mentioning here?

The *Howlett* judgment deals thoroughly with the pleading requirements. However, the order granting permission to appeal emphasised the lack of a definition for 'fundamental dishonesty'.

While the Court of Appeal approved *Gosling*, that case deals with the meaning of the word fundamental in the QOCS context. Some commentators have expressed disappointment that dishonesty itself was not defined.

I recommend reading the very recent decision of the Supreme Court in the fascinating case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, [2017] All ER (D) 134 (Oct), which was handed down after the hearing in *Howlett*. Paragraphs [52] to [74] address the meaning of the word dishonesty in some detail, the reason why there is no uniform definition and the correct test to be applied by the court when it considers whether a witness is dishonest.

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Howlett Tom acted for Ageas Insurance Ltd (instructed by Iain Davison, a partner in the Leeds office of Weightmans LLP).

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