12
King's Bench Walk

Next Talk: 15:00 – 15:40

Fraud: A Practical Analysis of Recent Developments

David Callow
callow@12kbw.co.uk

Samuel Cuthbert
cuthbert@12kbw.co.uk

Introduction

- When to plead fundamental dishonesty (“FD”)
- The use of surveillance and social media
- Tactical approaches to dealing with FD claims
  - When to discontinue your claim
  - Challenging inconsistencies
- Appealing FD findings
- Is youth an excuse?
- Committals

S57 CJCA 2015

- 57(1)This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—
  - (a)the court finds that the claimant is entitled to damages in respect of the claim, but
  - (b)on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

When to Plead FD

- ***Mustard v Flower*** [2021] EWHC 846 (QB)
- "4.4 The Claimant's accounts of the RTA and its immediate aftermath, and the nature and severity of her symptoms both before and after the accident have varied over time, are unreliable and are in issue. They have been exaggerated (or in the case of her pre-RTA history minimised) either consciously or unconsciously – the Third Defendant cannot say which absent exploring the issues at trial. *In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate.*"

When to Plead FD

- *Mustard v Flower*
  - Trial judge can make a finding of FD whether specifically pleaded or not.
  - Factors governing are as set out in *Howlett v Davies* [2017] EWCA Civ 1696 - fair warning?
  - Until C has given evidence, neither the defendant nor the judge may be in a position to make conclusions about their honesty.
  - Where there is a proper basis for a plea of FD this should ordinarily be set out in a statement of case or written application at the earliest opportunity.

When to Plead FD

- *Mustard v Flower*
  - Permission refused for the provisional plea because:
    - The proposed amendment served no purpose as the defendant can make a s.57 application without foreshadowing it in a pleading;
    - At the present time, the plea of FD did not have real prospects of success on the current evidence;
    - It caused prejudice to the claimant as it had to be reported to her legal expenses insurers.

When to Plead FD

- But note *Pinkus v Direct Line* [2018] EWHC 1671 at [14] as
  - "I would not allow any issue to be raised of which the claimant would not have any sufficient notice and which he might have been able to deal with by way of additional evidence or which the experts would have been able to address, but had not and could not in the course of the hearing."

When to Plead FD

- ***Covey v Harris*** [2021] EWHC 2211 QB
- FD doesn't need pleading…
  - *"..but it seems in-keeping with the overriding objective that the parties should know the liniments of the case they have respectively to meet in advance of the relevant hearing."*
- And so:
  - FD does not need to be pleaded, but if the defendant has the grounds to plead a positive case of FD, it should do so at the earliest opportunity.

Surveillance and Social Media

- *Iddon v Warner* [2021]
- C alleged her GP missed a diagnosis of breast cancer and she was left with chronic debilitating pain
- C alleged she used to be a keen open water swimmer but could not now return to her hobbies
- Social media showed this to be untrue
- *'It has pervaded her case to the extent that Mrs Iddon has scarcely taken any step in the action that was not tainted by dishonesty'* pated in

Surveillance and Social Media

- *Sudale v Cyril John* 2 WLUK 623 [2021]
- C fell from scaffold
- C alleged the D witnesses had been dishonest in his evidence as to whether the wheels of the scaffold tower had been fully engaged or not.
- The focus of s.57(2) was whether C would suffer substantial injustice as a result of being deprived of his damages, rather than whether the operation of the section would produce an unjustified benefit to D.

Tactics – Discontinuing Your Claim

- ***Zurich Insurance PLC v David Romaine*** [2019] EWCA Civ 851 (CA)
  - "*a claimant who discontinues immediately upon realising that "the game is up" is naturally… to be contrasted with the claimant who contumaciously presses on nevertheless*"

Tactics – Discontinuing Your Claim

- [49] “The stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct. It is clear that the modus operandi of some of those involved in fraudulent insurance claims has been to issue tranches of deliberately low-value claims (sometimes on an industrial scale) for e.g. whiplash, slips and trips etc and when confronted with resistance or evidence of falsity, simply then to drop those particular claims, in anticipation that it would probably not be worth the candle for insurers to pursue the matter further"

Tactics – Discontinuing Your Claim

- *Alpha Insurance A/S v (1) Lorraine Roche (2) Brendan Roche* [2018] EWHC 1342 (QB)
  - the High Court permitted the insurer to have the issue of fundamental dishonesty determined where the claimants had discontinued one day before trial.

- If you're going to discontinue, do it early but you may still be exposed.

Tactics – Challenging Inconsistencies

- For Claimants:
  - Explore them early on with the client
  - Make use of conferences
  - Address them in evidence

- For Defendants:
  - Early evidence
  - Be thorough in the disclosure - undisclosed pre-existing injuries?
  - If you've got a positive case on FD, plead it

Young Claimants

- Hogarth-v-Marstons PLC
  - Recorder Willets, Torquay CC
- Accident on 31 May 2015 when C was 14
- C slipped on oil/ grease near a rotisserie
- Issues about whether she was running *etc*
- D also argued C was dishonest in the presentation of her claim for damages.

Hogarth

- Alleged that C had given a false account to the expert in relation both to initial severity of her injury and the longevity of symptoms.
- This was despite the low value of the claim and her age when giving the allegedly false account.
- Of the 5 central elements of her account to the expert, the Judge found that "…the first three assertions were patently untrue as demonstrated by the medical records. The last two are very likely also untrue…"
- Overall he considered her evidence to be "…unsatisfactory and consisted of either noncommittal answers or implausible explanations. Mr Lofthouse was clearly given a false and exaggerated account of [C's] injury."
- C succeeded on liability despite her "tainted" evidence on loss but her claim was dismissed pursuant to section 57 CJCA 2015.

Appeals

(I) Claimant's Appeals against finding that they have been fundamentally dishonest.

- Walkden-v-Drayton Manor Park [2021] EWHC 2056, Tipples J on appeal from HHJ Murdoch
  - Claim for >£1.5M
  - Liability admitted
  - 9-day trial on causation and quantum.
  - C awarded £17,600
  - 8 Grounds of appeal

Claimant's Appeals-Walkden

- The appeal was, on a proper analysis, one against the Judge's findings of fact.
- Therefore, the correct approach is that which is drawn from (among others):
  - Henderson-v-Foxworth Investments Ltd [2014] UKSC 41. [58]-[67], Lord Reed
  - Fage UK Limited-v-Chobani UK Limited [2014] EWCA Civ [114]-[117], Lewison LJ

Walkden

- The Judge did not ignore or fail to take into account any of the lay witness evidence and his approach to their evidence was sound.
- Complaints about the weight to be attached to evidence did not satisfy any relevant test on appeal.
- The same goes for the assessment of the credibility of witnesses.
- Many of the grounds amounted to little more than complaints that the Judge rejected C's approach at first instance.

Defendant's Appeals

- Michael-v-I E &D Hurford Limited T/A Rainbow and NFUM Insurance Society Limited [2021] EWHC 2318, Stacey J
  - RTA on 7 November 2018 when C was working as an Uber driver and was struck by D1's employee driving a Landrover. C's Hyundai was written off.
  - There was "no doubt" that the collision happened and that it was solely the fault of D1.
  - Claims for credit hire, physiotherapy and PSLA.
  - D successfully applied to debar C's impecuniosity arguments at the commencement of the trial.

Michael (Cont)

- C was cross-examined “at length” on numerous inconsistencies and it was repeatedly put to him that he was dishonest and that some of the documents on which he relied were false. All were denied.
- There was an issue that whereas C had claimed for 8 sessions of physio he had, in fact, had none.
- The Judge found that C was not dishonest and made a modest award for credit hire and £100 for physiotherapy. He was “not absolutely persuaded” that there was one session but made the award on the basis of the civil standard of proof.

Michael

- The Recorder made a clear finding of fact at paragraph 51 that "I do not think that Mr Michael himself has been dishonest". The discrepancies are explained by his lack of understanding.
- D submitted that its appeal was not strictly against findings of fact but an evaluation of the evidence and akin to the exercise described by the Court of Appeal in *Re Sprintroom: Prescott v Dr Potamianos & Anor* [2019] EWCA Civ 932 at paragraph 76:
- "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"

Michael

- Stacey J considered by analogy the approach of Martin Spencer J in *Molodi v Cambridge Vibration Maintenance Service, Aviva Insurance Limited* [2018] EWHC 1288 (QB) and *Richards and Anor v Morris* [2018] EWHC 1289 (QB), a case also involving the question of whether a claimant had been fundamentally dishonest in bringing a personal injury claim, where the Court made the following observation of the role of an appellate court:
- “The scope of an appellate court was further elucidated by the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 where it was held that there is a distinction between the finding of a specific fact and the finding of fact which is really an inference drawn from facts specifically found. In the case of “inferred” facts, an appellate tribunal will more readily form an independent opinion than in the case of “specific” facts which involve the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing. In the course of his judgment, Viscount Simmonds LC cited from the judgment of Lord Cave LC in *Mersey Docks and Harbour Board v Proctor* [1923] AC 253 at 258-9 where Lord Cave said:

- Martin Spencer J then directed himself as follows:
- “However, where the trial judge has heard the evidence and has not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court effectively to overturn the trial judge’s conclusion in that respect and find that the claimant was dishonest despite not having seen the witnesses give evidence.”

- On this basis Stacey J rejected D's approach to the appeal and distinguished the approach that had been taken in other D appeals in FD cases namely:
  - *Haider v DSM Demolition* [2019] EWHC 2712 (QB) where the challenge was to the adequacy of the judge's reasoning in light of the C's evidence which was "plainly dishonest" thus enabling Julian Knowles J to overturn the first instance judge's conclusion.
  - *Roberts v Kesson and Anor* [2020] EWHC 521 where the C had accepted that parts of his first witness statement were dishonest. There was a mass of inconsistencies and inaccuracies in the claimant's evidence and troubling non-compliance with disclosure orders on which the defendants based a submission that the claimant had been fundamentally dishonest
- This was an appeal against a finding of fact and had no merit.

New Committal Regime

- Part 81 was introduced in 2012 but was the subject of periodic judicial criticism for its uncertainty and lack of consistency (particularly where an alleged contempt fell within more than one category not all of which required permission).
- With effect from 1 October 2020 the procedural rules relating to contempt of court were simplified.
- As with the old rules, it is important to emphasise that the procedural rules are just that and are not intended to affect the substantive law relating to contempt, the sources of which are a mixture of common law and legislation.

The Changes

- The main changes implemented by the new Part 81 have been to:
  - Clarify the procedural routes involved and specify the level of judge to whom a committal application should be made (CPR 81.3);
  - Provide that permission is only required where the application is made in relation to:
    - interference with the due administration of justice (except in relation to existing High Court or county court proceedings) (CPR 81.3(5)(a));
    - an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement (CPR 81.3(5)(b)).

Main Changes

- Gather together in one rule (CPR 81.4) the requirements of a contempt application including what factual and other matters are to be specified/addressed and the procedural safeguards intended to achieve fair disposal of the application6;
- Provide for service of the committal application on a defendant's legal representatives in certain circumstances instead of personal service (CPR 81.5(2));
- Specify in a rule (CPR 81.8) the manner in which contempt proceedings are to be conducted (including a general rule that the hearings are to be heard in public).

- The new Part 81 was not the subject of any transitional provisions.
  - Unlikely to pose any further issues but in *Secretary of State for Transport and anr v Cuciurean* [2020] EWHC 2723 (Ch) Marcus Smith J held (at [6(2)]) that all procedural steps taken before 1 October 2020 were governed by the old Part 81 and the steps thereafter after (principally sanction) were governed by the new Part 81.
  - Insofar as there was inconsistency between the old and new rules, those to be applied were those that were more beneficial to the alleged contemnor ([6(3)].

- The revoked Practice Direction expressly provided (at paragraph 16.2) that the court had the power to waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice had been caused to the respondent by the defect.
- *Deutsche Bank AG v Sebastian Holdings Inc and anr* [2020] EWHC 3536 (Comm) at [148] confirms that the Court retains the power.

Pleading

- CPR 81.4(2) now provides as follows (as relevant):
- *A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—*

  (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

  (b) the date and terms of any order allegedly breached or disobeyed;

.. . (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

- The overall test is whether the respondent, having regard to the background against which the committal application is launched, would be in any doubt as to the substance of the breaches alleged (*Deutsche Bank AG v Sebastian Holdings* (supra) at [77] per Cockerill J). The Application Notice need only set out a succinct summary of the claimant's case, to be read in the light of the relevant background known to the parties; it is for the evidence to set out the detail (*ibid* at [80]).

General Points

- The defendant to a committal application is entitled to remain silent and is not a compellable witness
- CPR 81.4(2) - a committal application must include statements that the defendant (paragraph (m)) is entitled but not obliged to give written and oral evidence in their defence and (paragraph (n)) has the right to remain silent and to decline to answer any question the answer to which may incriminate him or her.

General Point

- If a respondent serves evidence in advance of the committal hearing that evidence is not taken as having been deployed. The respondent may, right until the last moment, choose not to deploy it; Deutsche Bank AG v Sebastian Holdings Inc at [53]. Further the following are unaffected by the change in Part 81:
  - Until any such material is deployed it is inadmissible :Templeton Insurance v Motorcare Warranties [2012] EWHC 795 (Comm) at [24]
  - Any evidence which is served in advance of the committal hearing by the respondent may, however, be used by the applicant for the purposes of “gathering preparatory evidence in reply” (Re B (A Minor) [1996] 1 WLR 627

Threshold for Permission

- Still silent about the threshold to be met in cases where permission for a committal application is required.
- Whether a need to show a “strong prima facie case” or “at least a prima facie case”.
- *Ocado Group plc and anr v McKeeve* [2021] EWCA Civ 145:
  - Ordinarily the test to be taken is strong prima facie case.
  - The one potential exception to the strong prima facie case threshold generally to be applied was, said Davis LJ, a permission application made by a Law Officer or other relevant public body

Permission (cont)

- The extent to whuch the facts need to be considered will vary.
  - In *Ocado* the public interest element only required brief consideration because of the underlying factual position ([92]).
  - Where the contempt takes the form of alleged untrue evidence a more nuanced approach may be called for: *Tinkler v Elliott* [2014] EWCA Civ 564 at [44] per Gloster LJ; *Zurich Insurance plc v Romaine* [2019] EWCA Civ 851; [2019] 1 WLR 5224 at [26]- [30] per Haddon-Cave LJ.

Strike Out

- Where the permission filter does not apply, the Defendant to a committal application which is considered weak or which may otherwise be characterised as an abuse of the Court's process should consider a cross-application to strike it out.
- Paragraph 16.1 of the former PD 81 provided express power.
- The Court retains an inherent jurisdiction to strike out committal applications in appropriate circumstances: *Taylor and anr v Ribby Hall Leisure Ltd and anr* [1998] 1 WLR 400.
- A defendant could, it is suggested, have recourse to CPR 3.1(2)(m) (court's power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective).

Strike Out

- Targeted strike-out applications has been encouraged where the alleged abuse of process is said to arise because the committal application is alleged to be pursued for ulterior or improper purposes or where the alleged contempt is technical rather than serious: *Public Joint Stock Company Vseukrainsky Aktsionernyi Bank v Maksimov* [2014] EWHC 4370 (Comm) at [22 and *Navigator Equities Ltd and anr v Deripaska* [2020] EWHC 1798 (Comm) at [139].

Strike Out

- Improper purpose:
  - where the committal application is pursued vindictively to harass defendants against whom the claimant has a grievance (whether justified or not): *KJM Superbikes Ltd v Hinton*
  - where a committal application is used to secure a settlement of the underlying litigation: see *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm)
- The manner in which a committal application is pursued may also amount to an abuse. The claimant is serving the public interest which requires the claimant to act generally dispassionately, to present the facts fairly and with balance and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment: *Navigator Equities Ltd v Deripaska*