Pleading Fundamental Dishonesty Allegations: Mustard v Flower [2021] EWHC 846 (QB)

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The mustard flower is simple and delicate. The mustard seed, on the other hand, packs more of a punch. Pleadings of fundamental dishonesty in cases where there is no strong evidence (such as damaging surveillance) of a claimant's fraud should, it seems, be more like the former than the latter.

Background

In 2017, the Court of Appeal in *Howlett v (1) Davies (2) Ageas Insurance Limited* [2017] EWCA Civ 1696 reminded us that allegations of fundamental dishonesty do not need to be formally pleaded, but a defendant ought to give a claimant sufficient notice that it will test his credibility at trial and cannot ambush him.

In 2018, HHJ Coe QC sitting as a High Court judge in *Pinkus v Direct Line* [2018] EWHC 1671 (QB) reached the same view.

In both of those cases, the trial judge ultimately went on to find that the claimant had been fundamentally dishonest, even though fundamental dishonesty had not been pleaded.

In the recent case of *Mustard v Flower* [2021] EWHC 846 (QB) (judgment here), Master Davison was asked to consider an application to amend the Defence to include the following paragraph:

> "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.*"

The italicised words were not italicised in the proposed amendment; they are italicised here because those were the only words ultimately rejected by the Judge.

Following *Howlett* and *Pinkus*, one might be forgiven for thinking that the whole paragraph above was entirely reasonable; indeed, it arguably went beyond the sort of 'fair warning' which (following those cases) a defendant is required to give and set out in clear terms what the defendant might ask the court to do at the conclusion of the evidence.

However, this verbosity turned out to be the defendant's undoing.

Despite having initially felt there was nothing overtly objectionable about the above proposed amendment in its entirety, Master Davison ultimately came to the view that:

1. The contentious sentence served no purpose. Pursuant to *Howlett*, any submission that the claim was fundamentally dishonest was one which could simply be made at trial. There was no need to 'reserve the right' to make it.
2. The defendant had already conceded that conscious exaggeration was one of a number of potential explanations for any proven exaggeration which the court might ultimately identify, on the particular facts of the case. It might also be that the claimant was subconsciously exaggerating her injuries. Thus, the proposed amendment amounted, in the judge's mind, to a 'contingent' pleading which could not be said to enjoy a 'real'

prospect of success.

3. A claimant facing a plea of fundamental dishonesty has to report such matters to any legal expenses insurer he/she may have, which is prejudicial and a further reason to refuse the amendment in the full terms sought.

Therefore, Master Davison refused the amendment insofar as is related to the final sentence of paragraph 4.4 (the sentence in italics above).

Discussion

Master Davison referred more than once to the italicised sentence as being a 'plea' of fundamental dishonesty. It is difficult in my view to characterise it as that; it was not being suggested by the defendant that the claim was fundamentally dishonest, merely that it might be, and that if the evidence emerged at trial to support a submission of fundamental dishonesty, then the defendant would be likely to make such a submission.

Whilst it is perfectly proper to deprecate the sort of scattergun approach one often sees in low-value PI claims, where defendants make strong hints in virtually every defence that a claim is (or may be) fundamentally dishonest, based at times on the slimmest possible arguments in support, it is unclear to me that the specific proposed amendment in the *Mustard* case could be characterised as such. Indeed, the claimant did not even object to the first sentence of the proposed paragraph 4.4 (which pleaded that she had been inconsistent and 'unreliable' in reporting her symptoms), so must have accepted that it was not unreasonable for the defendant to at least harbour some of the suspicions it did.

However, as Master Davison reminds us, there is no need to reserve the right to make a submission under s. 57 at the conclusion of the evidence; the right to do so simply exists as a matter of course.

Thus, by going out of its way to refer to s. 57, and the disapplication of QOCS, aspects of the proposed Amended Defence which Master Davison described as "*somewhat doom-laden wording*", it was felt the defendant was perhaps cynically attempting to win a malleable tribunal around to the view that something was amiss with this claim.

Therefore, even if the dispute which was put before him in the *Mustard* case amounted on one view to little more than the semantic equivalent of splitting hairs, a marker has now been put down; unless a defendant has cogent evidence to support an express pleading of fundamental dishonesty, the safest course to adopt in the Defence is simply to give the claimant warning of the intention to challenge his credibility at trial and to identify the disputed aspects of the claimant's case, but not to refer, in terms, to 'fundamental dishonesty', 'CPR 44.16', 'disapplication of QOCS' and/or 's. 57 CJCA 2015'.