



Compass Chambers

FUNDAMENTAL DISHONESTY

KAY SPRINGHAM, Q.C.

1st June 2018



Outline of talk

- What do we mean by ‘fundamental dishonesty’?
- The decisions in Grubb v Finlay
- Practice and procedure where FD alleged
- Civil Litigation (Expenses and Group Proceedings) Bill/ Act



‘Fundamental dishonesty’

- ‘dishonesty’ – “...a simple, if occasionally imprecise, English word. We expect juries to understand and recognise dishonesty and of course the same applies to trial judges. (Wright v Satellite Information Services Ltd [2018] EWHC 812 (QB))
- ‘fundamental’ – not incidental or collateral; going to the root of the claim or a substantial part of it (LOCOG v Sinfield [2018] EWHC 51 (QB))



- English provisions under (i) CPR r.44.16, and (ii) Criminal Justice and Courts Act 2015, s.57
- Rationales
 - CPR: loss of benefit of QOCS
 - s.57: Parliamentary response to problems caused by fraudulent/dishonest claims
- Not (currently) part of any court rule or legislative provision in Scotland.



Grubb v Finlay decisions

- Lord Kinclaven - Outer House decisions on
- (i) the merits – [2017] CSOH 81
- (ii) expenses - unpublished but accessible through Compass Chambers' website -
<https://www.compasschambers.com/news/important-decision-on-expenses-successful-pursuer-has-to-pay-expenses-to-defender>

Inner House decision

[2018] CSIH 29

- inherent power of the court to dismiss, even in the absence of a rule permitting it to do so.
- whether a fair trial remains possible is a factor of considerable, although not always determinative, weight.
- a draconian power – an option of last resort.
- if proof has been allowed and has begun, will be a rare and exceptional case where power will be exercised.



Where does that leave us?

- Confirmation that the Court of Session has the inherent power to dismiss if a claim is fundamentally dishonest.
- What about the Sheriff Court/ASPIC?
- If acting for pursuer, duty to advise of possible consequences of FD?
- If acting for defender, make/plead the alleged FD as early as possible. Consider enrolling for dismissal.



A lost opportunity?

If a party is seeking to subvert the process of the court by fraudulent means, the court has to decide whether the case should be allowed to proceed any further.

The decision to stop a case is not to punish the party concerned; it is the proper response where a party has shown that his object is not to have a fair trial, but to have a trial the fairness of which he has attempted to compromise.

(Lies, damned lies: Abuse of process and the dishonest litigant
– Lord Reed)

Civil Litigation (Expenses and Group Proceedings) Bill/ Act

Passed Stage 3 on 1 May 2018

Section 8 – applies to claims for damages for personal injuries or the death of a person from personal injuries.

Court must not make an award of expenses against the person, provided the person ‘conducts the proceedings in an appropriate manner’.

Will have conducted proceedings in an appropriate manner unless the person or the person’s legal representative:



- makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings, or
- behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
- otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.



- Scottish QOCS – ‘fraudulent’ representations/acts
c.f. English QOCS – ‘fundamental dishonesty’
- ‘Fraud is a machination or contrivance to deceive,
by words or acts’ (Bell’s Principles, para 13)
- Continued role in QOCS for FD allegations under
‘abuse of process’?
- SCJC prioritising implementation of the Bill.



Compass Chambers

Contact

Compass Chambers

Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

www.compasschambers.com

KAY SPRINGHAM, Q.C.

kay.springham@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

gavin.herd@compasschambers.com