Neutral Citation Number: [2022] EWHC 1561 (QB)

Case No: C55YM648

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 20/06/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Steven Lee Woodger	**Claimant/ Respondent**
- and -	
Reece Hallas	**Defendant/ Appellant**

- -
- -

Toby Sasse (instructed by **Keoghs LLP**) for the **Defendant/Appellant** **Philip Davy** (instructed by **Bhatia Best**) for the **Claimant/Respondent**

Hearing date: **10 May 2022**

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is an appeal with leave of Andrew Baker J from the judgment of His Honour Judge Godsmark QC sitting at the County Court at Derby on 25 June 2021 in a claim for damages for personal injury arising out of a road traffic accident. The Appellant is the Defendant to the claim, and the Respondent is the Claimant. I will refer to them, for clarity, as 'the Defendant' and 'the Claimant' respectively.

2. In summary, the judge found for the Claimant and awarded him £49 415 plus costs of the claim up to September 2018. Later I will need to say more about how those figures were arrived at. The judge found that the Claimant had been fundamentally dishonest in relation to his claim within the meaning of s 57(1) of the Criminal Justice and Courts Act 2015 but did not dismiss the claim under s 57(2), on the grounds it would be substantially unjust to do so. He awarded the Claimant his costs up to the date the Defendant withdrew its Part 36 offer made in March 2015 (September 2018) and no order for costs thereafter.

3. The Defendant's first ground of appeal is that the judge's failure to dismiss the claim was wrong. It is argued that there was no proper basis for a finding of substantial injustice. The only expressed reason given by the judge was inadequate and the judge did not balance the extent of the Claimant's dishonesty against the suggested injustice to him if the claim were dismissed in its entirety.

4. The second ground of appeal relates to the judge's award of costs. The Defendant says that even on the judge's approach to s 57, it was wrong in principle and outwith the proper scope of his discretion for him to have awarded the Claimant any costs given his findings that the Claimant had been fundamentally dishonest.

5. Also canvassed at the hearing was the judge's approach to damages. Having found the Claimant to be fundamentally dishonest and calculated what he was properly entitled to, the judge then reduced the damages by disallowing two heads of claim. Whether the judge had been entitled to do this was in issue. There was no Respondent's Notice on this issue but it is something I have to decide for reasons I will explain later.

Section 57

6. Section 57 was enacted as a response to the long-standing and well-recognised problem of fraudulent personal injury claims, and in particular their impacts on the insurance industry and the courts. These were described by Moses LJ in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin), [2]-[4]:

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those

who are injured as a result of the fault of their employer or a defendant can receive just compensation.

3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.

4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability."

7. In *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004, the Supreme Court held that under both its inherent jurisdiction and CPR r 3.4(2), the court had power to strike out a statement of case, on the ground that it was an abuse of the process of the court, at any stage of proceedings, even after trial in circumstances where the court had been able to make a proper assessment of both liability and quantum; but that that power would be exercised at the end of a trial only in very exceptional circumstances where the court was satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined;

8. Section 57 provides:

"Personal injury claims: cases of fundamental dishonesty

(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") -

(a) the court finds that the claimant is entitled to damages in respect of the claim, but

(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

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

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

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

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

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

(8) In this section—

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

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

"related claim" means a claim for damages in respect of personal injury which is made—
(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

> (b) by a person other than the person who made the primary claim.
>
> (9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force."

9. In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] AC 1, [95]-[96], Lord Hughes said, referring to the 'fraudulent claims rule', ie, the rule that a genuine insurance claim supported by fraudulent evidence should fail even if valid in law, said:

> "95. The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a claim has been exaggerated by a "fundamentally dishonest" claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in *Summers v Fairclough Homes*.
>
> 96. Severe as the rule is, these considerations demonstrate that there is no occasion to depart from its very long-established status in relation to fraudulent claims, properly so called. It is plain that it applies as explained by Mance LJ in *The Aegeon* at paras 15-18. In particular, it must encompass the case of the claimant insured who at the outset of the claim acts honestly, but who maintains the claim after he knows that it is fraudulent in whole or in part. The insured who originally thought he had lost valuable jewellery in a theft, but afterwards finds it in a drawer yet maintains the now fraudulent assertion that it was stolen, is plainly within the rule. Likewise, the rule plainly encompasses fraud going to a potential defence to the claim. Nor can there be any room for the rule being in some way limited by consideration of how dishonest the fraud was, if it was material in the sense explained above; that would leave the rule hopelessly vague."

10. The Supreme Court addressed the elements the court must consider in deciding whether dishonesty is made out in *Ivey v Genting Casinos UK Limited (t/a Crockfords Club)* [2018] AC 391. Lord Hughes, with whom the other justices agreed, said at [74]:

> "74. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of

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

11. In *Howlett v Davies* [2017] EWCA Civ 1696 the Court of Appeal approved the following formulation by HHJ Moloney QC of 'fundamentally dishonest' in the context of CPR 44.16(1):

> "44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the [Qualified One-way Costs Shifting] rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
>
> 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

12. In *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51, I reviewed the authorities concerning 'fundamentally dishonest' and 'fundamental dishonesty' and concluded as follows:

> "62. In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) if the defendant proves on a balance of probabilities that the

claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* , supra.

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

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

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

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

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

65. Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will

> lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s. 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

13. In *Iddon v Warner* [2021] Lexis Citation 39, [97]-[98], His Honour Judge Sephton QC (sitting as a High Court judge) said:

> "97. In my judgment, section 57 of the Criminal Justice and Courts Act 2015 is frankly punitive in character. A claimant who is fundamentally dishonest is penalised by having his claim dismissed. Parliament has plainly concluded that the aim of addressing the evils of dishonest claims justifies depriving a claimant of the part of the claim he can prove and providing the defendant with the windfall of not having to satisfy a lawful claim, albeit one that may have been dishonestly presented. The only escape from the default position of dismissal arises if the injustice the dishonest litigant suffers is 'substantial.'
>
> 98. I respectfully agree with Julian Knowles J when he said in *Sinfield* that 'substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty.'"

14. The learned judge went on to hold that it would not cause substantial injustice to deprive a fundamentally dishonest claimant (who was entitled to damages for a negligent late cancer diagnosis which had required her to undergo disfiguring surgery which she would not otherwise have needed, but who had then lied repeatedly and often about the extent of her ongoing disability) of the whole of her damages, notwithstanding she had used a large interim payment to buy a house which would have to be sold in order to repay the money. He said at [101]-[103]:

> "101. I do not think that Mrs Iddon suffers "substantial injustice" merely because Dr Warner is not required to pay damages and because Mrs Iddon does not have the funds to seek the therapies she wants: these are inevitable corollaries of the operation of the statute.

> 102. I was initially inclined to think that Mr Skeate was on stronger ground in submitting that Mrs Iddon has changed her position (by buying a house) in the expectation of succeeding in her claim. On reflection, however, I am not persuaded that this could amount to substantial injustice in this particular case. The court may order the repayment of an interim payment: see CPR 25.8(2)(a); any claimant who receives an interim payment runs the risk that the court will exercise the power to order repayment. If the money is invested, for example, in a house, the claimant runs the risk that if the court orders repayment, he may lose the investment unless he has other means to repay. I conclude from this observation that a claimant who changes his position on receipt of an interim payment does not have a defence to an order to repay merely because he has changed his position. I remind myself that even if I were not to dismiss the claim, Mrs Iddon would have an award of less than she has already received by way of interim payments. It is likely that she would have to make a substantial repayment: thus, she may have to sell her house in any event. I do not believe that Mrs Iddon would suffer substantial injustice if I dismissed her claim if such a dismissal is likely to result in the court ordering her to repay the interim payment.
>
> 103. I regard Mrs Iddon's dishonesty in this case to be very grave. She lied repeatedly about her injuries, she continued to lie after she had been found out and, most seriously, she persuaded others to lie on her behalf. In my judgment, the culpability and extent of her dishonesty far outweighs any injustice to her in dismissing her claim; the dismissal of this claim seems to me to be exactly the evil to which Parliament directed its mind in enacting section 57. I do not believe that she would suffer substantial injustice if her claim were dismissed."

15. In *Jenkinson v Robertson* [2022] EWHC 791 (QB), [25], Choudhury J gave the following helpful summary of the applicable principles:

> "25. It is clear from these authorities that in an application under s.57 of the 2015 Act:
>
> (i) The burden is on the defendant to establish on the balance of probabilities that the claimant has been fundamentally dishonest;
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> (ii) An act is fundamentally dishonest if it goes to the heart of or the root of the claim or a substantial part of the claim;

> (iii) To be fundamentally dishonest, the dishonesty must be such as to have a substantial effect on the presentation of the claim in a way which potentially adversely affects the defendant in a significant way;
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> (iv) Honesty is to be assessed by reference to the two-stage test established by the Supreme Court in *Genting*;
>
> (v) An allegation of fundamental dishonesty does not necessarily have to be pleaded, the key question being whether the claimant had been given adequate warning of the matters being relied upon in support of the allegation and a proper opportunity to address those matters.
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> (vi) The s.57 defence can be raised at a late stage, even as late as in closing submissions. However, where the claimant is a litigant in person, the Court will ordinarily seek to ensure that the allegation is clearly understood (usually by requiring it to be set out in writing) and that adequate time is afforded to the litigant in person to consider the defence."

Factual background

16. On July 2014 the Claimant was a front seat passenger in a Peugeot 205 vehicle being driven by the Defendant on the A6, Allestree, Derby, when the vehicle was involved in a serious road traffic accident. The Defendant lost control of the vehicle which spun, before being struck square on to the passenger side of the vehicle at speed by a Nissan Navara that had been travelling in the opposite direction. The Claimant had to be cut free from the vehicle.

17. The accident was caused by the Defendant's negligence. Liability for the accident was admitted by the Defendant's insurers, Hastings Direct, in correspondence dated 10 June 2016. In the normal way, they have stood in the shoes of Mr Hallas, the Defendant to the claim.

18. The judge said this in [1]-[4] of his judgment about the Claimant's injuries:

> "1. On 5 July 2015, Mr Woodger was injured in a road traffic accident. The details do not matter greatly since liability is admitted, but the injuries sustained were serious. There was a compression fracture of the fourth thoracic vertebra and a minimally displaced open book fracture of the pelvis. Both required surgery. There was also a fracture of the scapula and of the upper left ribs, with a minor pneumothorax. It is agreed that these injuries arose out of the accident for which liability is admitted.

> 2. Such injuries would be expected to result in substantial disability in the early stages, with a gradual improvement over the first six to twelve months after injury. So far as those injuries are concerned, that expectation was largely realised. The controversy in this case relates to Mr Woodger's right hip. Mr Woodger complains that this injury site has caused him continuing problems. He describes pain and limitation of movement in the right hip, which have been and remain debilitating in terms of his daily activities and in particular his ability to undertake his pre-accident work.
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> 3. Mr Woodger worked in the motor trade undertaking mechanical and electrical car repairs. He previously worked as a welder fabricator, and variously as a fitter of tyres, exhausts and clutches. Mr Woodger claims that as a result of his injuries, he is much less able to undertake mechanical work on cars, much of which involved bending and stretching, lifting and carrying and twisting himself to access components within and under vehicles.
>
> 4. Mr Woodger claims general damages for pain, suffering and loss of amenity, past loss of earnings, past care and assistance from friends and family, past travel expenses and some damage to clothing and footwear cut off following the accident. As for future losses, the Schedule of Loss dated September 2018 sets out claims for future loss of earnings, future care and future treatment costs. What would otherwise have been a fairly conventional quantification of loss case, has become rather more sharply contested since the Defendants allege that Mr Woodger is dishonestly exaggerating his claim."

The Claimant's fundamental dishonesty as found by the judge

19. Whilst formally maintaining on behalf of his client that he had not been dishonest, Mr Davy for the Claimant accepted that the judge, having heard the evidence and seen the Claimant give evidence and be cross-examined, was entitled to reach the conclusion that the Claimant had been fundamentally dishonest, and that this was a finding of fact he was not able to challenge on the appeal before me. That concession was rightly made.

20. The judge found the Claimant to have been fundamentally dishonest for the following reasons. He said the focus of the Defendant's case that the Claimant had dishonestly exaggerated his claim was in relation to his complaint of continuing symptoms, particularly in his right hip, and his related past loss of earnings claim. The Claimant had been the subject of surveillance. On a number of occasions, at a time when the Claimant was complaining of substantial disability and inability to earn, he was seen at a local garage moving relatively freely, involved in some work under the bonnet of cars and during one fairly

lengthy sequence, working on his back underneath a vehicle apparently doing some welding. When viewed by experts who had examined the Claimant and to whom he had complained of significant pain and disability they agreed that the footage showed a significantly greater range of movement in his right hip than he allowed either expert to elicit on examination.

21. The Defendant served an amended Defence alleging fundamental dishonesty in September 2018 when it served the surveillance evidence, at which point it withdrew its Part 36 offer of £80 000 that had been made in March 2015.

22. Part of the Claimant's case was that he had, in years following the accident, done unpaid work for a firm called NRCS. A statement to that effect was taken by the Claimant's solicitor from a Mr Godfrey of NRCS. However, Mr Godfrey declined to sign it because it was not true that the Claimant was not being paid: he was.

23. Mr Godfrey from NRCS was called to give evidence by the Defendant. He had been seen by the solicitors for the Defendant, and made a witness statement indicating that the Claimant did a substantial amount of paid work whilst at NRCS between March 2015 and March 2017. He says the work was "cash in hand" and involved servicing and similar of motor vehicles, with the sums paid mounting up to something like £12,000 a year. The Claimant later left NRCS and went to work for a firm called KAMS where he accepted he was paid.

24. At [23] the judge referred to invoices for payments to the Claimant which had been produced by KAMS, which he said the Defendant viewed with 'deep suspicion'. Before me, Mr Sasse called them 'patently unreliable'.

25. The Schedule of Loss dated 3 September 2018 was still the only schedule in this claim which was before the judge. That maintained a claim for loss of future earnings which was effectively working life-long of some £481,000. Future care and assistance was on the Schedule at £15,000. There were future treatment costs at nearly £3,000 and future DIY maintenance provision at around £26,000, with an unquantified pension loss claim. At [28] the judge noted that these had all been effectively abandoned not long before trial in light of the disclosure of the surveillance material.

26. From [32] onwards the judge set out his findings. He said that the Claimant had sought to exaggerate the effects of his injury when seen by the medicolegal experts. The judge said he had been impressed by Mr Godfrey's evidence. The Claimant had been paid at NRCS. The picture of the Claimant's remuneration whilst working at KAMS was, the judge said, 'cloudy to say the least.' The judge found that the Claimant's remuneration from KAMS had been significantly more than shown by the invoices provided, although there was no doubt that Mr Woodger had suffered serious injuries in the accident.

27. At [42] the judge emphasised the evidence about the Claimant's remuneration at KAMS, and said that he had been 'left with the distinct impression that an attempt has been made to pull the wool over my eyes.'

28. At [44] the judge found that the Claimant did suffer from hip pain but had exaggerated the level of disability it caused.

29. After calculating the various heads of damages which were pursued and been proved, at [55] the judge found they came to £74,460. That figure was made up as follows: pain, suffering, loss of amenity, £40,000; loss of earnings, £12,545; past care, £7,650 travel and clothing £1,765; handicap on the open labour market (a *Smith v Manchester* award), £12,500.

30. At [56] the judge then turned to the question of fundamental dishonesty. At [57]-[60] he said:

> "57. The first question I need to consider is whether there is fundamental dishonesty. That is, dishonesty which goes to the root of the claim or a substantial part of it. I have found that Mr Woodger has exaggerated his symptoms on presentation to the medical experts. However, I am also of the view that he is not fabricating his hip symptoms. There is pain there and he has just presented it as being more debilitating than it is.
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> 58. I have also found that Mr Woodger has concealed income, which he has received from working. He has not concealed that he was doing some work, just that he was being paid for it. However, the suggestion that he could not earn money as a mechanic in the motor trade has been the largest element of this claim. The schedule set out a loss of earnings claim to September 2018 of £66,000, and a future losses figure of £481,000 thereafter. There was a claim for loss of pension. Also associated DIY and future care claims, but the loss of earnings element of this claim, on its own, was in excess of half a million pounds.
>
> 59. True most of that has been abandoned, but in September 2018, before the surveillance evidence was disclosed, it was being maintained. The claim that Mr Woodger was not capable of earning as a mechanic was thus central to this claim. The concealment of earnings which would undermine or fundamentally destroy that element of this claim, in my judgment, goes to the root of it. My assessment is that Mr Woodger has been dishonest about his earning capacity and about his earning capacity rather than anything else, but that was the bulk of this claim.
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> 60. There will be a finding of fundamental dishonesty. What should be the consequence? Section 57(2) requires me to dismiss the primary claims unless satisfied that the Claimant would suffer substantial injustice. There are elements of this claim which remain sound and uncontaminated by my findings on earnings. The injuries themselves are serious and have continuing effect. There is

> an element of the claim on behalf of innocent parties who selflessly gave their time, care and generosity to Mr Woodger in looking after him. Whilst I recognise that there is a penal element to Section 57, in my view, it will be unjust to dismiss the whole claim."

31. The judge then said this:

> "What I propose to do is dismiss all aspects of the claim which are founded on lack of earning capacity. That is the claim for past loss of earnings and also the claim for handicap on the open labour market. The award is thus adjusted and made out as follows. Pain and suffering, loss of amenity, £40,000. Past care, £7,650. Travel and clothing, £1,765. If my arithmetic is correct, that is a total of £49,415. There will be judgment in that sum."

32. The judge then turned to costs at [62]-[65]:

> "62. The Claimant has been successful in this claim to the extent of some £49,000 odd, and made a Part 36 offer in March 2020 of £40,000. The Claimant has just beaten that Part 36 offer. The normal consequences would be, indemnity costs thereafter, uplift to the damages figure. What distinguishes this case in many ways is the fact that I have made findings of fundamental dishonesty. It is also brought to my attention that in 2015, the Defendant made its own Part 36 offer in the sum of £80,000 which was withdrawn once the surveillance evidence came to light. Therefore there was a period up to a date in 2015, when the Claimant would have been able to achieve a result in this case in excess of that which has been achieved following trial.
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> 63. Dealing firstly with the consequences of Part 36. I am directed towards aspects of conduct which are relevant in deciding whether the usual Part 36 consequences should follow under 36.17(5). There has been misconduct in this case in that I have found that there has been dishonesty in the way that the claim has been presented. There has also been serious shortcomings, as I have indicated, in disclosure. By far the greatest part of the claim I have dismissed, as being founded upon dishonesty and that must be reflected in any Part 36 consequences. They lead me to the view that there should be no Part 36 penalties imposed in relation to this matter, and that I should look at the matter in terms of overall general [discretion].
>
> 64. On the one hand the Defendant says, had the Claimant accepted the £80,000 in 2015, then this case would have

> finished then, and all of the costs that have flowed thereafter are a consequence of the Claimant's stance and the risks that he was taking. The counter failing argument is, well there was an offer in March 2020 of £40,000 which, as I have observed, is pretty close to a pain suffering loss of amenity figure on its own, without any consequential losses. The Defendant chose to ignore that, to make no counteroffer of any description and effectively to say, we are going to defeat this claim in its entirety and took the risk upon itself that it would prove fundamental dishonesty, which was been demonstrated, but also that the consequences that would flow from that would be the dismissal of the entire claim.
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> 65. That is a stance that they are entitled to take, but the Defendant has chosen not to protect itself against that strategy not being successful to any degree. That is the Defendant's choice. There is thus, in this case, an element of each side failing to avail itself of opportunities which were available along the journey before we get to today. As I have said, there will be no Part 36 penalties imposed upon the Defendant, but the order which I consider to be that which is just in all the circumstances is that the Claimant will have his costs to the date of the withdrawal of the Part 36 offer. There will be no order for costs thereafter."

The parties' submissions

33. On behalf of the Defendant Mr Sasse submitted that the judge had been wrong to make a finding of substantial injustice. (The judge in fact just referred to 'injustice' but Mr Sasse did not take a point on that and accepted the judge had had the correct statutory test mind.) Mr Sasse's argument was that there was simply nothing on the facts or evidence in this case to warrant such a finding. He said that the judge had not attempted to identify in what way particular and peculiar to this Claimant the dismissal of the whole claim – what Mr Sasse described as 'the intended and mandatory outcome' under s 57 - would be substantially unjust to him.

34. He said, by reference to *Sinfield* and *Iddon,* that the mere loss of the reduced damages to which a fundamentally dishonest claimant would otherwise be entitled to cannot be substantial injustice on its own. That outcome is the inevitable and expected outcome of the section (s 52(3)). He said it followed that the only expressed reason given by the judge, namely that it was unjust to dismiss the genuine part of his claim, took into account an irrelevant factor. Alternatively, the judge's reasoning failed to explain why the loss of the whole of his damages would be substantially unfair to this Claimant in particular, when it would not be for the majority of Claimants. Mr Sasse said that nor could it be the position of those who had afforded care, on whose behalf such damages are claimed/held, as their position is not contemplated under s 57(2).

35. Mr Sasse emphasised that the Claimant's conduct had been sustained over five years, across several successive statements of case and schedules, had involved perjured evidence given by the Claimant, and sought by the Claimant from others and knowingly advanced at trial, The enormous irrecoverable additional cost attributable to that false case, and the considerable waste of court time were relevant when considering fundamental dishonesty and hence the question of injustice to the Claimant caused by such dishonesty and should have been considered by the judge, but were not.

36. On the judge's costs order, Mr Sasse said that the judge had been right to disapply CPR r 36.17(4) by reason of the Claimant's dishonest conduct, pursuant to CPR r 36.17(5), and instead to fall back on his general discretion as to costs under CPR r 44.2. However, he said that the judge's exercise of discretion had been fundamentally flawed and that by reason of the Claimant's sustained and fundamental dishonesty throughout the case, the only proper order the judge could have made is that the Defendant have all of its costs.

37. On the judge's approach to damages, Mr Sasse at one point tentatively suggested that the power to do what the judge did was to be found in the general case management provisions of CPR r 3.1 but in the event did not pursue it.

38. On behalf of the Claimant, Mr Davy emphasised that the judge was very experienced. He said when the judgment was read as a whole, the judge's reasons for finding substantial injustice were sufficiently clear. He advanced his case on substantial injustice on four bases: (a) the severity of the Claimant's injuries; b) the lasting consequences and permanence of his injuries; c) third party care; (d) the need for the Claimant to see justice done against the Defendant who had caused his injuries. He emphasised liability had been conceded.

39. On costs, Mr Davy said that the judge had directed himself reasonably to the fact that Defendant made no offers (after it withdrew its Part 36 offer) and made no concessions. They had not allowed for the risk of its argument for total dismissal not being accepted. The judge had weighed up the pros and cons and made an order that was properly within his discretion.

40. The judge had to perform a balancing exercise, weighing into the balance *not only* the Claimant's fundamental dishonesty as regards his earnings claims and the attested level or effect of his proven residual symptoms of injury, *but also* the fact the Claimant had successfully established an entitlement to some damages, *and* the fact that those damages exceeded a Part 36 offer which he (the Claimant) had made, *and* the fact that the Defendant had elected not to make *any* offer, even a *Calderbank* offer, to protect itself on the issue of costs, in the event the Claimant recovered some damages at trial and was accordingly able to call himself the 'winner'.

41. Mr Davy said the judge directed himself that there had to be a penal element. He found it would be substantially unjust to dismiss the whole but in balancing matters he then dismissed what equated to a third of it – even though what he dismissed he found the Claimant had proved. He submitted that a judge who has found fundamental dishonesty but not dismissed the whole claim has the

power under s 57 to dismiss elements of it as a matter of discretion even if the claimant has genuinely proved an entitlement to those damages.

Discussion

Substantial injustice

42. With respect to this very experienced judge, for the substance of the reasons advanced by Mr Sasse, I am satisfied that the judge was wrong not to have dismissed the entire claim once he had rightly found the Claimant to have been fundamentally dishonest. In my judgment there was no proper or adequate basis for the judge's finding that it would be substantially unjust to dismiss the entire claim.

43. The starting point is that s 57 only comes into play where the court finds that a claimant is genuinely entitled to some damages (s 57(1)(a)). Hence, in every case where the court goes on to find fundamental dishonesty *ex hypothesi* the claimant will stand to lose their genuine damages. But Parliament has provided in express terms that that should be so, subject to the question of substantial injustice. I quoted the *Hansard* material in *Sinfield*, [61], which makes that clear.

44. I thus reiterate what I said in *Sinfield*, [65], which I quoted earlier and which was endorsed by HHJ Sephton QC in *Iddon*, [98], namely that substantial injustice must mean something more than the claimant losing their genuine damages.

45. In light of this, it seems to me that the judge's reasoning, in particular in [60], cannot stand. The two expressed reasons for finding substantial injustice were that part of the claim was genuine; and that others had provided past care. Neither reason is sufficient. The first reason is in conflict with *Sinfield* and *Iddon* and the plain purpose of s 57. The second reason is difficult to reconcile with s 57(2) which makes clear it must be the claimant – and not anyone else – who would suffer substantial injustice.

46. None of Mr Davy's four reasons for seeking to uphold the judge's finding, set out above, admirably advanced though they were, even if they can be teased out of, or implied into, the judge's judgment, seem to me to be sufficient. I have already dealt with the third point (regarding care). With respect to the first two points, I accept that the Claimant did indeed suffer serious injuries. But they were not the most serious and he had made a substantial recovery. The fourth point, regarding the need for a liable defendant to be seen to pay damages, was also advanced in *Iddon* and rejected at [101].

47. In *Iddon*, [103] the judge approached the question of substantial injustice by balancing on the one hand, the nature and extent Mrs Iddon's dishonesty, and on the other the injustice to her of dismissing her whole claim, and came down in favour of dismissal on the basis that the former outweighed the latter. Mr Sasse commended this approach and commented that the judge had not undertaken any balancing exercise.

48. Taking the same approach to this appeal, even on the assumption that there was some injustice to this Claimant (which I have found there was not), the same conclusion follows. The sustained nature of his dishonesty; the length of time for which it was sustained; and his involvement of others all make his dishonesty so serious that it would have outweighed any injustice to him.

49. Counsel on this appeal were unable to refer me to any case which has defined the meaning of 'substantial injustice'. I was not wholly surprised by that. To paraphrase US Supreme Court Justice Potter Stewart in *Jacobellis v Ohio* 378 US 184, 197 (1964), county court judges will generally, 'know it when they see it'. But in this case, for the reasons I have given, I have concluded that the judge was wrong.

50. In my judgment the judge should have dismissed the entire claim and awarded the Defendant its costs of the action (subject to s 57(4) and (5), which I will discuss in a moment).

51. This makes it unnecessary for me to consider the ground of appeal in relation to the judge's costs order, which now falls away.

52. I come now to the question of the damages figure. The reason I do so is because of s 57(4) and (5) which require the court, when dismissing a claim: (a) to record the amount of damages that it would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim; and (b) when assessing costs to deduct the amount so recorded from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant. Thus, in light of the findings that I have made, my order must comply with these provisions. This means that the proper amount of damages needs to be determined.

53. I need not finally determine whether the judge had the power to do as he did by reducing the damages as he did. I would prefer to leave that for a case where it properly arises for determination and there has been full and detailed argument about it.

54. I am clear, because the claim should have been dismissed under s 57(2), that the appropriate figure for the purposes of s 57(4) is the judge's initial figure of £74,460. That is the figure he would have awarded the Claimant but for his fundamental dishonesty, and that that is the right figure follows from the plain meaning and effect of s 57(4). That, accordingly, is the figure he should have deducted from any costs award against the Claimant, pursuant to s 57(5).

Conclusion

55. The appeal is allowed; and the entirely of the Claimant's case is dismissed under s 57(2) on the grounds of fundamental dishonesty. The judge was wrong not to have so concluded. The Defendant will have its costs of the action subject to s 57(4) and (5). I invite the parties to draw up an order reflecting the terms of this judgment, including costs of the appeal.