

London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield [2018] EWHC 51 (QB)

The High Court has provided guidance on the test for ‘fundamental dishonesty’, in a claim where a Claimant wrongly sought substantial special damages in an otherwise honest claim. In striking out a claim because of fundamental dishonesty, despite the majority of the claim being legitimate, Mr Justice Knowles has provided the clearest guidance yet in relation to s.57 of the Criminal Justice and Courts Act 2015.

Legal Background

Before the Criminal Justice and Courts Act 2015, it was rare for the entirety of a personal injury claim containing fraudulent elements to be struck out. Whilst such claims could be struck out as an abuse of process under CPR 3.4(2)(b) or under the court’s inherent jurisdiction, successful applications were infrequent. As per Lord Clarke in *Summers v Fairclough Homes*, the power to strike out a dishonestly exaggerated claim as an abuse of process at any stage in the proceedings was only to be exercised in ‘very exceptional circumstances’.

However, s.57 of the 2015 Act enabled defendants to have a personal injury claim dismissed or struck out on the basis of fundamental dishonesty. S.57(2) states that, if the court is satisfied that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim, the court must dismiss the primary claim unless it is satisfied that the claimant would suffer substantial injustice if the claim was dismissed. As per subsection (3), this would include the duty to dismiss any element of the claim in which the Claimant has not been dishonest.

As per CPR 44.16(1), fundamental dishonesty is an exception to QOCS in personal injury claims; a claimant will not benefit from QOCS if they are found to be fundamentally dishonest. Proper guidance on the assessment of ‘fundamental dishonesty’ is, therefore, of paramount importance to civil practitioners.

Factual Background

Whilst volunteering at the 2012 Olympic Games, Mr Sinfield suffered an injury to his left arm. He brought proceedings against LOCOG, and liability was admitted. In bringing his proceedings, Mr Sinfield served a Preliminary Schedule of Damages. This document was verified by a statement of truth and was signed by Mr Sinfield himself. Contained within the Preliminary Schedule was a claim for damages in respect of gardening expenses, both past and future. In relation to this head of loss, the Preliminary Schedule stated:

- At Paragraph 5: “Prior to the accident the Claimant looked after the garden himself with his wife. Post

accident his wife continues to do some of the gardening but they had to employ a gardener for 2-4 hours per week at a cost of £13 per hour”.

- At Paragraph 8: “The Claimant would probably at some point have required assistance with gardening and employed a gardener in any event whilst continuing to work himself”.

In total, the claim for gardening expenses amounted to approximately £14,000 excluding interest. This head of loss represented 41.9% of the special damages claimed, and 28% of the total damages sought, as presented on the Preliminary Schedule. Approximately one month later, Mr Sinfield served his List of Documents. Included on this list were invoices, described as ‘Invoices Mervyn Price – Gardener’, that purported to be from the gardener employed by Mr Sinfield following the incident.

In due course, Mr Sinfield served a witness statement. At Paragraph 30 of this statement, Mr Sinfield claimed that “pre-accident [his wife] and I did all the gardening”. Following this disclosure, LOCOG located and obtained a witness statement from Mr Price, the gardener. Mr Price stated that he had worked for Mr Sinfield since 2005, his workload did not change after the accident and he did not issue the disclosed invoices.

In light of this revelation, LOCOG served an Amended Defence in which it alleged fundamental dishonesty on the part of Mr Sinfield and relied upon s.57 of the 2015 Act. The Amended Defence averred that, as a result of Mr Sinfield’s fundamental dishonesty, the entire claim should be dismissed. Mr Sinfield subsequently filed a Supplementary Witness Statement, within which he accepted that Paragraph 30 of his first Statement was wrong and that it had been ‘worded badly’.

First Instance

The trial took place before Mr Recorder Widdup. The judge’s conclusions were summarised by Mr Justice Knowles at Paragraph 41 of his judgment:

1. Mr Sinfield had not been dishonest in relation to Paragraphs 5 and 8 of his Preliminary Schedule of Damages but, rather, had been ‘muddled, confused and careless’ (para 18);
2. Mr Sinfield had created the invoices; he was not entitled to self-bill; and the ‘false invoices’ were ‘true in part’ (para 18);
3. The invoices were produced to pursue the claim and Mr Sinfield’s motivation was to ‘conceal the earlier muddle in which he had found himself’ (para 19);
4. Paragraph 30 of Mr Sinfield’s witness statement contained the assertion that he and his wife did all of the gardening prior to the accident, and that was ‘inaccurate and misleading’. There was an implied assertion in the statement that prior to the accident he had never before employed a gardener. The witness statement was an opportunity for him to state the true position, which he did not take. He presented LOCOG with the impression that Mr Price had only been employed post-accident (para 20);
5. The creation of the false invoices and Paragraph 30 of the witness statement were dishonest actions by Mr Sinfield and he realised that that was the case;
6. In relation to the question whether the dishonesty was fundamental to ‘the claim’, the judge said it was fundamental to ‘the gardening claim’. However, the dishonesty ‘did not contaminate the entire claim’ (para 21);
7. Mr Sinfield did not set out to bring a dishonest claim but made a careless error in the initial presentation of part of his case which he later compounded by attempting to conceal it. His dishonesty was motivated not by a wish to create a false claim but ‘to conceal and get away with the muddled and careless presentation of his case in the past’ (para 22);
8. The judge said that he would answer the question, ‘If the greater part of the claim is genuine and honest, is the dishonesty fundamental?’ by considering s.57(2). He said that it would be potentially unjust to deprive Mr Sinfield of the damages to which he was entitled for his injury, ‘taking into account that he was entitled to damages in respect of assistance in the garden, and so the enhanced claim for gardening expenses or the muddled claim for gardening expenses, contaminated as it was by later dishonesty, was itself a genuine claim’ (para 22);

9. Dishonesty which goes to the heart of a claim is fundamental. Peripheral exaggeration or embellishment or something incidental or collateral is not. The dishonesty in this case related solely to the gardening claim. He had a genuine claim which he failed to present in a proper manner. He exaggerated this claim, but it was peripheral to the main claim. There was a genuine claim for personal injury which 'went wrong' when Mr Sinfield was careless and then dishonest (para 23).
10. The judge found Mr Sinfield not to have been fundamentally dishonest, but if he were wrong about that it would be substantially unjust for the entire claim to be dismissed when the dishonesty related to a peripheral part of the claim and the remainder of the claim was genuine.

Accordingly, Mr Sinfield was awarded damages in the sum of approximately £27,000.

The Appeal

LOCOG appealed this decision on three grounds:

- The judge was wrong to reject LOCOG's case that Mr Sinfield had been fundamentally dishonest in respect of the facts alleged in Paragraphs 5 and 8 of the Preliminary Schedule concerning the gardening expenses;
- The judge was wrong to conclude the dishonesty he did find proved did not constitute fundamental dishonesty in respect of the claim for personal injury; and
- The judge was wrong to conclude that, even if there had been fundamental dishonesty, dismissing the claim would have resulted in a substantial injustice to Mr Sinfield.

Before Knowles J addressed these grounds of appeal, he issued the following guidance in relation to the assessment of fundamental dishonesty. At Paragraph 62, he stated that a claimant should be found fundamentally dishonest if the defendant proves, on a balance of probabilities, that the claimant has acted dishonestly in relation to the primary claim and/or a related claim, and that he has substantially affected the presentation of his case, either in respects of liability of quantum, in a way which potentially affected the defendant in a significant way, judged in the context of that case's facts and circumstances.

In considering whether the claimant acted dishonestly, a court should ask itself two questions, as set out by the Supreme Court in *Ivey v Genting Casinos Limited*: (1) what did the Claimant's words mean? (2) could the Claimant have genuinely believed that meaning?

In circumstances where an application is made by a defendant for the dismissal of a claim under s.57, the court should:

- Consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter;
- If the judge concludes that the Claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim;
- If the judge is so satisfied then he must dismiss the claim including, by virtue of s.57(3), any element of the claim in respect of which the claimant has not been dishonest unless, in accordance with s.57(3), the judge is satisfied that the claimant would not suffer substantial injustice if the claim were dismissed.

Against that background, the Learned Judge assessed the grounds of appeal. Turning to the first ground, Knowles J was satisfied that the judge at first instance was plainly wrong not to have reached the conclusion that Paragraphs 5 and 8 of the Preliminary Schedule were dishonest statements. It was found that Mr Recorder Widdup's original conclusion was not supported by the evidence. The only reasonable meaning to ascribe to those

paragraphs is that Mr Sinfield was intending to convey that, at the date of the accident, it was solely him and his wife who attended to the garden, and nobody else.

As to the second ground, it was held that the judge at first instance should have concluded that Mr Sinfield had been fundamentally dishonest in relation to the claim. In reaching this decision, Knowles J based his analysis solely on Mr Recorder Widdup's own findings of dishonesty against Mr Sinfield. The judge incorrectly asked himself, at Paragraph 22 of the first instance judgment: "if the greater part of the claim is genuine and honest, is the dishonesty fundamental?". This was the wrong question to ask. On Mr Recorder Widdup's own findings, Mr Sinfield presented a significant claim for special damages, the largest head of which was evidenced by false invoices and a dishonest witness statement. Accordingly, Mr Sinfield's dishonesty substantially affected the presentation of the claim.

As to the final ground; it was held that Mr Recorder Widdup was wrong when he held that, even if Mr Sinfield was fundamentally dishonest, he would have suffered a substantial injustice were the entire claim to be dismissed, as the dishonest element only related to a peripheral part of the claim. The starting point under s.57 is that the entire claim should be dismissed where there is fundamental dishonesty, *unless* it would cause substantial injustice. To find that dismissing a whole claim would cause a substantial injustice would rob that section of its purpose. S.57(3) would be rendered pointless if the loss of genuine damages could constitute substantial injustice in and of itself. Something more was needed to clear this hurdle, however quite what constitutes substantial injustice was not considered in detail in this case.

Having made the above findings, the appeal was allowed and Mr Sinfield's claim for damages was dismissed pursuant to s57(2) of the 2015 Act.

Comment

This is the first reported High Court decision on the interpretation of "fundamental dishonesty" under s.57 of the 2015 Act, and it provides much needed clarity on the topic. Knowles J's clarification makes clear that the even honest elements of a claim are liable to be struck out where fraud substantially infects the claim. Whilst this will be of little consequence to honest claimants, the guidance will be welcomed by defendant practitioners and insurers alike. Knowles J's thorough explanation of the law and clear reasoning is likely to be persuasive in future cases.

Ted Cunningham