Neutral Citation Number: [2022] EWHC 756 (Admin) Case No: PR10/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

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

Date: 31/03/2022

Before :

MR JUSTICE CHOUDHURY

- -

Between :

MR ANDREW JENKINSON	**Claimant / Appellant**
- and -	
MR GARY ROBERTSON	**Defendant / Respondent**

- -

Matthew White (instructed by **Brian Barr Solicitors**) for the **Appellant**
Pascale Hicks (instructed by **DWF LLP**) for the **Respondent**

Hearing date: Friday 21 January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 31st March 2022.

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MR JUSTICE CHOUDHURY

The Hon. Mr Justice Choudhury:

1. This is an appeal against the judgment of HHJ Christopher Dodd ("the Judge") that the Appellant (to whom I shall refer as "the Claimant" as he was below) was fundamentally dishonest in advancing his claim of personal injury with the result that his claim was dismissed in its entirety pursuant to s.57(2) of the *Criminal Justice and Courts Act 2015* ("the 2015 Act").

Background

2. The Claimant sustained personal injury in a road traffic accident which occurred on 24 July 2013. The Defendant, who was the driver of the other vehicle involved, accepted liability. The dispute between the parties at trial was as to causation and quantum. The Claimant's case was that he sustained multiple injuries in the accident, including fractured ribs, and soft tissue injuries to his knee, cervical spine, lower back and abdominal wall. One particular injury alleged was described as "soft tissue and bone injury to mid back engendering the development of Schmorl's nodes (at T12) and permanent symptoms of pain and related disability worsening over time" ("the midback injury"). The Defendant accepted all of the injuries (all of which had resolved within 30 months of the accident) save for the mid-back injury which was said by the Claimant to be ongoing.

3. The principal issue between the parties at trial was therefore whether there was any causative link between the accident, the mid-back injury and the development of a Schmorl's node or indeed any persisting thoracic pain symptoms.

The Judgment Below

4. The court received expert evidence on the matter from two consultant orthopaedic surgeons: Mr Ampat (called by the Claimant, who represented himself at trial) and Mr Braithwaite (called by the Defendant). Both agreed that if the court were to find a reasonably close temporal relationship between the accident and the onset of thoracic spinal pain then a causal link would be likely. However, if the court were to find that there was a significant delay between the accident and the onset of thoracic spinal pain then there may be no causal link. Mr Braithwaite was of the view that the onset of pain would have to have been within a few days of the accident for there to be a clear causal link.

5. The Judge considered the Claimant's evidence as to the onset of symptoms and also a substantial quantity of contemporaneous documentation, including GP and hospital records. Whilst the Claimant impressed the Judge as an "apparently sincere, pleasant individual who had fully mastered the details of his case" and who had made some concessions in giving evidence, he was found "on one issue [to have] demonstrated a willingness to manipulate the evidence to his perceived advantage": [25] and [26]. That evidence concerned a radiological report produced by a Dr Young ("the Young report"); the Claimant was found by the Judge not to have been entirely straightforward with the Court about his reasons for not disclosing that report until directed to do so. I shall return to the circumstances of that apparent non-disclosure below.

6. The Judge also found that the Claimant had no good answer to the questions put to him as to the absence of any mention of back pain in many of the contemporaneous medical records ([30]).

7. The Judge concluded that the Claimant's assertion that he had suffered from significant mid and/or low back pain since the accident was "simply not supported by the totality of the contemporaneous and other documents" ([45]), and that it was "overwhelmingly likely that the Claimant's recollection of the origin and development of back symptoms has become, to say the least, unreliable" ([55]). Accordingly, the Judge concluded, on the balance of probabilities, that the requisite temporal nexus between accident and the onset of symptoms was not made out and that the Claimant had failed to prove his claim in that regard ([57]).

8. The only injuries sustained were found to be those that had been admitted by the Defendant. Taking account of the effects of psychological injury (which the Defendant had also accepted), quantum was assessed in the sum of £14,000 ([68]). That is to be contrasted with the total sum claimed in the Claimant's final schedule of loss, which was in excess of £500,000. Much of that large sum comprised future losses based on the Claimant's alleged inability, as a result of his continuing back injury, to engage in the maintenance of his property portfolio and to derive profits from the sale of renovated properties.

9. After the close of evidence and in the course of closing submissions, Counsel for the Defendant, Ms Hicks, invited the Judge to find that, on the balance of probabilities, the Claimant had been fundamentally dishonest in bringing his claim, thereby triggering the provisions of s.57 of the 2015 Act. Those provisions (set out below) require that where the court finds that a claimant is entitled to damages but finds that the claimant has been fundamentally dishonest in relation to the primary or a related claim, it must dismiss the entire claim unless it is satisfied that the claimant would suffer substantial injustice.

10. Having referred to some case law on dishonesty and fundamental dishonesty, the Judge concluded as follows:

> "74. Applying this test, I must decide on the balance of probabilities whether the claimant in this case:
>
> (a) has advanced his case dishonestly, or
>
> (b) sincerely but mistakenly believes that he has had significant (and even severe) thoracic pain ever since the 2013 accident.
>
> 75. When giving evidence, the claimant had every appearance of sincerity. However, a number of features of his case have caused me to doubt that sincerity:
>
> (a) his first schedule of Special damage included the assertion that he paid someone to collect rent on his behalf £15 per hour for 50 hoursper year; when cross-examined, he had to concede that he had done no such thing; that schedule had been signed by the claimant himself;

> (b) I have already referred to his attempted manipulation of expert evidence – it was clearly and persistently dishonest;
>
> (c) when presented with multiple medical records contradicting his case …, his reaction was not to reconsider or moderate his claims but rather to redraft the proceedings with a view to multiplying the size of damages claimed by 10."
>
> 76. I cannot find, on the balance of probabilities, that the Claimant, an intelligent man, sincerely believes the account of his symptoms that he has put before the Court. He has, I am afraid, been fundamentally dishonest in advancing the Claim."

11. Accordingly, the Claimant's claim was dismissed and he was ordered to pay the Defendant's costs (save to the extent of damages that the court found would otherwise have been awarded to the Claimant and a further sum of £1000 awarded against the Defendant for failure to engage in a Joint Settlement Meeting).

12. The Judgment was handed down on 9 October 2020. At the hand-down hearing, the Judge, having considered submissions made by the Claimant, corrected some material errors in the Judgment. These corrections are only apparent from the transcript of the hand-down hearing, as the copy of the Judgment provided on appeal has not been amended to reflect the corrections. I shall refer to these corrections where relevant below. The Judge did not revisit any of his conclusions in relation to fundamental dishonesty in light of those corrections.

The Grounds of Appeal

13. The Grounds of Appeal, which were drafted by the Claimant, were wide ranging; they took issue with most of the conclusions reached by the Judge including those as to quantum and fundamental dishonesty; and alleged that there had been a procedural irregularity in the preparation of the trial bundle.

14. The grounds were considered by Fordham J on the papers. In a detailed written decision, Fordham J refused permission to appeal against the assessment of quantum. However, permission was granted in respect of the appeal against the conclusion that the Claimant had been fundamentally dishonest, Fordham J finding that it was properly arguable with a real prospect of success that the Judge's findings in this regard were wrong and/or vitiated by procedural unfairness "especially in light of materials which the Judge did not have and which the Defendant – arguing fundamental dishonesty for the first time at trial against a litigant in person – did not ensure the Judge was made aware of".

15. The Claimant is now represented in this appeal by Mr White of Counsel, who has encapsulated the grounds of appeal being pursued as follows:

    i) Ground 1 - As a matter of procedural fairness, the Claimant was not given sufficient notice of, or opportunity to respond to, allegations of fundamental dishonesty.

    ii) Ground 2 - The Judge wrongly reversed the burden of proof, effectively requiring the Claimant to prove that he had not been fundamentally dishonest.

iii) Ground 3 - The Judge was led into error, or was simply wrong, in relation to each of the factors on which he based his decision that the Claimant was fundamentally dishonest.

16. The second of these grounds is a new point not contained in the notice of appeal and in respect of which Mr White seeks permission. Mr White submits that, although the point is introduced late, that is because the argument was obvious to Counsel but not to the Claimant as a litigant in person. He further submits that there is no prejudice to the Defendant in that the point is one solely of law, it was first raised in the Skeleton Argument served in April last year and the Defendant has had ample to time to consider it. Ms Hicks, who appears for the Defendant (as she did below) helpfully did not object to this ground being raised at this stage, but maintained that it had no merit.

17. The fact that Counsel is brought in at a late stage does not automatically justify the introduction of new grounds not contained in the original notice. Whether or not any new grounds are permitted will depend on the nature of the amendment sought, the balance between injustice to the party seeking amendment if it were refused and the prejudice to the other party if granted. In the context of an amendment to grounds of appeal, permission would not be granted if the additional ground did not also satisfy the test for permission to appeal, namely that it has a real prospect of success and/or that there is some other compelling reason to grant permission.

18. In my judgment, the contention that the Judge applied the wrong burden of proof is at least arguable. There is no express reference to the burden, which clearly does lie on the Defendant (see below), and the terms in which the Judge expressed his conclusions could arguably be seen as reversing that burden. The point is a short one and is unlikely to lengthen proceedings or affect the time estimate for this appeal. Finally, I can see no real prejudice to the Defendant in the point being allowed to be taken, and Ms Hicks very fairly does not suggest that there is any. In these circumstances, I allow the Claimant to pursue this new ground.

Fundamental Dishonesty

19. Section 57 of the 2015 Act provides:

> 57 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 counterclaim;
>
> *"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.

20. This provision was considered by Julian Knowles J in *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield* [2018] EWHC 51

(QB) [2018] PIQR P8 ("*Sinfield"*), a case where the trial judge was found to have erred in failing to conclude that a false claim for special damages supported by an untrue statement amounted to fundamental dishonesty. At [62], Julian Knowles J held as follows:

> "62. In my judgment, a Claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(v) 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 s57(8)) and that he has thus, substantially affected the presentation of his case either in respects (sic) 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*)"

21. The Court of Appeal in *Howlett & anor v Davies & anor* [2018] 1 WLR 948, considered the extent to which notice of an application under s.57 of the 2015 Act is required. Newey LJ, giving the lead judgment of the Court said this:

> "31. Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the court. However, the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley and Klarfeld* [2006] 2 All ER 303, has denied a claim without putting forward a substantive case of fraud but setting out "the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted", it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgment not just that the Claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the Claimant was not present. The key question in such a case would be whether the Claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence." (Emphasis added)

22. In *Mustard v Flower & ors* [2021] EWHC 846 (QB), the Court considered whether to permit a proposed amendment to a defendant's pleaded case that: (a) the claimant's accounts of the nature and severity of her symptoms were unreliable and exaggerated; and (b) if the Court were to conclude that there had been conscious exaggeration, the

defendant reserved the right to make an application under s.57. The Judge permitted (a) as a proper pleading, but rejected (b) on the grounds that a provisional or condition plea of that nature served no purpose since the application could be made without foreshadowing that possibility, the plea of fundamental dishonesty had no real prospect of success at that stage, and it would prejudice the claimant since a plea of fundamental dishonesty has to be reported to legal expenses insurers and could lead to the voiding of the claimant's cover. However, in so concluding, Master Davison said as follows:

> "24. I emphasise that nothing in the foregoing is intended to detract from the modern "cards on the table" approach. Where the Defendant does have a proper basis for a plea of fundamental dishonesty and intends to apply under section 57 , then, subject to the direction of the judge dealing with case management or the trial judge, that should ordinarily be set out in a statement of case or a written application and that should be done at the earliest reasonable opportunity. What I am intending to discourage are pleas of fundamental dishonesty which are merely speculative or contingent."

23. Thus, a defendant would not be precluded, by reason of not having formally pleaded s.57, from running that defence so long as the claimant had been given adequate warning of, and proper opportunity to deal with, that defence. No general guidance can be laid down as to what would constitute adequate warning and a proper opportunity to deal, as these would depend on the circumstances of each case. However, in a case involving a litigant in person, the Court would ordinarily seek to ensure that the nature of any fundamental dishonesty allegation is properly understood by the litigant in person (whether by requiring the defendant to set out the particulars of the allegation in writing or otherwise), and that adequate time is given to the litigant in person to consider the allegation. The interests of fairness would generally militate against requiring a litigant to deal with a submission of fundamental dishonesty "on the hoof" or immediately after it is raised for the first time in closing submissions.

24. The necessary steps to take in determining whether there was dishonesty were considered by the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67. Lord Hughes JSC said as follows:

> "74 .... 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."

25. It is clear from these authorities that in an application under s.57 of the 2015 Act:

i) The burden is on the defendant to establish on the balance of probabilities that the claimant has been fundamentally dishonest;

ii) An act is fundamentally dishonest if it goes to the heart of or the root of the claim or a substantial part of the claim;

iii) To be fundamentally dishonest, the dishonesty must be such as to have a substantial effect on the presentation of the claim in a way which potentially adversely affects the defendant in a significant way;

iv) Honesty is to be assessed by reference to the two-stage test established by the Supreme Court in *Genting*;

v) An allegation of fundamental dishonesty does not necessarily have to be pleaded, the key question being whether the claimant had been given adequate warning of the matters being relied upon in support of the allegation and a proper opportunity to address those matters.

vi) The s.57 defence can be raised at a late stage, even as late as in closing submissions. However, where the claimant is a litigant in person, the Court will ordinarily seek to ensure that the allegation is clearly understood (usually by requiring it to be set out in writing) and that adequate time is afforded to the litigant in person to consider the defence.

26. After reserving my judgment in this matter, Counsel drew my attention to the very recent case of *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) (which was decided after the hearing in this matter). In that case, the Court had to consider whether the court below had erred in finding that a prisoner had been fundamentally dishonest within the meaning of s.57 where he had lied about the cause of his injury, and where an erroneous schedule of loss was advanced by his lawyers. It was held that the failure by the lawyers to quantify the claim properly was not a fundamental dishonesty by the Claimant and that inadequate pleadings were not within the mischief at which s.57 was aimed.[1]

27. Bearing those principles in mind I turn now to consider the grounds of appeal.

Submissions

28. The first ground of appeal (although dealt with last in oral submissions) is that there was inadequate notice of the allegation of fundamental dishonesty. Mr White acknowledges that such allegations do not need to be pleaded but contends that the notice relied upon here was wholly inadequate and fell far short of the requirement established in *Howlett* in that the Claimant was not given a fair opportunity to consider

and respond to the matters relied upon as giving rise to fundamental dishonesty. The Defendant relies upon correspondence prior to trial in which it was asserted that the

[1] I should note that at [47(i)] of the Judgment in *Cojanu*, Ritchie J, after a review of the authorities, stated, inter alia, that "the s.57 defence should be pleaded". I do not read that as requiring the defence always to be pleaded, as to read it thus would appear to be contrary to the Court of Appeal's decision in *Howlett*, and would oblige defendants to seek permission to amend, even where the basis for alleging fundamental dishonesty only arises at trial, is not in doubt, is clearly understood and is capable of being addressed without the formality of an amended pleading.

claim was "exaggerated and unreasonable". However, the Defendant refused to provide particulars of the grounds on which a s.57 application would be made even after being requested to do so. In any event, submits Mr White, an exaggerated and unreasonable claim is not necessarily fundamentally dishonest. The Defendant's counter-schedule similarly alleged only that the claims were speculative and remote rather than false. At no stage, submits Mr White, was the Claimant put on notice that it would be suggested to him that he was lying in saying that he had symptoms. The effect of the Defendant's approach was to subject the Claimant to an ambush thereby precluding him from having a proper opportunity to deal with the allegations.

29. These points apply *a fortiori* to the three specific matters relied upon by the Judge in concluding that there was fundamental dishonesty, given that there were key documents and matters in relation to each that the Defendant had not ensured were in the bundle or highlighted to the Judge. These documents and matters, had they been brought to the Judge's attention in the context of a properly notified s.57 application, could have affected the conclusions reached. Mr White submits that it is clear upon analysis that the Judge's conclusions in respect of each of the three matters relied upon were simply wrong and unsustainable.

30. Ms Hicks submits that there was adequate notice of challenge to the Claimant's honesty. Reliance is placed on the fact that the Judge questioned the Claimant about the disclosure of the Young report and that the Claimant had an opportunity to answer. Moreover, submits Ms Hicks, the Judge heard submissions from the Claimant as to correspondence which shed further light on the misleading first schedule of loss; the fact remains that an inaccurate schedule was confirmed by a statement of truth. Although correspondence explaining the Claimant's position was overlooked, the Claimant cannot escape that fact.

31. Ms Hicks submits that the non-inclusion of certain documents was an oversight. However, that did not undermine the findings made by the Judge which were made with the benefit of seeing and hearing the Claimant give evidence at trial. Ms Hicks reminds me that such findings of fact made by the trial judge should not be interfered with unless there is a compelling reason to do so: see, e.g. *Staechling v ACLBDD* [2019] EWCA Civ 817 at [29] and [30].

Discussion

Ground 1 - Adequacy of notice

32. It is in the interests of basic fairness that a Claimant should be given adequate warning of, and a proper opportunity to deal with, the possibility of a finding of fundamental dishonesty. The consequences of such a finding are severe, and rightly so, but the safeguards against an unjust finding are the giving of adequate notice of the allegations and a proper opportunity to respond. What amounts to such notice or opportunity in a given case will depend on the circumstances. Ordinarily, the allegations will be either pleaded or set out in writing, but there may be cases where that is not necessary. The fact that the Claimant is a litigant in person is a factor to be taken into account in assessing adequacy of notice and the opportunity to respond but that fact does not of

itself demand that in all cases involving litigants in person, there has to be written prior notice of the allegations.

33. The Defendant in the present case acknowledges that there was no express notice given to the Claimant in advance of trial that fundamental dishonesty would be alleged in relation to his case as to the onset of symptoms. The Defendant's pleaded case, which merely put the Claimant to strict proof on the injuries and symptoms, did not suggest that there was any exaggeration. However, it is said that correspondence asserting that the claim was "exaggerated" and "unreasonable" and referring to s.57 provides sufficient notice. I disagree. A claim that is unreasonable is not necessarily dishonest; it may simply be misconceived. A claim that is exaggerated may be so because of the inclusion of losses that are wrongly believed to arise out of the accident in question. If a defendant wishes to establish that an exaggerated or unreasonable claim is fundamentally dishonest, then the basis on which that dishonesty arises or is alleged to arise ought to be made clear. The correspondence suggests that the losses claimed were unreasonable and exaggerated; it is not clear from the correspondence that it was being alleged that the Claimant was exaggerating the onset of symptoms. Any doubt that that was the case being put by the Defendant would have been cleared up by setting out its position with specificity.

34. There is an allegation in the correspondence that the Claimant's claim that the index accident was causing the losses alleged was not considered "reasonable or credible". Whilst this was not an aspect of the letter expressly relied upon by Ms Hicks, I would accept that an allegation that a claim was not credible could amount to notice of an allegation of dishonesty; but without more, in the circumstances of this case, it did not unequivocally amount to such an allegation.

35. A further point of note in the present case is that the Claimant, very reasonably, sought particulars of the allegations of dishonesty being made. Having stated, in a letter to the Defendant's Solicitors dated 12 March 2019, that the unspecified allegations of fundamental dishonesty "have no value or meaning" and made it "impossible for [the Claimant] to evaluate or respond to", the Claimant requested that the Defendant:

    i) list on what grounds the s.57 application would be made;

    ii) list and disclose all supporting evidence in its possession to support the application; and

    iii) be "very clear here as to what it is you are alleging my act or acts of exaggeration or fundamental dishonesty are..."

36. The Defendant's response to that was to refuse to provide any particulars, and to state that "[m]atters or findings of dishonesty will be a matter for the court". In short, the Claimant, a litigant in person (albeit one with some experience of litigation), was given no assistance or guidance at this pre-trial stage as to what allegations of dishonesty he might be required to face. He did not know, for example, whether the allegation related to the onset of symptoms, the extent of those symptoms or the loss that allegedly was caused (albeit that the earlier letter from the Defendant tended to suggest that it was the latter). That is not a satisfactory way in which to pursue an application of fundamental dishonesty. Of course, the failure to provide particulars in March 2019 would not of itself preclude an application from being made subsequently, if the *Howlett* requirements of adequate notice and a proper opportunity to respond are met at the later stage. In the present case, that did not occur either.

37. The allegation in this case, as it emerged during the trial (and even then, only expressly in closing submissions), was that the Claimant was being dishonest about the onset of symptoms. However, that particular allegation was not asserted by the Defendant at any stage before trial, and nor was it expressly put to the Claimant during the trial that he was being dishonest. I was taken to various parts of the transcript in which Ms Hicks had put to the Claimant that he had not been suffering from the pain alleged at the points in time that he claimed he was. Ms Hicks submitted that, taken in context with the other evidence in the case, including the lack of contemporaneous medical evidence in support of his claims, that is enough to put the Claimant on notice of an allegation of dishonesty. However, there is a world of difference between putting to the Claimant that he was not in fact suffering the pain he now alleges and an allegation that he is fabricating or exaggerating the entire story about pain. There could be a number of reasons as to why the Claimant was not in pain (at all or to the extent claimed) at the relevant time without being dishonest, including that he was mistaken in his recollection, or that he has, over time, filled the gaps in memory with a sequence of events that he now believes to be true.

38. It seems to me that if the Defendant's case was that the Claimant was putting forward a dishonest claim, that ought to have been put to him fairly and squarely in order that he could respond, even if the only response he could muster is a bare denial that he is lying. He was not given that opportunity.

39. Similarly, the allegation made in the Defendant's counter-schedule that the claims were too remote and speculative, falls far short of an allegation of dishonesty.

40. In my judgment, the approach taken by the Defendant did not comply with the requirement of adequate notice. Indeed it is difficult to see that the Claimant was given any real notice at all, apart from a vague and deliberately unparticularised allusion to the possibility of a s.57 application. Merely alluding to such possibility does not, in the circumstances of this case, amount to adequate notice. Were that not so then defendants could routinely flag up the possibility of a s.57 application in advance of trial and then seek to rely upon the fruits of a successful cross-examination to support such an application without giving any further notice. I do not consider that approach to be fair or procedurally sound. A defendant can of course give a claimant fair warning that if the evidence turns out a certain way then a s.57 application might follow. However, a defendant could not simply rely on putting the claimant to proof in order to satisfy the requirement of adequate notice; something more specific would be required so as to alert the claimant (perhaps after the evidence has emerged under cross-examination) as to which aspects of his case were considered to be fundamentally dishonest.

41. I note here that at the hand-down hearing, the Judge expressed the view that "it was fairly put to you long before the trial that this is what the Defendants are going to say, that you'd grossly exaggerated your symptoms. So the fact that it doesn't actually appear in the defence doesn't mean that they're not allowed to put the claim to you. If that had been the position I wouldn't have allowed them to cross-examine you on that basis.". Ms Hicks relies on this passage as confirmation that the Judge clearly considered the notice (contained in pre-trial correspondence) to be adequate and that that is a finding with which this Court should not readily interfere. The difficulty with

that submission is that, in my judgment, the Judge was wrong, for reasons explained above, to consider that a reference to the exaggeration of loss was sufficient in and of

itself to give adequate notice, in these circumstances, that it was being alleged that the Claimant was being fundamentally dishonest as to the onset of symptoms. However, even if that were not the case, the further difficulty for Ms Hicks is that the subject matter of the Defendant's letter (such as it was), did not in fact make any reference at all to two out of the three specific matters relied upon by the Judge as giving rise to his conclusion that there was fundamental dishonesty; these are the payments made for the collection of rent and the manipulation of expert evidence. There is no basis on which it can be said that the Claimant was given any notice that those matters would be relied upon to found a claim of fundamental dishonesty.

42. One of the benefits of giving adequate notice of a s.57 application is that the defendant will ensure that all documentation relevant to the points relied upon is adduced with proper opportunity being given to the claimant to consider it and respond. It is selfevident that that did not occur here given the absence of certain key documents and information, the details of which I shall return to in due course.

43. The first ground of appeal is therefore made out. There was a serious procedural irregularity in that the Claimant was not afforded adequate notice of the basis on which it was alleged that there was fundamental dishonesty within the meaning of s.57 of the 2015 Act.

Ground 2 – Burden of Proof.

44. Mr White's straightforward submission here is that the terms of paragraph [76] of the Judgment clearly indicate that the Judge expected the Claimant to establish that he had a sincere belief in the account of symptoms being put forward, and that that amounts to a reversal of the proper burden of proof. Ms Hicks submits that the Judgment must be considered as a whole and that it is evident that the Judge clearly understood the issue and did not mistake the burden. I was not, however, directed to any particular passage in the Judgment that might indicate that the Judge did have the correct burden of proof in mind, in which case, any infelicity of expression in the concluding paragraphs might have been viewed more generously.

45. Mr White is correct that there is no express reference in the Judgment to the burden of proof being on the Defendant to establish fundamental dishonesty. However, paragraph [76] of the judgment does not unequivocally suggest that the Judge had the wrong burden in mind: the Judge's conclusion that he could not find, "on the balance of probabilities" that the Claimant "sincerely believes the account of his symptoms" is also at least arguably consistent with the burden being placed on the Defendant. The Judge similarly refers to the balance of probabilities at [69] and [74], which are similarly equivocal about the burden.

46. Furthermore, this is not a case where the Judge has, expressly or otherwise, relied on the burden of proof to resolve an issue in favour of either party. Instead, the Judge clearly weighed the evidence, as it appeared to him, and applied a balance of probabilities test in deciding the outcome. It is not the case, for example, that the Judge found the weight of evidence on any particular issue to be equally balanced and then proceeded to determine that issue against the Claimant on the incorrect basis that the burden lay on him.

47. Based on the material before me, I am not able to say that the Judge was plainly wrong in the application of the burden of proof. For these reasons, Ground 2 of the appeal does not succeed.

Ground 3 – Errors in matters relied upon by Judge

48. I turn now to deal with each of the three features which the Judge relied upon to reach the conclusion that the Claimant had been fundamentally dishonest. These were the features that the Judge expressly identified as causing him to doubt the otherwise apparently sincere evidence of the Claimant.

(a) Payments made for someone to collect rent ([75(a)]) –

49. The first is the claim made in the Claimant's first Schedule of Loss relating to assistance with the collection of rent. The Judge described this as "an assertion that he paid someone to collect rent on his behalf £15 per hour for 50 hours per year; when crossexamined, he had to concede that he had done no such thing; that schedule had been signed by the Claimant himself" ([75(a)]).

50. It is helpful to set out that claim as it was actually stated in the Schedule:

> "C. LOSS OF EARNINGS
>
> 1 The Claimant would have ordinarily collected rent however was unable to do this. He therefore had to pay someone to collect this on his behalf The Claimant claims the reasonable rate of 50 hours per annum
>
> 2 The calculation is therefore 50 hours per annum x £15 = £750 per annum together with the appropriate multiplier"

51. This was not therefore an allegation that the Claimant had paid someone £15 per hour for 50 hours per annum; it was an allegation that he had had to pay someone to collect the rent on his behalf and for which he was seeking a "reasonable rate" of 50 hours at £15 per hour. The seeking of a "reasonable rate" implies that the person assisting him in the collection of rent was not paid a specific sum for that task; instead, the Claimant was at that stage seeking the recovery of a reasonable sum to reflect the fact that someone was undertaking that task. This is not merely a matter of semantics: an accurate reading of the Schedule puts into context the Claimant's candid answer when asked at trial if he had paid anybody that particular amount, that he had "done no such thing". However, far more significant than the error in the meaning of the Schedule, which was drawn up by Solicitors, was that those Solicitors had written to the Defendant's solicitors on 29 March 2017 to explain as follows: "With regard to loss of earnings there has been some confusion. The collection of rent and other duties checking fire-smoke alarms, showing people round etc was in fact undertaken by the Claimant's son. Whilst it is true that the Claimant gives his son money it cannot be specifically ascribed to the undertaking of these duties and therefore we have explained to the Claimant that

> the assistances his son provided was provided gratuitously. We will amend the Schedule of Loss in due course to reflect this".

52. That explanation is clearly important: it is consistent with the interpretation of the first Schedule of Loss that the Claimant was not claiming that a specific amount was paid to any person for the collection of rent; insofar as the Schedule gave a misleading impression as to the payments, that was corrected by the letter; and insofar as the Schedule contained an unsustainable claim, it was subsequently amended and the claim was thereafter not pursued.

53. However, this letter was not included in the trial bundle, and nor was its existence brought to the Judge's attention in the course of the Defendant's application under s.57. Not only that, it does not appear from the transcript that there was anything in the Defendant's submissions that would have alerted the Claimant that this was an issue that would be relied upon to establish fundamental dishonesty. The consequence of all of this was that the Claimant was found to be dishonest on the basis (in part) of an answer given in cross-examination which appeared to the Judge (incorrectly) to be inconsistent with what was said in the Schedule. The Claimant was given no, or no proper, opportunity to address the concern raised by his answer. It is no answer to say that the Claimant would have been aware of the letter and could have alerted the Judge to its existence in the course of giving his answers. The letter was written by his Solicitors some 3.5 years before trial; he had no inkling prior to being questioned that this would be an issue; and it would be unfair to expect the Claimant, a litigant in person, to recall the letter and/or its significance in this context whilst under the glare of cross-examination or questioning by the Judge.

54. There can be little doubt that if this letter had been included in the bundle and considered by the Judge, it could have made a difference to the Judge's assessment. As it is, the Judge's conclusions arising out of the Schedule of Loss are plainly wrong. Moreover, the way in which the matter was raised demonstrates that the Claimant was not given adequate (or any) notice that this would be relied upon and that he was not given a fair and proper (or any) opportunity to respond to it.

55. An application of the *Genting* approach quickly reveals that there is no dishonesty here. The Claimant's subjective belief was never, and was never stated to be, that he actually paid someone £15 per hour for 50 hours a year. That was consistent with what he said in evidence. Insofar as there was any doubt about that, that doubt only arose because of the way in which the claim had been drafted in the original Schedule and that error had been corrected. An error in the pleaded case, particularly one which is corrected long before trial, is not the kind of mischief to which the s.57 jurisdiction is directed: see *Cojanu* at [92]. Objectively, this cannot be said to be dishonesty.

56. Furthermore, there was no consideration by the Judge as to whether this apparent dishonesty (i) related to a fundamental matter in the claim or (ii) such dishonesty was such as to have a substantial effect on the presentation of the claim in a way that potentially adversely affects the Defendant in a significant way: see principles (ii) and (iii) in [25] above. It is hard to see how this element of the claim potentially adversely affected the Defendant in a significant way when it was clarified after a relative short period and long before trial. Even if the Judge had been correct in his belief as to dishonesty, the particular issue to which that belief related had become peripheral by the stage of trial, if not entirely irrelevant.

57. For these reasons, the Judge's conclusion that there was dishonesty, let alone any fundamental dishonesty, in relation to the Schedule was plainly wrong.

(b) Manipulation of Expert Evidence ([75(b)]) –

58. The second feature relied upon by the Judge was described as the Claimant's attempted manipulation of expert evidence, which the Judge regarded as "clearly and persistently dishonest". The Judge cross-refers (at [75(b)]) to the earlier part of his judgment where he had "already referred to [the Claimant's] attempted manipulation of expert evidence". The only passages in the Judgment assessing such manipulation are at [26] to [29], where the Judge found as follows:

> "26. However, on one issue he demonstrates a willingness to manipulate the evidence to his perceived advantage. At an interlocutory stage in these proceedings, a judge directed the claimant to disclose the radiological report of a Dr Young which accompanied some scans. The claimant resisted doing so, even threatening to appeal the order of the judge. Eventually, the claimant disclosed Dr Young's report. It is at pages [350-1].
>
> 27. Whilst listening to the claimant's submissions, I asked for his explanation for seeking to withhold Dr Young's report. At first, he stated that he wanted to have Mr Braithwaite's opinion unclouded by that of Dr Young. However, when pressed, he accepted that he had done so because Dr Young;s report "didn't suit me". This I took to be a reference to the recommendation at the end: "normal or minor abnormality, no action necessary".
>
> 28. At that point the claimant accepted that he had not been (as I put to him) entirely straightforward with me.
>
> 29. I remind myself that there are many reasons why litigants lie or tell less than the truth; lying on one issue does not render all other evidence worthless. Nonetheless, this was not a single lie or evasion in the heat of the moment, but a course of conduct he persisted in for months and only resiled from when pressed on the point at trial. The incident causes me to view the claimant's assertions with some caution."

59. The Judge therefore formed the view, based on the documentation before him, that the Claimant had sought to withhold a potentially adverse report and that he had maintained that position "even threatening an appeal" until pressed on the point at trial. This gave rise to the conclusion that the Claimant had "manipulated" the expert evidence and had clearly and persistently been dishonest.

60. However, the Judge did not know prior to hand-down, that at the time when disclosure of the Young report was sought the Claimant was being advised by Counsel that the report may be subject to litigation privilege. There is a skeleton argument from the Claimant's Counsel at the time dated 14 July 2019. The skeleton is in support of an application for permission to appeal against the order of 24 June 2019 requiring disclosure of the Young report, and the principal basis for the application is that litigation privilege attached to the report. That claim to litigation privilege was rejected by HHJ Beech on 17 January 2020 and the Young report was disclosed shortly

thereafter on 28 January 2020. None of this material or information was before the Judge prior to the handing down of the Judgment and nor was it brought to his attention.

61. The significance of this material is obvious: the Claimant's resistance to disclosing the Young report was because of his belief, based on advice, that it was privileged. That advice might have been wrong. However, it cannot be said that it was dishonest of the Claimant to rely on that advice in order to resist disclosure. In *Genting* terms, subjectively, the Claimant's actions were dictated by his belief as to privilege; and objectively, those actions were not dishonest.

62. Ms Hicks sought to persuade me that there was more to the Claimant's conduct in that he had expressly denied that the Young report had existed. She relies upon the Claimant's response dated 13 June 2019 to a written request "for any report accompanying the MRI scans". The response from the Claimant was that "there is no paperwork accompanying the images". The Claimant's understanding, according to a witness statement served for the purposes of the appeal, was that the MRI scan and the Young report were two separate items. He says that he did not therefore deny the existence of the Young report.

63. Mr White submits that there was nothing unreasonable in a litigant in person taking the view that the MRI Scan and the Young report were two separate items; they had reached him separately and, moreover, the Claimant's Counsel's skeleton argument appears to support the view that the images were separate from the report.

64. It is not necessary for me to make a finding on this appeal as to whether or not there was a false declaration about the Young report as that was not something on which the Judge relied. However, what I do conclude is that the Judge did not have the full picture of events. In particular, he was not made aware that: (i) the Claimant considered on the basis of advice at the time that the report was privileged; (ii) his refusal to disclose at that stage was based on that advice; (iii) almost as soon as a judge rejected the privilege argument, the report was disclosed; and (iv) the "threat" of an appeal was once again based on the advice received at the time, which it may reasonably be inferred, was that asserting privilege was a tenable position to take.

65. There can be little doubt once again, that if the Judge had had that complete picture before him, the conclusion as to fundamental dishonesty might have been different.

66. The Judge's view was evidently strongly influenced by the Claimant's responses to his questioning at trial, during which the Claimant had admitted, after some probing, that he had not wanted to disclose the report because it "didn't suit me". However, if the Claimant had thought the Young report privileged, it is difficult to see what is dishonest about seeking to withhold it. If privilege did attach to the report then he was not bound to waive such privilege, particularly where it was considered not to assist his case, or as he put it to the Judge, it did not suit him to do so. The claim to privilege may have been misconceived but it was based on advice. It is difficult to see, in these circumstances, how this is an example of dishonesty, let alone fundamental dishonesty. A proper application of the *Genting* test to the issue might have avoided the treatment of a normal (albeit misguided) litigation stance as dishonesty.

67. The conclusion that the Claimant's dishonesty "persisted" until trial is perplexing. The "manipulation" of the expert evidence (if that is what it was) could only have persisted until the Young report was disclosed. That occurred on 28 January 2020 some eight

months prior to trial. There was no "manipulation" of the evidence thereafter because the Defendant had the report. The Defendant was at no risk of being subjected to a claim that was being pursued (in this respect) on a false basis. The Claimant's admission at trial that it did not suit him to disclose the report the previous year was, by that stage, largely irrelevant to the issues to be determined. Even if the Judge had been right that the Claimant's conduct in not disclosing the Young report prior to 28 January 2020 had been dishonest, the conclusion ought to have been either that this wrongdoing had been remedied long before trial and/or that the Claimant's misguided litigation stance 8 months previously did not significantly prejudice the Defendant's position at trial.

68. There was once again a failure to comply with the requirements, which are no more than that which is demanded by basic fairness, of adequate notice and a proper opportunity to respond. The particulars of the alleged fundamental dishonesty were not clearly set out for the Claimant to consider. Had the Defendant ensured that adequate notice was given, it would in all likelihood have realised that further information as to Counsel's involvement ought to be raised with the Judge. If the Defendant had not done so, adequate notice would have enabled the Claimant to consider the position and adduce the material himself. He was not given that opportunity.

69. Ms Hicks has taken me to various passages of the transcript of the hand-down hearing at which the issue of privilege was discussed in more detail with the Claimant, but which evidently did not alter the Judge's view. However, the Judge had by then already concluded that the Claimant had been fundamentally dishonest; the fact that there was discussion about the findings giving rise to that conclusion at the hand-down hearing merely serves to underline the fact that this sort of discussion ought to have occurred earlier, and that the reason it did not was that the Claimant was not given proper notice of the allegation being made. It was also submitted that the Claimant did not really believe the document was privileged. However, that allegation was never put to the Claimant at trial; even if it had been, Counsel's advice that it was privileged would probably have been a complete or near-complete answer. Once again, if that was the case that the Defendant had wished to put, he ought to have done so in accordance with the *Howlett* requirements of adequate notice and a fair opportunity to respond.

70. For these reasons, I consider the conclusion at [75(b)] of the Judgment that there was clear and persistent dishonesty in relation to expert evidence to be plainly and manifestly wrong.

(c) Multiplying the size of the damages claim by 10 ([75(c)]) –

71. The final matter relied upon by the Judge was that the Claimant, instead of reconsidering or moderating his claims when faced with medical records contradicting his case, multiplied the size of his damages claim by 10.

72. The Schedule of Loss signed by the Claimant on 2 April 2019 valued the claim in excess of £500,000. The factor of 10, upon which the Judge relied, appears to derive from the fact that the claim, issued on 13 July 2016, was (after an amendment) limited to £50,000. Both those sums feature in paragraph [1] of the Judgment, which states as follows:

> "1. This is a claim for damages for personal injury and consequential losses brought by Andrew Jenkinson … who now acts as a litigant in person. The claim when issued on 13 July

> 2016 was limited to £10,000. The limit was later amended to £50,000. That remains the limit on the face of the claim form but the latest schedule of loss signed by Mr Jenkinson on the 2 April 2019 values the claim at a sum substantially in excess of £500,000."

73. The problem is that this paragraph was shown to be incorrect at the hand-down hearing. The Judge accepted that the limit had in fact been increased so that it should have said "more than £200,000". The Judge accepted other corrections so that the relevant parts of [1] should now read:

> "…The limit was later amended to ~~£50,000~~ over £200,000~~. That remains the limit on the face of the claim form~~ but the latest schedule of loss signed by Mr Jenkinson on the 2 April 2019 values the claim at a sum substantially in excess of £500,000."

74. Moreover, that amendment to the limit was made pursuant to an order in July 2017 which was several months before Mr Braithwaite's report (that being one of the medical reports said by the Judge to contradict the Claimant's case) had been disclosed to the Claimant.

75. These errors are fundamental and go to the core of one of the three reasons for concluding that the Claimant was fundamentally dishonest; and yet, despite agreeing to the correction, the Judge did not revisit his conclusions in the handed down judgment. At the very least, there ought to have been some acknowledgement that the factor of 10 increase relied upon in [75(c)] could no longer stand. Furthermore, the chronology ought to have been revisited to determine whether it was indeed the case, as the Judge found, that the claim was inflated following the receipt of medical reports. In fact, it would appear that the Claimant believed he had a claim worth well over £200,000 even before he had received such reports. It might still be fair to criticise the Claimant (as Ms Hicks does) for maintaining a very substantial claim after the receipt of such reports (and in fact increasing it, by April 2019, to one that exceeded £500,000), but that is still a far cry from concluding that a litigant had inflated his claim by a factor of 10 in the face of such reports or had acted dishonestly in so doing.

76. These errors are sufficient in and of themselves to undermine the conclusion at [75(c)]. However, there are other errors in the Judgment, identified at the hand down, which cast some doubt on the basis on which the Judge considered the Claimant's evidence to be unreliable.

77. At [23(a)] of the Judgment, the Judge had found that a report made by Dr Tudor on 13 January 2014 had recorded that the Claimant's thoracic spine symptoms had started "the day after the accident". In fact, as was pointed out by the Claimant at the hand down hearing (and which the Judge accepted), Dr Tudor's report records that the symptoms had started on the day of the accident. The Judge decided, in the light of that correction to excise, not just [23(a)], but all of [23] and all of [54] from the Judgment. Paragraph [54] is significant: it appears just after two paragraphs highlighting the fallibility of human memory and the fact that memory is a "selective reconstruction and

can change over time, particularly when often revisited in the course of preparing for litigation" ([52]). The Judge then went on to say as follows in [54]:

> "54. A minor example of this tendency to change is to be found in the claimant's varying account to medical experts of the onset of symptoms: in 2014 he told Dr Tudor it was the day after the accident; in 2016 he told Mr Ampat it was shortly after the accident; in 2017 he told Mr Braithwaite that it was immediately after the accident. There is an obvious trajectory." (Emphasis added)

78. The Judge was clearly of the view that the Claimant had, as a result of repeatedly revisiting the same issue, changed his selective reconstruction of events over time so that the onset of symptoms was moving closer in time to the index accident. It was on that basis (at least in part) that the Judge went on to conclude that the "claimant's recollection of the origin and development of back symptoms has become, to say the least, unreliable." ([55]). In fact, there was no such "trajectory" at all, since the Claimant had told the first of those experts, Dr Tudor, that the pain had started on the day of the accident. That was consistent with what he had said to the other experts; namely that the pain had commenced "shortly after" and "immediately after" the accident.

79. However, although this finding of a "trajectory" had been removed, there was, once again, no attempt to revisit the Judgment or that part relating to fundamental dishonesty. Whilst the Judge did not identify the accounts given by the Claimant to medical experts as one of his reasons for concluding that the Claimant was fundamentally dishonest, a finding that his account to all experts had not been the subject of a "trajectory" might have had a bearing on whether this was a case being advanced "*a. … dishonestly, or b. sincerely but mistakenly [in the belief] that he has had significant and even severe) thoracic pain ever since the 2013 accident.*" ([74]).

80. In conclusion, on Ground 3, there are substantial errors in respect of each of the three matters relied upon in concluding that there was fundamental dishonesty. In my judgment, that conclusion was plainly wrong and cannot stand.

Conclusion

81. For the reasons set out above, Grounds 1 and 3 of the Appeal are allowed. It follows that the finding of fundamental dishonesty and the consequential orders made below are set aside.