Neutral Citation Number: [2018] EWHC 51 (QB)

Case No: QB/2017/0241

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2018

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

LONDON ORGANISING COMMITTEE OF THE OLYMPIC AND PARALYMPIC GAMES (IN LIQUIDATION)	**Appellant**
- and -	
HAYDN SINFIELD	**Respondent**

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- -

James Laughland (instructed by Kennedys Law LLP) for the Appellant
Mark James (instructed by Pictons Solicitors LLP) for the Respondent

Hearing date: 11 December 2017

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Judgment Approved

Mr Justice Julian Knowles:

1. This is an appeal with the permission of Martin Spencer J by the Appellant, the London Organising Committee of the Olympic and Paralympic Games (In Liquidation) ('LOCOG'), against the decision of Mr Recorder Widdup at Oxford County Court on 18 September 2017 to award damages to the Respondent, Mr Haydn Sinfield ('Mr Sinfield'), for personal injuries. Mr Laughland appears on behalf of LOCOG. Mr James appears on behalf of Mr Sinfield.

2. The case concerns s 57 of the Criminal Justice and Courts Act 2015 ('s 57'/'the 2015 Act') and the power it gives the court to dismiss a claim for personal injuries where the court is satisfied that the claimant has been fundamentally dishonest in relation to the claim. Section 57 provides:

> **"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.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

(6) If a claim is dismissed under this section, subsection (7) applies to—

(a) any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and

(b) any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.

(7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.

(8) In this section—

"claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counter-claim;

"personal injury" includes any disease and any other impairment of a person's physical or mental condition;

"related claim" means a claim for damages in respect of personal injury which is made—

> (a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and
>
> (b) by a person other than the person who made the primary claim.
>
> (9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force."

3. Mr Sinfield was injured in an accident for which LOCOG admitted liability. By its Amended Defence and following a trial on quantum, LOCOG submitted to the judge that, pursuant to s 57, Mr Sinfield's claim should be dismissed because he had knowingly presented a dishonest claim for damages for gardening expenses which, as originally formulated, represented a substantial part of the claim, and thus that he had been fundamentally dishonest in relation to his claim. The judge rejected LOCOG's application and awarded Mr Sinfield damages. LOCOG appeals against the judge's decision not to dismiss the claim under s 57.

The factual background

4. The 2012 London Olympic and Paralympic Games were a fantastic festival of sport. The Games captivated the nation and the world that summer. There were thousands of spectators. Many people volunteered to assist them. Mr Sinfield was one such person. Unfortunately, on 9 September 2012 Mr Sinfield was injured whilst volunteering at the Games. The details of the accident do not matter for the purposes of this judgment, save that it involved Mr Sinfield falling on to his left arm and breaking his left distal radius and the ulnar styloid of his left wrist. The injury had some long-term consequences for him in terms of what he could do.

5. Mr Sinfield brought proceedings for personal injury against LOCOG. On 7 December 2015 he served a Preliminary Schedule of Damages ('the Preliminary Schedule'). The Preliminary Schedule was verified by Mr Sinfield with a statement of truth, and signed by him: 'I believe that the facts stated in this schedule are true'. Special damages were claimed under a number of different heads, including for medical expenses, travelling, and a broken watch strap. Of particular relevance to this appeal was the claim by Mr Sinfield for damages in respect of gardening expenses. There were two separate claims: damages from the date of the accident to the date of the Preliminary Schedule; and a claim for future loss. These were in paras 5 and 8 of the Preliminary Schedule, respectively, and I need to set them out in full.

6. At para 5 the Preliminary Schedule stated:

> "5. Gardener
>
> The Claimant has a 2 acre garden. Prior to the accident the Claimant looked after the garden himself with his wife. Post accident his wife continues to do some of the gardening but they

> had to employ a gardener for 2-4 hours per week at a cost of £13 per hour. Throughout the Winter months the gardener tends to do only 2 hours per week and during the Spring/Summer months this increases to 4 hours per week."

7. For the period from 9 September 2012 to the date of the schedule a figure of £4992 plus £79.87 interest was served, making a total of £5071.87.

8. At para 8 the Preliminary Schedule stated:

> "8. Gardening
>
> The Claimant would probably at some point have required assistance with gardening and employed a gardener in any event whilst continuing to do some work himself. Presuming the Claimant's ability to carry out gardening would have reduced as he got older, perhaps managing 2 hours per week initially future gardening is claimed at one hour per week."

9. Damages under this head for future gardening losses were claimed at £13 per week, ie £677.86 per year, with an appropriate multiplier of 13.22, producing a figure of £8961.31.

10. The total value of the claim for gardening was therefore £13953.31 (£4992 + £8961.31), excluding interest. The total value of the special damages claimed was £33 340.86, meaning that the gardening claim represented some 41.9% of the total special damages claim as presented on this Schedule.

11. In due course, liability was admitted and damages for pain, suffering and loss of amenity were agreed at £16 000. Thus, the gardening claim represented about 28% of the damages claim overall.

12. In January 2016 LOCOG served its Defence. On 25 August 2016 Mr Sinfield served his List of Documents. That stated:

> "I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I further certify that the list of documents set out in or attached to this form, is a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose.
>
> I understand that I must inform the court and the other parties immediately if any further document required to be disclosed by Rule 31.6 comes into my control at any time before the conclusion of the case."

13. Items 14 – 15 on the List were described as 'Invoices Mervyn Price – Gardener' for the periods October – November 2012 and March – November 2013 respectively. Items 16 – 20 were described as 'Invoices Dan Hardy – Gardener' for the periods March – November 2014, March – November 2015, March – May 2016, June 2016 and July 2016, respectively.

14. These invoices thus purported to be from the gardeners who tended Mr Sinfield's garden. To take one of the invoices with Mr Price's name on it as an example, it purports to be an invoice for July 2013 from 'Mervyn Price, 29 Finsbury Road, Luton, Beds' in the sum of £208.

15. In September 2016 a further Schedule of Damages was served by Mr Sinfield maintaining (with adjustments due to the date) the claims for past and future gardening losses. The figure claimed for gardening on this Schedule was £14 785.31, exclusive of interest.

16. On 17 October 2016 Mr Sinfield served his first Witness Statement. Paragraph 30 was as follows:

> "30. Pre-accident Christine and I did all the gardening. We have a 2 acre garden which needs a lot of upkeep. Christine still does some of the garden but it is impossible for her to do it alone and so we now employ a gardener. Over the winter months the gardener only does a couple of hours per week but in the summer months this increases to 4 hours per week."

17. In light of the disclosure provided LOCOG made enquiries and located and approached Mr Price, the gardener. A witness statement was taken from him dated 29 September 2016 and he gave evidence at the trial. He said that he had worked for Mr Sinfield and his wife since May 2005. He said that the invoices which Mr Sinfield had produced had not been issued by him. Among other things, at para 4 of his witness statement he pointed out that the address on them was incorrect. He said that between May 2005 and March 2014, when he retired, he worked four hours per week, eleven months of the year, excluding January, at £13 per hour. His work did not change after Mr Sinfield's accident. At para 14 of his witness statement he said:

> "14. I do not know why Mr Sinfield says that prior to his accident in September 2012 he and his wife looked after the garden themselves but following the accident he had to employ a gardener. This is just not true and I felt that it was important to provide this statement to set out the correct position."

18. In light of this evidence LOCOG served an Amended Defence in which it alleged fundamental dishonesty on the part of Mr Sinfield and relied upon s 57 of the 2015 Act. In the pleading LOCOG alleged that the fundamental dishonesty arose because of:

    a. The assertions in paras 5 and 8 of the Preliminary Schedule of Damages. LOCOG contended that at the time the Claimant made the assertions in those paragraphs, verified as they were by a statement of truth, he knew them to be false.

    b. The invoices identified in the List of Document purporting to come from Mr Price. LOCOG contended that Mr Sinfield's claim to have received invoices from Mr Price in relation to gardening work in the periods identified was false and

that the documents were created by Mr Sinfield to support 'a dishonest claim for expenditure on commercial gardening assistance'.

c. Paragraph 30 of Mr Sinfield's witness statement. LOCOG contended that Mr Sinfield's claim that by reason of this accident he had to employ a gardener to do gardening which previously he would have done in conjunction with his wife is false.

19. Paragraph 14 of the Amended Defence therefore averred:

> "Accordingly, the Claimant's claim that as a consequence of this accident he has incurred expenditure on gardening assistance that he would not otherwise have incurred is false. In this regard the Claimant has been fundamentally dishonest in relation to his primary claim for damages for personal injury and his entire claim should be dismissed."

20. In March 2017 Mr Sinfield provided a Supplementary Witness Statement. He agreed that Mr Price had been employed by him since 2005 and that he worked 16 hours a month except in January. He accepted that para 30 of his first Witness Statement had been wrong. He said that he had worded it 'badly'. However, he said that he and his wife had done a lot of the gardening, and that after the accident he was unable to do any of it. He also admitted preparing the Price invoices himself. Paragraphs 13 - 16 of the Supplementary Witness Statement were as follows:

> "13. I fully accept that paragraph 30 of my witness statement dated 19 October 2016 is incorrect. Pre-accident Christine and I did not do all the gardening and I have worded my statement badly. However, together, we did a lot of gardening. Whilst we did employ a gardener before my accident and continued to do so after the accident, Christine and I also worked on the garden. Mr Price was only there for four hours per week so would have been unaware what Christine and I did during the week. If you have a large house and garden there is always something that needs to be done.
>
> 14. Post-accident I was completely prevented from doing any gardening, lifting, DIY and so on because of my injury. Therefore, the basis of my gardening claim was to claim the cost of something I was unable to continue myself albeit that I did employ someone already. I felt like the choice been taken away from me so although I had been paying someone to do the garden I now had no choice in the matter. This is reflected by the fact that I did not claim for the full 16 hours per month that I paid Mr Price. I claimed 8 hours per month March and April, 16 hours per month May to October, 8 hours for November and nothing for December to February. Conscious of the fact we did have a gardener I did not think it was appropriate to claim the full amounts that I paid Mr Price. I included a claim for a reasonable sum to reflect that I was now no longer able to carry out any gardening at all. In hindsight I agree was wrong for me to do that and the correct thing would have been for me to claim the extra work that Christine now had to do in the a garden because I was unable to help.

> 15. Post-accident I did not increase Mr Price's hours although on occasion I asked him to do additional jobs for me, without increasing his hours. For example, I asked him to leave mowing the lawn to do other jobs I was incapable of doing.
>
> 16. I did prepare the invoices in respect of Mr Price's work myself. I always paid Mr Price by cheque but he never gave me an invoice or receipt. My solicitor asked me to provide proof of the sums paid for gardening. In my business, if we pay someone by cheque but they don't raise an invoice we prepare the invoice for the same amount. This is known as self billing. As far as I was concerned I was only trying to show what I had paid Mr Price. I therefore saw nothing wrong in doing the same here."

21. A further Schedule of Damages was served on 15 March 2017 by Mr Sinfield. That said at para 5:

> "The claimant had a 2 acre garden (the Claimant sold the property in December 2017) (*sic*) and downsized.
>
> Prior to the accident the Claimant employed a gardener for four hours per week but in addition, because it was such a large garden the Claimant and his wife did a great deal of work in the garden. Post accident, the claimant was unable to carry out any gardening and his wife took over his share of gardening. As per the medical report of Mr Rupert Eckersley dated 20 April 2016, the Claimant accepts that he probably would have required assistance in the garden in any event within three years of the date of the accident.
>
> Prior to the accident the claimant and his wife would carry out additional 2 to 4 hours per week of gardening depending on the time of year; on average three hours per week. The claim for gratuitous gardening services is limited to 3 years at £7, based on one and a half hours per week."

22. The figure claimed for gardening on this version of the Schedule was £1657.96 (£1643.99 plus £13.97 interest.)

The judgment below

23. The trial took place before Mr Recorder Widdup in August 2017. The judge invited written closing submissions and there was a further hearing in September 2017 when he was addressed by counsel. After retiring for a short time the judge delivered his judgment. There is an approved transcript of that judgment.

24. Having set out the background, at para 9 the judge summarised Mr Sinfield's evidence. He accepted that he had employed a gardener pre-accident, but he said he did so out of choice, and after the accident he had no alternative but to employ a gardener. He accepted that there had been what he called a 'slight inaccuracy' in the

wording of the Schedule of Loss but said that he was 'not good with words now' as a result of a stroke in 2003. He denied exaggerating, however. He also accepted that if the claim had been settled on the basis of the Schedule of Damages, he would have received more than he was entitled to, but he did have an honest belief that he was entitled to this part of his claim. He also accepted he had manufactured and disclosed the invoices purporting to be from Mr Price, but he thought he was entitled to do so because he was self-billing. He thought the sums were fair and reasonable. He also accepted that if LOCOG's solicitors had not located Mr Price and interviewed him, the solicitors would be none the wiser about this.

25. At para 11 the judge summarised Mr Price's evidence. He said that both before and after the accident, he worked the same number of hours per week, and that in his view there was very little of anything left for Sinfields to do. In cross-examination Mr Price said he was angry about the invoices which had been created, and he said he would have not have agreed to them being produced.

26. At para 12 the judge directed himself as follows:

> "12. The burden of proof in relation to the items claimed is on the claimant. The burden of proof of dishonesty is on the defendants. The civil standard of proof applies. However, an allegation of dishonesty is one of particular gravity, and evidence of quality and weight is required to prove dishonesty. I must first make findings of fact in respect of the actions which are alleged to be dishonest. I must then ask whether those actions either singly or collectively were dishonest by ordinary standards and, if so, whether Mr Sinfield knew that what he was doing would be regarded as dishonest by those standards. Both counsel invited me to consider whether it was more likely than not that the claimant had been fundamentally dishonest in relation to the claim."

27. I should point out that the judge's decision pre-dated the judgment of the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club*) [2017] 3 WLR 1212 in which the court restated the common law test for dishonesty and, in summary, held that whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards.

28. Returning to the judgment, at para 13 the judge noted the three ways in which LOCOG said Mr Sinfield had been dishonest in relation to his claim for special damages for gardening. He rejected a fourth basis suggested by LOCOG arising out of something Mr Sinfield said to a medical expert and I say no more about that matter.

29. At para 14 the judge reiterated that he needed 'evidence of weight' before he could find dishonesty, and said that 'I would need also to consider whether less serious inferences than dishonesty could be drawn such as an innocent misrepresentation or a careless or negligent misrepresentation.' He went on to say that he rejected as being of little weight Mr Sinfield's evidence about his stroke.

30. At para 15 the judge noted that although Mr Price had in fact worked four hours a week all year round (apart from January) the claim was for two hours in the winter and four hours in the summer. The judge said this was an attempt to 'moderate' the claim, and that 'this arose according to Mr Sinfield, because before the accident he had a choice about employing Mr Price, whereas afterwards he did not, and his approach to this part of the claim appears to have been influenced by that approach'.

31. At para 16, having quoted para 5 of the Preliminary Schedule, which I have already set out, the judge said

> "On one interpretation of that section, although there is the glaring omission of any reference to Mr Price, the words 'that have had to employ a gardener' appear to be a reflection of Mr Sinfield's case that before he had a choice but after the accident he had no choice and had then to employ a gardener".

32. At para 17, the judge noted that that there had never been a claim for loss of earnings, although, he said:

> "… such a claim might well have been made and might well have been exaggerated. I am told that potentially there was such a claim, but no claim whatsoever has been made. To that extent, that stands to Mr Sinfield's credit. To his credit also, I note that in item 8 of the schedule, under the heading "Gardening", he conceded that at some time he would have needed help in the garden, and so at the very least he made some attempt to moderate this aspect of his claim."

33. At para 18 the judge expressed his conclusion as follows:

> "Looking at this part of the claim in the round, I find that the proper inference to draw was that Mr Sinfield was indeed muddled, confused and careless about this part of his claim but there is insufficient evidence from which I can infer that he was dishonest about it. However, at some stage before August 2016 Mr Sinfield must have realised that he would need to produce invoices from Mr Price to show his post-accident work or reveal that there were no invoices. In fact Mr Price had never provided invoices for his work, and Mr Sinfield decided to create these invoices to show what he had paid Mr Price. In doing so, he did not claim for all hours worked by Mr Price, and he modified the invoices to show fewer hours worked by Mr Price in the winter. He did not disclose these invoices as being created by him on a self-billing basis, and I reject his evidence that he was entitled to self-bill in these circumstances. So the false invoices were true in part, in that Mr Price had worked four hours per week between February and December at £13 per hour for four hours per week, but he had never presented these invoices and the false invoices were for less than the actual hours worked, and in providing these invoices Mr Sinfield laid himself open to the obvious suggestion that the production of false invoices was an inherently dishonest action."

34. At para 19 the judge said:

> "Disclosure was then followed by the schedule of loss and the witness statement. I find that the only inference I can draw about the invoices was that they were prepared to pursue the claim, which had been started in this muddled and careless fashion. I find that motivation is of relevance to some extent, and I find that part of Mr Sinfield's motivation was to conceal the earlier muddle in which he found himself at this time. The schedule of loss then followed, which repeated the earlier errors, and by this time Mr Sinfield had put himself in an impossible position. By presenting his claim carelessly and inaccurately in providing invoices without disclosing that they were created by him, his position was extremely difficult."

35. At paras 20 – 21 the judge said in relation to para 30 of the first of Mr Sinfield's witness statements and the invoices:

> "… I have considered whether I can draw any inference short of dishonesty from the way in which the statement was worded. The witness statement was an opportunity for Mr Sinfield to explain the true position. He could then have explained that he had employed Mr Price pre-accident and that his claim related only to the increased work Mr Price and Mrs Sinfield had had to undertake post-accident. He could have explained that he had created the invoices. He did not do so. He did not do any of these things, and he presented the defendants with the impression that Mr Price had only been employed post-accident.
> 21. Was the creation of these false invoices and the misstatement in the witness statement dishonest by ordinary standards ? I find that it was. It goes without saying that the making of a false statement which might result in financial gain through an award of damages is dishonest by ordinary standards. Did Mr Sinfield know that what he was doing would be regarded as dishonest by those standards ? He is an intelligent man. He is a successful businessman with some financial acumen and experience. The fact that his claim for gardening costs was justified in part does not did not entitle him to present a claim based on inaccurate information and evidence. I find that he must have known that what he was doing would be regarded as dishonest by ordinary standards. His witness statement and the invoices were an attempt to conceal the earlier, less culpable errors made in the initial presentation of his case."

36. Hence, the judge found that at least by the time he made his List of Documents and his first Witness Statement (in August 2016 and October 2016 respectively), Mr Sinfield was knowingly making false statements in pursuit of his claim, and that he was by then acting with a dishonest state of mind, in order to justify what he had said in the Preliminary Schedule.

37. The judge went on in para 21 in an important passage:

> "Was that dishonesty fundamental to the claim? Well, I have no hesitation in finding that it was fundamental to the gardening claim. The genuine claim was worth about £1 650 per year. The inflated claim was

> worth £14 785. I find that the dishonesty, however, did not contaminate the entire claim. I accept that the claim for care and assistance also included a reference to gardening difficulties, but on balance I regard that as being an inadvertent duplication rather than an element of the dishonest claim. I say that because notwithstanding Mr James' efforts to persuade me otherwise, the claimant was entitled to damages for care and assistance including in relation to the garden. He was not entitled separately to gardening costs. I find it was a clear and obvious error rather than a dishonest item."

38. I interpolate here that the claim of special damages included a claim for care and assistance from Mr Sinfield's wife including for gardening, ie, the gardening he was unable to do because of the accident which she did instead.

39. At para 22 the judge said:

> "I also take into account that the claimant did not set out to bring as dishonest claim (*sic*). My findings of fact mean that he made a careless error in the initial presentation of part of his case, which he later compounded by attempting to conceal it. I find that the dishonesty was motivated not by a wish to create a false claim but to conceal and get away with the muddled and careless presentation of his case in the past. If the greater part of the claim is genuine and honest, is the dishonesty fundamental? I answer that by considering section 57(2). "The primary claim must be dismissed unless the claimant would suffer substantial injustice if the primary claim is dismissed" … So what would be the consequence to the claimant of dismissal of the entire claim? He would lose compensation to which he would otherwise have been entitled for an injury which has long-term consequences to him. Would that be unjust when he has been found to be dishonest in relation to a part of the claim? Potentially, I find it could be unjust, taking into account that he was entitled to damages in respect of assistance in the garden, and so the enhanced claim for gardening expenses or the muddled claim for gardening expenses, contaminated as it was by later dishonesty, was in itself a genuine claim."

40. At para 23 the judge said, having referred to various County Court decisions on the meaning of fundamental dishonesty in the context of CPR r 44 (which I address below):

> "The common theme of those decisions appears to be that dishonesty which goes to the heart of the claim is fundamental. Peripheral exaggeration or embellishment or something incidental collateral is not. I find that the dishonesty in this case related solely to the gardening claim. He did have a genuine claim for damages under this head but failed to present it in a proper manner. He thereby created an exaggeration of this part of the claim, but it was peripheral to the main claim. I find there was a genuine bona fide claim for personal injury and other expenses which went wrong when the claimant was careless and later dishonest in relation to this one important item of special damages. I take into

> account that section 57(1)(a) only applies where the court finds that the claimant is entitled to damages in respect of the claim, and so it only applies to cases in which there is a genuine claim. But I find that this dishonesty was an attempt in part to conceal the errors made by him in the initial presentation of his case. I know from section 57 that it is the claimant who has to be fundamentally dishonest, whereas in CPR 44.16 it is the claim which has to be shown to be fundamentally dishonest. Having regard to all the circumstances of this case, I do not find that Mr Sinfield was fundamentally dishonest, but even if I were to be found wrong in that respect, I also find that it would be substantially unjust for the entire claim to be dismissed when the dishonesty relates to a peripheral part of the claim and the remainder of the claim was honest and genuine."

41. From these passages, the judge's conclusions can be summarised as follows:

a. Mr Sinfield had not been dishonest in relation to paras 5 and 8 of his Preliminary Schedule of Damages but, rather, had been 'muddled, confused and careless' (para 18). In reaching this conclusion, the judge took into account as weighing against a conclusion of dishonesty that Mr Sinfield had moderated the gardening claim by not claiming for the full amount the gardener had actually worked (para 15); he found that the words 'have had to employ a gardener' in para 5, instead of meaning that as a result of the accident Mr Sinfield had employed a gardener for the first time to do what he could no longer do because of the accident, meant instead that after the accident he had no choice but to employ a gardener whereas prior to the accident he did so through free choice (para 16); and that Mr Sinfield had never made a claim for loss of earnings which he might have been expected to do had he wished to obtain everything he could from LOCOG's insurers (para 17).

b. Mr Sinfield had created the invoices; he was not entitled to self-bill; and the 'false invoices' were 'true in part' (para 18);

c. The invoices were produced to pursue the claim and Mr Sinfield's motivation was to 'conceal the earlier muddle in which he had found himself' (para 19).

d. Paragraph 30 of Mr Sinfield's witness statement contained the assertion that he and his wife did all of the gardening prior to the accident, and that was 'inaccurate and misleading'. There was an implied assertion in the statement that prior to the accident he had never before employed a gardener. The witness statement was an opportunity for him to state the true position, which he did not take. He presented LOCOG with the impression that Mr Price had only been employed post-accident (para 20).

e. The creation of the false invoices and para 30 of the witness statement were dishonest actions by Mr Sinfield and he realised that that was the case. The fact that his claim for gardening costs was justified in part did not entitle him to present a claim based on inaccurate information and evidence (para 21).

f. In relation to the question whether the dishonesty was fundamental to 'the claim', the judge said it was fundamental to 'the gardening claim'. He said the genuine

claim was worth about £1650 per year (*sic*) and the inflated claim was worth £14 785. However, the dishonesty 'did not contaminate the entire claim' (para 21).

g. Mr Sinfield did not set out to bring a dishonest claim but made a careless error in the initial presentation of part of his case which he later compounded by attempting to conceal it. His dishonesty was motivated not by a wish to create a false claim but 'to conceal and get away with the muddled and careless presentation of his case in the past' (para 22).

h. The judge said that he would answer the question, 'If the greater part of the claim is genuine and honest, is the dishonesty fundamental?' by considering s 57(2). He said that it would be potentially unjust to deprive Mr Sinfield of the damages to which he was entitled for his injury, 'taking into account that he was entitled to damages in respect of assistance in the garden, and so the enhanced claim for gardening expenses or the muddled claim for gardening expenses, contaminated as it was by later dishonesty, was itself a genuine claim' (para 22).

i. Dishonesty which goes to the heart of a claim is fundamental. Peripheral exaggeration or embellishment or something incidental or collateral is not. The dishonesty in this case related solely to the gardening claim. He had a genuine claim which he failed to present in a proper manner. He exaggerated this claim, but it was peripheral to the main claim. There was a genuine claim for personal injury which 'went wrong' when Mr Sinfield was careless and then dishonest (para 23).

j. The judge found Mr Sinfield not to have been fundamentally dishonest, but if he were wrong about that it would be substantially unjust for the entire claim to be dismissed when the dishonesty related to a peripheral part of the claim and the remainder of the claim was genuine.

42. Overall, the judge gave judgment for the Claimant in the sum of £26 694.66 plus interest of £793.93, a total of £27 758.79 (less interim payments). He ordered that LOCOG had to pay Mr Sinfield's costs of the claim to 31 December 2016, and thereafter only 50% of his costs.

The submissions of the parties

43. On behalf of LOCOG, Mr Laughland challenged the judge's decision not to dismiss the claim on three grounds:

a. Ground 1: the judge was wrong to reject LOCOG's case that Mr Sinfield had been fundamentally dishonest in respect of the facts alleged in paras 5 and 8 of the Preliminary Schedule of Loss concerning gardening.

b. Ground 2: the judge was wrong to conclude the dishonesty he did find proved did not constitute fundamental dishonesty in respect of the claim for damages for personal injury.

c. Ground 3: the judge was wrong to conclude that even if there had been fundamental dishonesty there was substantial injustice to Mr Sinfield if the claim was dismissed pursuant to s 57.

44. In relation to Ground 1, Mr Laughland submitted that in light of what Mr Sinfield eventually admitted in his Supplementary Witness Statement, the only proper conclusion was that at the time he made the Preliminary Schedule, verified as it was by a statement of truth, he did not have an honest belief in the truth of the facts stated in it in relation to the gardening claim. He argued the judge was wrong simply to have regarded this as a muddle, when what was stated was unambiguous. As for the judge's reasons for not finding dishonesty, eg, that there had been no claim for loss of earnings, these were either irrelevant or based on a misunderstanding of the evidence, for example, he said Mr Sinfield's own evidence was that there was no basis for a loss of earnings claim.

45. In relation to Ground 2, he submitted that the judge's reasoning was confused and in error. There was a wrongful conflation of substantial injustice with whether there had been fundamental injustice. He wrongly attached weight to the fact that there was a partly genuine claim when, by s 57(1), that is a precursor for the operation of s 57. The judge wrongly concluded the gardening claim was 'peripheral' when it represented around 42% of the pleaded specified damages. The dishonesty in this case was not a lie in the heat of the moment but was calculated and sustained and therefore justified the description of 'fundamental'.

46. In relation to Ground 3, Mr Laughland argued that there was nothing before the judge to justify the conclusion that there would be substantial injustice to Mr Sinfield if the whole claim was dismissed. The fact there was a genuine claim for damages for pain, suffering and loss of amenity and a partly genuine claim in respect of gardening (namely, a gratuitous care claim for the additional hours spent by Mrs Sinfield in tending to the garden) did not justify such a conclusion.

47. On behalf of Mr Sinfield, Mr James submitted that the judge had been correct, or at least entitled, to reach the conclusions which he did and that he took into account all of the relevant matters and directed himself correctly on the law.

48. In relation to Ground 1, he submitted that this was a finding of fact by the judge which I should only overturn if I was satisfied that the judge was plainly wrong. He relied on passages in *The Ikarian Reefer* [1995] Lloyd's Rep 455, 458-9 and *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1 WLR 577, para 12 – 22; *Datec Electronic Holdings Limited v United Parcels Service Limited* [2007] 1 WLR 1325, para 47. He submitted that the judge was not plainly wrong and entitled to find that what Mr Sinfield had been saying was that he 'had to' employ a gardener was that he then had no choice but to employ a gardener, not that he was then doing so for the first time.

49. In relation to Ground 2, the judge asked himself the right question, namely, whether the dishonesty went to the heart or root of the claim: *Howlett v Davies* [2017] EWCA Civ 1696 (in relation to 'fundamental dishonesty' in CPR 44.16(1)); *Gosling v. Hailo*, Unreported, 29 April 2014 (Cambridge County Court). He said that the question of whether dishonesty was fundamental was a finding of fact and the judge was not

plainly wrong. In any event, he argued by comparing the annual multiplicands for loss of gardening capacity in the two schedules (£1536 in the Preliminary Schedule, a figure obtained by dividing the past loss figure of £4992 by 3 ¼ years, from September 2012 until December 2015, as compared with £548 in the Final Schedule, obtained by dividing £1643.99 by three) the overstatement of the claim was just under £1000 pa, over three years, and therefore amounted to less than £3000, or 11% of a claim worth £26 694.66 (see Respondent's Skeleton Argument at para 40.7). Mr James submits that this cannot be described as going to the root of the claim.

50. In relation to Ground 3, Mr James said that the judge was entitled to find substantial injustice in that it would be disproportionate to dismiss a genuine claim worth £26 694.66 plus interest where interim payments have been made, even if dishonesty on one head of the claim was held to go to the heart of the entire claim. Also, an innocent third party, namely Mr Sinfield's medical insurers would be out of pocket. He also relied on what he said was Mr Sinfield's lack of means.

Discussion

Introduction

51. Before turning to the grounds of appeal, it is useful to set out the background to s 57 of the 2015 Act and to offer some observations on its application.

52. Prior to the coming into force of s 57 a remedy open to a defendant to a personal injuries claim who suspected that the claim was fraudulent was to have the claim struck out as an abuse of process under CPR r 3.4(2)(b) or under the court's inherent jurisdiction. However, such applications faced a number of difficulties. In *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004 the Supreme Court held that although a court had the power to strike out a dishonestly exaggerated claim as an abuse of process at any stage in the proceedings, the power was only to be exercised in very exceptional circumstances. Lord Clarke said;

> "49. … The draconian step of striking a claim out is always a last resort, *a fortiori* where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small.
>
> 50. It was submitted on behalf of the defendant that it is necessary to use the power to strike out the claim in circumstances of this kind in order to deter fraudulent claims of the type made by the claimant in the instant case because they are all too prevalent. We accept that all reasonable steps should be taken to deter them. However, there is a balance to be struck. To date the balance has been struck by assessing both liability and quantum and, provided that those assessments can be carried out fairly, to give judgment in the ordinary way. The reasons for that approach are explained by the Court of Appeal in both *Masood v Zahoor* [2010] 1 WLR 746 and *Ul-Haq v Shah* [2010] 1 WLR 616.

> 51. We accept that such an approach will be correct in the vast majority of cases. Moreover, we do not accept the submission that, unless such claims are struck out, dishonest claimants will not be deterred. There are many ways in which deterrence can be achieved. They include ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings."

53. In light of this approach the Supreme Court found for the claimant, notwithstanding that he had 'persistently maintained his claim on a basis or bases which he knew to be false, both before he was found out and thereafter at the trial' (para 63). However, at para 57 the Supreme Court approved what Moses LJ said in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin), paras 2 – 7, about how serious false and lying claims are to the administration of justice, and how they undermine a system whereby those who are injured as a result of someone else's fault can receive just compensation. There, he pointed out that they impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. He also said that the system of adversarial justice depends upon openness, upon transparency and, above all, upon honesty, and that the system is seriously damaged by lying claims.

54. From 13 April 2015, s 57 has provided defendants with the means of having a personal injury claim dismissed or struck out on the basis of 'fundamental dishonesty'. It therefore represents a Parliamentary response to the problems caused by fraudulent claims which were identified by Moses LJ. Although in S*ummers*, supra, at para 61 Lord Clarke said that it is in principle more appropriate to penalise a fraudulent claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability, by enacting s 57, Parliament has taken a different view. In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] AC 1, paras 95 - 96, Lord Hughes said referring to the 'fraudulent claims rule', ie, the rule that a genuine insurance claim supported by fraudulent evidence should fail even if valid in law, said:

> "[95] The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a claim has been exaggerated by a "fundamentally dishonest" claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in *Summers v Fairclough Homes*.
>
> [96] Severe as the rule is, these considerations demonstrate that there is no occasion to depart from its very long-established status in relation to fraudulent claims, properly so called. It is plain that it applies as explained by Mance LJ in *The Aegeon* at paras 15-18. In particular, it must encompass the case of the claimant insured who at the outset of the

> claim acts honestly, but who maintains the claim after he knows that it is fraudulent in whole or in part. The insured who originally thought he had lost valuable jewellery in a theft, but afterwards finds it in a drawer yet maintains the now fraudulent assertion that it was stolen, is plainly within the rule. Likewise, the rule plainly encompasses fraud going to a potential defence to the claim. Nor can there be any room for the rule being in some way limited by consideration of how dishonest the fraud was, if it was material in the sense explained above; that would leave the rule hopelessly vague."

55. The concept of fundamental dishonesty was introduced by CPR r 44.16(1) as an exception to qualified one-way costs shifting (QOCS) in personal injury claims contained in CPR r 44.14, introduced following Jackson LJ's *Review of Civil Litigation Costs: Final Report* (2009). A claimant will not benefit from QOCS if, on application by the defendant, the claimant is found to have been fundamentally dishonest. In such circumstances, an order for costs may be enforced against the claimant: see *Howlett v Davies* [2017] EWCA Civ 1696.

56. The meaning of fundamental dishonesty in CPR r 44.16(1) was considered in *Howlett v Davies*, supra, at para 16. Newey LJ said:

> "16. As noted above, one-way costs shifting can be displaced if a claim is found to be "fundamentally dishonest". The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (29 April 2014). He said this in his judgment:
>
> > '44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
> >
> > 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.'

> 17. In the present case, neither counsel sought to challenge Judge Moloney QC's approach. Mr Bartlett spoke of it being common sense. I agree."

57. There are a number of other decisions at the County Court level on CPR r 44.16(1). In *Meadows v La Tasca Restaurants*, Unreported, HHJ Hodge QC at Manchester County Court, said at para 18:

> "18. It may perhaps be appropriate to draw an analogy with the court's approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest."

58. In *Rayner v Raymond Brown* Group, Unreported, HHJ Harris QC at Oxford County Court, the judge said at para 10 that he would direct himself:

> "… that fundamental dishonesty within the meaning of CPR 44 means a substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case … Was there substantial material dishonesty which went to the heart of the quantum of this claim ?"

59. In *Menary v Darnton*, Unreported, HHJ Hughes QC at Portsmouth County Court, the judge said at paras 9 to 11:

> "9. In terms of ordinary language, the word 'fundamental' was given its classic definition for forensic purposes by Lord Upjohn in the well-known *Suisse Atlantique* case [*Suisse Atlantique Société D'Armement Maritime SA v nv Rotterdamsche Kolen Centrale* [1967] 1 AC 361]**.** I quote so far as is necessary for present purposes (at p421-422):
>
> > '… there is no magic in the words "fundamental breach", this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case … A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that *any* breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach …

> 10. Although in that case Lord Upjohn was contrasting the meaning of the phrase 'fundamental breach' with that of 'fundamental term', the sense in which the word 'fundamental' is applied is broadly the same in each case, namely it is some characteristic that inevitably goes to the root of the matter. In the present appeal, that matter would not be fundamental in this sense. CPR 44.16(1) only requires the defendant to establish fundamental dishonesty on the balance of probabilities, the civil standard of proof. I think it unhelpful therefore to focus on the meaning of dishonesty as described in the criminal courts, such as in the case of *R v Ghosh* … or as defined by criminal statute, such as the Theft Act 1968.
>
> 11. The use of the word 'dishonesty' in the present context necessarily imports well understood and ordinary concepts of deceit, falsity and deception. In essence, it is the advancing of a claim without an honest and genuine belief in its truth. Although I would not presume to give a definition of a phrase that neither Lord Justice Jackson nor the Editorial Board of the Civil Procedure Rules thought appropriate to provide, for present purposes, fundamental dishonesty may be taken to be some deceit that goes to the root of the claim. The purpose of the phrase is twofold: first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally dishonest; they do not go to the root of the claim. Second, the fundamental dishonesty is related to the claim not to the claimant. This must be deliberate on the part of those who drafted the Civil Procedure Rules. It is the claim the defendant has been obliged to meet, and if that claim has been tainted by fundamental dishonesty, then in fairness, and in justice and in accordance with the overriding objective, the defendant should be able to recover the costs incurred in meeting an action that was proved, on balance, to be fundamentally dishonest."

60. Picking up on a point made by the judge in *Menary*, the drafter of s 57 sought to draw several distinctions from CPR r 44.16: it is the claimant who the court must find dishonest, rather than the claim. Further, rather than permitting the defendant to recover all of his costs, the court is required to assess the claimant's 'genuine' damages and deduct that figure from the defendant's costs. As to the first point, however, it will be rare for a claim to be fundamentally dishonest without the claimant also being fundamentally dishonest, although that might be a theoretical possibility, at least.

61. Mr James' Skeleton Argument referred me to what Lord Faulks QC, the Minister of State for Justice, said at the Committee stage of the passage of the Criminal Justice and Courts Bill in the House of Lords (*Hansard*, 23 July 2014, cols 1267 – 1268):

> "I am grateful for some of the constructive suggestions that have been made about how the clause ought best to have been drafted. At the moment, it requires the court to dismiss in its entirety any personal injury claim when it is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest, unless it would cause

substantial injustice to the claimant to do so. That is of particular relevance when the claimant has grossly exaggerated his claim, and in cases where the claimant has colluded with another person in a fraudulent claim relating to the same incident—also, sadly, a far too common feature of the whole claims industry at the moment.

This is part of a series of measures taken by the Government to discourage fraudulent and exaggerated claims, which arise often in motor accident cases and so-called "trips and slips" claims. Such claims cause substantial harm to society as a whole, not least in increasing the insurance premiums that motorists have to pay …

Under the current law, the courts have discretion to dismiss a claim in cases of dishonesty, but will do so only in very exceptional circumstances, and will generally still award the claimant compensation in relation to the "genuine" element of the claim. The Government simply do not believe that people who behave in a fundamentally dishonest way—and I will come to address the adverb in a moment—by grossly exaggerating their own claim or colluding should be allowed to benefit by getting compensation in spite of their deceit. Clause 45 seeks to strengthen the law so that dismissal of the entire claim should become the norm in such cases. However, at the same time, it recognises that the dismissal of the claim will not always be appropriate and gives the court the discretion not to do so where it would cause substantial injustice to the claimant. To that extent, some of the remarks of my noble friend Lord Marks were entirely apposite. The clause gives the court some flexibility to ensure that the provision is applied fairly and proportionately.

…

I assure the Committee that the way that the clause is drafted should not result in the courts using the measures lightly. Civil courts do not make findings of dishonesty lightly in any event; clear evidence is required. The sanction imposed by the clause—the denial of compensation to which the claimant would otherwise be entitled—is a serious one and will be imposed only where the dishonesty is fundamental; that is, where it goes to the heart of the claim. That was very much what my noble friend said about what it was aimed at.

Of course, "fundamental" has an echo in the Civil Procedure Rules and the qualified, one-way costs shifting. An adverb to qualify a concept such as dishonesty is not linguistically attractive, but if we ask a jury to decide a question such as dishonesty, or ask a judge to decide whether someone has been fundamentally dishonest, it is well within the capacity of any judge. They 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 wins many prizes for elegance, but it sends the right message to the judge."

62. In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of 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 is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club*), supra.

63. By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum.

64. Where an application is made by a defendant for the dismissal of a claim under s 57 the court should:

    a. Firstly, consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.

    b. If the judge concludes that the claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;

    c. If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s 57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s 57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

65. 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. That must be so 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.

66. With that introduction, I turn to the issues arising on the appeal.

Grounds of appeal

Ground 1: the judge's finding in respect of paras 5 and 8 of the Preliminary Schedule

The approach of an appellate court to findings of fact

67. The first ground of appeal challenges the judge's finding in relation to paras 5 and 8 of the Preliminary Schedule. As I have explained, the judge found they were the product of muddle and confusion and were statements by Mr Sinfield that after the accident he had to employ a gardener as a matter of necessity, whereas before the accident he had done so through choice. The judge did not find that they were dishonest statements by Mr Sinfield that he and his wife had done all the gardening prior to the accident, but then had to employ a gardener after the accident, and so incurred recoverable losses as a consequence.

68. Because I am being asked to overturn a finding of fact, it is necessary to set out the proper approach of an appellate court in this context.

69. The appeal before me is by way of review: CPR r 52.21(1). I must allow an appeal if I conclude that the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR r 52.21(3).

70. The approach to be adopted by an appellate court to a judge's findings of fact following a trial is set out *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1 WLR 577, para 14 – 17, *per* Clarke LJ, approved by the Supreme Court in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325, para 46:

> "14. The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293 and *Bessant v South Cone Inc* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.
>
> 15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the

greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the Rules of the Supreme Court and should be its approach on a "review" under the Civil Procedure Rules 1998.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

17. In *Todd's* case [2002] 2 Lloyd's Rep 293, where the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows, at p 319–320, para 129:

> "With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of 'review' may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment—such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in rule 52.11(3)(4) to the power of an appellate court to allow an appeal where the decision below was 'wrong' and to 'draw any inference of fact which it considers justified on the evidence' indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellate court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's

> conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well - recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious."

> In the same case Neuberger J stressed, at pp 305–306, paras 61–64, that the question whether there was a contract of service on the facts involved the weighing up of a series of factors. Thorpe LJ agreed with both judgments."

71. I also bear in mind, as Mr James reminded me, that where a party has been acquitted of fraud the decision in his favour should not be displaced except on the clearest grounds: *Akerheim v De Mare* [1959] AC 789, 806; *Glasier v Rolb* (1889) 42 Ch D 436. I also bear in mind, that although there is a single civil standard of proof, the more serious the allegation, then the stronger the evidence required to prove it: *R(N) v. Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62; In re D [2008] 1 WLR 1499, 1509.

Analysis

72. In this case, the judge's decision depended on the meaning of paras 5 and 8 of the Preliminary Schedule and upon what Mr Sinfield said about them. It seems to me, therefore, that this case is the kind of case referred to in para 14 of *Assicurazioni Generali SpA*, namely, where the judge's decision depends upon documents and the inferences to be drawn from them, as well as a witness's evidence. Whilst having regard to the general approach that I have set out I am entitled, in accordance with CPR r 52.21(4), to draw any inference of fact which I consider justified on the evidence. This provision is not, as Mr James submitted, only concerned with fresh evidence: see *Assicurazioni Generali SpA*, supra, para 13.

73. Because LOCOG alleges that Mr Sinfield was dishonest in respect of the Preliminary Schedule, *Ivey*, supra, para 74, provides the starting point:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

74. In his statement of truth on the Preliminary Schedule Mr Sinfield said: 'I believe that the facts stated in this schedule are true'. But what were those facts so far as paras 5

and 8 were concerned? In order to determine whether he was dishonest in relation to what was said, I consider that the question to be considered is: What were the facts stated in paras 5 and 8, and did Mr Sinfield have a genuine belief in their truth?

75. It seems to me that the only reasonable meaning to be attached to paras 5 and 8 is that what Mr Sinfield was saying was that before the accident the gardening was done solely by him and his wife, whereas his accident had - for the first time - necessitated the employment of a gardener, thus generating the recoverable losses which were then set out in the tables under each paragraph. The phrase in para 8 'The Claimant would probably at some point have required assistance with gardening …' referred to the mere probability of an event (the employment of a gardener) which was, in fact, the actuality, long before the accident. It was therefore obviously a misleading statement.

76. Although in his Skeleton Argument at para 16 Mr James breaks down the paragraphs and analyses them sentence by sentence, taking each sentence in isolation, I do not consider that to be the correct approach. The two paragraphs need to be read as a whole and they have to be read together. For example, I take the point that in para 5 the second sentence about Mr Sinfield and his wife looking after the garden was factually true, albeit it omitted words such as 'with the assistance of a gardener'. But when that is read with the next sentence, 'Post-accident his wife continues to do some of the gardening but they had to employ a gardener for 2-4 hours per week at a cost of £13 per hour', what is plainly being conveyed is that a gardener has had to be employed in substitution for Mr Sinfield. But that was not the case. Further, when the first sentence is considered together with the sentence in para 8 (emphasis added), 'The Claimant would *probably at some point* have required assistance with gardening *and employed a gardener in any event* whilst continuing to do some work himself', again the only reasonable conclusion is that what Mr Sinfield was intending to convey was that at the date of the accident, it was solely him and his wife who did the garden, and nobody else.

77. Given that this is the only reasonable meaning to be ascribed to paras 5 and 8, and that that state of affairs was not true and obviously known by Mr Sinfield not be true, and that the statements were being made in support of a claim for damages, it follows that the judge should have found that paras 5 and 8 were dishonest misrepresentations. He should have found that Mr Sinfield was falsely asserting that before the accident only he and his wife had done the gardening, but that the accident had required the employment of a gardener, in respect of which recoverable losses had been incurred. The judge never considered the question: What do the two paragraphs mean, and could Mr Sinfield have genuinely believed that meaning? Because the judge never asked himself the right question, he came to the wrong answer.

78. As a subsidiary point, as Mr Laughland pointed out, on any view Mr Sinfield knew that para 5 at least was untrue because Mr Price worked four hours per week, every week, apart from January, and did not work two hours a week in the winter, as claimed on the Preliminary Schedule.

79. None of the reasons put forward by the judge for finding that these paragraphs were not a dishonest misrepresentation seem to me to be of much weight. True it is, for example, that Mr Sinfield did not claim for the full number of hours gardening

actually worked. But that in my view was not of sufficient weight to displace the clear meaning of the words in the Preliminary Schedule. And, as Mr Laughland submits, the evidence from Mr Sinfield's first witness statement was that he was not able to quantify a claim for loss of earnings. Thus, the judge was wrong to conclude that there could have been such a claim, and that the absence of one somehow undermined a conclusion of dishonesty.

80. In coming to this conclusion I have borne in mind, as I am required to do, that the judge heard Mr Sinfield give evidence and be cross-examined, whereas I have not. I have given appropriate weight to his findings. I have also borne in mind that I do not have a transcript of the evidence and so my review is limited to the judge's judgment and his reasons for his determination. However, in light of para 30 of Mr Sinfield's first witness statement, in which he unambiguously said that 'Pre-accident Christine and I did all the gardening', it seems to me to be inescapable that Mr Sinfield was intending to say the same thing in the Preliminary Schedule. As I have explained, the judge reached the conclusion that para 30 was, in effect, a dishonest 'cover-up' of paras 5 and 8, which he said was the product of muddle and confusion. But nowhere in his judgment does he make a finding as to what it was that happened to make Mr Sinfield realise between the date of the Preliminary Schedule and the date of his witness statement that there was an error in the Schedule. Therefore, it seems to me that the judge's conclusion was one which was not supported by any evidence.

Conclusion

81. For these reasons, I have concluded that the judge was plainly wrong not to have reached the conclusion that paras 5 and 8 of the Preliminary Schedule were dishonest misstatements by Mr Sinfield that he had not employed a gardener prior to the accident, that he and his wife doing all the gardening, but that the accident had resulted in him having to employ one for the first time so as to generate the recoverable losses which he set out.

Ground 2: the judge's conclusions on the question of fundamental dishonesty

82. The judge concluded that Mr Sinfield had been dishonest in relation to para 30 of his first witness statement and by creating the false invoices, and that he had been fundamentally dishonest in relation to the gardening claim (para 21), but not that he had been fundamentally dishonest in relation to the claim (para 23). In my judgment, the judge was wrong and he should have concluded on a balance of probabilities that Mr Sinfield had been fundamentally dishonest in relation to the claim. In the analysis which follows I will rely solely on the findings of dishonesty which the judge made against Mr Sinfield (and which have not been challenged), in case I should be held to be in error in my conclusions on Ground 1.

83. As I have set out, in my judgment a claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim, and that he has thus substantially affected the presentation of his case, either in respects of 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.

84. Even on the findings made by the judge, according to that test, what Mr Sinfield did was fundamentally dishonest. He presented a claim for special damages in a significant sum, and the judge found that the largest head of damage was evidenced by the dishonest creation of false invoices and by a dishonest witness statement. Both pieces of dishonesty were premeditated and maintained over many months, until LOCOG's solicitors uncovered the true picture. As presented on the Preliminary Schedule, items 5 and 8 made a total of £14 033.18 out of a total claim for special damages of £33 340.86. Mr Sinfield therefore presented his case on quantum in a dishonest way which could have resulted in LOCOG paying out far more then they could properly, on honest evidence, have been ordered to do following a trial.

85. I reject Mr James' argument that the claim was not fundamentally dishonest because, by comparing multiplicands, the overstatement was less than £3000, and so any dishonesty cannot be said to go to the heart or root of the claim. The fact is that Mr Sinfield dishonestly maintained a claim for £14 033.18 which he was not entitled to. The fact that a later medical report showed that a gardener would have been employed within three years, thereby limiting future losses to three years, is neither here nor there. For all Mr Sinfield knew, LOCOG might have been willing to settle the case at or near the dishonestly claimed figure of damages long before the medical report was served. The dishonesty therefore potentially impacted it in a significant way.

86. The judge should have concluded that Mr Sinfield had been fundamentally dishonest in relation to the claim and therefore, *prima facie* by virtue of s 57(3), the entire claim fell to be dismissed unless, by s 57(2), that would result in substantial injustice to Mr Sinfield. Instead, he asked himself the question (para 22): 'If the greater part of the claim is genuine and honest, is the dishonesty fundamental ? I answer that by considering s 57(2)'. In my respectful opinion, that was the wrong question and the wrong answer. If the claimant has been fundamentally dishonest in the way I have indicated then the fact that the greater part of the claim might be honest is neither here nor there (subject to substantial injustice): by enacting s 57(3) Parliament provided that the entire claim, including any genuine parts, are to be dismissed.

87. As I have said, I consider that even on the findings of dishonesty which the judge made, the claim should have been dismissed (subject to substantial injustice). But if I am right in relation to Ground 1 then, *a fortiori,* the claim should have been dismissed.

Ground 3: substantial injustice

88. At para 23 of his judgment the judge held that Mr Sinfield had not been fundamentally dishonest but if he was wrong about that, then it would be substantially unjust to dismiss the entire claim given that (in the judge's view) it related to a peripheral part of the claim and the remainder of the claim was honest and genuine. In my view the judge was wrong to make a finding of substantial injustice on this basis.

89. The starting point is s 57(3). As I have explained, it follows from this provision that something more is required than the mere loss of damages to which the claimant is

entitled to establish substantial injustice. Parliament has provided that the default position is that a fundamentally dishonest claimant should lose his damages in their entirety, even though *ex hypothesi*, by s 57(1), he is properly entitled to some damages. It would render superfluous s 57(3) if the mere loss of genuine damages could constitute substantial injustice. The judge made no findings capable of supporting a conclusion that if the whole claim was dismissed it would result in substantial injustice to Mr Sinfield Furthermore, the judge was wrong to characterise the gardening claim as peripheral. As I have explained, as originally presented, it was a very substantial part of the claim.

Conclusion

90. For these reasons, the appeal is allowed, the judge's order of 18 September 2017 is set aside, and the claim for damages is dismissed under s 57(2) of the 2015 Act.

91. I invite counsel to draw up an order and to make any submissions on costs in writing, although I hope the matter can be agreed.