

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

By [Gabriel Adedeji](#)

3PB Barristers

Summary

In this case the High Court set out the correct approach in relation to applications under s.57 Criminal Justice and Courts Act 2015 ('the 2015 Act').

Facts

The Respondent had broken his left arm and wrist while acting as an assistant to spectators at the 2012 Olympic and Paralympic Games. Liability was admitted.

The Respondent's claim for special damages included a claim of around £14,000 for future gardening expenses. He asserted that the accident had caused him to employ a gardener to look after his two-acre garden, a task which had previously fallen to himself and his wife. This aspect of the claim represented around 42% of the special damages sought, and 28% of the entire claim, general damages having been agreed at £16,000.

However, when he was contacted by the Appellant, the Respondent's gardener (identified from the Respondent's list of documents which had referred to numerous invoices from the gardener) indicated that he had been working for the Respondent and his wife since 2005 and that his work had not changed following the Respondent's accident. He further indicated that the invoices referred to had not come from him and that the Respondent had not been telling the truth in relation to his allegation that he had had to employ a gardener as a result of the accident.

The Appellant therefore sought to have the claim dismissed under s.57 of the 2015 Act, asserting that the Respondent had been fundamentally dishonest.

The judge at first instance refused the application, finding that the Respondent had not been dishonest but, instead, *'muddled, confused and careless'* in relation to the preliminary Schedule of Damages. The judge found further that the Respondent had been dishonest in creating false invoices and as to his statement that the accident had caused him to hire a gardener for the first time. However, the judge found the dishonesty did not contaminate the entire claim as there was a genuine claim for personal injury which *'went wrong'*. The judge found that the Respondent had not been fundamentally dishonest but, if he had, it would have been substantially unjust for the entire claim to be dismissed, given that the dishonesty related to only a *'peripheral'* part of the claim and the remainder of it was genuine.

Appeal to the High Court

Allowing the appeal, the High Court set out the proper approach to s.57 of the 2015 Act, stating that a claimant should be found to be fundamentally dishonest (within the meaning of s.57(1)(b)) if the defendant proved on the balance of probabilities that the Claimant had acted dishonestly in relation to the primary claim and/or a related claim, as defined in s.57(8). Moreover, that he had substantially affected the presentation of his case in respect of either liability or quantum in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.

Dishonesty was to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos*. If the court was satisfied as to the Claimant's dishonesty, it had to dismiss the claim, including any element of the primary claim in respect of which the Claimant had not been dishonest, unless he was satisfied that the Claimant would suffer substantial injustice, per s.57(2).

As to what would constitute substantial injustice, Knowles J, giving judgment, stated:

'Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty...because of s 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their "honest" damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages.'

The Court therefore found that the judge had been wrong in his finding that the Respondent had been *'merely muddled and careless'*. Applying the *Ivey* test in relation to whether the Respondent had been dishonest in respect of the Preliminary Schedule, the *'only reasonable conclusion'* was that he had been dishonest and that, *'the judge was plainly wrong not to have reached the conclusion that paras 5 and 8 of the Preliminary Schedule were dishonest misstatements'*. The judge should therefore have concluded the Respondent had been fundamentally dishonest as he had presented his case on quantum in a dishonest way, which could have resulted in the Appellant paying out far more than it would have on honest evidence. Further, the judge had not made any findings capable of supporting a conclusion that that dismissal of the whole claim would result in substantial injustice to the Respondent. He had also been wrong to characterise the gardening claim as peripheral given that it was a substantial part of the claim.

Comment

Where a Claimant has, on the balance of probabilities, been fundamentally dishonest within the meaning of *Ivey* (i.e. with reference to the actual state of the Claimant's knowledge or belief as to the facts, they were dishonest by the standards of ordinary people) and it substantially affected the presentation of their case in a way which adversely affected the Defendant, the Court will have to dismiss the whole part of the claim, including those parts which are 'untainted' by the dishonesty unless a substantial injustice arising out of the loss of the Claimant's damages can be made out. The judgment confirms the strict approach courts will take to claims involving fundamental dishonesty, and underscores the need for solicitors and counsel to properly brief their clients as to the potential impact on the claim for damages and costs, including QOCS.

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Gabriel Adedeji

3PB Barristers

020 7583 8055

gabriel.adedeji@3pb.co.uk

3pb.co.uk