Neutral Citation Number: **[2023] EWHC 1724 (KB)**

Case No: QB-2022-002964

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2023

Before :
MR JUSTICE CONSTABLE

- -

Between :

NOTTINGHAM UNIVERSITY HOSPITALS NHS TRUST

Claimants

- and -

SVEN RAYMOND BOGMER

Defendants

- -
- -

Romilly Cummerson (instructed by Browne Jacobson) for the Claimants
The Defendant did not appear and was not represented

Hearing date: 4 July 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 10th July 2023.

Mr Justice Constable:

Introduction

1. This is an application for the committal of the defendant, Mr Sven Raymond Bogmer, for contempt of court. The application is brought by the Nottingham University Hospitals NHS Trust ('the Trust'), with permission granted by His Honour Judge Anthony Dunne following a remote hearing which Mr Bogmer attended by CVP on 31 March 2023. Mr Bogmer was reminded at the hearing and on the face of the Order sealed by the Court that it was in his interests to seek legal representation and he is entitled to a reasonable opportunity to obtain legal representation and to apply for Legal Aid which is available.

2. The allegation is that Mr Bogmer advanced a false and dishonest claim for compensation arising out of clinical negligence in relation to a coronary artery bypass procedure performed in October 2014. Mr Bogmer alleged that he had suffered a nerve injury to the right arm as a result of harvesting of the right radial artery to use as a graft in the bypass procedure. The Trust contends that the Defendant made false statements regarding the nature and extent of the loss of function of his right arm and/or falsely represented that the symptoms he experienced were caused by the index surgery when such loss of function as he actually suffered from predated the surgery or were otherwise unrelated to it.

3. It is alleged that, in the course of bringing his dishonest claim Mr Bogmer made numerous false statements in documents verified by statements of truth and false statements to medico-legal experts instructed by both parties for the purposes of his clinical negligence claim, when he knew those statements to be false and/or he consciously and dishonestly exaggerated his symptoms with the intention of recovering compensation to which he knew he was not entitled.

4. The true position was discovered by the Trust, it is alleged, as the result of a forensic review of his medical and DWP records and by covert surveillance conducted on the Trust's behalf.

5. In the course of the proceedings, Mr Bogmer served a Schedule of Loss, verified with a Statement of Truth, which made claims totalling £227,990 with three further heads of loss marked as TBC. The proceedings were concluded in January 2021 when Mr Bogmer accepted a drop hands offer, following service of the Trust's surveillance evidence and the joint statement of the Neurosurgery/ Hand Surgery experts in which they detailed their views on the surveillance and inconsistencies within the medical records. At that stage costs incurred by the Defendant investigating and defending the claim amounted to over £90,000.

6. The application to bring these committal proceedings was issued in September 2022, some 20 months after the settlement of the claim. The delay in bringing these proceedings was acknowledged and explained by Mr Paul Wainwright, solicitor for the Trust, in his Affidavit dated 5 August 2022 and was no doubt taken into account by HHJ Dunne when considering whether bringing these proceedings was in the public interest at the permission hearing.

7. Mr Bogmer issued an Acknowledgement of Service stating:

> "*I would like the claimant to drop the claim*" and
>
> "*…I bought a claim against [the Trust] for negligent medical treatment but agreed to stop the claim with each side bearing their own costs. My medical evidence supported by my claim, but with the evidence disclosed I was advised the claim was [finely] balanced and should not be pursued to [trial]. No decision was made at court on the evidence. I deny that I intentionally [misled] anyone.*"

8. Mr Bogmer attached a letter from the Trust from Dr Rao, a Consultant Medical Oncologist, containing a diagnosis of metastatic clear cell renal cell carcinoma (i.e. kidney cancer).

9. Following the granting of permission, the parties were directed to file and serve any further written evidence upon which they intend to rely by 5 June 2023, and to apply to the court to cross examine any witness at the committal hearing by 11 June 2023. As stated above, Mr Bogmer was reminded that he should obtain legal representation and apply for Legal Aid, to which he should be entitled given the seriousness of the allegations and the quasi-criminal nature of committal proceedings. Mr Bogmer did not attend the committal hearing on 4 July 2023 and, for the reasons I explain further below, I decided that it was appropriate to proceed in Mr Bogmer's absence.

10. I thank Ms Cummerson for the fair and balanced manner in which she assisted the Court in the prosecution of the application on behalf of the Trust, and I also extend my thanks to Mr Wainwright, solicitor for the Trust, whose numerous communications with Mr Bogmer which I have read exemplify the great professionalism, courtesy and sensitivity in dealing with difficult matters of this nature with a litigant in person of which the legal profession should be proud.

<u>Background and the original claim</u>

11. Mr Bogmer moved to the UK from Sweden, with his English wife in 2010. His Swedish medical records reveal that he had been involved in very heavy physical work in Sweden, that he had been on sick leave since 1999 due to an occupational injury (tennis elbow) in the right elbow and that he had suffered nerve damage during surgery to treat the injury, which affected the function in his right arm and hand. An entry in his Swedish records dated 16 February 2005 stated that he had been on sick leave since 1999 and avoided moving the right arm that was now very weak. In addition, on 12 May 2009 he was noted to be registered as 75% disabled due to long-term pain problems in the neck. A further assessment on 1 March 2010 indicated that he was now 50% disabled and was working 5 hours per week. However, Mr Bogmer did not agree with that assessment and still considered himself to be 75% disabled.

12. Following his arrival in the UK, Mr Bogmer's UK medical records and interactions with social security also reflect a history of his reporting ongoing restriction of function in both arms/hands. For example, on 9 August 2011 Mr Bogmer made a claim for Disability Living Allowance (DLA), in which he stated, amongst other things, that he required assistance with the preparation of meals; that he required a special knife and fork because he, "*cannot grip normal ones*"; that he needed help to get in and out of bed every day and during the night; that he needed help with washing, drying, using the shower and getting out of the bath; that he didn't, "*have*

feeling in my hand and cannot grip or feel pain"; that he had difficulty with fine motor skills such as holding a toothbrush; and that he could not go fishing without assistance. He further noted that he had falls on a daily basis as a result of coughing fits that caused him to pass out.

13. Mr Bogmer's carer completed a section of the DLA claim form, in which, in addition to the restrictions and needs described by him, the carer reported that Mr Bogmer required constant supervision due to Chronic obstructive pulmonary disease (COPD) induced blackouts.

14. In addition to the medical problems noted above, Mr Bogmer has a history of angina and had undergone coronary artery stenting in Sweden in or about 2009 and again in Kingsmill Hospital, Nottingham on 25 July 2013. In the summer of 2014 his condition deteriorated and a CT angiogram on 1 August 2014 revealed that the stent fitted in July 2013 was already becoming blocked. He was, therefore, referred to Mr. Naik, at Nottingham City Hospital for coronary artery bypass surgery. Pre-admission clerking took place on 8 October 2014 and on 16 October 2014 the Defendant underwent coronary artery bypass surgery at the Claimant's hospital. The procedure involved using the right mammary artery as a bypass graft, extended by the right radial artery to reach the posterior descending artery.

15. The surgery was successful. However, Mr Bogmer alleged that he had suffered a nerve injury to the right arm due to the harvesting of the right radial artery. Thereafter, and as appears below, Mr Bogmer continued to complain of a significant injury to the right arm causing increasing weakness and loss of function in the right arm and hand and consequent disability.

16. The Trust issued a Letter of Claim dated 25 October 2016. The key allegation was that the surgeon had negligently opted to use the right radial artery to extend the graft, as opposed to the left radial artery, contrary to Mr Bogmer's understanding and instructions. There had, it was alleged, been a failure to obtain informed consent for the procedure in fact performed. It was further alleged that, as a result of the surgery Mr Bogmer had suffered injury to his right arm, resulting in a loss of function affecting his use of the right arm. In its Letter of Response, the Trust denied all the allegations.

17. In support of his prospective claim, Mr Bogmer saw various experts in the autumn of 2017. This included Dr Radatz, a neurosurgery expert, in September 2017, and Mr Turner, a psychiatric expert also in September 2017. The statements made by Mr Bogmer for the purposes of these reports are dealt with further below.

18. The Claim Form was issued on 13 October 2017, and Particulars of Claim, verified by a Statement of Truth signed by Mr Bogmer, was served on 15 February 2018. It was stated in the Particulars of Claim under a Section headed, '*Particulars of Injury*' that Mr Bogmer suffered from the following issues:

- "*Significant injury to his right arm*";
- "*Significant pain which radiates into his shoulder*";

- "*dysaesthesia, symptoms of pins and needles and shooting pains in his right forearm and around the scar of the radial artery harvest sight [sic], with additional pain referring into his right hand*" that was "*constant and debilitating*";

- "*Weakness of the right arm and hand*", which, "*prevents* [Mr Bogmer] *from undertaking simple day to day activities such as opening a bottle or crisp packet*";

- "*Lack of function and pain in his right upper limb*"; which prevents him "*holding fishing tackle or casting a fly*";

- "*Carrying/wring items such as kettles and hot pots present problems*".

- He is "*50-60% worse with regards to the dexterity on the right than he was pre-operative*".

- "*Significantly compromised with regards to a number of domestic, DIY and gardening activities*".

- "*The symptoms affect all aspects of his life including his ability to work, social, domestic and recreational activities*".

19. The Schedule of Damages served at the same time was also verified by a Statement of Truth. The Preamble repeated the alleged Particulars of Injury noted above, and made claims totalling £227,990.94 excluding three heads of claim which were 'TBC'. Claims were made for (1) past care based on 7 hours per week in addition to care paid for by the local authority (26 hours per week) and totalling £13,659.70; (2) Ongoing care of 7 hours per week, in addition to local authority care, at a cost of £6,292.06 per annum; (3) future aids and equipment totalling £5,283.36; (4) Occupational Therapy at a cost of £10,240; (5) an unquantified claim for ongoing transport costs; (6) psychological treatment at a cost of £2,250.

20. Proceedings were served on 6 March 2018 and on 1 June 2018 the Trust served its Defence which denied liability, and causation. At a costs and case management hearing on 6 November, Mr Bogmer sought and was given permission to increase the Statement of Value on the Claim Form to '*in excess of £200,000*'. The combined total of costs budgets for the two parties was in excess of £400,000.

21. On 15 August 2019, Mr Bogmer signed a witness statement verified with a Statement of Truth, which supported his claim by describing the history of his symptoms and his continuing state of pain and disability caused by the loss of function of his right hand/arm. This was served in December 2019, and the document repeated and expanded upon the various statements made to the medico-legal experts. These statements form the basis of the claim for contempt dealt with in this application.

22. On 29 August 2019 Mr Bogmer was examined by the Trust's expert Hand Surgeon, Mr. Bainbridge. As with previous expert assessments, Mr Bogmer informed Mr. Bainbridge that prior to the index surgery, he had relatively good function in the right hand, albeit with some restrictions, but gave an account of severely restricted function since the index surgery. He expressed the view that his symptoms were getting worse. It is apparent from the Report that Mr Bainbridge drew to Mr Bogmer's attention the contents of the Swedish medical records indicating prior right arm-related restrictions

and weakness. The report says, "*He categorically denied ever reporting or stating that he only had 20% of grip strength in his right hand…. He estimated that his right had had approximately 90% of normal function* [previously]".

23. Mr Bainbridge concluded:

> *"Mr Bogmer claims that his right hand was essentially normal with 90% function of the hand until his cardiac surgery. However the medical records from Sweden and the Nottingham County Council social work records document major problems with the right hand prior to his surgery. The complaints of inability to lift a hot drink, pop pills out of a blister pack, cope with buttons, et cetera, allegedly as a result of the radial artery surgery, are all documented in significant detail prior to the cardiac surgery.*
>
> *The nerve conduction studies in August 2010 confirm a significant left cubital tunnel syndrome and this would be consistent with the social service records which record the left arm working at 40% of normal function. However they clearly document at the same time that he only had 20% function in his right arm. All of the evidence from Sweden and the UK suggests that he had significant problems with his right arm prior to moving to the UK in early 2010 and in the years after he moved but before the cardiac surgery."*

<u>The Surveillance Evidence and Subsequent Expert Evidence</u>

24. Video surveillance was carried out on 23, 24, 27 and 28 January 2020. I have watched the extracts of the surveillance provided by the Trust and read the unchallenged witness evidence of the surveillance operatives. The content of the relevant extracts of the video evidence is accurately described in full detail at paragraphs 42 to 45 of Mr Wainwright's affidavit. In summary, it shows:

(1) on 23 January 2020, Mr Bogmer walking his dog. Mr Bogmer is holding the lead in his right hand, maintaining control of the dog, and does not appear to be in any difficulty doing so and showing no signs of discomfort;

(2) on 24 January 2020, Mr Bogmer getting out of his car, using the right arm/hand to open and close the door without any signs of pain, discomfort or difficulty and moving normally. He opens the mailbox to his house with his right hand;

(3) on 27 January 2020, Mr Bogmer is seen pressure-washing his car outside his house. He is operating the pressure washer's trigger throughout by squeezing it with his right hand, and holding the washer normally in both hands. His arms are moving up and down, and at various angles, in order to spray all parts of the car without any apparent limitation of movement or pain or discomfort. Later, he is again seen getting in and out of his car without difficulty, using his right hand and arm for the door and the seat belt strap; carrying shopping with his right arm/hand and using it to sort fruit and vegetables, to take his bank card out of his wallet and complete the transaction, and put the shopping in the car. He appears to have no particular difficulty or discomfort and does not drop anything. In another retail park Mr Bogmer is seen using his right hand/arm normally in relation to a shopping trolley, gripping the handle and using his right hand to take items from the shelf. He picks up items at the till, and the shopping bags,

without difficulty with his right hand. At a petrol station he uses his right hand to operate the pump normally.

(4) On 28 January 2020 he is again driving, using his right hand for the door, and walking the dog, holding the lead in his right hand without difficulty.

25. On 5 March 2020, the surveillance video was disclosed, and sent to the parties' experts. On 5 June 2020, Mr Bogmer completed a supplemental statement (served in July 2020), again verified by a statement of truth, in which he sought to explain the surveillance evidence. He asserted that he had been advised by Dr Radatz, the consultant neurosurgery expert whom he had visited and who prepared a report for the litigation, that he should try to use the right arm/hand even though it was painful to, that he had taken this advice seriously and that he therefore had been trying to use it whenever possible.

26. Mr Bogmer went on to explain that the activities depicted in the surveillance had not required significant effort or heavy use of the right arm/hand. He explained that the pain was variable and '*I have good and bad days*'. In relation to the video of him jet washing the car, Mr Bogmer explained, "*I can only use it on a good day for a short time such as washing my car. I cannot use it reliably and 2 days earlier I had not been able to use it to do some jet washing in the back garden and my daughter in law had had to do it. It is so light my 2 year old grandson can operate it for short times*."

27. In relation to the forms for benefits, Mr Bogmer explained, "*The forms for the benefits are completed on the basis of my worst days and not on what I can or cannot do sometimes.*"

28. Mr Bogmer's expert, Mr Radatz, and the Trust's expert, Mr Bainbridge, drew up a joint statement having been provided with the surveillance footage. This statement included the following agreed evidence:

(1) At paragraph 15: "*We agree the medical records in this case from the occupational therapy and pre-admission (8th October 2014) clearly document problems with self-care when using both hands as well as fine movement problems (i.e. buttons) prior to the surgery. There is nothing in the particulars of claim which was not evident in the Nottingham City council records from 2010 onwards. The inability to push tablets out of a blister pack was specifically documented on 11/2/2013 … and 9/4/2014*";

(2) At paragraph 16, when asked to consider the Defendant's assertion that his dexterity on the right was 50-60% worse than it had been pre-operatively: "*Mr Bogmer had reported only 20% function and power in the right arm according to Nottingham City Council records prior to the surgery. 50-60% worse would mean that he had less than 70% function in the right hand. Prof Bainbridge found in the Rapid Exchange grip strength test that Mr. Bogmer's grip was essentially equal. Even on the static test he exhibited 25% power. Mr. Radatz found MKC grade 4/5 muscle power which is greater than the muscle power recorded in the Nottingham City Council notes*";

(3) At paragraph 18(i): "*We agree that there is no evidence of particular weakness on the video surveillance. The use of pressure washer is completely inconsistent with the particulars of claim and witness evidence*";

(4) At paragraph 18(ii): "*We agree that his right hand appears to be dominant and there is no evidence of the normal protection afforded to an injured painful hand. Mr. Radatz notes specifically that there is no evidence of the protection of the forearm which was evident on examination in 2017*";

(5) At paragraph 18(iii) and (iv): "*We agree that if you can hold a jet wash you can hold a fishing rod. We agree that we saw no evidence of problems with driving and there was significant inconsistency with a number of the claimed restrictions*";

(6) At paragraph 18(v), when asked whether the Claimant's witness statement in response to the surveillance evidence (dated 5 June 2020) was consistent with the account the Claimant gave to them with regard to his functional abilities: "*We agree that his witness statement and complaints to us at examination are internally inconsistent*";

(7) At paragraph 18 (vi): "*We agree that he evidences more than 20% function in the right hand. Therefore his ability on surveillance is greater than it was recorded as being in the Nottingham City Council records predating the index surgery.*"

29. Mr Bogmer served his expert care evidence by way of a Report dated 23 November 2020 from Ms Hopkinson. In it, Ms. Hopkinson reported Mr Bogmer's assertion that he had been attempting to use his right arm/hand as much as possible since receiving advice from Dr. Radatz that this would be helpful. She further reported that he had experienced gradual improvements in his right arm/hand over the preceding 5 years and had now "*reached the point which he was at prior to the index injury*". I note that in no document prior to this (and, importantly, prior to the service of the surveillance evidence) had there been any suggestion that Mr Bogmer had been improving or that a condition approaching that prior to the index injury was in sight.

30. Ms. Hopkinson noted that Mr Bogmer had been unable to perform cleaning, laundry, ironing, housework, gardening or DIY since before October 2014. In the circumstances, she made a modest assessment of care needs, gradually reducing from May 2015 to November 2020. No doubt as a result of this, on 2 December 2020 Mr Bogmer served an amended Schedule of Loss setting out a significantly reduced claim, for a total of £51,850.09 inclusive of general damages, but excluding an element of past care "TBC". This was again signed by a Statement of Truth.

31. The claim resolved in January 2021. During 2020, the Trust had made a number of drop hands offers, none of which were accepted. However, on 8 January 2021 the parties attended a Round Table Meeting in the course of which the Trust made a further drop hands offer, which was accepted by Mr Bogmer. The parties subsequently signed a Consent Order providing for discontinuance of the claim and vacation of the trial date with no order as to costs.

The Legal Framework

32. As is often the case in relation to contempt proceedings of this nature, there are two forms of contempt relied upon. The two categories are that:

    (1) Mr Bogmer interfered with the due administration of justice by:

    (i) making false statements and representations to the medico-legal experts; and

    (ii) His physical presentation to the Defendant's expert in Hand Surgery, Mr Bainbridge, was dishonest, in that he grossly exaggerated the loss of function in his right hand, specifically with regard to grip strength;

    (2) Contrary to Part 32.14 CPR, Mr Bogmer made false statements in his Particulars of Claim, Schedule of Damages, Witness Statements and Amended Schedule of Loss, and verified them with a statement of truth.

33. The burden is on the Trust to prove the allegations set out within the Statement of Grounds to a criminal standard (i.e. beyond reasonable doubt).

34. Adopting the analysis of Spencer J in *Calderdale and Huddersfield NHS Foundation Trust v* Atwal [2018] EWHC (QB) 2537 at paragraphs 31-35, in the context of this case,

    (1) the first category requires the Trust to prove that:

    (a) Mr Bogmer made the statements and representations alleged;

    (b) he did so with the deliberate intention of deceiving the experts in question by falsely representing the function in his right arm (specifically concerning grip strength, motor weakness and dysaethesia) and by falsely representing that the symptoms he experienced were caused by the index surgery, when in fact they predated the surgery or were otherwise unrelated to it;

    (c) he must thereby have intended to interfere with the administration of justice; and

    (d) that the statements and representations, if persisted in, would have interfered in the administration of justice.

    (2) the second category requires the Trust to prove that:

    (a) the statements in questions were false;

    (b) at the time the statements were made Mr Bogmer (i) had no honest belief in the truth of the statements and (ii) knew that they were likely to interfere with the administration of justice;

    (c) the statements, if persisted in, would have interfered in the administration of justice.

35. It can readily be seen that, whilst distinct categories legally, they overlap. The Trust relies upon the same underlying evidence to prove its case in relation to both

categories. I respectfully adopt and repeat the observations of Spencer J in *Calderdale* that it is necessary to concentrate on the nub of what is complained of at its most serious, rather than to consider and adjudicate on every detail of statement made which is alleged to have been false. At the heart of this case is a central complaint that a number of layers of deception were deliberately adopted by Mr Bogmer in the pursuit of his clinical negligence case against the Trust. The first layer of alleged deceit was a deliberate *under* reporting of problems with his right arm as they pre-existed before the operation in 2014. This draws on the inconsistency between Mr Bogmer's reports about his pre-existing condition to the various medico-legal experts and his Swedish and UK medical records and, in particular, the reports on day-to-day restrictions and care needs in the context of his DLA claims prior to 2014. The second layer was a deliberate *over* reporting of his physical condition and the impact of his right arm issues said to have been caused by the effects of the operation. This draws principally on the inconsistency between his reported pain and living restrictions as claimed in the litigation and the surveillance evidence. Third, there was a dishonest attribution of his claimed present condition to the operation in circumstances where, if his reports on day-to-day restrictions and care needs in the context of his DLA claims prior to 2014 were accurate, were matters that pre-existed the operation in any event.

36. Of course, to the extent that the surveillance evidence undermines his claims as to the extent of his right-arm restrictions, it may also lead to a conclusion that the conditions as reported to the DWP (very similar in nature to the restrictions claimed to have been caused by the operation) were also exaggerated. If this is the case, it may of course be that statements to medico-legal experts as to his lack of difficulty with his right arm prior to the operation were not themselves wholly untrue (i.e. he did not have particularly limited function of his right arm/hand prior to 2014, and did not have so afterwards, either). Nevertheless, it is for me to consider, on the basis of all the evidence before me, whether I am sure that the nature and extent of the condition of Mr Bogmer's right hand/arm and the impact that had on his daily life was, in the period from 2014 onwards, dishonestly and grossly exaggerated and/or falsely attributed to the operation in circumstances where (to the extent a problem existed at all), it was largely consistent with his historic medical condition.

37. In the context of a claim which involves allegations of exaggeration based upon surveillance evidence, I also remind myself of the observations of Coulson J, as he then was, in *Walton v Kirk* [2009] EWHC 703 (QB). He stated that discrepancies between a statement verified by a statement of truth, on the one hand, and video evidence on the other, will not automatically give rise to a contempt of court. Ultimately, it is a matter of fact and degree. Some exaggeration may be natural, even understandable, for the reasons set out by Bell J in *Rogers v Little Haven Day Nursery Limited* (30th July 1999, unreported). In *Rogers,* the Court concluded on the basis of the evidence that the exaggeration which took place fell within the bounds of "*familiar and understandable attempts to make sure that doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead in order to increase the value of her claim beyond its true worth*". This is to be distinguished from gross exaggeration and dishonesty which plainly will not be tolerated.

38. Having made these observations, Coulson J then identified three principles. The first two echo the principles I have already set out above by reference to *Calderdale*, above. The third additional principle I remind myself of was as follows:

> "*Exaggeration of a claim is not, without more, automatic proof of contempt of court. What may matter is the degree of exaggeration (the greater the exaggeration, the less likely it is that the maker had an honest belief in the statement verified by the statement of truth) and/or the circumstances in which any exaggeration is made (a statement to an examining doctor may forgivably focus on the worst aspects of the maker's physical condition, whilst it may be less easy to dismiss criticism of a similar statement made when the maker has been repeatedly asked to specify variations in his or her physical condition, and chosen only to give one side - the worst - of the story).*"

The Absence of the Defendant

39. Before my substantive consideration of the contempt application, it was necessary to determine whether I would proceed with the hearing in the absence of the Defendant.

40. On 13 June 2023, Mr Bogmer emailed the Trust's solicitors stating [sic]:

> '*…I have been very poorly been admitted to hospital home now. I am very sorry about all I have not intended to lie on my behalf, with my stage in life I need to focus on myself and I can't fight against nhs trust it will be to much for me. I have not managed to get any one to do it for me…So I am not going to attend the court day I need to focus on my self again sorry*.'

41. In response to further correspondence, Mr Bogmer reiterated his intention not to attend the trial in a further email dated 14 June 2023, in which he stated:

> '*I am not going to contest this case due to my Health and Mental Health deteriorating rapidly. I have come to decision after my GP and Oncologist advised me not to worry over this case and focus on my own well-being, after being given a very s[h]ort life expectancy*.'

42. That position was reiterated in a telephone conversation between Mr Wainwright of the Trust's solicitors and Mr Bogmer's wife on 14 June 2023. Mr Bogmer provided an unsigned letter from his GP, Dr Mattick, dated 16 June 2023. In the letter Dr Mattick states that in his opinion the Defendant is not fit to stand trial.

43. Shortly before the hearing, Ms Cummerson provided an updated Note apprising the Court of further developments. Further medical evidence had been provided and reviewed. A letter from Dr Rao, Mr Bogmer's treating Consultant Oncologist dated 2 June 2023 set out Mr Bogmer's current condition and confirmed that he '*continues to* [be] *in a decent clinical condition'* and that '*his primary left kidney lesion, small lung nodules and bone metastases are all stable.'* The letter did confirm that a recent MRI of the liver demonstrates '*a few new apparent small focal hepatic lesions which are entirely consistent with metastatic disease and his recent CT body scan has also shown newly apparent and progressive hepatic metastases as well as new soft tissue nodules in the region of the pancreatic tail which are likely to be small metastases…'*

44. The Trust fairly acknowledged that this represents a progression in the disease.

45. On 3 July 2023, the day before the hearing, Mr Wainwright (who had quite properly and with a great deal of sensitivity been staying in communication with Mr Bogmer and his wife) updated the Court further. This update contained an email communication in which Mr Bogmer stated, '*I would like to the judge to go ahead with the case, because of my health and mental health not going to be any better, and it make me more il because I can't think positive anymore. I am in so much pain and want this to be over*'.

46. It was against this background, and in light of Mr Bogmer's anticipated non-attendance at Court on 4 July, that I had to consider the Trust's application to proceed in his absence.

47. The starting point is, of course, that whilst paragraph 81.8.3 of the notes of guidance to Part 81.8 in the White Book states that the court's power to proceed with a trial in the absence of a party extends to the trial of committal applications, this should be regarded as an "*exceptional course*".

48. The cases of *R v Jones* [2003] 1 AC 1 and *Sanchez v Oboz* [2015] EWHC 235, each identify factors to be taken into consideration by the court when determining whether or not to proceed in the absence of the Defendant. The two lists of factors are set out compendiously at paragraphs 37 and 38 of the Judgment of Spencer J in *Calderdale,* as follows:

> "*37. Contempt proceedings are quasi-criminal. It is, therefore, appropriate to have regard to the principles which a judge in the Crown Court would apply in deciding whether to proceed with a trial in the absence of the defendant. These principles are conveniently summarized in R v. Jones [2003] 1 AC 1. The relevant factors which the court should consider are:*
>
> *(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial and in particular whether his behaviour is deliberate, voluntary and such as plainly waived his right to appear;*
>
> *(ii) whether an adjournment might result in the defendant being caught or attending voluntarily;*
>
> *(iii) the likely length of such an adjournment;*
>
> *(iv) whether the defendant, though absent, is, or wishes to be, legally represented;*
>
> *(v) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;*
>
> *(vi) the general public interest that a trial should take place within a reasonable time of the events to which it relates.*

38. I have also had regard to the helpful checklist suggested by Cobb J in such circumstances in Sanchez v Oboz [2015] EWHC 235 (Fam), derived in part from R v. Jones, namely:

(i) whether the defendant has been served with the relevant documents including notice of the hearing;

(ii) whether the defendant had sufficient notice to enable him to prepare for the hearing;

(iii) whether any reason has been advanced for his non-appearance;

(iv) whether by reference to the nature and circumstances of the defendant's behaviour he has waived his right to be present; i.e. is it reasonable to conclude that the defendant knew of and was indifferent to the consequences of the case proceeding in his absence;

(v) whether an adjournment would be likely to secure the attendance of the defendant or at least facilitate his representation;

(vi) the extent of the disadvantage to the defendant in not being able to present his account of events;

(vii) whether undue prejudice would be caused to the applicant by any delay;

(viii) whether undue prejudice would be caused to the forensic process if the application were pursued in the absence of the defendant.

(ix) take account of the overriding objective, including the obligation of the court to deal with the case justly, doing so expeditiously and fairly, and taking any step or making any order for the purposes of furthering the overriding objective."

49. I have had careful regard to all these factors. I have also considered whether the alternative options open to the Court were appropriate, in order to satisfy myself that the decision to proceed in Mr Bogmer's absence reflected the fact that this was a decision of last resort. I considered that, in the overall interests of justice, it was appropriate to proceed in the absence of Mr Bogmer, notwithstanding the seriousness of the case against him, for the following reasons:

(1) there is no doubt that Mr Bogmer was served with the proceedings and evidence, and was fully aware of the importance of the court hearing. There can be no suggestion that he did not have notice or inadequate time to prepare;

(2) as Ms Cummerson submits, there is inadequate evidence before the Court to conclude, as implied in Mr Bogmer's emails, that he has been unable to secure representation having taken reasonable steps to do so. Mr Bogmer would be entitled to legal aid. In order to be persuaded that the appropriate course would be to adjourn to permit such representation to be provided, the Court would have to be made aware of the detail of the unsuccessful attempts so far made. No such evidence exists.

(3) Notwithstanding the fact that a principal reason given in the communications from Mr Bogmer and his wife relate to the physical and mental health of Mr Bogmer, I do not consider it appropriate to adjourn the proceedings on medical grounds. Mr Bogmer has not applied for any such adjournment, and in fact actively invites the Court to proceed rather than to adjourn to such later time as may be more appropriate. This may, fairly, be on the basis that Mr Bogmer's cancer appears to be deteriorating. However, the evidence from his oncologist which is before the Court describes his overall position as '*decent*' and there is no clinical explanation before the Court as to how his present physical condition is such that he cannot attend the Court either in person or more obviously by CVP, as he did a relatively short time ago. There is no evidence at all relating to his mental condition. The letter from Mr Bogmer's GP is unsigned, but even if it were signed it fails to set out with any detail those features of Mr Bogmer's physical condition which prevents him from attending trial (and does not, for example, refer to attendance by CVP at all). I do not therefore regard the evidence before the Court as sufficient to meet the requirements set out by Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 at [36] relating to the circumstances in which an adjournment on medical grounds is appropriate.

(4) As set out above, Mr Bogmer has indicated that he does not intend to oppose the proceedings. This plainly is not taken to mean that he admits the allegations: indeed, other parts of his communications make clear he considers that he did not intend to mislead anyone and that, if correct, would be a defence to the allegations against him. Nevertheless, Mr Bogmer has made it clear that he is waiving his entitlement to participate in the proceedings in spite of clear reminders regarding the seriousness of the proceedings and the potential consequences for him.

(5) Mr Bogmer's communications also support the conclusion to which I have come that an adjournment would not be likely to secure Mr Bogmer's attendance at trial, and that his attitude to attendance would not change if the matter was adjourned. It is for this same reason that I did not consider it appropriate in the circumstances of this case to institute the procedure adopted by the Court of Appeal in *Her Majesty's Attorney General v Anthony Branch* [2021] EWHC 1735. In that case, Dingemans LJ and Holgate J, sitting in the Administrative Court, issued a bench warrant to secure the defendant's attendance, in spite of his old age and frailty, but did so on terms that the warrant would provide for his arrest and immediate release, with a direction to attend the court for trial two days later. The warrant was considered to be the "*least worst*" means of securing the defendant's attendance to give him an opportunity to make submissions and ensure the administration of justice was not frustrated, whilst limiting any deprivation of the defendant's liberty [17]. Each case of this nature turns on its facts, and it is not clear from the judgment in *Branch* the precise nature and extent of communications from the defendant to the Court (through the Claimant) explaining his position/intentions. However, I have taken the view in this case that the only realistic conclusion is that adopting the same procedure would serve no practical purpose, other than to waste police time and increase the Trust's costs. In particular, it is not necessary to do this in order to convey to Mr Bogmer the seriousness of the application as he is plainly aware of that already; it is also not going in fact to secure his attendance in practical terms (just as, in fact, the

procedure did not secure the attendance of the defendant in *Branch*, and the matter proceeded in his absence two days later).

(6) I do not consider that Mr Bogmer will be disadvantaged in not being able to present his account of events, having regard to the nature of the evidence against him. In particular I have carefully and critically reviewed the incontrovertible surveillance evidence, and the evidence of inconsistency and contradiction between the documentary evidence and the accounts given at various times by Mr Bogmer. The decision not to engage with this material by way of defence is one of choice on the part of Mr Bogmer. This is no doubt because he considers it, as do I, a vanishingly remote prospect that subjecting himself to cross-examination on these matters or seeking to cross examine the various medico-legal experts or the surveillance operatives would present any real advantage in meeting the case against him. The disadvantage to non-attendance is negligible.

(7) The overriding objective is to deal with cases justly, and this includes an obligation to do so expeditiously and fairly. Further delay will add to the cost burden on the Trust, which is already considerably out of pocket in terms of legal expenses in defending the Mr Bogmer's discontinued claim, and there is no practical reality that any such additional costs will be reimbursed.

Analysis of the Grounds of Contempt

50. In paragraph 37 above, I noted potential contradiction in part of the Trust's claim arising out of the fact that, in relation to representations about his pre-existing condition, the Trust seek to rely upon the truth of the contents of his representations in respect of DLA, whereas in relation to his representations about his present condition, there is the inference (at least) that the DLA representations were false, coupled with the allegation that (if the DLA records were an accurate representation of his condition pre-index surgery) the loss of function forming the basis of his claim was pre-existing. In light of this, the Trust did not press those specific grounds of contempt relating to the representations relating to Mr Bogmer's pre-2014 condition. The specific grounds that I do not need to consider are those pleaded at paragraphs 65.1, 66.1, 68.1, 68.2, 68.3, and 78.6.

51. However, it clearly remains the case in my judgment that consideration of the inconsistencies between what he told the medico-legal experts about his 2014 condition and what he had historically represented to other medical experts or for the purposes of care and disability allowance remains relevant evidence. Put bluntly, if (as I consider to be the case) I am sure that this inconsistency arose as a result of Mr Bogmer's dishonesty, this may be a factor which I am entitled to take into account when considering whether his accounts of his post 2014 condition and their cause were dishonest.

52. I therefore consider first the allegations made in relation to the representations relating to his condition prior to the index surgery. At Appendix 1 hereto I set out all the grounds for completeness. The relevant grounds are that Mr Bogmer made the following statements about his condition prior to the index surgery to the stated people or in the stated documents (the paragraph number from the Grounds in brackets):

(65.1) he had "*bilateral hand problems which did act his ability to care for himself and required some carer input. He was particularly unable and found it very difficult to button things up*" "*Nevertheless... on direct questioning Mr. Bogmer was able to look after himself and do most things*" (to Mr Radatz).

(66.1) he had described himself as "*as an easy going and active individual who was up for a range of activities...A particular hobby that he loved was fishing, in various forms, including course fishing and fly fishing*" (to Dr Turner)

(68.1) "*He had the first operation on his right arm in 1998…. He had some continuing problems for approximately 1 year but then no further problems with his right arm*" (to Mr Bainbridge)

(68.2) "*[in 2009] he returned to 100% normal function with no disability*" (to Mr Bainbridge)

(68.3) "*Between 2010 and 2014 he thinks he had 10-15% weakness in his hands compared to normal but insists he was driving snowmobiles…[and] estimated his right hand had an estimated 90% of normal function*" (to Mr Bainbridge)

(78.6) That before the 2014 surgery, he was able to get tablets out of a blister pack and '*whilst it was difficult, I could still do (sic) get tablets out of a blister pack.'* (Signed statement dated 5 June 2020)

53. These statements are claimed to be false when compared with entries in Mr Bogmers's Swedish medical records, the DWP records and NCC records which, the Trust claim, demonstrate that between 2010 and 2014 he regularly reported restriction of power and function in the right hand and difficulty with bi-manual tasks. Particularly damning examples from the records given, in relation to both his physical and psychological condition, are:

(1) An entry in Mr Bogmer's Swedish medical records dated 01/03/2010 which notes that he reported, "*...loss of sensation in the right forearm, hand …*" and that, on assessment, there was "*…weakness in right arm and aches in left arm*".

(2) In an application for Disability Living Allowance made in August 2011, Mr Bogmer reported: "*I have special cutlery as I cannot grip normal ones*"; "*I have difficulty with fine motor skills, i.e., toothbrush holding etc.*"; "*I don't have feeling in my hand and cannot grip or feel pain*".

(3) An OT assessment conducted by Alison Fletcher on 29/09/2011 found that Mr Bogmer had *"limited use of the right arm"* and "*limited grip in both hands*".

(4) A Review of Support Plan completed in September 2011 records that Mr Bogmer reported, "*I am frightened to go out on my own as I am worried that I might have a cough attack and fall and injure myself. I need somebody to come with me to support me and to assist with certain tasks as I have limited use of my hands*".

(5) In March 2012 Mr Bogmer completed a Review of Community Care Assessment, in which, amongst other restrictions, he reported that he, "*struggle[s] with showering (reaching certain parts of my body) and drying…"*, and that he was *"unable to fasten buttons*" or "*to push blister packs [of medication] open*" or "*to open a yoghurt*".

(6) A further review undertaken in April 2012 notes that, "*Sven requires support with his household affairs as he is unable to go out unsupervised and will often become confused*" and, *"…Sven does not feel safe going out alone and at times suffers panic attacks. Sven would like to go fishing, thus requires support to enjoy his hobby. Without this support Sven would not go out and be at risk of social isolation*".

(7) In April 2014, 6 months prior to the index surgery, Community Care Review and Support Plan recorded that the Defendant was "…. *unable to grip due to damaged nerves in his arms and hands …*"; that he "*…requires support each morning with showering, brushing his teeth, shaving, getting dried and dressed*" and that he was, "*…unable to push the tablets out of the blister packs due to the nerve damage".*

54. I am satisfied on the evidence before me to the criminal standard that the statements attributed to Mr Bogmer, both in the context of the medico-legal reports for litigation and in the various disability and care claim related documentation, are accurate records of the statements made by Mr Bogmer.

55. Unsurprisingly, in light of this documentary evidence, Mr Radatz and Mr Bainbridge confirmed that contemporaneous records identify problems with self-care when using both hands as well as fine movement problems prior to the index surgery and that all functional restrictions pleaded in the Particulars of Claim were evident in the NCC records from 2010 onwards.

56. It is not possible for me to conclude that, as set out in the grounds of contempt, the statements made to the various medico-legal experts about his condition between 2010 to 2014 was dishonestly false. Indeed, it may be that the statements were correct and it was the statements being made in the context of care and disability allowances that were grossly exaggerated. In this context, I note that at paragraph 18(vi) of their joint statement, Mr. Radatz and Mr. Bainbridge confirm that the functional ability demonstrated by Mr Bogmer on surveillance was "*greater than recorded as being in the Nottingham City Council records predating the index surgery*".

57. However, on the basis of the blatant contradiction between his representation of his condition prior to the index surgery to the medico-legal experts and what he was claiming his condition was in the same period in the context of care and disability allowances, I am compelled to the regrettable conclusion that I am sure, to the criminal standard, that he was not being honest: (1) if his statements to the medico-legal experts were true, his disability and care claims were untrue or (2) if his statements in his disability and care claims were true, his statements to the medico-legal professionals were untrue. It is not necessary for me to determine where the dishonesty lay given that the statements about Mr Bogmer's prior condition are not

now part of the specific grounds of contempt I must come to a conclusion on. However, this conduct is clearly context against which I am entitled to consider the allegations relating to the statements made describing the physical condition and functionality of Mr Bogmer's right arm/hard following and as a result of the index surgery.

58. Turning to the live grounds of contempt, I have considered each individually, but deal with them in (overlapping) groups in this judgment, drawn to some extent from the way in which the Trust helpfully advanced its case in an appendix to Mr Wainwright's Affidavit.

59. At the outset I note that some of the grounds relied upon concern or include a number of generalised and plainly subjective statements made either individually or as parts of longer statements. These include statements like, '*He perceives his whole arm as weak'* (65.2)*, 'the reduced ability is in his right hand'* (64.5) '*he has reduced sensation in the right arm and hand*' '*altered sensation, numbness"* (71.4). These statements are, in my judgment, overly generalised to form the basis of a claim of contempt. They do not add to the case against Mr Bogmer, which includes a wide variety of specific claims of loss of function in relation to which I have been able to make unequivocal findings to the criminal standard. The thematic review which follows therefore identifies those claims which, on the basis of the surveillance evidence and on the basis of the joint expert evidence which draws conclusions from that surveillance evidence, I am regrettably sure that Mr Bogmer has grossly exaggerated his condition in the pursuit of his clinical negligence claim. Whilst I would have come to this conclusion even without knowledge of the inconsistencies in the pre-index surgery condition, my conclusions above that those inconsistencies are also derived from dishonesty on the part of Mr Bogmer fortifies my determination.

Weakness/deterioration and loss of function in the right hand

60. Mr Bogmer claimed (to more than one expert, in his verified pleadings and/or in his witness statement), that the weakness he was left with following the operation meant:

(1) [Mr Bogmer was prevented from] "*...undertaking simple day to day activities such as opening a bottle or crisp packet*" (65.2, 74.1.3, 75.2)

(2) "*he now did not even have the strength to lift a cup of coffee*" (68.4)

(3) "*I struggle to hold a teacup so I prefer a large mug but then it's too heavy*" (76.5.3)

(4) "*he needs to use his left hand instead of his right for most tasks*" (71.1)

(5) "*finds squeezing soap and shampoo from containers difficult and has assistance with this*" (67.2)

(6) *"he cannot hold a toothbrush properly"* and that, *"he can no longer pop tablets out or even take them out of a pill box*" (68.5, 76.4.2)

(7) *"*[Mr Bogmer] *estimates he was 50-60% worse with regards to the dexterity on the right than he was preoperatively"* (74.1.7, 75.6, 65.6)

(8) "… [he] *believes his hand is getting worse*. […] *He believes his hand is getting weaker and he cannot use his right hand as much*. […] *He believes his dexterity has definitely got worse in the last two years*. As *an example he tells me that he can no longer pop tablets out or even take them out of a pillbox.* […]" (68.7, 68.8, 68.9)

61. Each statement contains a clear representation of a significant loss of function of the use of Mr Bogmer's right hand. However, as recorded in the surveillance footage, over 4 days of surveillance Mr Bogmer is seen using his right hand for a number of different activities including holding his dog's lead, using a petrol pump, using a pressure washer, opening his car door and boot, opening his mailbox, pulling his seatbelt across himself and carrying shopping. Mr Bogmer performs all of these activities with his right hand without any apparent signs of pain, discomfort or difficulty and with normal movements. The conclusion is supported by the medical experts, who considered that, in their expert opinion, there was no evidence of particular weakness on the video surveillance, that the use of pressure washer was '*completely inconsistent with the particulars of claim and witness evidence*'; and that '*his right hand appears to be dominant and there is no evidence of the normal protection afforded to an injured painful hand. Mr. Radatz notes specifically that there is no evidence of the protection of the forearm which was evident on examination in 2017'*. This is extremely damning evidence, coming as it does from Mr Bogmer's own expert. The exaggeration of his deterioration in right arm function was significant and unconscionable. It was plainly untrue, for example, that Mr Bogmer needed to use his left hand instead of his right for most tasks when, as is plain from the surveillance, his right arm was plainly dominant in all his activities with no visible restriction. The use of the pressure washer and the petrol pump, in particular, makes it clear beyond doubt that his representation that Mr Bogmer found squeezing soap and shampoo from containers difficult and had assistance to perform this task cannot possibly have been true.

62. Mr Bogmer's explanation for the complete inconsistencies, as explained in his statement of 5 June 2020 after disclosure of the surveillance evidence, was essentially two-fold: his right hand/arm had been improving, and that he had 'good days' when function was better. This does not, however, bear scrutiny. As to the first, I note that Mr Bogmer said precisely the opposite to Mr Bainbridge just 4 months before the surveillance video: see the representations identified at sub-paragraph (7) in which Mr Bogmer was representing that his condition was deteriorating, not improving. As to the second, there was no indication in any of his representations either to the medico-legal experts or within his witness statement, or Particulars of Claim/Schedule of Loss, of any '*good days/bad days*' variation: indeed, it is plain that all the statements made painted an unremittingly bleak picture of Mr Bogmers' loss of function and the impact this had on his life. Even if (which I do not consider to be the case) Mr Bogmer did have 'good days/bad days', it was plainly dishonest not to make this fact clear when describing his condition.

63. There is, in addition, a second layer to the claim against Mr Bogmer with regard to these allegations, based upon their comparison to the statements made in the context of his care and disability claims prior to the index surgery. If those statements were true, then the disability, loss of function and impact on his life described as being caused by the surgery pre-existed the surgery. There is no doubt that Mr Bogmer

knew that the complaints he made as to the loss of function caused by the operation in his action against the Trust were materially identical (and in some cases, actually identical e.g. he can no longer pop tablets out) to the loss of function he had describe as suffering from prior to the operation in his care and disability claims. Whether or not he actually suffered this degree of loss of function (which I am sure he did not, on the basis of the surveillance evidence), this itself was fundamentally dishonest.

Impact on specific activities/leisure pursuits

64. Mr Bogmer's claim made specific complaint about the impact on his ability to pursue, as a result of the operation, his love of fishing:

(1) *'Fishing used to be my life and I would do it all the time but I have had to give it up because I cannot swing my arms to cast the line and do not have the strength to pull the fish in.'* (76.3)*;*

(2) "*…the lack of function and pain in his right upper limb has prevented* [Mr Bogmer] *… holding fishing tackle or casting a fly…*" (74.1.4 and 75.3)

65. However, as set out above, in the surveillance footage dated 27 January 2020, Mr Bogmer can be seen for some time using a pressure washer without any difficulty at all. He is seen using a variety of angles, involving moving his arm up and down repeatedly and over his head. In their joint statement, Mr Radatz and Mr Bainbridge concluded, with some justification in my judgment, that if Mr Bogmer can hold a pressure washer, he is able to hold a fishing rod. I have no doubt in concluding that this description of curtailment of his hobby was fundamentally dishonest. Moreover, as set out above, *even if* it was true, he was making the identical complaint in the context of his care and disability claims prior to the index surgery: see e.g. April 2014, in the Community Care Review and Support Plan which stated that Mr Bogmer "*use*(d) *to enjoys* (sic) *fishing and outdoor activities, also going out to and visiting places, but since his health has deteriorated, he is unable to participate in these types of activities*". Claiming that his inability to enjoy fishing (even if true, which I do not believe) was caused by the surgery was dishonest when he had identified the same loss of function prior to the surgery.

66. Mr Bogmer's claim made specific complaint about the impact on his ability to carry out personal care:

(1) *"Alix helps with all of my personal care, she helps me to shave, help to shower, to put my socks on, she does up any buttons and zips and I am dependent for help a lot because my hand cannot do these things anymore"* (76.6)

(2) "*…he has problems with personal hygiene and it is now more difficult showering. This has got worse over the last two years*" (68.9)

(3) "*had problems putting socks on and doing up shoes" (68.10)*

(4) *"He needed help with showering and dressing and food preparation*" (66.2.3)

(5) *"I now need help with washing and dressing and I am not able to safely cook on my own"* (76.2.3)

67. Whilst it is right to acknowledge that the video surveillance evidence does not show Mr Bogmer undertaking any particular personal care activities, I am nevertheless sure, having seen that footage, that these statements are a gross exaggeration of his (in)capabilities. As the medico-legal experts jointly agreed, there is simply no evidence of a particular weakness in the right arm/hand at all. Moreover, as with previous categories, *even if* the statements were true (which I do not believe to be the case), they remain fundamentally dishonest in the context of a claim in which the loss of function is said to have been caused by the surgery in October 2014. Mr Bogmer had prior to 2014 described materially similar limitations on his ability to carry out personal care in the context of his disability and care claims for state assistance. By way of example, in a Community Care Review and Support Plan completed in February 2013, it is noted that "*He needed help with showering and dressing and food preparation*"; and in April 2014, 6 months prior to the index surgery, a Community Care Review and Support Plan recorded that Mr Bogmer was "…. *unable to grip due to damaged nerves in his arms and hands* …"; that he "…*requires support each morning with showering, brushing his teeth, shaving, getting dried and dressed*".

68. Mr Bogmer's claim made specific complaint about the impact on his ability to go shopping:

    (1) *"He manages to do some shopping, but it needs to be light as he can't carry anything heavy"* (65.5)

    (2) *"He will drive his wife and stepdaughter to go to the supermarket but will not even help lift items into the boot of the car from the trolley" (71.4)*

69. The second of the two statements is contradicted by the surveillance evidence in which Mr Bogmer is seen pulling a trolley out of the trolley park using his right hand and is subsequently seen inside the shop picking items of the shelf using his right hand and then using both hands to unload shopping from his trolley onto the conveyor belt and thereafter into shopping bags. He is seen to pick up items with his right hand without difficulty and to transfer items between hands without difficulty. Whilst the first statement is not necessarily contradicted by the surveillance evidence, in that the video does not show Mr Bogmer carrying anything particularly heavy, it remains a dishonest statement in the context of his claim which attributes this inability (if true) to the surgery in October 2014. In 2011, Mr Bogmer was already reporting in the context of his care and disability claims that his loss of function meant that others "*do the cleaning, laundry and shopping*" (see the Review of Community Care Assessment dated 13/9/2011).

70. Mr Bogmer's claim made specific complaint about the impact on his ability to carry out domestic work or to prepare food or drinks for himself:

    (1) Mr Bogmer claimed he was "*significantly compromised with regards to a number of domestic DIY and gardening activities*" (74.1.8, 75.7)

    (2) "*Carrying/using items such as kettles and hot pots present problems*" (74.1.5, 75.4)

(3) *"At home I do not do much housework any more. The vacuum is too heavy and I cannot cook anymore because it would be very easy for me to drop something, cut or burn myself."* (76.4.1)

(4) *"I cannot clean the house windows or use many kitchen utensils because my hands cannot hold them properly anymore"* (76.5.1)

71. As with Mr Bogmer's complaints about his personal care capabilities, it is right to acknowledge that the video surveillance evidence does not show Mr Bogmer undertaking any of these particular activities. I am nevertheless sure, having seen that footage and considered the views of the medico-legal experts including the Claimant's own expert, that these statements are a gross exaggeration of his (in)capabilities. Moreover, as with previous categories, *even if* the statements were true (which I do not believe to be the case), they remain fundamentally dishonest in the context of a claim in which the claimed loss of function is said to have been caused by the surgery in October 2014 (note Mr Bogmer's use of the word 'anymore'). Mr Bogmer had prior to 2014 described materially similar limitations on his ability to carry out domestic chores and food/drink preparation in the context of his disability and care claims for state assistance. By way of example, an OT assessment in October 2011 noted that Mr Bogmer "*… is not safe to use sharp implements and due to poor grip and sudden lack of grip does not do anything in the way of meal preparation*"; the Community Care Review and Support Plan completed in February 2013 recorded that, "*Sven is unable to make his own hot drinks due to his inability to grip his hands [.....] Food/Drink – Sven needs assistance with preparing and carrying due to lack of grip and nerve damage in arms and hands*"; and the Community Care Review and Support Plan completed in April 2014 recorded that the Defendant was "*…unable to complete any household chores…*".

72. Mr Bogmer's claim made specific complaint about the impact on his ability to walk the dog. On 23 October 2019 Mr Bogmer told Ms Gooch, the care expert, that *"His stepdaughter walks the dog when she walks her own dog."* (71.9) The clear implication, in the context of the report, was that he was unable to. This is flatly contradicted by the video surveillance evidence in which he is seen taking the dog out for a walk twice, and holding the lead in his right hand without any apparent difficulty or discomfort. Mr Bogmer's claim in this regard was dishonest, and for the same reasons that I have dealt with above, I do not consider that Mr Bogmer's 'good days/bad days' (even if true) negates that dishonesty in circumstances where he had at no point prior to the surveillance evidence being disclosed had he represented that he was describing only his 'bad days'.

73. Finally, a specific alleged ground of contempt is that during his examination by Mr Bainbridge Mr Bogmer purported to demonstrate his maximum grip strength and displayed a marked loss of strength in the right hand, with a grip strength of 7.8kgf, compared to 25.8kgf on the left side. Mr Bainbridge reported that throughout the grip strength test Mr Bogmer maintained his right thumb in a straight position, extended at the MCP and IP joints. However, on rapid exchange grip strength test there was very little difference between the left and right sides in terms of strength. It is alleged that this conduct in not attempting full grip strength and/or manipulating the grip strength test was intended to provide a false reading and to manipulate Mr. Bainbridge's assessment of his grip strength and consequent functional restriction in order to support a claim for injury loss and damage that had not in fact been sustained.

74. In this context it is relevant to note that in their Joint Statement, Mr Radatz and Mr Bainbridge noted that:

> "*The [Defendant] had reported only 20% function and power in the right arm according to Nottingham City Council Records prior to the surgery. 50-60% worse would mean that he had less than 10% function in the right hand. Prof Bainbridge found in the Rapid Exchange grip strength test that Mr Bogmer's grip was essentially equal. Even on the static test he exhibited 25% power. Mr Radatz found MRC grade 4/5 muscle power which is greater than the muscle power recorded in the Nottingham City Council notes"*.

75. In light of my conclusions about the manner in which Mr Bogmer's many representations were dishonest, both in light of the surveillance evidence and in light of the previous reported capabilities in the context of his care and disability claims, I am sure that the proper inference to be drawn from Mr Bainbridge's report of the grip strength tests is that, in the static test, Mr Bogmer was consciously and deliberately attempting to provide a false reading.

Conclusion

76. On the basis of the evidence, I am sure that, in each of the grounds identified in the preceding paragraphs, Mr Bogmer made the statements and representations alleged. It is not necessary for me to, and I do not, make findings in relation to any ground not specifically included in the preceding paragraphs. I am sure that he had no honest belief in the truth of the relevant statements, and he made them with the deliberate intention of deceiving the experts and in due course the Court, by falsely representing the loss and deterioration of function in his right arm and the day to day implications of that claimed loss and deterioration. Moreover, to the extent any of the representations of loss of function and deterioration were accurate (which I do not accept), Mr Bogmer in any event falsely, and dishonestly, represented that the symptoms he said he experienced and the associated impacts were caused by the index surgery, when (to the extent they existed at all) they predated the surgery and were unrelated to it. I have no doubt that Mr Bogmer, by these actions, intended to interfere with the administration of justice, knowing that his actions were likely so to interfere. This is because he knew they would have caused him to be paid significant compensation to which he was not entitled. I am sure that the statements and representations, if persisted in, would in fact have interfered in the administration of justice.

77. As such, I find that Mr Bogmer is guilty of contempt of court.

78. I will hear the Trust and Mr Bogmer as to the penalty to be imposed in consequence. I strongly urge Mr Bogmer to attend the hearing, on a date to be arranged. On the basis of the evidence before me, I will permit Mr Bogmer to attend by CVP if he is unable to attend in person. To the extent that, as appears likely, Mr Bogmer would wish the Court to take into account his present medical condition by way of grounds to mitigate any sentence and/or to seek to persuade the Court that any custodial sentence of imprisonment should be suspended, it is essential for Mr Bogmer to provide to the Court an up to date report from the relevant treating specialist which specifically deals with his present physical condition and prognosis.

APPENDIX 1

PARTICULARS OF THE DEFENDANT'S ACTS OF CONTEMPT

CPR 81.3 (3) and (5): Interference with the due administration of justice

The Defendant made the following false statements and representations to experts:

65. The Defendant told Mr. Radatz, Consultant Neurosurgeon and Spinal Surgeon on 10 July 2017 that:

65.1 Prior to the index surgery he had "bilateral hand problems which did affect his ability to can for himself and required some carer input. He was particularly unable and found it very difficult to button things up" "Nevertheless. ..on direct questioning Mr. Bogmer was able to look after himself and do most things".

65.2 Following the index surgery: "He perceives his whole arm as weak now, but in particular his hand. He can't open a bottle any more, which he used to do before. He can't open a crisp packet".

65.3 "The loss of function and pain in his right hand stops him from fishing as he can't hold the fishing tackle any more safely".

65.4 "The reduced ability in his right hand and the pain affect his driving."

65.5 He "manages to do some shopping but it needs to be light as he can't carry anything heavy".

65.6 "His dexterity is reduced significantly more than it was pre-index surgery and when asked to put a percentage on the decline, he stated about 50-60% worse than it was".

66. The Defendant told Dr. Turner, Consultant Psychiatrist on 11 September 2017 that:

66.1 Prior to the index events [the Defendant] described himself as an easy going and active individual who was up for a range of activities... A particular hobby that he loved was fishing in various forms, including course fishing and fly fishing

66.2 Since the index surgery:

66.2.1 He has reduced sensation in the right arm and hand.

66.2.2 He "has reduced grip, constantly dropping things'

66.2.3 He needed "help with showering and dressing and food preparation'.

67. The Defendant informed Ms. Hopkinson, Care Expert on 10 January 2018 that:

67.1 He "finds it difficult to use his right hand in most activities due to pain".

67.2 He "finds squeezing soap and shampoo from containers difficult and has assistance with this";

67.3 He is "unable to [cut his own hair] since the injury due to the dexterity required".

67.4 "He finds it difficult to hold cutlery and relies on his stepdaughter to cut up his food'.

68. The Defendant told Mr. Bainbridge, Consultant in Plastic and Hand Surgery on 29 August 2019, that:

68.1 He had the first operation on his right arm in 1998. He had some continuing problems for approximately 1 year but then no further problems with his right arm.

68.2 "[in 2009] he returned to 100% normal function with no disability".

68.3 "Between 2010 and 2014 he thinks he had 10-15% weakness in his hands compared to normal but insists he was driving snowmobiles... and estimated his right hand had an estimated 90% of normal function".

68.4 Since the index surgery: "he believed the strength had almost completely gone in the right hand and he now did not even have the strength to lift a cup of coffee?

68.5 His fine motor skills were "markedly reduced' and he "cannot hold a toothbrush properly".

68.6. "He cannot lift a coffee cup or a 1L. (litre) bottle of milk without dropping it'.

68.7 He believed "his hand is getting worse" and "weaker and he cannot use his right hand as much".

68.8 "His dexterity has definitely got worse in the last two years... he can no longer pop tablets out [of a blister pack] or even take them out of a pillbox".

68.9 "He has problems with personal hygiene and finds it more difficult showering This has got worse over the last two year?

68.10 "He has problems putting socks on [and] doing up shoes".

69. Further, when examined by Mr. Bainbridge on 29 August 2019, the Defendant purported to demonstrate his maximum grip strength and displayed a marked loss of strength in the right hand, with a grip strength of 7.8kgf, compared to 25.8kgf on the left side. Throughout the grip strength test the Defendant maintained his right thumb in a straight position, extended at the MCP and IP joints. However, on rapid exchange grip strength test there was very little difference between the left and right sides in terms of strength.

70. This conduct in not attempting full grip strength and/or manipulating the grip strength test was intended to provide a false reading and to manipulate Mr. Bainbridge's assessment of his grip strength and consequent functional restriction in order to support a claim for injury loss and damage that had not in fact been sustained.

71. The Defendant told Ms. Gooch, Care Expert on 23 October 2019 that:

71.1 "He needs to use his left hand instead of his right hand for most tasks [in spite of being right- handed]".

71.2 "He reports dropping objects from both his hands and being unable to manage any bimanual tasks".

71.3 "His walking tolerance is limited to walking to the car in his driveway by shortness of breath.

71.4 "He will drive his wife and stepdaughter to go to the supermarket but will not even help lift items into the boot of the car from the trolley". He reported "altered sensation, numbness, a pins and needles sensation and "stabbing pain" in this hand that stops him holding "anything"'.

71.5 "He has "no strength.. .no power" in either hand, preventing him opening jars, fishing using a knife and fork to cut food, hold a pen, squeeze shampoo from a bottle and carrying things".

71.6 "Objects will just fall from his right hand, without warning and especially if he is experiencing pins and needles'.

71.7 "He feeds himself using only a fork held in the left hand"; and Ms Lobar [his stepdaughter] reportedly "cuts up his food for him".

71.8 'He recently reportedly dropped a kettle, so he does not use one now".

71.9 "[His stepdaughter] Ms. Lobar walks the dog when she walks her own [dog]".

72. On 6 January 2020 the Defendant informed Dr. Goodhead, Consultant Psychiatrist that;

72.1 He "also described shooting pains and numbness of the lower right arm and right hand, together with weakness such that he regularly drops things".

72.2 and he "has generally reduced grip".

72.3 "He couldn't even open a bag of sweets

<u>CPR 81.3 (5)(b) and CPR 32.14: False statements in documents verified by a statement of truth</u>

73. In accordance with CPR 32.14 and in contempt of court, each of the documents identified below contained statements that were false, and which the Defendant cannot

have believed to be true at the time of making the statements. Full particulars of the false statements made by the Defendant are set out below.

74. In his Particulars of Claim dated 15 February 2018, which were verified by a Statement of Truth signed by him, the Defendant stated:

74.1 Paragraph 29: Particulars of Injury:

74.1.1 He, "suffered significant injury to his right arm" as a result of the index surgery.

74.1.2 "[The Defendant's] dysaesthetic pain has led to under usage and he has developed a weakness of the right arm and hand,

74.1.3 The above-noted weakness, "prevents [the Defendant] from undertaking simple day to day activities such as opening a bottle or crisp packet'.

74.1.4 "The lack of junction and pain in his right upper limb has prevented [the Defendant] ... holding fishing tackle or casting a fly.

74.1.5 "Carrying /using items such as kettles and hot pots present problem.

74.1.6 "Driving is ... adversely affected'.

74.1.7 He estimated that he was "50-60% morse with regards to the dexterity on t he right than he mas preoperatively.

74.1.8 He was "significantly compromised with regards to a number of domestic, DIY and gardening activities'.

75. In his Schedule of Damages dated 15 February 2018, which is verified by a Statement of Truth signed by the Defendant, the following is stated to have been caused by the index surgery:

75.1 "(The Defendant] now suffers from chronic dysaesthetic pain leading to under-usage and has developed a weakness of the right arm and hand".

75.2 The above-noted weakness, "prevents [the Defendant] from undertaking simple day to day activities such as opening a bottle or crisp packet'.

75.3 "The lack of function and pain in his right upper limb has prevented the Claimant... holding fishing tackle or casting a fly.

75.4 "Carrying/ using items such as kettles and hot pots present problems.

75.5 "Driving is additionally adversely affected'.

75.6 He estimated that he was "50-60% worse with regards to the dexterity on the right than he was preoperatively'

75.7 He was "significantly compromised with regards to a number of domestic, DIY and gardening activities.

75.8 That the Defendant's claim, with certain items, including General damages, 'TBC', had a value of £227,990.94.

76. In his witness statement dated 15 August 2019 which was verified by a Statement of Truth signed by him, the Defendant said:

76.1 Paragraph 38:

76.1.1 It was only after the surgery on 16 October 2014 that there was any deterioration in my right am, I had always been able to use it normally before that. "

76.2 Paragraph 44:

76.2.1 I have no power in my [right] hand and arm to grip or pinch anything and across the palm of my hand it is numb.

76.2.2 I drop things when they are in my right hand, I did occasionally drop things before the bypass, but is has been very much worse since and I use plastic cups instead of glass in case I drop things.

76.2.3 I now need help with washing and dressing and I am not able to safely cook on my own.

76.3. Paragraph 49:

76.3.1 Fishing used to be my life and I would do it all the time, but I have had to give it up because I cannot swing my arms to cast the line and do not have the strength to pull the fish in.

76.4 Paragraph 53

76.4.1 At home I do not do much housework any more. The vacuum is too heavy, and I cannot cook anymore because it would be very easy for me to drop something, cut or bum myself.

76.4.2 I cannot open blister packets for tablets, so Alix does this for me.

76.5 Paragraph 54:

76.5.1 I cannot clean the house windows or use many kitchen utensils because my hands cannot hold them properly anymore.

76.5.3 Alix has to do any heaty tasks or lifting for me now.

76.5.3 I struggle to hold a tea-cup so 1 prefer a large mug but then it's too heavy.

76.6 Paragraph 55:

76.6.1 Alix helps with all of my personal care, she helps me to shave, help to shower, to put my socks on, she does up any buttons and zips and 1 am dependent for help a lot because my hand cannot do these things anymore.

77. In his amended Schedule of Loss, dated 2 December 2020 and verified by a Statement of Truth signed by him, the following is stated:

77.1 That "following advice from Mr. Radatz following an examination he tried to desensitise his arm and use it more normally." and

77.2 As a result [of the above] he has now recovered to hispre-2014 operation levels of function.

77.3 That "The [Defendant] cannot take part in his previous hobby of fishing any longer".

78. In a witness statement, dated 5 June 2020 and verified by a Statement of Truth signed by him the Defendant stated that:

78.1 Following advice from Dr. Radatz, "that it would help to desensitise it and I would retain more use for longer. I took this advice seriously and have tried to use my right arm when I can to try and retain use in it as long as possible.

78.2 He continued to find it 'painful/difficult to hold the [dog's] lead in either hand, for any length of time but I find on good days I can hold it for the short walk.

78.3 He can "sometimes carry a [shopping] basket but cannot carry more than one or two light items in it".

78.4 That he can only "use [a pressure washer] with his right hand] on a good day.

78.5 That as "Using the fuel gun to fill my car is painful" he has devised a special way to use a petrol pump to limit pain but still cannot always manage to operate it with his right hand alone as "[I] cannot always use my right hand and would say usually I have to use two hands or my left hand".

78.6 That before the 2014 surgery he was able to get tablets out of a blister pack and "whilst it was difficult, I could still do (sic) get tablets out of a blister pack."

<u>Particulars of falsity and knowledge</u>

79. In relation to each and every statement and representation set out above at Paragraphs 65 to 78 or any of them, the statement or representation was false, in that:

79.1 The Defendant's true level of disability arising from the surgery was very minor, if there was any disability at all.

79.2 When making those statements and representations he was fabricating and/or grossly understating the restriction of function in his right arm/hand prior to the index surgery.

79.3 When making those statements and representations he was fabricating and/or grossly exaggerating his post-surgery symptoms and disability for the purposes of his claim.

79.4 When he made those statements and representations, he knew they were false and that he was not suffering from significant pain and disability. In particular:

79.4.1 He was able to hold, lift and carry items in his right hand without difficulty.

79.4.2 He was able to operate machinery (e.g., the pressure washer) using his right hand without difficulty.

79.4.3 He could hold items in his right hand and manoeuvre them without difficulty with his arms above his head.

79.4.4 He did not require additional assistance with personal hygiene or with activities of daily living as a result of symptoms in the right hand that were not present prior to the index surgery.

79.4.5 He did not require aids and equipment to assist him with activities of daily living as a result of symptoms in the right hand that were not present prior to the index surgery.

79.5 When he made those statements and representations, he knew that they were false because:

79.5.1 He had full knowledge of the functional restrictions he had experienced and/or reported in the right arm/hand prior to the index surgery.

79.5.2 He had full knowledge of the assistance he had required and received prior to the index surgery with regard to both personal care and domestic activities.

79.5.3 He had full knowledge of the restrictions he had experienced and/or reported to his social, leisure and working activities as a result of symptoms in the right arm/hand prior to the index surgery;

79.5.4 He had full knowledge of his true level of function post-surgery.

80. Further, the said statements and representations, if persisted in, would have interfered with the administration of justice in that:

80.1 Subject to liability, they would have caused the Defendant to be paid compensation to which he was not entitled, and

80.2 At the time that the Defendant made the said statements and representations he had no honest belief in their truth and knew the same to be false, and/or

80.3. At the time that the Defendant made the said statements and representations he knew that they would be likely to interfere with the administration of justice.

81. By reason of the aforesaid matters the Defendant has committed contempt of court and should be sanctioned accordingly.