

What is sufficient notice of allegations of fundamental dishonesty? (Jenkinson v Robertson)

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Dispute Resolution analysis: The High Court (Mr Justice Choudhury) allowed the claimant's appeal against a finding that his claim was fundamentally dishonest. Most importantly, the defendant had not given the claimant (who represented himself at trial) adequate notice of the allegations that the claimant's claim in respect of a back injury had been exaggerated to the extent that it was dishonest. The particular matters which the trial judge had relied upon in order to base their findings of dishonesty were all incorrect, in part because the defendant had failed to ensure that all documents relevant to those matters were before the court. Written by Sam Way, barrister at Devereux Chambers.

Jenkinson v Robertson [2022] EWHC 791 (QB)

What are the practical implications of this case?

The case highlights the importance of procedural controls which regulate allegations of fundamental dishonesty. Choudhury J provides a tangible example of how the often overlooked requirement to provide adequate notice of the particulars of alleged dishonesty can undermine the force of such allegations. Choudhury J was scathing about the defendant's 'vague and unparticularised allusion to the possibility of a s.57 application' (para [40]). Such allusions did not constitute adequate notice of the allegations that were made.

This case further emphasises the importance, where allegations of fundamental dishonesty are made, that defendants comply with their duty of candour in ensuring that all relevant documents are before the court, even where those documents were generated in the early stages of litigation. Choudhury J considered that failing to comply with the requirements of proper notice and giving a claimant a proper opportunity to respond can lead to substantive problems for a judge reaching conclusions on allegations of fundamental dishonesty without all relevant evidence before them.

Overall, this decision should cause defendant practitioners to consider the manner in which they pursue allegations of fundamental dishonesty, and provides another tool in the armoury of claimant representatives in resisting allegations made at a late stage, including those made for the first time at trial.

What was the background?

The claimant brought a claim for personal injuries following a road traffic accident. Liability was admitted, as was causation in respect of most of the injuries which the claimant claimed were caused by the accident. The dispute at trial focused only on causation of a soft tissue and bone injury to the claimant's mid-back.

Before trial, the defendant indicated that it may seek a finding at trial that the claimant's claim was dishonest pursuant to [section 57\(2\)](#) of the Criminal Justice and Courts Act 2015. The claimant sought particulars of that allegation, but this was not provided by the defendant.

The claimant represented himself at trial. Following cross-examination, the defendant pursued their application that the claimant's claim was fundamentally dishonest. His Honour Judge Christopher Dodd found that the claimant was fundamentally dishonest, principally on the basis that he had:

- conceded in cross-examination that an assertion in his Schedule of Special Damages that he had paid someone £15 per hour to collect rent on his behalf was not true
- persistently attempted to manipulate the expert evidence, and
- increased the damages claimed when presented with medical records which contradicted his case

The claimant appealed on the basis that he had not been given sufficient notice of the allegations, or an opportunity to respond, that the judge had reversed the burden of proof and required the claimant

to prove that his claim was not dishonest, and that the judge was led into error in respect of each of the factors on which he based his finding of fundamental dishonesty.

What did the court decide?

Adequacy of notice

Choudhury J considered that the defendant had failed to provide the claimant with adequate warning of, or an opportunity to deal with the possibility of a finding of fundamental dishonesty. Although noting that 'what amounts to such notice or opportunity in a given case will depend on the circumstances' (para [32]), Choudhury J noted that 'if a defendant wishes to establish that an exaggerated or unreasonable claim is fundamentally dishonest, then the basis on which that dishonesty arises or is alleged to arise ought to be made clear' (para [33]).

Most importantly, Choudhury J deprecated the practice of seeking to rely on a successful cross-examination as the foundation of a section 57 application without any further warning: 'I do not consider that approach to be fair or procedurally sound' (para [40]).

Burden of proof

It was held that the judge had not relied on the burden of proof in reaching his decision and therefore, although there was no express reference to the burden being on the defendant, the decision could not be impugned on that basis alone.

Errors in matters relied on by the judge

Choudhury J's found that there had been substantial errors in respect of the matters relied on by the judge in concluding that there had been a finding of fundamental dishonesty.

In a forensic examination of the basis on which the judge had reached his decision on each of the matters relied on as establishing the claimant's dishonesty, Choudhury J noted that there was documentary evidence which undermined each of those matters, and that:

'...had the Defendant ensured that adequate notice [of the allegations] was given, it would in all likelihood have realised that further information...ought to be raised with the Judge. If the Defendant had not done so, adequate notice would have enabled the Claimant to consider the position and adduce the material himself.'
(para [68])

This decision is a salutary reminder that allegations of dishonesty must be considered in light of all the evidence which bears on the claimant's intentions. In considering allegations that a claim has been pursued dishonestly, that is likely to lead to a broad factual enquiry which requires significant volumes of material (which is not relevant to the substantive claims) to be put before the judge.

Case details:

- Court: Sitting in Manchester, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Choudhury
- Date of judgment: 31 March 2022

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