



Neutral Citation Number: [2021] EWHC 2318 (QB)

Case No: QB/2020/027

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG

Date: 17/08/2021

Before :

THE HONOURABLE MRS JUSTICE STACEY

Between :

Luul Michael

**Claimant/
Respondent**

- and -

I E & D Hurford Limited T/A Rainbow (1)
The National Farmers Union Mutal Insurance
Society Limited (2)

**Defendants/
Appellants**

No appearance or representation by the Claimant
Mr William Poole (instructed by DAC Beachcroft Claims Ltd) for the
Defendants/Appellants

Hearing date: 18 May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 17th August 2021 at 10:00am.

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THE HONOURABLE MRS JUSTICE STACEY

The Honourable Mrs Justice Stacey:

1. The appellants in this appeal were the defendants before Leeds County Court in a road traffic accident claim in which judgment for the claimant, Luul Michael, was entered for £3,624.18 after trial on 14 September 2020. The Court then rejected the appellants' application to dismiss the claim on the basis that the respondent had been fundamentally dishonest in relation to the primary claim or a related claim pursuant to s.57(1)(b) Criminal Justice and Courts Act 2015 ("the Act"), which is the subject of this appeal. Permission to appeal was given by the trial judge, Mr Recorder Cameron. A challenge to the quantum award and costs order for which permission had been given by Mr Justice Griffiths on 21 February 2021 was withdrawn part way through the appeal hearing.
2. The respondent did not appear and was not represented at today's hearing. An application dated 17 March 2021 by his solicitors NNE to come off the record had been returned to them, unissued, as it did not comply with the rules. No rule compliant amended application has been re-submitted and they thus remain on the record. It was unclear if their client, the respondent, was aware of the hearing.
3. The single issue in this appeal is the correct approach to s.57 of the Act.

Background facts and judgment below

4. On 7 November 2018 the respondent was involved in a road traffic accident whilst working as an Uber driver in his Hyundai i30 Active Blue CRD with a passenger on board. An employee of the first appellant was driving a company Land Rover Defender travelling immediately behind the respondent and drove into the back of the respondent's vehicle as it was moving off from traffic lights on the A58 in Park Lane, Leeds. The second appellant is the insurer of the first appellant.
5. The Recorder found that there was no doubt that the collision occurred and no doubt that responsibility for the collision lay entirely with the first appellant's employee who had negligently driven into the back of the respondent's vehicle in breach of his duty of care to the respondent as another road user. The appellants accepted that the respondent's vehicle was written off from the damage caused by the collision and that their insured was responsible. The respondent received a cheque from the second appellant within 5 weeks of the accident on 10 December 2018 for £4,200 representing the value of the vehicle at £4,700 less salvage value of £500 as assessed by an engineer instructed by the respondent's solicitors.
6. Three heads of loss were in dispute at trial: a claim for credit hire, a claim for physiotherapy and the quantum of the personal injury damages.
7. The appellant made a number of preliminary applications at the outset of the hearing, one of which is relevant for the purposes of this appeal. In the notice of application to the fast track of 30 October 2019 District Judge Hesford had made an order that the respondent be debarred from relying upon the fact of impecuniosity for the purposes of determining the appropriate rate of hire unless he had served copy bank and credit card statements for the period three months prior to the accident and during the period of

hire by 4pm 11 December 2019. It is a standard order in cases of this type where credit hire rates are being claimed since it is only where a claimant can, amongst other things, demonstrate an inability to obtain more competitive car hire rates on the open market from the likes of Avis, EasyCar etc that a court will entertain car hire rates at the level charged by credit hire companies. Although some bank statements were provided there was a gap from between 12 September 2018 to 11 November 2018. The Recorder accepted the appellants' submission that the absence of statements for that short period amounted to non-compliance with the order and that there should be no relief from sanction. The respondent was therefore debarred from relying on the fact of impecuniosity in his car hire claim.

8. The Recorder ruled against the appellants on all the various other preliminary issues raised including a strike out application. There is no appeal in respect of the other applications which are not relevant for the purposes of this appeal.
9. The statements of case consisted of the particulars of claim and defence and a reply to the defence that DJ Hesford had ordered on 30 October 2019 for the respondent to set out all facts in support of the assertion that he was impecunious at the commencement of and during the hire agreement.
10. The trial itself commenced at 12.30pm. The respondent gave evidence and was the only witness in the case.
11. Although dishonesty was not pleaded by the appellant as the defence had merely made no admissions and put the respondent to strict proof as to his losses with particular focus on the credit hire claim, Mr Poole repeatedly put to the respondent that he was dishonest and lying in his evidence and that some of the documents were fraudulent. No point was taken on this by the respondent's counsel or the judge and the issue of dishonesty was at the heart of the appellants' case. There were some inconsistencies in the evidence before the Court which were explored at length by Mr Poole with the witness. The respondent denied that he was lying or being dishonest and gave his explanations for the discrepancies to the Court. The Recorder found that the respondent was not dishonest and that his oral evidence was credible and true.
12. The respondent was awarded the sum of £524.18 for the replacement hire vehicle calculated as 16 days at a weekly rate of £229.33 and not the £7,728.00 claimed for credit hire in the particulars of claim and schedule of special damage.
13. The respondent's claim included a claim for physiotherapy. In the respondent's written witness statement, which stood as his evidence in chief, the respondent stated that Dr Amin, the GP instructed by his solicitors for the purposes of preparing a report for the claim, told him he "might benefit from physiotherapy to help aid faster recovery. I obtained this as I feel that it helped." 8 physiotherapy sessions at £100 per session were claimed for in the particulars of claim. This head of loss was supported by documentary evidence consisting of an invoice and a 2 page report or summary which was accompanied by detailed notes of some 8 treatment sessions seemingly compiled by the physiotherapist. The Claimant had signed a disclosure statement on which these documents were all listed. In cross examination the respondent was asked about the physiotherapy treatment. He initially appeared not to understand the word physiotherapy, but when it was explained that it was the treatment recommended by Dr Amin he said that he had attended one physiotherapy session and had been given

various exercises to do at home. He confirmed that he had attended just one session. When asked why he had claimed £800 for physiotherapy he replied:

“Where....where is it I don’t know, I....”

and his answer appears to have tailed off or perhaps he was interrupted. He continued

“It just makes me confusing, you know, everything that I ---”

and he appears to have been interrupted or tailed off again. It was then put to him that he had made a false claim. He said:

“I didn’t claim for false, so I examined and told to do physiotherapy. Is it a physiotherapy, I... I don’t know what you mean”

and in answer to the next question

“I don’t know, you’re just confusing me.”

14. The appellants’ counsel submitted to the Recorder that the physiotherapy document was some sort of fraud designed to exaggerate the respondent’s claim. The respondent denied it.
15. Faced with the conflict of evidence of whether the respondent had received none, 1 or 8 physiotherapy sessions, the Recorder carefully set out his analysis of the evidence before him. He noted that the respondent had been genuinely confused in some of his evidence and was “rather a poor historian with limited immediate recollection of events and some confusion over perhaps what is and is not important in deciding a case of this nature.” He was also “rather soft spoken and was perhaps sometimes difficult to understand in the course of his evidence.” The Recorder stated that although he was “not absolutely persuaded that the evidence that there was only one session of physiotherapy is correct”, bearing in mind the burden and standard of proof, he preferred the oral evidence of the respondent to the unsigned physiotherapy document that had no statement of truth and which was not in the form of an expert report. The Recorder made an award of £100 in respect of this head of claim.
16. The respondent had two jobs: he worked part time as an Uber private hire driver and 3 days a week for Asda supermarket. He had not mentioned working for Asda in his witness statement and nor was it set out in the reply but his Asda wages were evident from his bank statements. When asked in cross-examination if his only occupation was as a private hire taxi driver he immediately explained that he had another job. When asked why it was not in his reply he did not know, but stated that his solicitors had specifically asked him if he had any other jobs and he had told them about his work at Asda. He then went on to explain that he needed to work both jobs in order to earn enough for a living and that taxi driving alone was not enough to support him.
17. He was also challenged in cross-examination for not including credit card statements in his disclosure statement. Credit card payments were apparent from his disclosed bank statements. He again said that he had given his solicitors all the documents they had asked of him for and appeared puzzled why they were not before the court.

18. He explained that the reference in his bank statements to payments to a credit card company is a historic debt he is paying off. He said he no longer has a credit card but then said that he did have a credit card but was just not using it. When asked about the inconsistent answers he said “I’m not using it, but I have that credit card, yeah, at that time.” He went on to explain “I don’t use it because I’m still paying a payment to that card which is outstanding balance, that I didn’t get it back...pay it back, paid it back”
19. When asked about what the appellants considered were other omissions in his disclosure statements the respondent again stated that he had given every document asked of him by his solicitors. He was asked about documents relevant to his Uber account which the appellants considered should have been disclosed and he confirmed that his Uber account would contain records of any changes he had made to it. When asked why he had not provided them he replied: “I didn’t asked to provide them.”
20. The Recorder concluded that the respondent was “clearly unfamiliar with parts of his witness statement in a way that gave very much the impression of his being confused by the procedure adopted by this court and, indeed, some of the procedure in the lead-up to this trial...he gave the impression of really not knowing what day of the week it was sometimes. However he was able to give an account of certain other aspects.” The Recorder also noted that “in certain respects his [the respondent’s] witness statement appears to have been filled in using phraseology with which he was unfamiliar such that he was unable to explain what certain aspects of it meant.”
21. The Recorder considered all aspects of the evidence - oral and written - and the statements of case. He concluded that the respondent’s oral evidence in cross-examination was honest and accurate insofar as the respondent could understand what was being asked of him and remember. He was not “basically fraudulent”. Although his witness statement did not explain everything about the claim accurately and fairly, he “happily volunteered” information asked of him in cross-examination, including information that did not assist his claim – such as the fact he had attended only 1 physiotherapy session. The respondent also volunteered that he had sold the vehicle for £1,000 cash, when the engineer instructed by his solicitors concluded that the vehicle was a write-off with a scrap value of £500. He explained that he had been quoted a repair cost for the vehicle of £850 but sold it because the licensing authority would not have approved his using the repaired vehicle for private hire and so he sold it instead. The Recorder said this:

“I assume a more determined fraudster – as was put to him he was – could simply have said absolutely nothing about it. It seems to me that the explanation for that being omitted lies in the way in which his evidence was prepared. I am reluctant to criticise individuals or firms of solicitors or anyone else from who, of course, I have not heard, but there are question marks, it seems to me, about what went into that statement and what was omitted from it.”
22. The lack of familiarity with his statement was evidenced from the respondent’s cross examination when he explained that he did not understand some parts of the statement that he was taken to and could shed no light on them and appeared unconfident of his ability to read English and it is apparent from his evidence that English was not his first language. The following extract is illustrative:

“Q: Do you accept that the contents of paragraph 15 before they were amended are dishonest because that didn’t happen?”

A: Which one didn’t happen?

Q: The contents...the events that you described in paragraph 15 did not happen, did they?

A: I don’t understand this one. Is it saying that (inaudible) is required?

Q: Can you read English?

A: Yes, but ----

Q: Have you read it? You understand what it says in English don’t you? I just want to be absolutely clear that you understand what it says in English

A: I don’t think, sir, this is not clear from me.

Q: You...did...you told the maker of that statement that that’s what happened, didn’t you, the maker of that document, I should say? Sorry, I’m going to need an answer to the question, please.

A: I don’t know, I really don’t understand this one.

And so it went on.

23. On the general damages claim there is now no criticism of the Recorder’s approach to the assessment of quantum based on the evidence that the claim fell within section 7A(c)(ii) of the Judicial College Guidelines whiplash type back and neck and shoulder injuries with full recovery between 3 months and 1 year and his award of £3,000. The Recorder found that he had not exaggerated his symptoms and his evidence of pain and suffering was true and accurate.

24. The respondent was thus awarded a total of £3,624.18. The Recorder then rejected the appellants’ application for the dismissal of the claim pursuant to s.57(1)(b) of the Act since he had not found the respondent to be dishonest. He found as follows:

“49. It seems to me that there are two points to make about that matter. The first is that the wording of the statute requires that the Claimant be dishonest. I have already referred to the fact that there has been some infilling of the Defendant’s witness statement, and also I think particulars of claim, such that it seems to me that he had only a limited understanding of what was actually in them.

50. It seems to me, given the draconian effect of the statute and given, as counsel tell me, there is no binding authority on the

question of whether a distinction should be drawn between "the claimant" and "the claim", I ought to use the word in the statute, "the claimant", and ask myself the question: has the Claimant been dishonest?

51. In most cases where there is fundamental dishonesty, there will be absolutely no doubt about the matter, I would have thought, but in this case, it seems to me, and again consistent with the decision that I have already given, I do not think that Mr Michael himself has been dishonest. I think the various discrepancies that I have already referred to in his evidence are explained by his lack of understanding, really, of what is going on.”

“55. It seems to me that, on the basis of what I have decided, I can logically say that, although the case presented on behalf of Mr Michael has not been proved and that the finding of fact that follows from that not being proved is that the physiotherapy which was claimed did not actually occur, that of itself does not necessarily establish the fundamental dishonesty that Mr Poole argues for in the way that he suggests.

56. So, for each of those two separate reasons, quite independently of one another, I decline to make any finding of fundamental dishonesty.”

25. He therefore considered that the various discrepancies in the respondent’s evidence were explained by his lack of understanding of what was going on. Since the respondent did not know or understand the basis of the claim that the solicitors had advanced on his behalf, the Recorder could not conclude that dishonesty on the part of the respondent from the inaccurate physiotherapy claim and other inaccuracies in the respondent’s statement of case, evidence in chief and omissions in the disclosure statements.

Grounds of appeal and Appellants’ submissions

26. Although expressed as 6 separate grounds, it is perhaps better described as one ground of appeal: that the Recorder was wrong not to have found that the claimant was fundamentally dishonest and was therefore wrong to dismiss the appellants’ application under s.57(1)(b) of the Act (ground 6). The first 5 grounds of appeal merely set out the findings that were said to compel the Recorder to a conclusion of fundamental dishonesty. It was also said that the case raised an interesting point of law about the distinction between a dishonest claim and a dishonest claimant.
27. It was submitted by Mr Poole that the appeal was against not so much a specific finding of fact, but of an evaluation of the evidence and akin to the exercise described by the Court of Appeal in *Re Sprintroom: Prescott v Dr Potamianos & Anor* [2019] EWCA Civ 932 at paragraph 76:

“So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, “such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion”.”

28. His second line submission in the alternative was that if it was a finding of fact, it was really an inference drawn from facts specifically found, which enabled the appeal court to interfere more readily with the conclusion reached by the court below. He also submitted that the respondent’s behaviour was reckless to the point of dishonesty.
29. The five matters said to lead to an unavoidable and inevitable conclusion of a finding of fundamental dishonesty were:
 - i) Having found the claimant attended only one of the eight physiotherapy sessions claimed for, it must follow the claim for physiotherapy had been dishonestly exaggerated by what Mr Poole described as a fabricated and fraudulent document.
 - ii) The consequence of CPR 22 and the signing of the statements of case – whether personally or through his solicitors - which the Recorder had found to be inaccurate in some respects.
 - iii) The consequence of the fact of the respondent having signed the disclosure statements on 23 August 2019 and 2 September 2020 which contained the two physiotherapy documents that the Recorder should have acknowledged had been fabricated (the physiotherapy discharge report and invoice and notes of the 8 sessions).
 - iv) The fact of the failure of the respondent to give disclosure of credit card statements as an omission from his disclosure statement of 2 September 2020 and
 - v) The respondent’s failure to include in his Reply that he had a second job working at Asda which was said to be an example of dishonesty given the credit hire claim and the assertion of impecuniosity.
30. It was submitted that any one of the 5 matters would be sufficient to establish fundamental dishonesty and the instances should be considered both in isolation and together.

The law

31. The appellate jurisdiction of the High Court in an appeal from the County Court is limited to “a review of the decision of the lower court” (CPR52.21(1)). An Appeal Court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings (CPR52.21(3). 52.21(4) provides that the Appeal Court “may draw any inference of

fact which it considers justified on the evidence”. No serious procedural or other irregularity is suggested in this case.

32. The role of appellate courts in reviewing a county court decision in order to decide if it is wrong has been frequently revisited. A useful summary is provided by Lewison LJ in *Fage UK Ltd and Anor v Chobani UK Ltd and Anor* [2014] EWCA Civ 5 at paragraph 114

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii) The trial is not a dress rehearsal. It is the first and last night of the show.
- iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”

And the earlier case of *Benmax v Austin Motor Company Limited* [1955] AC 370 at 375 where Lord Reid said:

“Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No-one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness’ memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations.”

33. In *Molodi v Cambridge Vibration Maintenance Service, Aviva Insurance Limited* [2018] EWHC 1288 (QB) and *Richards and Anor v Morris* [2018] EWHC 1289 (QB), a case also involving the question of whether a claimant had been fundamentally dishonest in bringing a personal injury claim, Martin Spencer J made the following observation of the role of an appellate court:

“The scope of an appellate court was further elucidated by the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 where it was held that there is a distinction between the finding of a specific fact and the finding of fact which is really an inference drawn from facts specifically found. In the case of “inferred” facts, an appellate tribunal will more readily form an independent opinion than in the case of “specific” facts which involve the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing. In the course of his judgment, Viscount Simmonds LC cited from the judgment of Lord Cave LC in *Mersey Docks and Harbour Board v Proctor* [1923] AC 253 at 258-9 where Lord Cave said:

“It is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.””

Viscount Simmonds went on to say:

“This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts.”

He made the same observations in paragraph 58 of *Richards*.

34. Martin Spencer J then directed himself as follows:

“However, where the trial judge has heard the evidence and has not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court effectively to overturn the trial judge’s conclusion in that respect and find that the claimant was dishonest despite not having seen the witnesses give evidence.”

35. The legal framework governing this appeal is set out in s.57 of the Act the material parts of which provide as follows:

“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 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.

36. The definition of dishonesty is as set out in *Ivey v Genting Casinos UK Ltd (trading as Crockfords Club)* [2017] UKSC 67, [2017] 3 WLR 1212. At para 74:

“These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does

not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. 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."

For completeness, the extract from *Barlow Clowes* set out in paragraph 62 of the *Ivey v Genting* judgment referred to above is as follows:

"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

37. A number of authorities have considered the meaning of "fundamental" used as an adjective to the word "dishonesty", a term that first appeared in CPR 44 in the context of when the qualified one-way costs shifting (QOCS) regime in personal injury claims. The leading authority is *Howlett v Davies & Anor* [2017] EWCA Civ 1696 in which the court of appeal approved the judgment of HHJ Moloney QC in *Gosling v Hailo* (29 April 2014 at Cambridge County Court) which analysed its meaning as follows:

"44..... 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 cost 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.”

38. In *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield* [2018] EWHC 501(QB) Julian Knowles J provided the following gloss:

“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 respect 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.”

39. But he went on to say:

“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 £9,000 is a trivial sum”

So the use of the term ‘substantially affects’ is therefore synonymous with ‘going to the root of’ or ‘going to the heart of’ and any one of the three may be used.

40. Julian Knowles J then set out a three step sequential approach to be adopted by courts when faced with an application by a defendant for the dismissal of claim under s.57 at paragraph 64:

“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.”

Analysis

41. This appeal is not a challenge to an evaluative exercise, but to the Recorder’s findings of fact. In *Re Sprintroom* relied on by Mr Poole, the issue before the court was not a challenge to a finding of fact – whether a specific finding of fact or a fact found by inference – but the conclusion of the court from its evaluation of the facts it had found. The issue was whether Dr Potamianos was entitled to relief on his unfair prejudice petition under sections 994 – 996 Companies Act 2006 when he had been found to have been in breach of his fiduciary duties as a director. The case analysed how the judge below had balanced the competing considerations and weighed the facts (see the discussion in paragraphs 69 – 78), not how the first instance court had reached its findings of fact. Paragraph 76 of *Re Sprintroom* is therefore not relevant to the issue in this appeal. It is an important distinction.
42. The court was helpfully taken to all the appellate decisions on the s.57 point. In *Haider v DSM Demolition* [2019] EWHC 2712 (QB) the challenge was to the adequacy of the judge’s reasoning in light of the claimant’s evidence which was “plainly dishonest” thus enabling Julian Knowles J to overturn the first instance judge’s conclusion. On the facts of that case the plain dishonesty was also demonstrably fundamental and went to the root of the claim. Similarly, in *Roberts v Kesson and Anor* [2020] EWHC 521 the claimant had accepted that parts of his first witness statement were dishonest. There was a mass of inconsistencies and inaccuracies in the claimant’s evidence and troubling non-compliance with disclosure orders on which the defendants based a submission that the claimant had been fundamentally dishonest. Jay J found that the short 14 paragraph judgment of the Recorder was inadequately reasoned and he had not considered the defendants’ contention that the claimant was fundamentally dishonest in relation to the primary claim. The findings of fact led inexorably to the conclusion that the dishonesty that the claimant had admitted went to the root of the claim. The Recorder was therefore wrong to have concluded otherwise.
43. In this case however the appellants have not put their appeal on the basis of an inadequacy of reasoning. They were right not to since the Recorder’s reasoning was full and comprehensive, but seek instead to challenge his findings of fact in an exercise akin to that of Martin Spencer J in *Molodi* and *Richards* which, as My Lord described, requires a very clear case indeed for an appellate court effectively to overturn the conclusions of the trial judge who has seen and heard the evidence.
44. In this case the Recorder was entitled to conclude from the respondent’s oral evidence in cross examination that he was not dishonest in relation to the claim. He had had a genuine accident caused by the negligent driving of the first appellant’s employee and had not sought to exaggerate his symptoms or the severity of his injuries. In his oral cross-examination it was readily apparent that he was unfamiliar with the contents of his statement, and as soon as the various matters were put to him, gave what the

Recorder was entitled to conclude was a true account and was entirely honest. When asked why certain documents and matters had not been disclosed or put in his statement he was as perplexed as Mr Poole. He repeatedly stated that he had given his solicitors every document that they had asked him for and had told them, for example, about his second job at Asda. He too was mystified as to why it had not been included in his statement.

45. As the Recorder noted, the respondent “happily volunteered” information that was detrimental to aspects of the special damages claim in his oral evidence. For example agreeing that he drove his vehicle to the mechanic and had stored it outside his house when storage and transportation costs had been claimed by his solicitors. He told the court he had attended only one physiotherapy session. He was also forthcoming about the amount he had sold the car for which was double the amount his solicitors had given as the salvage value.
46. The appellants quite properly observed that the respondent’s evidence that he had attended only one physiotherapy session meant that the invoice for eight sessions this was, at best inaccurate and at worst fraudulent, Mr Poole could also draw attention to the provisions of CPR 22 and the expression of a party’s belief in the accuracy of their statement of case, whether or not signed personally by that party. He similarly pointed to the fact of the respondent having personally signed the disclosure statements which contain a declaration of truth, as of course did the respondent’s witness statement.
47. The respondent was not asked to waive legal professional privilege and there was no evidence before the court as to what advice had been given to him by his solicitors about the various documents he had signed. The Recorder was entitled to conclude that the respondent did not understand the documents, whether those that he had himself signed, such as his witness statement, or those signed on his behalf by his solicitors, namely the Particulars of Claim and the Reply. The Recorder noted at paragraph 23:

“It seems to me that the explanation for that [a vehicle repair quotation] being omitted lies in the way in which his evidence was prepared. I am reluctant to criticise individuals or firms of solicitors or anyone else from whom, of course, I have not heard, but there are question marks, it seems to me, about what went into that statement and what was omitted from it.”
48. The Recorder was entitled to conclude that if there had been dishonesty it was not on the part of the respondent. It may also be relevant to note that the troubling aspects related to the heads of claim - such as the physiotherapy and credit hire claim - would not be paid to the respondent himself, but to solicitors for settlement of the purported invoices.
49. It is too bold a submission to assert that an inaccurate pleading or defective disclosure statement is synonymous with the respondent’s fundamental dishonesty. The test for dishonesty is that set out in *Ivey* cited above. Reference to the case of *LV v Zafar* [2019] EWCA Civ 392 (civ) does not assist. It concerned contempt of court which has its own definition, for which dishonesty is not a necessary ingredient¹. The test of recklessness

¹ In any event *Zafar* was an appeal against sentence, not conviction, and therefore has no relevance to the issues in s.57 of the Act.

is different to the test of dishonesty, even though recklessness in signing a false statement of truth, or disclosure statement may result in committal proceedings under CPR 81.18. But contempt of court is a different concept to dishonesty. There may also, of course, be cases where signing an inaccurate witness statement, statement of case or disclosure statement will be evidence of dishonesty, such as in *LOCOG v Sinfield* and *Roberts v Kesson* but it does not automatically follow. In this case the respondent was able to provide an honest explanation.

50. Mr Poole acknowledged that in an application under s.57(1)(b) of the Act the court is considering whether a *claimant* has been fundamentally dishonest, whereas in CPR 44.16 the court considers whether the *claim* is fundamentally dishonest, but relied on the obiter observation by Julian Knowles J in *Sinfield* at paragraph 60:

“...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.”

51. It may, perhaps, be a less rare occurrence than it seems when the benefit of the disputed elements of a claim (such as physiotherapy treatment, vehicle storage and transportation and credit hire fees) are not paid to a claimant for their benefit, but paid to the service provider, by a claimant’s solicitor. If the defendant solicitors consider that potential dishonesty lies with a claimant’s solicitor and not their client then surely their attention is better directed at the solicitor firms, rather than the hapless client who has instructed them? In this case we do not know anything about why Mr Michael chose NNE solicitors, nor of any links or commercial arrangements between NNE solicitors and the physiotherapy company, medical report company, engineers, garage or credit hire company. Where, as here, there was a genuine accident with genuine injuries and vehicle damage, but also aspects of the evidence which appear troubling or dishonest, a defendant may, in order to prove dishonesty on the part of a claimant him or herself, need to explore in evidence potential complicity or collusion by a claimant with their solicitor. It may depend in part on the adequacy of the explanation for the inaccuracies provided by the claimant. That did not happen in this case.
52. In this case the Recorder made a clear finding of fact at paragraph 51 that “I do not think that Mr Michael himself has been dishonest”. The discrepancies are explained by his lack of understanding. He rejected the submission that inaccuracies in the respondent’s statements of case and disclosure list were evidence of dishonesty but “it does not seem to me that I could be confident that the Claimant really knew what the basis of the claim made on his behalf was.” To put it in the language of the statute, the Recorder was not satisfied that the appellants had discharged their burden of proof. Each of the five points raised by the appellants in the appeal was addressed by the Recorder and his reasons for rejecting the appellants’ submissions set out in his judgment.
53. Those were findings of fact open to the Recorder with the benefit of having heard the evidence. He therefore correctly dismissed the appellants’ application. Whether or not the Recorder suspected that parts of *the claim* were dishonest, the recorder was perfectly entitled to conclude that *the claimant* was not. (Part 44.16 could perhaps have come into play, but may not have done as the respondent failed to beat a part 36 offer.)

54. This is a classic illustration of when the appeal court ought not to seek to go behind the careful findings made by the trial judge who has had the benefit of hearing and seeing the witness and reaching his own conclusion (see paragraphs 31-3 above). Whether drawn from specific findings of fact or by inference, it was the Recorder who was best placed to decide as a fact if the appellants had proved to the civil standard that the respondent had been dishonest. As *Ivey* makes clear the question of dishonesty is to be determined by the fact-finder, once the actual state of mind of the person alleged to be dishonest as to knowledge or belief as to facts has been established.
55. For the reasons the Recorder set out, as fact finder he found that the respondent was not dishonest. The Recorder in effect found that the respondent did not know about the claim for physiotherapy and other invoices claimed on his behalf and it is perhaps unsurprising that as a consequence he found that the respondent was not dishonest. I was briefly puzzled by the references in the judgment to the respondent being “not basically fraudulent” and contrasting him with a “determined fraudster”, when the finding of fact is that he was not dishonest and therefore not fraudulent whether basically or otherwise. If he was not dishonest, then it follows he would be neither a determined nor a lacklustre fraudster. It seems to me that I should prefer the express finding of fact and regard the use of the two phrases as mere infelicitous wording and draw no conclusions from them.
56. This case turned on the credibility of the respondent and as stressed in the authorities such as *Benmax* and *Fage* an appellate court must be very cautious indeed to interfere with the first instance court’s findings of fact. Although the entire record of the proceedings had been transcribed for the appeal, it is impossible to pick up nuance, intonation, pauses and the like from reading a transcript, or even tell why a witness’s sentence was incomplete (see paragraph 13 above). The Recorder was much better able to decide that the respondent was not feigning ignorance and dissembling when he appeared confused than the appeal court with only the transcript to go on. This case is an illustration of the importance of live evidence and the power of the trial process to establish the facts and ensure a just outcome for both parties. It was through Mr Poole’s advocacy that the incorrect, or deceitful, claim for physiotherapy was revealed for example and through the respondent’s oral evidence that the appellants were unable to establish that he had been dishonest.
57. This case can thus be easily distinguished from the evidence and the facts in *Molodi* and *Richards*. There can be no interference with the Recorder’s decision in this case.
58. The appeal is dismissed.

Postscript. On the afternoon before the handing down of this judgment listed, as the parties had been informed, for a 15 minute hearing, Mr Poole made further written submissions and additional proposed “corrections” to the draft judgment that had been previously circulated to the parties. The “corrections” went beyond the scope of 40EPD.3, seeking to add factual detail concerning the car hire claim that had not been included in the appeal bundle and on which no submissions had been made at the appeal hearing. I therefore did not incorporate the suggested revisions. The further submissions sought to re-open points made by Mr Poole at the appeal hearing which it is apparent from the judgment were rejected. There is nothing further to add.