Neutral Citation Number: [2024] EWCA Civ 552

Case No: CA-2023-001592

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROMTHE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Order of Mr Justice Richard Smith (24.7.2023)
[2023] EWHC 2313 (Ch)

ON APPEAL FROM THE COUNTY COURT AT
MAYOR'S AND CITY OF LONDON
(Order of HHJ Backhouse (20.4.2022)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2024

Before:

THE LADY CARR OF WALTON-ON-THE HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between:

1 Mr Hiren Thakkar	**Appellants**
2 Mr Pritam Patel	
3 Mr Navin De Costa Dassenaieke	
- and -	
1 Ioan Mican	**Respondents**
2 Axa Insurance UK PLC	

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Kevin Latham & Andrew Buchan (instructed by **Lincoln Harford Solicitors LLP**) for the **Appellants**
Roger Mallalieu KC (instructed by **DAC Beachcroft**) for the **Respondents**

Hearing date: 1 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

Introduction

1. This is an appeal by the appellants (the successful claimants in the underlying RTA claim) against the decision of Richard Smith J, dated 24 July 2023, in which he upheld the decision of HHJ Backhouse ("the trial judge") of 20 April 2022, in which she had refused to make an order for indemnity costs against the respondents (the losing defendants). The appeal raises the question of whether there is some form of default entitlement to indemnity costs on the part of a claimant (or at least a presumption to that effect), in circumstances where a defendant has unsuccessfully suggested that the claim is fundamentally dishonest.

The Material Facts

2. On 18 May 2017, the appellants and the first respondent were involved in a road traffic accident. The appellants contended that the first respondent drove his van into their car. The first respondent defended himself by saying that the first appellant pulled out from a parked position into the side of his van. The second respondent was the insurer of the first respondent.

3. The appellants' claims were set out in a Claims Notification Form on 31 May 2017. Liability was denied by the second respondent on 21 June 2017.

4. The accident was witnessed by Mr Bigesh Patel, who was not known and not related to any of the parties. On 27 December 2017, an investigator instructed by the second respondent called Mr Patel at his home address. Mr Patel was not there but the investigator told his uncle that Mr Patel was a witness, and may be accused of fraud.

5. Later that day the investigator telephoned Mr Patel and asked for telephone mandates to search his phone records, to which he agreed. The investigator did not tell him about his earlier message or mention the possibility of fraud. However, by the time the investigator rang again the following day, Mr Patel's uncle had told him about the possible accusation of fraud, and so Mr Patel withdrew his cooperation.

6. Proceedings were filed and served on 28 October 2020. On 19 November 2020, the respondents filed a defence stating that the appellant's credibility and honesty would be challenged at trial. Subsequently, on 6 May 2021, the respondents sought permission to amend their defence to allege fundamental dishonesty. The trial judge presided over the CCMC on 16 July 2021. She was unimpressed by the allegations of dishonesty, pointing out that "all the [respondents] had were doubts" and asking, "why on earth is there any basis for pleading fundamental dishonesty?". The relevant amendments were refused for these reasons:

> "3. Mr Buchan for the claimants calls this a storm in a teacup and I entirely agree with him. The matters put forward, in my judgment, come nowhere near what is required to be able to plead fraud and/or fundamental dishonesty. They are matters as to the happening of the accident and I should say that in road traffic accident claims it is often the case that the parties' accounts are entirely different but this is what the court is faced with day in, day out. The assessment of the witnesses and their independence is a matter for the court.

> This is, in truth, an absolutely standard road traffic accident which, for reasons that slightly baffle me, this particular fee handler at DAC Beachcroft has decided to label as fundamentally dishonest.
>
> 4. Now, of course Mr Waszak accepts that, if after cross-examination of the claimants and their witnesses there are grounds to do so, counsel for the defendants can make submissions as to fundamental dishonesty at the trial but on what we have currently, I consider that it is not in the interests of justice or proportionate to grant the defendants permission to amend the defence as requested, so that application is dismissed."

It was therefore understood that these allegations were not and did not need to be pleaded (as per *Howlett v Davies* [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948, CA), but that the respondents were not prevented from raising them at trial. However, I would add that such allegations should only be raised if it was appropriate to do so, and in accordance with the professional obligations of both counsel for the respondents and his instructing solicitors. The trial judge's judgment did *not* amount to some sort of open-ended permission to the respondents to run dishonesty arguments come what may.

7. The trial took place over two days on 19 - 20 April 2022. In her judgment, the trial judge found in favour of the appellants. She did so largely on the basis that the evidence of Bigesh Patel, which she accepted, demonstrated that the first respondent had been at fault for the accident. She did not expressly address any suggestions of fraud and dishonesty; she addressed and resolved the issues on the basis that it was a straightforward RTA claim. In addition, contrary to the submission at paragraph 4p of the appellants' skeleton argument, the trial judge did not find, and there is no reason to infer, that the first respondent had lied in his evidence. The trial judge simply found the recollection of the appellants, and particularly that of Bigesh Patel, was more reliable than his. The appellants did not cross-examine the first respondent on the basis that he was lying; nor did they seek a finding of dishonesty against him at trial. It is no part of the Grounds of Appeal that the trial judge erred in not finding that he was dishonest.

8. That left a debate about costs, which is at the heart of this appeal. However, the issue in respect of costs is, on analysis, much more limited than at first appears. This is because:

(a) It has subsequently been accepted that the appellants' costs up to 6 May 2021, when the respondents first sought permission to amend to allege fundamental dishonesty, should be assessed on the standard basis. That was properly conceded by Mr Buchan, on behalf of the appellants, during the appeal hearing before Richard Smith J below (see in particular pages 4A and 5F-G of the transcript). It is accepted that this point should have been (but was not) mentioned in the application for permission to appeal the decision of Richard Smith J.

(b) The trial judge's order of 20 April 2022 stated at paragraph 15 that the appellants' costs of the trial (namely the costs after 18 April) would be assessed on the indemnity basis. This was because the appellants had bettered the relevant offer under CPR Part 36.

9. In this way, the only element of the costs that now remains in issue are the costs from 6 May 2021, when the application to plead fundamental dishonesty was made, up to the start of the trial. The appellants sought to have these costs assessed on the indemnity basis. The respondents argued that those costs should be assessed on the standard basis. The trial judge agreed with the respondents. The trial judge's reasons for refusing the application for indemnity costs are dealt with in greater detail below.

10. On 11 May 2022 the appellants appealed the trial judge's decision on costs. On 24 July 2022, Richard Smith J dismissed the appeal at [2023] EWHC 2313 (Ch). He concluded at [11] - [16] that the trial judge had not misdirected herself in law, and at [17] – [23] that she was entitled to exercise her discretion in the way that she did.

11. The Grounds of Appeal are extensive but, as usefully filtered through the skeleton argument provided on behalf of the appellants, they can be pared down to three issues. The first is that the trial judge misdirected herself as to the test to be applied when considering indemnity costs and/or that the absence of proper reasons in her decision was sufficient to throw real doubt on the test that she applied. The second is that, in all the circumstances, the trial judge reached a conclusion which no reasonable judge could have reached; that the refusal to award indemnity costs to the appellants was perverse.

12. The third ground is identified at paragraph 18f of the appellants' skeleton: it is said that, in Commercial and Chancery cases, the failure of allegations of fundamental dishonesty attract "a presumption" that indemnity costs will be awarded, and that the same approach should apply in personal injury cases. An element of this same submission is that such a presumption would reverse the burden of proof: hence the complaint, at paragraph 9c of the appellants' skeleton argument, that the trial judge "failed to identify a single issue or feature which pointed **against** making the award sought by the appellants" (emphasis added). It was this point of principle which led to the granting of permission to bring this second appeal.

13. It is appropriate, therefore, to take this third issue first. If the appellants are wrong to submit that there is some form of default entitlement to indemnity costs (or, at the very least, a presumption to that effect), in favour of a claimant who has defeated fraud or dishonesty allegations, then this appeal becomes a more straightforward analysis of the exercise of the trial judge's discretion as to costs, and the particular points about the applicable test and the adequacy of her reasons.

The Relevant Costs Matrix

14. Before turning to that point of principle, it is appropriate to set out the general position as to costs in cases of this sort. In the first instance, RTA claims start under the RTA protocol, where there is a regime of fixed recoverable costs. A denial of liability takes the case out of the RTA protocol, but the fixed recoverable costs regime remains in place, unless the case is allocated to the multi-track. This case was allocated to the multi-track and, although the respondents sought to have it re-allocated to the fast track at the CCMC, the trial judge was rightly dismissive of such a suggestion, particularly given their persistence in the suggestions of dishonesty, the number of witnesses to be called, and so on. Accordingly, by the time of the CCMC, this case was no longer under the fixed recoverable costs regime. Instead, the trial judge undertook a costs budgeting exercise.

15. Because this was a claim for personal injury, it was covered by CPR Rule 44.13(1), which meant that the Qualified One-Way Costs Shifting ("QOWCS") regime applied. Pursuant to that regime, save for particular exceptions, the general effect of r.44.14(1) is that, if a claimant's personal injury claim is unsuccessful, the defendant is not able to enforce any order for costs against the claimant. The exceptions to QOWCS include, under r.44.15(c), where the conduct of the claimant is likely to obstruct the just disposal of the proceedings and, under r.44.16(1), where a costs order in favour of a defendant may be enforced to the full extent of the defendant's costs "where the claim is found on the balance of probabilities to be fundamentally dishonest."

16. Thus, it is a potential way round the QOWCS regime for a defendant or his/her insurers (such as the second respondent in this case) to raise allegations of fundamental dishonesty. Despite what was said during the hearing in this case, and indeed in the judgment, this type of fundamental dishonesty allegation is nothing to do with s.57 of the Criminal Justice and Courts Act 2015 ("the 2015 Act"), which is concerned with the dismissal of the primary claim. This is different situation: if a defendant can bring themselves within r.44.15 or r.44.16, then the QOWCS regime does not apply and a claimant is personally at risk of enforcement in respect of any costs orders made in favour of the defendant.

17. From the perspective of a successful claimant, an order for indemnity costs is always seen as much more advantageous than any other sort of costs order. Although Mr Mallalieu KC gave examples of other ways in which a claimant's costs can be enhanced in these sorts of circumstances without such an order (such as where, as here, the costs were budgeted to make some allowance for the fundamental dishonesty allegations; or because conduct can be taken into account on the assessment of costs generally (r.44.4(3)(a)), and may also amount to a "significant development" justifying an increase over figures previously budgeted (r.3.15A(5)), I incline to the view that an order for indemnity costs will usually represent a significant victory for any receiving party. That is because r.44.3(3) provides that, if indemnity costs have been ordered, doubts as to whether the item of cost in question was reasonably incurred or reasonable in amount are resolved in favour of the receiving party. Its potential value is, of course, the reason why the courts must ensure that an order for indemnity costs is only made in an appropriate case.

Is There a Default or Entitlement to (or at least a Presumption in Favour of) Indemnity Costs in These Circumstances?

(a) The Applicable Legal Principles

18. On any appeal concerned with costs, a good starting point are the words of Wilson J (as he then was) in *SCT Finance Ltd v Bolton* [2003] 3 All E.R. 434 at [222], where he noted "the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him…For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely". The same point was made by this court in *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201 at [68].

19. It is convenient to summarise, without going to the authorities in laborious detail, the general principles applicable to the award of indemnity costs. They are:

(a) The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances of the case, including but not limited to the conduct of the paying party: see *Three Rivers DC v The Governor of the Bank of England* [2006] EWHC 816 (Comm)); *Digicel (St. Lucia) Limited v Cable and Wireless PLC* [2010] EWHC 888 (Ch); and *Excalibur Ventures v Texas Keystone & Others (No 2)* [2016] EWCA Civ 1144, [2017] 1 W.L.R. 2221 at [21].

(b) In order to obtain an order for indemnity costs, the receiving party must surmount a high hurdle; to be able to demonstrate "some conduct or some circumstance which takes the case out of the norm. That is the critical requirement": see Lord Woolf in *Excelsior Commercial & Industrial Holdings Limited v Salisbury* [2022] EWCA Civ 879, [2022] C.P. Rep. 67 at [32]). Whilst it is preferable for the judge expressly to apply the test of "out of the norm", the use of the word "exceptional" may be consistent with the judge having applied the principles in *Excelsior:* see *Whaleys (Bradford) Ltd v Bennett* [2017] EWCA Civ 2143; [2017] 6 Costs L.R. 1241 at [21] (Newey LJ).

(c) To the extent that the application is based on the paying party's conduct, it is necessary to show such conduct was "unreasonable to a high degree" in order to recover indemnity costs (see *Kiam v MGN Limited* [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810), but it is not necessary to go so far as to demonstrate "a moral lack of probity or conduct deserving of moral condemnation" on the part of the paying party (see *Reid Minty v Taylor* [2002] 2 All E.R. 150).

(d) Merely because the conduct in question may happen regularly in litigation does not mean that such conduct cannot also be 'out of the norm': "in my view the word 'norm' was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as 'normal', but was intended to reflect something outside the ordinary and reasonable conduct of proceedings": see *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [25], in the judgment of Waller LJ.

20. Since the judge has such a wide discretion when it comes to costs, the courts have repeatedly made it clear that the court should avoid going beyond the CPR to identify rules, default positions, presumptions, starting points and the like, when addressing costs disputes. Lord Woolf made that point in *Excelsior* at [32]:

> "In my judgment it is dangerous for the court to try and add to the requirements of CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge…"

21. As to allegations of dishonesty, there are many cases which demonstrate that, if a claim is found to be dishonest, the judge will very often award indemnity costs against the claimant: see *Three Rivers DC* at [25(5), (6) and (8)], and *Esure v Quarcoo* at [25] – [27]. In addition, there are a number of first-instance authorities which touch on the opposite question: where allegations of dishonesty are pursued and fail, is there a default position, or a presumption, that the party who relied on those allegations is liable to pay the entirety of the others side's costs on an indemnity basis?

22. In *Clutterbuck v HSBC PLC & Ors* [2015] EWHC 3233 (Ch); [2016] 1 Costs L.R. 13 Richards J (as he then was) said at [16]:

> "The general provision in relation to cases in which allegations of fraud are made is that, they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud, indemnity costs are not appropriate…"

23. In *Natixis S.A. v Marex Financial Limited* [2019] EWHC 3163 (Comm); [2020] 2 All E.R. (Comm) 867, Bryan J noted the submission, based on *Clutterbuck*, that "the starting point at least was that if you made a fraud claim and pursue it and either withdraw it or lose at trial, the starting point is that an order for indemnity costs is the appropriate order". But, as Bryan J found, the court retained a complete discretion as to what the appropriate order as to costs would be in all the circumstances: see [49]. He took the failed/withdrawn allegations of fraud as his starting point when he considered all the circumstances, and concluded on the facts that the fraud claim was one where there was no, or no sufficient, evidence to support or justify it. He therefore awarded indemnity costs.

24. In *Bishopsgate Contracting Solutions Limited v O'Sullivan* [2021] EWHC 2628 (QB); [2021] Costs L.R. 1357, Linden J considered the submission that, in the circumstances of a failed fraud claim, indemnity costs automatically followed. He addressed this category at [15](iv):

> "iv) where allegations of fraud or dishonesty are made which have failed: see *Clutterbuck* v *HSBC plc* [2015] EWHC 3233 (Ch) at paras 16 and 17. In relation to this authority, Mr Forshaw came close to submitting that as a matter of course, if allegations of fraud or dishonesty have failed, costs must be ordered to be assessed on an indemnity basis. In so far as that was his submission, I do not agree. There is, in my view, no such rule in the context of applications for indemnity costs although, as I have said, where such allegations are made and fail, that may be a reason for making such orders…"

25. Finally, in *Libyan Investment Authority v Roger Milner King & Ors* [2023] EWHC 434 (Ch) Miles J referred to a number of the authorities and concluded at [9]:

> "9. It seems to me in the light of these authorities that the failure of a case of fraud or dishonesty is a factor that the court may take into account in deciding on the basis of assessment but there is no automatic [or] rule that the making of such allegations which fail at trial will justify an order for indemnity costs or even operate as a starting point in the sense that the paying party is then required to explain why indemnity costs are not appropriate. It is also right to recall that the default position is that standard costs are to be paid unless the court orders otherwise."

(b) Analysis

26. It is first necessary to identify the precise submission of principle that Mr Latham was making on behalf of the appellants. As I have indicated, in his written submissions, he talked about a "presumption" in favour of indemnity costs where allegations of fundamental dishonesty have been rejected by the judge. In his oral submissions, he put this slightly differently, saying that there was a "starting point" in favour of indemnity costs. He disavowed the suggestion that there was a rule that indemnity costs would automatically be payable in these circumstances.

27. When asked what the effect of his starting point would be, Mr Latham said that it would reverse the burden of proof, and mean that the paying party would have to demonstrate why indemnity costs were *not* payable so as to avoid such an order. So, in the final analysis, it may not matter precisely how this principle is expressed. What matters for the appellants' case is that there is a principle of law or practice which tilts the balance of the judge's otherwise unfettered discretion in favour of an order for indemnity costs.

28. In my view, there is no such presumption or even starting point (if the use of the latter term is intended, as Mr Latham argued, to reverse the ordinary burden of proof). I consider, therefore, that the submission noted at paragraph 12 above is wrong in law. I explain why below. But nothing that I say there is intended to detract in any way from this statement of the obvious: that, because the making of a dishonest claim will very often attract an indemnity costs order against a claimant, a failed allegation of dishonesty will very often lead to the making of an indemnity costs order against the defendant, on the simple basis that "what is sauce for the goose is sauce for the gander": see Tomlinson LJ in *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12; [2017] 1 Costs L.R. 89 at [42]. A defendant who makes allegations of this kind therefore runs a very significant risk that, if the allegations fail, indemnity costs will be awarded against them.

29. As to the existence of a presumption or a starting point which tilts the balance in favour of an order for indemnity costs before any consideration of the circumstances, I respectfully agree with the views expressed by the first instance judges in *Clutterbuck, Natixis, Bishopsgate,* and *Libyan Investment,* all cited above. Their analysis makes plain that there is no such presumption or reversal of the ordinary burden of proof. It will always depend on the circumstances of the particular case, and the judge retains a complete and unfettered discretion. It may be that, in an appropriate case (like *Natixis*), the failure might be the starting point for any consideration of those circumstances but, as Miles J noted in *Libyan Investment*, that does not, in some way, reverse the burden of proof, or put the burden on the paying party to explain why indemnity costs are not appropriate. Bryan J did not suggest anything of the sort in *Natixis*, and he applied no presumption or reversal of the usual burden. The default position is always that standard costs will be assessed and paid, unless the party seeking indemnity costs can demonstrate why they are appropriate in all the circumstances.

30. I consider that any other conclusion would fetter the court's broad discretion in respect of costs in any given case, and would give rise to the very danger which Lord Woolf warned against at [32] of *Excelsior*, cited at paragraph 20 above: the court must avoid the temptation to create rules which cannot be found in the CPR.

31. It is often argued on behalf of parties seeking to persuade this court of an automatic or default entitlement to a particular costs outcome that refusal will act as an unwarranted restriction on access to justice. This case is no exception, and the appellants' access to justice arguments were outlined in paragraphs 18k-22 of their skeleton argument. They were not at the forefront of Mr Latham's oral submissions but, in any event, I reject them. There can be no restriction on access to justice to observe that, in cases of failed dishonesty allegations, the court will often make orders for indemnity costs against the paying party, but that the ultimate decision is a matter for the trial judge, based on all the circumstances of the case. That is the same principle applicable to almost any debate about costs.

32. For these reasons, I reject the point of principle said to arise in this case. I then turn to deal with the specific points taken about the trial judge's judgment.

Did the Trial Judge Apply the Wrong Test and/or Fail to give Adequate Reasons?

(a) The Law

33. The leading case on reasons is *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605: [2002] 1 W.L.R. 2409. The Court of Appeal held that a judicial decision which affected the substantive rights of the parties should be reasoned and that, while a judge was not obliged to deal with every argument or identify or explain every factor which weighed with him/her, the issues the resolution of which were vital to his/her conclusion should be identified and the manner in which he/she resolved them briefly but clearly explained. In relation to orders as to costs, Lord Phillips said at [14] that, "where the reason for an order as to cost is not obvious, the judge should explain why he or she has made the order. The explanation can usually be brief."

34. In relation to orders or judgments as to costs, Lord Phillips went on to say:

> "30 Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the court: see the comments of Sachs LJ in *Knight v Clifton* [1971] Ch 700, 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

35. That approach can most recently be seen in the judgment of Nugee J (as he then was) in *Easteye Ltd v Malhotra Property Investments Ltd & Ors* [2019] EWHC 2820 (Ch); [2019] Costs L.R. 2181. There, the judge carrying out the costs budgeting had made a reduction of £90,000 (£210,000 down to £120,000) in respect of the claimant's trial phase without providing any reason beyond his conclusion that leading counsel was not appropriate. Nugee J rejected the contention that insufficient reasons had been provided, noting that, in costs matters, decisions are often summary and that the matter had been before the experienced judge twice before. He reiterated that "judges

should be assumed to know what they are doing, unless it can be shown that they have gone wrong".

36. As to the approach of an appellate court to issues of this kind, Lord Phillips said at [26] of *English*:

> "26 Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this court, in the light of *Flannery's* case in *Ludlow v National Power PLC* (unreported) 17 November 2000; Court of Appeal (Civil Division) Transcript No 1945 of 2000. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial."

(b) The Submissions and the Trial Judge's Judgment

37. In accordance with Lord Philips' reference to the context provided by the submissions at trial, I start with the submissions that were made to the trial judge about indemnity costs, and her resolution of that issue. Counsel for the appellants, Mr Buchan, said this:

> "I wanted to just raise one matter because the spectre of fundamental dishonesty has been — Although the application was rejected by your Honour, my learned friend has not abandoned it at all, even in his final submissions. That has been hanging over the head of all three claimants. It explains why senior counsel has been instructed and indeed by both sides, and I would submit that this is a case which is an appropriate case for indemnity costs to be awarded because of the way the defendants have defended this case."

38. Following equally brief submissions in response, to the effect that there was nothing "sufficiently exceptional" about this case to warrant an order for indemnity costs, Mr Buchan's reply was succinct:

> "Your Honour was not to know that the defendants would continue to pursue the allegation of fundamental dishonesty"

That was the extent of the submissions on costs that the trial judge received.

39. She then went on to deal with the issue costs in a short *ex tempore* judgment:

> "1. The claimants apply for indemnity costs on the basis that, notwithstanding the dismissal of the Defendants' application to amend their defence to plead fundamental dishonesty on the part of the Claimants, the Defendants have not

> resiled from the allegation of fundamental dishonesty or at least, they have reserved their position to argue that at trial.
>
> 2. Of course, the possibility of arguing fundamental dishonesty is there in law. Parliament has enshrined it. It does not have to be pleaded. I would say in this case, as I said a year ago when dismissing the Defendants' application, that I had my doubts as to whether this was a proper case for raising and pursuing the allegation of fundamental dishonesty, at least to the extent it was. There was nothing in this case beyond the fact that there were three claimants all saying the same thing, and, as Mr Sharpe submitted, one would not be mistaken about pulling out. In addition, there was the hearsay evidence from the investigator as to what Mr Bigesh Patel's uncle had allegedly said to the investigator. Certainly, the case had none of the hallmarks of the sort of fundamentally dishonest fraudulent claims that this court sees all too frequently. I do wonder whether Parliament intended that blunt tool to be used for cases like this.
>
> 3. Before the Act, this was the type of case where the court would simply hear the evidence and decide who was telling the truth. Whilst I understand, of course, that insurers must look at cases and investigate claims properly, I think it would be very sad if public spirited people like Bigesh Patel were deterred from coming forward as witnesses in either this kind of case or to assist the police because of worries of being accused of fraud. I would say that I think that the raising of fundamental dishonesty has caused, quite clearly, both parties to incur far more costs than were necessary. But I cannot say that the conduct of the Defendants meets the test for indemnity costs. It is a highly unfortunate situation, and I would hope that AXA and other insurers would use their resources in perhaps a more targeted fashion. I will not award indemnity costs."

40. This all happened at the end of the second day of a trial, following an *ex tempore* judgment on the issues of liability and quantum, with counsel and the trial judge rightly keen to resolve everything then and there. Of course, submissions must be accurate and cover the key points, but they can be short, as can the subsequent judgment. That provides an important backdrop against which the appellants' subsequent criticisms must be viewed.

(c) Analysis

41. The first question is whether the trial judge applied the wrong test. The complaint is that the trial judge adopted the proposition put forward by the respondents, to the effect that the test was the exceptionality of the respondents' conduct. It was said that this was an error of law because she did not refer to "out of the norm". It is also said that she erred because she only considered conduct, and not all the circumstances of the case.

42. I reject both elements of that submission.

43. As to the criticism that the trial judge applied the test of exceptionality, rather than "out of the norm", there are two points. First, the submission is unfounded as a matter

of fact, because the trial judge used neither expression in her judgment, a point made by Richard Smith J at [11] of his judgment on the first appeal. I note that counsel on behalf of the appellants did not identify "out of the norm" as the relevant test, nor seek to correct counsel for the respondents when he referred to exceptionality. So if this complaint is well-founded, it is based on what the appellants must now say was an omission on their part, which is never an attractive stance. But it was not an omission at all. As Newey LJ noted in *Whaleys*, although it is always better to use the expression "out of the norm", there was, on the facts of that case, no difference between the two concepts. The same is true here. In my view, that explains why Mr Buchan did not feel the need to comment on the reference to "exceptionality"; everyone – including the trial judge - knew what the test was and how it was to be applied.

44. As to the trial judge's reference to conduct, it is clear that, having just given judgment at the end of the trial, she either had express regard to all the relevant circumstances in the three short paragraphs of her judgment or it must be assumed that she did. Mr Latham said that there were three key circumstances that made indemnity costs appropriate: the respondents' persistence in the allegations, the fact that the allegations had hung over the appellants' heads for a long time; and the potentially detrimental effect that such allegations might have on independent witnesses like Bigesh Patel. But in her short judgment the trial judge expressly referred to the respondents' persistence in making the allegations of dishonesty; and she expressly referred, in both her judgment at the CCMC and her judgment on costs, to the risk that the conduct of the respondents might deter independent witnesses like Bigesh Patel. As to the fact that the allegations had hung over the appellants' heads for a long time, she was only too aware of that, because she had conducted the CCMC the year before as well as the trial. So in the present case, seeking to categorise the relevant matters as 'conduct' or 'circumstance' is creating a distinction without a difference: all the relevant matters were, or must be assumed to have been, taken into account by the trial judge.

45. That then leaves the adequacy of the trial judge's stated reasons. In my view, the reasons stated in the judgment were sufficient to explain the order she made. First, the trial judge had just tried the case and was therefore aware of (and certainly must be assumed to have been aware of) all the material circumstances. Second, she explained that, although she was not uncritical of the respondents' conduct, she had concluded that, in all the circumstances, this was not a case that met the high hurdle for indemnity costs. Third, this was a short point, dealt with succinctly by the appellants' counsel, and matched in brevity by the trial judge's answer. It is unrealistic and unfair to criticise the trial judge for not setting out at length her reasons for rejecting such a short submission.

46. The trial judge also identified one particular reason for her order, namely that she doubted whether this was ever really a case where fundamental dishonesty was in issue. That echoes her ruling at the earlier CCMC. It is clear that the trial judge had always regarded the raising of the dishonesty allegations in this case as "a storm in a teacup" (see paragraph 6 above) and did not think that this was a case where those allegations would or did make any real difference to the outcome. Unlike other cases, where issues of dishonesty can involve evidence from investigators, covert CCTV footage and the like, it is clear that the trial judge regarded this throughout as a typical

RTA case, not a typical fundamental dishonesty case. That was a point that Richard Smith J made in his judgment at [19]. That was an additional reason why the trial judge was entitled to consider that the raising of such matters here did not meet the high hurdle for indemnity costs.

Was the Trial Judge's Judgment Perverse?

47. Finally, it is necessary to stand back and consider whether the trial judge's refusal to order indemnity costs was perverse: was it one which no reasonable judge could have reached?

(a) The Law

48. This court has repeatedly emphasised that the test on appeal against a judge's decision where there has been no error of law is not whether the appellate court would have come to a different decision on the facts, but whether the judge reached a conclusion which no reasonable tribunal could have reached: see, merely by way of recent example, *Volpi and Another v Volpi* [2022] EWCA Civ 464 at [2ii)].

(b) Analysis

49. Mr Latham's submission was that at paragraphs 2 & 3 of the judgment on costs (paragraph 39 above) the trial judge identified various circumstances of this case which all pointed in favour of an order for indemnity costs. So he said that the penultimate sentence of paragraph 3, which started with the word "but", stated a conclusion which was at odds with all that had gone before. He said that, in the absence of any counter-balancing factors which explained why indemnity costs were *not* appropriate, the trial judge's conclusion was perverse.

50. That submission was powerfully argued. But, in my view, it comes at the issue from the wrong angle. I do not consider that this is one of those situations where a judge has to balance, on the one hand, all of the factors in favour of a particular course of action, and, on the other, all the factors against that same course of action. Instead, when considering an order for indemnity costs, the judge has to decide whether the high hurdle, as explained in the authorities, has or has not been reached. There may be a number of reasons which might suggest that an order for indemnity costs was appropriate, but which, in the final analysis, do not ultimately get the receiving party over that high hurdle.

51. In my view, that was the approach that the trial judge took here. She was aware of all the relevant facts. She knew what was needed to demonstrate an entitlement to indemnity costs. On these facts, she concluded that, although there were some matters which possibly pointed that way, the necessary high hurdle had not been surmounted. Other judges (and I am one of them) might have reached a different view. But that is not the test. The trial judge plainly reached a conclusion that was open to her in all the circumstances. Her conclusion on costs was not perverse.

Conclusion

52. For all these reasons, I take the view that the trial judge had proper regard to the right test, considered all the circumstances of the case, and concluded that, although

criticisms could be made of the respondents, this was not a case in which those criticisms should be marked by an order for indemnity costs. That was a view to which she was entitled to come, in the exercise of her discretion, particularly in circumstances where there was no principle of law that she had failed to follow or apply. Other judges may have reached a different view but, given the width of the discretion allowed to her, I am in no doubt that the trial judge was within it, and Richard Smith J was right so to hold.

Disposal

53. For these reasons, if my Ladies agree, I would dismiss this appeal.

LADY JUSTICE ASPLIN

54. I agree with both judgments.

THE LADY CHIEF JUSTICE

55. I also agree and would add only this. This litigation has been characterised by parties on both sides far too ready to throw unnecessary and serious allegations against each other. In the appellants' case, this occurred from the very outset. The appellants' solicitors first email response to the second respondent spoke of the first respondent's "reckless" driving; within weeks they were referring to what they described as the first respondent's "fabrication of the truth" and "perversion of justice", and indicating that they would be seeking to recover their costs from the respondents on an indemnity basis.

56. As the trial judge recognised, this was a relatively straightforward road traffic accident case involving conflicting witness evidence. It should have been approached by the parties as such, all in accordance with the overriding objective. The trial judge is to be commended for her attempts throughout to lower the temperature, particularly at the CCMC on 16 July 2021. As the courts have made clear repeatedly, an unnecessarily aggressive approach to litigation is unacceptable (see *Excalibur Ventures LLC v Texas Keystone Inc (Costs)* [2013] EWHC 4278 (Comm) at [48]; *Collier v Bennett* [2020] EWHC 1884 (QB); [2020] 4 WLR 116 at [13]; *Bates and others v Post Office Limited* [2018] EWHC 2698 (QB) at [58]). Potential costs incentives are not a good reason for making unwarranted allegations of misconduct, let alone dishonesty. The unfortunate effect of the parties' conduct was to increase not only aggravation to an independent witness but also costs on both sides.