Personal Injury

QOCS outfoxed: the future of fundamental dishonesty

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Nearly three years after the introduction of Qualified One Way Costs Shifting (QOCS), the law is still developing. Rob's up-to-the-minute review looks at some of the current problem areas, including the threshold test (how dishonest? how fundamental?), pleading and procedure.

This paper is about fundamental dishonesty, which is a concept that first emerged as part of the QOCS regime, and now features in section 57 of the Criminal Justice and Courts Act 2015.

In the context of QOCS, a finding that the claim is fundamentally dishonest is a gateway to full enforcement of an order for costs made against the claimant.

In the context of section 57, a finding that the claimant has been fundamentally dishonest permits the court to exercise a power to dismiss the claim.

In short, the landscape has transformed from the position where:

1. subject to very bad behaviour invalidating their legal expenses policy, a claimant could expect to recover costs in the event of a win and risk nothing in the event of a defeat;

2. subject to the ghost of adverse inferences haunting other parts of their claim, claimants had little to lose by exaggerating their losses.

Cases and legislation are hyperlinked in green text for ease of reference. Busy practitioners may click through to QOCS practice points and where Rob reads the tea leaves.

QOCS

Introduction

Qualified one-way costs shifting (QOCS) was introduced as part of the morass of changes otherwise known as the 60th update to the CPR contained within The Civil Procedure (Amendment) Rules 2013. The scheme is contained within CPR 44.13 to 17 and the relevant Practice Direction, section II of CPR 44 PD.

The general rule is that QOCS applies to personal injury claims and counter-claims, including clinical negligence and fatal cases, where proceedings were issued after 1 April 2013 (CPR 44.13(a)-(c)).

The date of negligence is irrelevant except that if the claimant had entered into a pre-commencement funding arrangement then QOCS is disapplied (CPR 44.17; Wagenaar v Weekend Travel Ltd [2014] EWCA Civ 1105).

The basic structure of QOCS is that cost orders are made in the usual way but enforceability is limited to the amount of damages awarded to a claimant unless QOCS protection is lost:

CRP 44.14, Part II

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.

The main exceptions leading to loss of QOCS protection are strike out or a finding that the claim was fundamentally dishonest.

Strike Out

Strike out is a silver bullet for defendants that renders the whole of the costs liability payable without further order:

44.15 Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process; or

(c) the conduct of –

(i) the claimant; or

(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

Conventionally, applications to strike out have asserted no reasonable grounds for bringing the claim based on an allegation that the legal foundation of the case was unsound.

Such applications will continue – see, for example, Wall v British Canoe Union[1] – but are likely to be joined by an increasing number of applications to strike out for abuse of process, or at least the threat of such an application.

The power to strike out for abuse of process was considered in Summers v Fairclough [2012] UKSC 26. It was common ground before the Supreme Court that deliberately bringing a false claim and adducing false evidence could constitute an abuse of process. In the judgment of the Court, a claim might be struck out at an interlocutory stage to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined (see paragraph 62).

For cases caught by QOCS but not susceptible to dismissal under section 57, the prospect of a Summers strike out is maximally attractive to a defendant.

By way of postscript, In Brahilika v Allianz Insurance Plc (Romford County Court, 30 July 2015, Unreported), the Claimant failed to attend trial having given his Solicitors late notice that he would be on holiday before becoming incommunicado. DJ Dodsworth declined to make a finding of fundamental dishonesty without a hearing. Nonetheless, the claim was struck out under 44.15 on the grounds that the Claimant's failure to attend trial was likely to obstruct the just disposal of the proceedings. This non-binding decision appears a wrong turn: this was strike out for non-attendance at trial under CPR 39.3, which is not a trigger for costs liability.

Fundamental Dishonesty

In practice, a finding of fundamental dishonesty represents the main gateway to loss of QOCS protection:

CPR 44.16

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

In summary, the test is twofold:

(i) On the balance of probabilities, was the claim (as distinct from the claimant) fundamentally dishonest?

(ii) If so, should the discretion be exercised so that the claimant is exposed to some or all of the unbounded costs liability?

The Practice Direction suggests that where CPR 44.16 applies, the court will "normally" order the claimant to pay costs, notwithstanding that the costs exceed the judgment sum and costs (CPR 44 PD 12.6).

The issue of fundamental dishonesty may arise in variety of scenarios. In a claim that has failed but not been struck out, the defendant will need permission to enforce the entirety of the costs order. Alternatively, the claim may have succeeded and some damages awarded, but the claim may still be found to have been fundamentally dishonest, in which case the defendant requires permission to enforce beyond the limit of the award to the claimant.

Settlement in a case where fundamental dishonesty is genuinely in issue will be difficult to resist:

44.12(4)(b) where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;

Other Exceptions

QOCS does not apply to proceedings 'ancillary' to personal injury claims, for example Civil Liability (Contribution) Act 1978 claims even where such claims are brought as Part 20 claims within the claimant's personal injury action (Wagenaar v Weekend Travel Ltd).

QOCS protection may be lost where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or dependant (44.16(2) & (3)), for example subrogated claims and claims for credit hire (44 PD 12.1). This is not likely to be of importance in high value litigation.

True Lies: What does Fundamental Dishonesty Mean?

Readers may be surprised that although the concept of fundamental dishonesty is novel, no definition is offered by the draftsman.

During the House of Lords debate regarding section 57 of Criminal Justice and Courts Act 2015 (Hansard, 23 July

2014), Lord Faulks suggested that judges:

> "…will know exactly what the clause is aimed at – not the minor inaccuracy about bus fares or the like, but something that goes to the heart. I do not suggest that it winds many prizes for elegance, but it sends the right message to the judge."

The definition of fundamental dishonesty is yet to be considered by the appellate courts. It has been considered in a number of first instance cases.

Gosling

Gosling v Screwfix (HHJ Maloney QC, Cambridge County Court, 29 March 2014) was the first case to consider the issue and appears the most thoroughly argued and authoritative decision. For the moment, the case is the centre of gravity for fundamental dishonesty.

The facts of Gosling follow a pattern that have the potential to engender dread and delight in equal measure.

C suffered a serious injury to his knee in 2008, which he alleged was caused by a ladder manufactured by D1 and sold by D2. C put the overall value of his claim at the order of £80,000. Subsequently, D1 & D2 obtained surveillance evidence described by the Judge as "frankly devastating". Both orthopaedic surgeons turned tail and C revised his Schedule of Loss before settling against D1 for damages of £5,000, an indemnity against CRU of around £18,000 and costs of £27,000. He discontinued his claim against D2.

Under CPR 38.6, D2 would ordinarily be entitled to an order for costs but enforcement was limited by QOCS to the amount of damages recovered from D1, namely £5,000 (or perhaps £23,000). Consequently, D2 applied for a finding of fundamental dishonesty without setting aside the notice of discontinuance, as envisaged by 44 PD 12.4(c).

HHJ Maloney QC was not prepared to entertain an allegation of fundamental dishonesty on the issue of liability, which he considered would require a disproportionate oral hearing. On the other hand, it was "very clear" that the claim was fundamentally dishonest in light of the discrepancy between the covert surveillance and C's account of his injuries.

The judgment is a candid exposition of HHJ Maloney QC's reasoning. The crux is in paragraphs 44-50:

(i) The phrase "fundamentally dishonest" must be interpreted "purposively and contextually" to determine whether the claimant was "deserving" of costs protection.

(ii) A claimant should not be exposed to costs liability merely because of dishonesty as to some collateral matter or to some minor, self-contained head of damage.

(iii) Dishonesty that went to the root of either the whole of the claim or a substantial part of his claim would render it fundamentally dishonest.

(iv) In circumstances where the dishonesty was crucial to around half of the total claim (comprising future care and much of the award in general damages), that was sufficient to warrant the characterisation "fundamentally dishonest".

(v) It was not necessary for dishonesty to go to the root either of liability as a whole, or damages in their entirety.

In relation to procedure, an oral hearing would be unnecessary in light of the "bulletproof contrast'" between the claimant's conduct captured on the surveillance and the statements made to the doctor the same afternoon. Proportionality was an important consideration and satellite litigation was not to be encouraged.(!)

Other Decisions by Circuit Judges

Zimi v London Central Bus Company Ltd (HHJ Madge, Central London County Court, 8 January 2015) also led to a finding of fundamental dishonesty made by a Circuit Judge.

C's case was that his car had been struck by a bus that had encroached into his lane. Having viewed the CCTV, HHJ Madge was of the view that it did not show any collision and, if there was a collision, this occurred when the bus was stationary. There were also various issues in relation to the Claimants' credibility.

The claim was dismissed without reference to fraud or fundamental dishonestly and the pleadings were also silent on the same issues.

Having been invited to make an order that C pay D's costs the Judge remarked that "perhaps out of charity", he did not specifically find that the Claimant's evidence was fundamentally dishonest but in fact he was satisfied that the claimant "could not have had an honest belief that there was a collision of the kind claimed". C was to pay the entirety of D's costs, assessed in the sum of £3,000.

In the absence of a transcript of the judgment in Gosling but possessed of a summary from the website of C's Counsel (!), HHJ Madge offered the comment that the word, fundamental, meant "something going to the base, something going to the core of the claim, something of central importance and something which is crucial".

Zurich Insurance Plc v Bain (HHJ Freedman, Newcastle upon Tyne County Court, 4th June 2015) was an appeal against the surprising decision of a District Judge.

The accident occurred in a car park when the third party emerged from a parking space and reversed into the claimant's car at low speed. Liability was admitted and the vehicle repairs were discharged. There was a telephone conversation around 11 weeks after the accident where C indicated that he had not suffered injury and gave the insurer permission to close the file.

In due course, C was called by claims management companies and instructed solicitors. A medical report obtained 11 months after the accident diagnosed moderate low back pain for 8 weeks and made no mention of pre-existing back pain. The defence pleaded reliance on the telephone call and asserted that the accident was incapable of causing occupant displacement/injury.

The District Judge found that C had not suffered injury in the accident and that he had been untruthful to the reporting medic but refused to exercise his powers under 44.16.

On appeal, HHJ Freedman said the following:

"What it comes to is this: what does fundamentally dishonest mean? It does not, in my judgment, cover situations where there is simply exaggeration or embellishment. It is not unknown for these courts to hear claimants who appear to have suffered injury but who, whether consciously or otherwise, overstate the extent of their injuries. Therefore, for example, commonly, a soft tissue injury of the neck or back may be said to be more severe than a court concludes it actually was. That would not be fundamentally dishonest. Equally, in the experience of these courts, from time to time, schedules of loss are presented which somewhat magnify the degree of disability… That would not be fundamentally dishonest.

Where I am quite satisfied fundamental dishonesty does arise is where it goes to the core of the claim… If, as the judge found, the claimant suffered no injury, there was no claim here. It follows that this claim would never have been started but for Mr Bain's false assertion that he had suffered injury. It seems to me, therefore, that the dishonesty here

goes far beyond mere exaggeration; it props up, and provides the sole basis for the claim…

It seems to me that in looking at the issue of fundamental dishonesty a Court is entitled to consider not only the effect of the dishonesty but also the degree of dishonesty…"

It is difficult to disagree with HHJ Freedman's conclusion that if this were not a case of fundamental dishonesty, one has to ask when a claim does properly fall into that category.

Rouse v Aviva Insurance Ltd (HHJ Gosnell, Bradford County Court, 15 January 2016) was a decision of the Designated Civil Judge for Leeds and Bradford concerning the procedure to be adopted in conducting 44.16 applications where the case had discontinued.

Notwithstanding the potential for claimants to find themselves without representation (since their CFAs would likely terminate) and also recognising the potential for further costs, HHJ Gosnell concluded that fairness required either a full trial or a limited enquiry to allow the claimant and/or his witness to contribute.

Decisions by District Judges

There is now a steady flow of decisions in the County Court available on Lawtel including:

(i) Creech v Apple Security Group & 2 others (25th March 2015 DJ Rogers)

C was a security guard who claimed he had tripped on matting left behind after an ice rink was removed. Judge found ice rink still in situ. C's case must, to his knowledge, have been incorrect. The advancing of a case so plainly against the weight of the evidence in the circumstances outlined can only be described as fundamental dishonesty. But no order in favour of D3 who had failed to file a Schedule!

(ii) Mahen v Harries (10th April 2015 DJ Brown)

DJ intervened part way through trial at the conclusion of C's evidence. "There simply was not a scintilla of truth about anything he said." C discontinued. DJ had intended to strike out the claim. Fundamental dishonesty found.

(iii) Nama v Elite Courier Company Ltd (5th March 2015 DDJ Lindwood)

C's evidence about a roundabout collision inconsistent and unreliable. C presented a witness who she said was a passer-by whom she did not know prior to the accident but was in fact her passenger at the time of the accident and a 'Facebook' friend of C since 2011. On their own the inconsistencies in her account would not have been sufficient but the evidence of the passenger was fundamentally dishonest.

Beat the QOCS: Practice Points

In summary:

- Senior appellate guidance is awaited but is not imminent.
- Pending such guidance, Gosling will remain influential.
- A finding of fraud is not required.
- Argument is likely to focus on the meaning of "fundamentally".
- Although most of the reported authorities have followed trial, fundamental dishonesty findings may be made in the

absence of oral evidence.

Section 57 of the Criminal Justice and Courts Act 2015

Section 57 of The Criminal Justice and Courts Act 2015 came into force on 13 April 2015 by virtue of The Criminal Justice and Courts Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Order 2015 (SI 2015 no. 778).

The provision is as follows:

Personal injury claims: cases of fundamental dishonesty

(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.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

Section 57 was enacted by Parliament to reverse the common law. Its terms reflect but do not mirror a similar provision already in force in Ireland.

By way of summary, the section requires:

(i) an application by the defendant;

(ii) a finding on the balance of probabilities that the claimant was fundamentally dishonest;

(iii) a determination that dismissal would not result in substantial injustice (since this will inevitably be raised by a claimant).

(iv) a recording as to the amount of damages the claimant would otherwise have received.

Unlike a Summers strike out, the application is determined on an 'all or nothing' basis.

Section 57 is likely to prompt a strong response whether in favour or against. To dismiss the entirety of the claim is certainly a draconian step but whether it will prove to be a proportionate deterrent may depend on how the law develops.

The frontline issue is likely to be the application of the test of substantial injustice. It is not difficult to conceive of examples where the dismissal of the claim would result in hardship to severely injured claimants, their families and the

state.

It is likely that some assistance can be derived from the experience of the Irish Courts in the application of section 26 of the Civil Liability and Courts Act 2004, which is a similar provision:

26.— (1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

Some of the issues that can be expected to trouble the English Courts have already been before the Irish courts.

For example:

(i) Abandoning the tainted elements does not necessarily save C - Farrell v Dublin Bus [2010] IEHC 327 p.75

(ii) Separating out the good from the bad is not permissible – Meehan v BKNS Curtain Walling Systems Ltd & Others [2012] IEHC 441

(iii) Understandable exaggeration has been recognised in some cases – Ahern v Bus Eireann [2011] IESC 44

To date, the only known example of litigation concerning section 57 before the English Courts was in Ravenscroft v IKEA (2015) Manchester CC where the Defendant became suspicious of Mrs Ravenscroft's claim. The Judge concluding that the Defendant had adopted a "stance of suspicion rather than sympathy" and rejected the application under section 57. Somewhat surprisingly, the District Judge did not grant the Claimant's application for aggravated damages or indemnity costs. Defendants cannot expect to escape so lightly in future if an application fails.

Reading the Tea Leaves

There is no question that claimants now face a significantly more challenging environment to litigate.

There are differences in the focus of the test of fundamental dishonesty in QOCS and under section 57. Nonetheless, a common body of jurisprudence is likely to emerge. The scope for satellite litigation concerning the definition of "fundamental" and "substantial injustice" appears considerable.

Fundamental dishonesty will come in different shapes and sizes. Some of the more common issues are likely to arise from surveillance footage, undisclosed injuries / accidents and false loss of earnings claims. A body of case law arising from judges taking strongly against claimants at trial can also be expected.

In relation to quantum, it is suggested that the proportion of the claim that is tainted will be significant. Half of the overall claim was enough for a finding of fundamental dishonesty in Gosling. It will also be important to consider to what extent

the exaggeration was deliberate and signs of a more sympathetic approach towards the overstated claim can be found in Zurich Insurance Plc v Bain.

A lower threshold may arise in relation to dishonest conduct, such as phantom witnesses, forged documents, etc. The issue of substantial injustice may be the saving grace where the false evidence was produced in support of a genuine claim.

Fundamental dishonesty in relation to liability will be diverse. It is likely to require oral evidence to determine the issue (see Rouse) so will be more difficult to establish at an early stage of proceedings. It remains to be seen whether the ever-present mistaken witness will be consigned to history by the significance of more robust findings in relation to dishonesty.

Footnotes

[1] Birmingham County Court 30/7/15 HHJ Lopez. The court struck out, for lack of proximity, a claim in negligence brought against the publisher of a canoeing guidebook by the widow of a canoeist. It was held that CPR 44.15 permitted enforcement of the cost order made as if QOCS did not exist.

Acknowledgements

Underwood, K (2016) Qualified One-Way Costs Shifting, Section 57 and Set Off Law Abroad Plc, Hemel Hempstead

Norris, W & Crapper, S (2016) Fundamental Dishonesty in PI Claims PIBA London Seminar