



Compass Chambers

FUNDAMENTAL DISHONESTY
and
EXPENSES

James Hastie, Advocate
Compass Chambers

23rd November 2018

This guy...



This guy...



This guy...



This guy...



This guy...



This guy...



This guy...



This guy...





Compass Chambers

...his red bus



This guy...



... his inauguration crowd



This guy...



This girl...



This guy...



This guy...



This guy...



This guy...



Grant Grubb v John Finlay

- First instance: [2017] CSOH 81
- Appeal: 2018 SLT 463

Summers v Fairclough [2012] 1 WLR 2004

- CPR 3.4(2)
- Strike out statement of case where
 - No reasonable ground for bringing/defending claim; or
 - Statement of claim is an abuse of process; or
 - There was a failure to comply with a rule or practice or court direction



Summers v Fairclough

- Claimed £800,000 on the ground he was ‘grossly disabled’
- Surveillance – playing football and working
- Awarded £90,000
- Judge refused to strike out
- Court of Appeal upheld award



Summers v Fairclough

- Supreme Court
- Power to strike out even after trial
- Exercised after only in exceptional circumstances
- Where claimant had forfeited right to have claim determined

Summers v Fairclough

- BUT the Court dismissed appeal even where
- They found the case was a serious abuse of process, and
- The claimant had persistently maintained false claim

Criminal Justice and Court Act 2015

- Section 57
- Applies where
 - Court finds claimant entitled to damages, but
 - Court is satisfied on BoP claimant has been fundamentally dishonest in relation to the primary claim or a related claim



2015 Act

- Where the court finds the claimant fundamentally dishonest it can
- Dismiss primary claim or any element of primary claim even where claimant not dishonest,
- Unless there's substantial injustice



2015 Act

- Court states damages would have awarded and they are deducted from any expenses to which defendant entitled
- Fundamental dishonesty is not defined



LOCOG v Sinfield

- Volunteer at 2012 Olympic Games injured
- Claimed for gardening costs totalling £14,000 and forged invoices
- Judge found he was ‘muddled and confused’
- His dishonesty didn’t contaminate whole claim
- And it was substantially unjust to dismiss

LOCOG v Sinfield [2018]

EWCA 51 (QB)

- Mr Justice Knowles said section 57 met if in relation to primary claim the claimant had
 - “....substantially affected the presentation of his case either in respects of quantum or liability in a way which potentially affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.”
 - Para 62



“Dishonesty”

- Wright v Satellite Information Services Ltd [2018] EWHC 812 (QB)
 - Dishonesty a “simple, if occasionally imprecise word”
 - But juries are expected to understand and recognise it



“Fundamental”

- In LOCOG Mr Justice Knowles said he used:
 - ‘substantially affects’ to convey same effect as ‘goes to the root of’ or ‘goes to the heart of’ the matter
 - He concluded Mr Sinfield was fundamentally dishonest
 - The £14,000 was out of a claim totally £33,000
 - The loss of the whole claim was not a substantial injustice



CRP 44.16

- Qualified one way costs shifting orders – QOCS
- Claimant loses but can't be pursued for costs by defendant
- Exception in CRP 44.16 is that defendant can enforce costs against unsuccessful claimant where:
 - The claim is found on the BoP to be fundamentally dishonest
- Again fundamental dishonesty not defined

Howlett v Davies [2018] 1 WLR 948

- The Howletts were passengers in an RTA
- Trial judge found the Howletts had told:
 - “...so many contrasting stories about the circumstances surrounding the accident, what led up to it, the accident itself and what happened after it”
- That he had no confidence that the accident happened as described or at all



Howlett v Davies

- The Appeal centred on the finding of fundamental dishonesty without:
 - It having been pled and
 - Without it having been put to the claimants in cross examination



Howlett v Davies

- The Court of Appeal dismissed the appeal finding:
 - There was no need to plead it
 - As long as fair notice or warning was given regarding dishonesty the words lying or dishonest need not be used



Howlett v Davies

- The meaning of fundamental dishonesty
- Dishonesty to the root or heart of the matter
- Not incidental or collateral
- Claim would be fundamentally dishonest if it ‘...depended as to a substantial or important part on dishonesty.’



Grubb v Finlay

“To dismiss the whole action would create injustice. The pursuer would be deprived of his (now proven) entitlement to damages. The defender would avoid his (now proven) responsibilities. The pursuer’s conduct does not merit such a course.”

- Grubb was not fundamentally dishonest



Grubb v Finlay

- Appeal: 2018 SLT 463
- No rule as to fundamentally dishonesty
- Inherent power to dismiss
 - draconian
 - option of last resort



Grubb v Finlay

- It would be:

“in a very rare and exceptional case indeed that the court will bring a case to a sudden and permanent end, whilst one party is in the process of leading evidence to prove his or her averments.”
- In Grubb it would have been inappropriate to dismiss summarily either during or at the end of the proof



Other cases

- Shetland Sea Farms 2004 SLT 30
 - Fabricated documents for £1/2m extra
 - Those responsible untruthfully denying responsibility
 - Not enough to make a fair trial impossible

Levison v Jewish Chronicle Ltd 1924 SLT 755

- Borrowing out and destroying productions lodged in court
- Was enough to make a fair trial impossible



Grubb (again)

- “even if it were appropriate to dismiss a case summarily where a pursuer has been fundamentally dishonest in this jurisdiction it will at least remain dependent upon particular facts and circumstances”
- **EVEN IF**

Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018

Section 8

- Act not in force yet and no indication when
- Scottish QOCS
- Personal injuries/death from personal injuries claim
- “Conduct proceedings in an appropriate manner”



2018 Act

- Section 8(4)
- Get protection UNLESS:
- The person or their legal representative
 - Makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings
 - Behaves in a manifestly unreasonable manner
 - Otherwise conducts proceedings in a way which the court considers amounts to an abuse of process



2018 Act

- Fraud:
- Justinian – “every kind of cunning, trickery or contrivance in order to cheat, trick or deceive another”
- Bell/Erskine – “a machination of contrivance to deceive”



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2018 Act

- Pleadings?
- Findings of Incredibility?
- Warnings?

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