Neutral Citation Number: [2018] EWHC 812 (QB)
Case No: B44YP729 Appeal Ref: M18X017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester,
Greater Manchester, M60 9DJ

Date: 11/04/2018

Before :

MRS JUSTICE YIP DBE

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Between :

Edward Wright	**Claimant/ Respondent**
- and –	
Satellite Information Services Limited	**Defendant/ Appellant**

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Michael Nicholson (instructed by **Irwin Mitchell LLP**) for the **Claimant/Respondent**
Catherine Foster (instructed by **Clyde & Co LLP**) for the **Defendant/Appellant**

Hearing dates: 11 April 2018

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Judgment Approved

Mrs Justice Yip:

1. This is an appeal against a decision of HHJ Pearce handed down on 11 December 2017, following a three-day trial of a personal injury action at Chester County Court in June 2017. Judgment was entered for the Claimant in the sum of £119,165.02 and the Defendant was ordered to pay 75% of the Claimant's costs. The Defendant appeals contending that the claim should have been dismissed pursuant to section 57 of the Criminal Justice and Courts Act 2015 on the basis that the Claimant had been fundamentally dishonest.

2. I granted permission to appeal on the papers on the basis of the information then before me. The Defendant's application for permission to appeal firmly asserted that the Defendant did not seek to appeal any findings of fact made by HHJ Pearce. In summary, the Defendant maintained that "the Learned Judge, having found that the

Claimant's claim for the cost of care was not established, was wrong as a matter of law not to find that he had therefore been dishonest in his presentation of this element of the claim and that such dishonesty was 'fundamental' to the integrity of the claim within the meaning of section 57 of the Criminal Justice and Courts Act 2015."

3. In granting permission, I observed that, on the face of it, the judge gave careful consideration to the issue of fundamental dishonesty and that his judgment demonstrated a balanced approach. However, the grounds appeared to have sufficient merit to justify the grant of permission, noting some apparent parallels to the recent decision of Julian Knowles J in *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB). I noted though that there may be a distinction in how the care claim was presented to the trial judge and indicated that the appeal court was likely to wish to consider the evidence available at trial. I now have available a full appeal bundle, which includes the statements of the Claimant and his wife; transcripts of their oral evidence; the schedules of loss and the expert care report relied upon by the Claimant.

4. Those items are plainly relevant to the issues raised by the grounds of appeal. In addition, I have been provided with all the expert medical evidence and the video surveillance evidence which was placed before the trial judge. Bearing in mind that this appeal is limited to a review of the trial judge's decision having regard to the grounds upon which permission was granted, I have not considered it necessary to look in detail at all the evidence. In particular, I do not consider it necessary, or indeed appropriate, to review the video evidence.

5. The claim arose out of an accident at work on 24th January 2014. The Claimant, who was then aged 66, sustained nasty injuries affecting his right lower limb, including a comminuted intra-articular tibial fracture. He was unable to return to work post-accident.

6. The Defendant admitted liability. Quantum remained in issue and fell to be determined by the court. Further, the Defendant sought the dismissal of the claim under section 57 of the 2015 Act. That issue formed a prominent part of the trial before HHJ Pearce. It was the Defendant's case that covert video surveillance had produced evidence that the Claimant was far less disabled than he claimed and that he had deliberately and dishonestly exaggerated his claim.

7. Section 57 of the 2015 Act provides:

> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") –
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> a) the court finds that the claimant is entitled to damages in respect of the claim, but
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> 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.

The remainder of the section is not relevant to this appeal.

8. The judge heard the evidence over the course of two days. Having heard submissions, he reserved judgment. In a careful and thorough written judgment, he set out the history and conducted a detailed analysis of the evidence. He noted that the first major factual issue he was required to determine was "whether the Claimant is broadly correct in his description of his disability." He identified that having addressed the factual issues, he would then have to resolve the question of "whether, if the Claimant is misdescribing his symptoms, he is guilty of fundamental dishonesty."

9. The judge identified that there were some real inconsistencies in the Claimant's case, including as to how far he was able to walk; to what extent he needed to use a walking stick and the level of pain that he suffered.

10. He also considered that there were features of the presentation of the case giving rise to the suggestion that the claim was overstated. Of particular relevance to this appeal, given the way the grounds were put, was the claim for care, about which the judge said at paragraph 91 "Given the low levels of care to which the Claimant referred to in his evidence, it is difficult to see that assistance at the levels described by Ms O'Brien and adopted as part of the Claimant's case [in] the updated schedule of loss at 1/127 can be justified."

11. Having identified these concerns, the judge conducted a detailed analysis of all the evidence and the various elements of the claim before making a finding that the Claimant was not guilty of dishonesty, still less dishonesty of a fundamental nature.

12. He went on to indicate that had he found that the Claimant had been fundamentally dishonest as was alleged, he would have gone on to consider section 57(2) of the Act but would not have found that the Claimant would suffer a substantial injustice if the claim were dismissed. That conclusion is not challenged by the Claimant by way of a Respondent's Notice, rightly in my judgment. Therefore, the only issue arising on this appeal is whether the judge was wrong in not finding, on a balance of probabilities, that the Claimant had been fundamentally dishonest.

13. The legal issues as they apply to this case are not contentious. The decision under consideration was given before that of Julian Knowles J in *Sinfield*. However, there is nothing within that recent decision which conflicts with the approach taken by HHJ Pearce. It may be that there is scope for some argument in future cases as to the application of the principles identified by Julian Knowles J but that simply does not arise here. Further, there was never any suggestion in this case that even if Mr Wright had been dishonest by ordinary standards he could escape a finding of dishonesty by showing that he judged his conduct by different standards. The appeal has proceeded on the basis that the test in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 applies. As the Supreme Court said in that case "Dishonesty is a simple, if

occasionally imprecise, English word". We expect juries to understand and recognise dishonesty and of course the same applies to trial judges. The concept of dishonesty requires no further elaboration or explanation in the context of this case; nor indeed does the concept of fundamental dishonesty.

14. In light of the findings he made, the judge was required to consider whether the Claimant had been fundamentally dishonest in relation to his claim. He found that he had not.

15. The application for permission to appeal was founded on the contention that, having found that the Claimant's care claim was not established, it was wrong as a matter of law not to find fundamental dishonesty.

16. The judge dealt with the care claim at paragraphs 103 to 109 of his judgment. At [103], referring to the evidence of the care expert, he said

> "I am concerned that the figures set out in the report of Ms O'Brien significantly overstate the care that the claimant requires, a fact the Claimant himself readily acknowledged."

He went on to describe her report as "fundamentally unreliable."

17. The claim for future care had been pleaded in excess of £73,000. The judge allowed just £2,100 to cover the provision of some care following future surgery. Otherwise, he concluded that there was no true continuing care need. The part of the judgment dealing with what was substantially a rejection of a significant element of the claim was brief. There is much to be said for concise rulings and I make no criticism of the judge for his brevity. Having now had the opportunity to review the evidence, I consider that the judge's reasoning would have been, or at least ought to have been, readily understandable to the parties, who like the judge had had the benefit of hearing all the evidence. However, without all the background material, the judge's findings required some interpretation. Now that I have seen the relevant evidence, I am not persuaded that the interpretation which appeared to underpin the grounds of appeal is correct. It is right to say though that Ms Foster vigorously maintained her interpretation during the hearing.

18. At paragraph 7 of the application for permission, the Defendant contended that the Claimant's witness statements and his accounts given to the medical experts gave the impression that he had a significant ongoing claim for personal care whereas the judge found that he needed only minimal support. At paragraph 8, it was asserted that the judge's assessment of the care claim did not hinge on his interpretation of the medical evidence but on the Claimant's failure to establish this requirement as a matter of fact.

19. To understand the judge's findings and the impact on the issue of dishonesty, it is necessary to consider how the care claim was presented by the Claimant. Although Ms Foster took that as the starting point, I felt that she glossed over the detail of the evidence. Her position was essentially that the presentation of the care claim, as set out in the schedule, underpinned by the witness statements and the care evidence was factually inaccurate. The Claimant claimed for a not insignificant amount of care when in fact he had no ongoing requirement for care. He signed the statement of truth

on the schedule of loss and in doing so, when he would later admit in cross-examination that he had no ongoing need for care, the only possible conclusion is that he was dishonest. She said that the Claimant had a number of opportunities to correct the misleading impression his schedule created but failed to do so.

20. When I pressed Ms Foster to clearly identify the dishonesty in relation to the care claim, she initially said that the dishonesty came in "brandishing" the care report. She then thought better and withdrew what she admitted was emotive language and rephrased it as "presenting a claim for care with reference to the report when he must have known he didn't have such a claim."

21. This exchange did perhaps reflect the attitude on the Appellant's side. I accept that the insurers genuinely considered that there was a strong case for alleging dishonesty. They had obtained surveillance evidence which they considered showed exaggeration. They identified other inconsistencies. They fought this claim vigorously, as they were fully entitled to do. I have no doubt that their interpretation of the evidence led them to expect to succeed on the issue of dishonesty. However, while the Appellant criticises the judge for a lack of analysis, I consider that the assertion that the judge was bound to find dishonesty given his factual findings is itself based on a lack of detailed analysis of the way in which the claim was presented. The unintentional use of admittedly emotive language was perhaps symptomatic of that.

22. There is an initial unsigned and undated statement from the Claimant and a similar one from his wife. It is clear that these statements related to the early months following the accident, when the Claimant undoubtedly had a need for support from his wife. The judge made an allowance for past care to cover this. There is limited specific detail of the nature and quantity of care received.

23. Chronologically, the next relevant evidence is the care report of Rachel O'Brien dated 22nd May 2015. Like the trial judge, I am unimpressed by this expert evidence. Frankly, I question whether expert evidence was required to address the issue of care in this claim. I note that Ms O'Brien is an occupational therapist and that her report also covered a number of other heads of loss. It was perhaps justifiable to have an expert opinion to assist in quantifying the Claimant's likely care needs following future surgery, since the Claimant and his wife would not simply be able to give evidence of a future requirement in the same way that they could detail the ongoing position. However, generally I would question the need for a formal care report to deal with a limited need for a short period post-surgery.

24. There is fairly limited detail as to how Ms O'Brien arrived at her assessment that the Claimant had required 10 hours of care up to the date of her assessment and would continue to need 6.5 hours care per week in the future. In recording what she was told by the Claimant, she indicated that he required supervision when showering. He was able to get in and out of the shower independently but was afraid of slipping. He had no difficulty with dressing or with transfers. There were some restrictions in his mobility and he had difficulty bending and was unable to kneel or squat. It was said that he could not bend to low cupboards. He could no longer do the gardening, household maintenance or wash the car. Ms O'Brien assessed the present need for personal care on the basis that it amounted to 10 hours per week and a future need for 6.5 hours with additional care being required in the event of surgery. There was no narrative to explain the reduction of 3.5 hours from her present assessment to the

future requirement. It seems plain that this simply represented her estimate of the amount of time the Claimant's wife would, on average, be engaged in providing the minor assistance identified.

25. In my judgment, the Claimant did not labour the point as far as his care claim was concerned in his further statements. In a statement dated February 2016, which was subsequently amended and re-dated April 2016, he simply stated that he still required assistance from his wife and remained unable to do domestic chores that were his before the accident. In his statement dated June 2016 he said that he still required assistance, especially with washing and that his wife still did all of the domestic chores. His wife's statement from the same time said that she continued to do "the vast majority of the household chores". She now did the gardening. The Claimant coped with dressing although it took longer. He still required help with showering. She said that she was concerned for the future knowing that there would be periods after surgery when she would need to "be there for him and to care for him."

26. The claim for special damage and future loss was initially set out in a schedule dated 2 September 2015. The total, excluding pain, suffering and loss of amenity was over £350,000. This included a past care claim of £14,569 and a claim for future care of £109,050. The schedule was updated and revised prior to trial, the second schedule being dated 9 May 2015. Both documents were drafted by the Claimant's solicitors. Each was supported by a statement of truth signed by the Claimant himself.

27. It seems to me that the importance of the schedule of loss is frequently overlooked. This is, or should be, the document that draws together the presentation of the claim. It ought to be presented in an accessible and easy to follow format. The fact that the schedule of loss is required to be supported by a statement of truth highlights the need for it to be readily understandable by the claimant. It also sets out the claim for the defendant and for the trial judge who will come to the case afresh and ought to be able to follow the case from the schedule. This means that it should not simply be a series of calculations. It needs to be supported by sufficient narrative to explain the case being presented by the claimant.

28. With the exception of the claim for loss of earnings the schedule in this case did not serve that purpose. I note that the Claimant said in cross-examination that he regarded the schedule as similar to a set of accounts prepared by an accountant that he would sign in reliance upon the professional expertise of the drafter. I have some sympathy with that position given the format of the schedule here. However, that is not the right approach. Claimants will be fixed with knowledge of and taken to have certified the truth of the contents. It is very important that lawyers draft the schedule in such a way that the facts to which the client is attesting are clear. Failing to do so is failing in their duty both to the client and to the court.

29. I note the contrast between the schedule and the counter-schedule in this case. It was immediately apparent to me that the counter-schedule was a well drafted document clearly setting out the Defendant's case. I note that the counter-schedule was drafted by Ms Foster who was trial counsel. It properly fulfilled its purpose. It does need to be appreciated that schedules and counter-schedules are an essential part of the advocacy in a case. In my view, they need to be drafted by lawyers with sufficient experience and skill to properly present the claim as it will be presented at trial,

particularly in a contentious case such as this. This claim and the appeal highlight the dangers of treating the schedule as little more than a number-crunching exercise.

30. In relation to the care claim, it seemed at first blush that the schedule simply lifted the contents of the report of Ms O'Brien. However, on closer inspection, the claim for past care did not precisely mirror this expert evidence. There was no explanation for this. There was no narrative explaining the number of hours claimed for future care, the only narrative was as to the hourly rate. It might be thought that this was the wrong way round. The Claimant would have no knowledge of the appropriate hourly rate and reference could be made to the expert opinion for that. However, he was able to specify the nature and extent of the ongoing care. Indeed, when asked about this in cross-examination, his answers, given readily, were such that the judge rightly concluded that the claim as presented by Ms O'Brien could not be maintained.

31. In fact, it appears to me that the Claimant had been broadly consistent in what he had said in relation to any need for ongoing assistance. The judge accepted that his wife may occasionally do tasks for him such as reaching items out of a cupboard and that she would be present to provide support while he was showering. That fits with what the Claimant had said. The rejection of the care claim as pleaded seems to have flowed from a proper analysis of what was actually being done for the Claimant and the conclusion that this did not properly sound in damages. The judge concluded that "it is almost impossible in my view to value such occasional assistance."

32. Read in the context of the evidence and the way in which the claim was presented in the schedule, it is clear that in finding that the claimant had not established his claim for future care, the judge was not bound to find that the claimant had acted dishonestly merely in presenting such a claim. The reason for the judge's rejection of this element of the claim was not that he found the Claimant's evidence to be untruthful, but rather that a proper interpretation of that evidence did not support the assessment of the care expert.

33. I do not consider that the judge was wrong in not treating the failure to establish the care claim as amounting to a finding of dishonesty. I would go further. I would have been surprised if the judge had found that the rejection of the bulk of the future care claim in itself when set in context did support a finding of dishonesty, still less fundamental dishonesty.

34. The facts of this case are very different from *Sinfield*. In that case, the claimant had admitted manufacturing false invoices to support a claim for gardening. The judge found as a fact that this was dishonest but nevertheless found that the claimant had not been fundamentally dishonest within the meaning of section 57. On appeal Julian Knowles J found dishonesty going beyond that found by the trial judge and specifically relating to assertions of fact within the schedule of Loss. Even on the findings made by the judge, the appeal court concluded that what the claimant did was fundamentally dishonest.

35. The position is very different here. The issue of dishonesty was a prominent part of the trial. It is apparent that the judge had that issue at the forefront of his mind throughout. Looking at the transcripts of the evidence of the claimant and his wife, it is quite clear that the judge was interested in and focused on inconsistencies in the evidence which might support a finding of dishonesty. The approach he adopted as

set out in his judgment was appropriate. As I observed when granting permission, paragraphs 92 to 94 of his judgment particularly demonstrate the careful consideration he gave to this issue and the balanced approach he took when weighing up the evidence. There were clearly matters which caused the judge some concern but a full analysis of all the evidence led him to find that the Claimant had not been dishonest. That, of course, was contrary to the position in *Sinfield* where the judge specifically found that the claimant had been dishonest.

36. Despite Ms Foster's forceful submissions, I agree with the Respondent that, contrary to what is firmly stated by the Appellant, this appeal is essentially a challenge to the trial judge's findings of fact.

37. Ms Foster plainly takes a different view as to the correct interpretation of the evidence. However, this was very much a matter for the trial judge and many of the points argued before me appeared to be a repetition of trial submissions.

38. The first stage for the court when considering an application under section 57 is to decide whether, on a balance of probabilities, the defendant has established that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim. The judge was not satisfied that this was the case. On the facts and the evidence presented to him, it cannot be said that this was not a decision open to him. The issue of dishonesty is akin to a jury question. In the case of a civil trial before a judge alone, it is a matter for the trial judge who has seen and heard all the evidence unless some material flaw in approach or his analysis can be identified. The judge's approach cannot be faulted. He reminded himself at paragraph 93 of the judgment that the court should not give in to the temptation to find inadvertent rather than deliberate exaggeration and must not shrink from making findings of dishonesty. I can see no proper basis for interfering with the judge's findings.

39. There are four grounds of appeal. They must be read in the context of the introduction set out in the application for permission. That introduction made it clear that the appeal was focused upon the judge's substantial rejection of the care claim and the contention that he was wrong then in failing to find fundamental dishonesty. That is the basis upon which permission was granted. I do not consider that any of the grounds are properly arguable when the judgment is viewed in its proper context by reference to the evidence before the judge. Essentially, they amount to an impermissible attempt to overturn the trial judge's decision which the Appellant does not agree with.

40. I thought at first blush that the Appellant's skeleton argument appeared to go beyond the basis upon which permission was granted and apparently sought to reopen consideration of all the alleged misrepresentations and inconsistencies alleged at trial. That would not be appropriate bearing in mind the proper scope of the appeal process. However, Ms Foster assured me that the appeal was limited to the grounds advanced and that the other points were included merely by way of background. In any event, the judge dealt with all these matters in his judgment. It is plain he had concerns about some of the inconsistencies and he gave them particular attention before reaching the findings that he did. He was entitled to find that, although at times the Claimant gave a misleading impression by focusing on his symptoms when they were at their worst, he had not deliberately attempted to overstate his case.

41. In all the circumstances, having now considered the relevant evidence and revisited the judgment, I am entirely satisfied that this was a decision that was open to the trial judge. Accordingly, I dismiss this appeal.