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Case No: F92YJ067/ZP01/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER CIVIL APPEALS CENTRE
ON APPEAL FROM HIS HONOUR JUDGE KHAN
AT BURNLEY COUNTY COURT

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

Date: 10/08/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

ATTIQUE DENZIL

Appellant/Claimant

- and –

USMAN MOHAMMED

First Defendant

- and –

UK INSURANCE LTD

Respondent/Second Defendant

- -

Jeffrey Deegan (instructed by **Concept Law Solicitors**) for the **Appellant/Claimant**
Brian McCluggage (instructed by **Keoghs LLP**) for the **Respondent/Second Defendant**

Hearing date: 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 10 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

1. This is an appeal against an order of His Honour Judge Khan ("the Judge") dated 17 January 2022. The key issue on the appeal is whether the Judge erred in making a finding of fundamental dishonesty by reference to a head injury which led to swelling over a period of three to four days. There is no challenge for the purpose of the appeal against the finding of dishonesty in alleging a head injury. However, it is said that the Judge erred in finding that this dishonesty in respect of the head injury was fundamental to the claim.

2. Neither Counsel before the Court appeared before the Judge. This Court has had the benefit of clear and well researched written and oral submissions from Mr Jeffrey Deegan for the Appellant and Mr Brian McCluggage for the Respondent.

Background

3. The Appellant claimed to be injured in a road traffic accident which occurred on 28 January 2019. It is not necessary to set out the evidence in respect of the accident before the Judge. The Respondent did not accept that there had been any accident. The Judge found that both the Appellant and the First Defendant were unimpressive witnesses, the latter more so than the former: see the Judgment at paras. 24-25. The Judge found that on the balance of probabilities, there had been an accident by reference to the evidence of the Appellant, the photographs, the evidence of Mr Holton and Mr Gilgrass who each gave evidence regarding the impact of the accident on the motor vehicles involved in the accident: see the Judgment at paras. 26-29.

4. The Appellant's Skoda motor vehicle was a constructive loss. There were issues which are very common in such cases where storage and hire charges together were worth a multiple of the constructive loss claim for the vehicle itself. The Judge allowed the following sums:

   (i) £300 representing vehicle recovery charges;
   (ii) £3,694 was awarded for the constructive loss of C's vehicle.
   (iii) £672 of a £7,200 storage claim was allowed (28 days rather than 300 days).
   (iv) £47,580 representing 305 days of credit hire: see the Judgment at paras. 31-42.

5. As to the pain and suffering and loss of amenity claim ("PSLA"), it was recorded in the medical report that the Appellant reported injury to his neck and back and that he had been shaken and experienced moderate shock in his witness statement. During evidence he complained that in addition he had suffered a head injury for a period of four days. In his witness statement he said the following:

> *"24 When the car hit mine, I was pushed forward in my seat and then pulled back by the safety belt, My shoulders and head carried on moving towards forwards a little, but were then also pulled back and the back of my head hit the headrest with a thud.*
>
> ...

> *36. Eventually he did come over and offered to call the ambulance as I was holding the back of my head, where it had hit the head rest as it [was] swollen. He said he worked for the hospital and they would get there really quickly if they thought I had a head injury.*
>
> *37 I insisted that I didn't want to go to hospital or for anyone to call an ambulance as I didn't want to waste their time."*

6. The CNF (Claim Notification Form) did not refer to the alleged head injury. It was not referred to in the medical report of Dr Chishty. Dr Chishty did refer to moderate pain, stiffness and discomfort to (a) the neck, and (b) the shoulder from a day after the accident. This was said to be severe at the time of the report on 16 May 2019. He said that the symptoms of the Appellant had escalated from moderate to severe by 3.5 months after the accident. The prognosis was for recovery 9 months after the accident in the case of the neck and 10 months in the case of the shoulder.

7. The claim in respect of the head injury was not referred to in the Particulars of Claim. That set out the Particulars of Injury at para. 7 as follows:

> *"As a result of the First Defendant's negligence, the Claimant who was born on the 18 March 1970 sustained an injury to his neck and left shoulder as well as suffering from nightmares shock and shakiness. Such injuries are reported by Dr Muhammad Ehtisham Chishty in his medical report dated the 16 May 2019. The claimant seeks permission of the court to rely on Dr Chishti's evidence and reserves the right to rely on any further medical evidence as may be necessary."*

8. It can therefore be seen that the injury as described in the Particulars of Claim was to the neck and shoulder and as described in the medical report of Dr Chishty. Neither the Particulars of Claim nor Dr Chishty's report referred to a head injury.

9. It is evident that there was discussion at trial about the alleged head injury. Indeed, the failure of the Appellant to take this up with Dr Chishty was relied on by the Respondent as evidence that there never was a head injury. At para. 45j-k, the Judge said the following:

> *"j. There is also the evidence that Mr Denzil gave in relation to his head injury. He said that he had hit his head on the backrest as a result of being jolted in the collision and that his head was swollen at the back, how it had swelled five to six hours after the collision, and how the swelling had lasted for three to four days. Curiously, there is no mention in the CNF of the head injury, and whilst I bear in mind that, under the particulars of injury the solicitors who had completed the CNF used the shorthand form:"Full particulars of injuries will be*

> *detailed in the medical report. This will be forwarded to you in due course." Had Mr Denzil sustained a head injury, that is something which could easily have been referred to in the CNF, without having to deferred to the preparation and production of a medical report. Moreover, there is no mention of the head injury to the GP on 7 February 2019, or to Dr Chishty in the examination of 11 May 2019;*
>
> *k. Mr Denzil also admitted that what he had set out in his witness statement at paragraph 36 regarding the onset of the head injury was wrong and how his head had not been swollen immediately after the collision. Mr Denzil was unable to explain why neither his GP nor Dr Chishty referred to the head injury in the notes of the attendance on 7 February 2019 or, alternatively, in the examination on 11 May 2019, notwithstanding the fact that Mr Denzil claimed that he had informed both his GP and Dr Chishty that he had sustained such an injury. Mr Denzil acknowledged that he had read Dr Chishty's report but did not realise that it did not mention injury. When asked by Mr Walsh about the recovery period was in relation to the head injury, Mr Denzil's answer was short and to the point, he simply had no idea."*

10. It is apparent from the above that this evidence and the failure to pursue the head injury claim through the CNF, Dr Chishty, the GP and the Particulars of Claim were relied upon by the Judge as evidence that the Appellant had not suffered a head injury. In the context of para. 45, it was relied upon as evidence that the Appellant had not proven PSLA on the balance of probabilities. It is also evident from the above that the following allegations must have emerged in oral evidence, namely that the *"head had not been swollen immediately after the collision"* and that *"it had swelled five to six hours after the collision, and…the swelling had lasted for three to four days"*.

11. In the remainder of para. 45 of the judgment, the Judge set out numerous contradictions and unsatisfactory aspects of the evidence relating to alleged psychological problems, the neck injury, the shoulder injury, how it affected his ability to sleep and other unsatisfactory parts of the evidence. It is apparent from the level of detail of para. 45 of the Judgment that the Judge had a very detailed command of the evidence. In addition to sub-paras. j-k set out above, the nine sub-paras a-i are of similar length and detail. This all led not to a decision that the whole of the claim for PLSA was invented or dishonest, but that the case was not proven about any aspect of the personal injury.

12. Having found dishonesty proven in respect of the head injury alone, the Judge then had to consider if the dishonesty was fundamental. The Judge then approached this as follows:

> *"50. In my judgment Mr Denzil has been fundamentally dishonest in relation to the primary claim having regard to the matters that I identified a few moments ago in relation to the claim in relation to the head injury.*

> *51. Mr Denzil knew that he had not sustained a head injury. Had he done so, that is a matter that would have been identified in the CNF, a medical report would not have been needed to have recorded such an injury. The CNF was completed on 30 January 2019 at a time when Mr Denzil claimed that he was still suffering the effects of his alleged head injury. He admitted also that his own witness statement was wrong in relation to the onset of injury. Mr Denzil did not tell his GP or Dr Chishty that he had sustained a head injury, although he claimed that he did. Had Mr Denzil sustained such an injury and told both his GP and Dr Chishty, it is an alarming omission from not only the GP notes but also Dr Chishty's report.*
>
> *52. Mr Denzil should have noticed that Dr Chishty had not referred to a head injury when Mr Denzil had read the report of Dr Chishty before it was disclosed. The fact that he did not do so seems to me supportive of the fact that, as a matter of fact, no head injury was sustained. Subjectively, therefore, Mr Denzil has been dishonest. It seems to me that he has been dishonest applying the objective standard.*
>
> *53. It is axiomatic that the dishonesty is fundamental. There is no suggestion, to the extent that the Court exercises its powers under section 57, that Mr Denzil will suffer substantial injustice…"*

13. Whereas there had been a ground of appeal (1A-1C) about the finding of dishonesty, that has now been withdrawn.

14. The judgment set out section 57 of the Courts and Legal Services Act 2015 ("the 2015 Act") at para. 47 of the Judgment. The relevant part thereof read as follows:

> *"(1) This section applies where, in proceedings on a claim for damages in respect of personal injury, the primary claim,*
>
> > *(a) the Court finds … 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 … 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."*

15. The Court wishes to record how the judgment is in general a very careful and clearly presented document. The section on why the dishonesty was fundamental dishonesty is relatively light. The Judgment as it stood until an additional paragraph was added is encompassed in one short sentence at para. 53, namely *"It is axiomatic that the dishonesty is fundamental".* The word "axiomatic" is objectionable because it makes an assumption that the dishonesty was fundamental without grappling with the question why it was fundamental to the claim, or to use an expression used in some of the case law, whether, and, if so, why it went to the root of the claim.

16. The Judge reached the end of his judgment, identifying the conclusion at para. 54. It is evident from the start of para. 55 that Counsel for the Appellant was concerned that there had been a failure to give any or any adequate reasons for the finding that the dishonesty was fundamental. In accordance with his duty when a court is perceived not to have given sufficiently full reasons, he appears to have sought them as regards why the dishonesty was *"fundamental"*. This request was consistent with the practice expressed in *English v Emery, Reimbold & Strick Limited* [2002] 1 WLR 2409, 2419 at para. 25 (on an application for permission to appeal where a judgment is defective for want of reasons, the trial judge may be asked to give additional reasons to remedy any such defect).

17. The Judge then added a paragraph to the Judgment to seek to explain the finding of fundamental dishonesty. At para. 55, the Judge said the following:

> *"In the circumstances where a claimant maintains that he sustained a head injury when he did not, that goes to the root of the claim because what he is asserting before the Court that he has been injured in circumstances where he has not. Whilst bearing in mind the submission you made to me that, in the circumstances, the compensation to which Mr Denzil may have been entitled, had the head injury been genuine was nominal, it seems to me that that does not affect the fact that the dishonesty goes to the root of the claim because of the*

> *assertion of head injury in circumstances where no head injury was sustained."*

18. Looking at the whole of that paragraph, the Judge had in mind that the dishonesty was only in respect of the head injury. In those circumstances, the damages referable to the head injury alone may have been "nominal", that is to say very small indeed for 3-4 days swelling relative to damages for 9-10 months of injuries to the neck and the shoulder. The Judge's view was that the small or even nominal amount of damages did not affect the fact that making up the head injury went to the root of the claim. This was because of the assertion of a head injury where no head injury had been sustained. Even if the injury which was the subject of the dishonesty was small or minimal relative to the other injuries where dishonesty was not found, the Judge was saying that the dishonesty was still fundamental because it was inventing a personal injury in a case about personal injuries.

19. The Judge on the evidence found that the Appellant did not prove on the balance of probabilities any of the alleged injuries. He did not make a finding of dishonesty about the neck and shoulder injuries, and there is no cross appeal by the Respondent in that regard. In this respect, the appeal is significantly different from the case of *Pegg v Webb* [2020] Costs LR 1001. In that case, the successful appeal was based on the submission that the Judge ought to have found fundamental dishonesty rather than find that the claim for PSLA was not proven on the balance of probabilities. Had the Judge found that there was dishonesty in respect of the entirety of the PSLA or going beyond the head injury, he would have been bound to find so expressly. There was an evidential distinction between the head injury and the neck and shoulder injuries, namely that the medical evidence provided some support for the existence of neck and shoulder injuries (unlike the head injury). In the instant case, there has been no appeal that the finding of dishonesty was restricted to the head injury, and this Court must proceed on this basis.

The law as to fundamental dishonesty

20. There is not set out in the judgment in any detail the law relating to when dishonesty is "fundamental" for the purpose of a section 57 claim, albeit that in para. 55 of the Judgment (to which reference will be made below), the Judge recognised that the dishonesty had to go to the root of the claim. The Respondent submits that the words of section 57 of the 2015 are plain, and there is a danger discussed in the case law of elaboration or metaphor and in turn of creating tests which are different from the words of the statute.

21. Since dishonesty is no longer an issue, it is not necessary to recite the relevant law other than to mention the case of *Ivey v Genting Casinos Limited* [2017] UKSC 67 at 74 that requires a finding based on (subjectively) the actual state of mind of the claimant and (objectively) the standards of ordinary people. What matters for this appeal is the assessment of whether the dishonesty was fundamental to the primary claim as required under s.57(1)(b) of the 2015 Act.

22. The question of what is fundamental has been considered in the authorities both under the 2015 Act and in references to the same in the Civil Procedure Rules in connection with one-way costs shifting (QOCS). In connection with the latter, the judgment of HH Judge Moloney QC in the Cambridge County Court in *Gosling v Hailo* (unreported) has been adopted by higher courts, in particular by Newey LJ in the Court of Appeal in *Howlett v Davies* [2018] 1 WLR 948 at paras. 16-17. HH Judge Moloney QC had said in connection with QOCS and before the 2015 Act the following:

> *""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 QOCS 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."*

23. This is helpful to distinguish between what is fundamental and not fundamental. However, I express concern about looking for a "corollary" term, perhaps meaning a converse term. If it is not fundamental, it does not follow that it must be *"incidental"* or *"collateral"*. Something might not go sufficiently to the root of the claim and therefore not be fundamental without going so far as to say that it is incidental or collateral. The other wording that is then used for something that is not fundamental as being dishonesty as to a collateral matter or *"some minor, self-contained head of damage"*. It is easy to understand the use of these definitions, but it is important that they are confined to assist in applying the words of the statute itself without taking over from the statute so that the words of elaboration or metaphor replace the statutory words.

24. In *LOCOG v Sinfield* [2018] EWHC 51 (QB) *("LOCOG"),* Julian Knowles J helpfully cited other dicta in County Court cases as follows:

> *"57. There are a number of other decisions at the County Court level on CPR r 44.16(1). In Meadows v La Tasca*

Restaurants, Unreported, HHJ Hodge QC at Manchester County Court, said at para 18:

> *"18. It may perhaps be appropriate to draw an analogy with the court's approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest."*

58. In Rayner v Raymond Brown Group, Unreported, HHJ Harris QC at Oxford County Court, the judge said at para 10 that he would direct himself:

> *… that fundamental dishonesty within the meaning of CPR 44 means a substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case … Was there substantial material dishonesty which went to the heart of the quantum of this claim ?*

59. In Menary v Darnton, Unreported, HHJ Hughes QC at Portsmouth County Court, the judge said at paras 9 to 11 (it suffices for this judgment to quote simply a part of para. 11):

> *…Although I would not presume to give a definition of a phrase that neither Lord Justice Jackson nor the Editorial Board of the Civil Procedure Rules thought appropriate to provide, for present purposes, fundamental dishonesty may be taken to be some deceit that goes to the root of the claim. The purpose of the phrase is twofold: first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally dishonest; they do not go to the root of the claim. Second, the fundamental dishonesty is related to the claim not to the claimant. This must be deliberate on the part of those who drafted the Civil Procedure Rules…"*

25. Later in the judgment in LOCOG, Julian Knowles J at para. 61 referred to what was said by Lord Faulks QC at the Committee stage of the passage of the bill which led to the 2015 Act:

> *"I assure the Committee that the way that the clause is drafted should not result in the courts using the measures lightly. Civil courts do not make findings of dishonesty lightly in any event; clear evidence is required. The sanction imposed by the clause—the denial of compensation to which the claimant would otherwise be entitled—is a serious one and will be imposed only where the dishonesty is fundamental; that is, where it goes to the heart of the claim. That was very much what my noble friend said about what it was aimed at.*
>
> *Of course, "fundamental" has an echo in the Civil Procedure Rules and the qualified, one-way costs shifting. An adverb to qualify a concept such as dishonesty is not linguistically attractive, but if we ask a jury to decide a question such as dishonesty, or ask a judge to decide whether someone has been fundamentally dishonest, it is well within the capacity of any judge. They will know exactly what the clause is aimed at—not the minor inaccuracy about bus fares or the like, but something that goes to the heart. I do not suggest that it wins many prizes for elegance, but it sends the right message to the judge.*

26. At paras. 62-63, Julian Knowles J added the following in his own words:

> *"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 £10000 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."*

Submissions of the Appellant

27. The Appellant submitted that there was no basis to find that (a) the dishonesty in this case went to the root of the case, or that (b) it has 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. In making that submission, the Appellant especially relied upon the following facts and matters, namely:

    (i) the allegation about a head injury was not a part of the pleaded claim, nor was it added to the Particulars of Claim before or after the making of a witness statement;

    (ii) in his witness statement, the Appellant did not in the recitation of his claim for PSLA specify the head injury. At paras. 73-74 and onwards, the Appellant referred to the neck and shoulder injuries. He did earlier refer to the swollen head, but the fact that it was omitted from the list of injuries shows how it did not form part of the claim and/or was not treated as substantial;

    (iii) in his oral evidence, the Appellant did not invite the Judge to include the head injury to be including in his claim for PSLA;

    (iv) in closing, counsel for the Appellant did not invite the Judge to include the head injury when assessing the quantum of damages.

28. In the words of the Grounds of Appeal (at para. 25.1*),"the Judge failed to identify whether the dishonesty was fundamental as defined by authority and it was wrong of him to dispatch the issue by saying that it was axiomatic."* That was a reference to para. 53 of the Judgment. The Judge did refer to the value of the head injury being nominal in para. 55, but stated (as quoted more fully above) that *"that does not affect the fact that the dishonesty goes to the root of the claim because of the assertion of head injury in circumstances where no head injury was sustained".* The Appellant objects to this because it fails to engage beyond the dishonesty with why it was fundamental. It did not explain the conclusion, particularly by reference to the case law and the facts as a whole, of how an element which was not a part of the claim and so minor relative to the claim for personal injuries could go to the root of the claim. Without more, the Appellant's submission was that there was nothing or not enough to discharge the burden of proving that any dishonesty was fundamental.

Submissions of the Respondent

29. The Respondent mentions *that "[The Appellant's] claim of head injury was not an opportunism under pressure in oral testimony. Within his witness statement, [the Appellant] gave a florid description of the accident aftermath asserting severe acute symptoms and a swollen head at Paris 29 to 36. That was all confirmed and exaggerated further in oral evidence: see paras. 12 and 45(j) of the Judgment."* At para. 1 of the Respondent's Notice, it was stated that the *"head injury value was low*

but not trivial. It had a financial worth. The lie was not a passing concoction but a mercenary deception."

30. Whilst the Judgment did not set out in detail the test for fundamental dishonesty, it was submitted that the Judge had demonstrated that he had understood it. This was evident especially from para. 55 referring to the head injury going to the root of the claim. He also demonstrated in that paragraph that he had taken into account the fact that the compensation for head injury was or may have been nominal if it had been genuine, yet that did not affect the fact that the dishonesty about the head injury went to the root of the case. In a footnote in the Respondent's skeleton argument, it was stated that the Judge was fully familiar with the concept of fundamental dishonesty having been a District Judge for many years prior to being a Circuit Judge.

31. The Respondent mentioned the backdrop to such dishonesty and the very profound impact of the same. In particular, he referred to the judgment of Moses LJ in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 [2-9]. This was summarised in LOCOG in the following terms at para. 53, namely *"how serious false and lying claims are to the administration of justice, and how they undermine a system whereby those who are injured as a result of someone else's fault can receive just compensation. There, he pointed out that 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. He also said that the system of adversarial justice depends upon openness, upon transparency and, above all, upon honesty, and that the system is seriously damaged by lying claims."* The legislation was to be construed as a Parliamentary response to the problems caused by fraudulent claims which were identified by Moses LJ.

32. The Respondent emphasised the evaluative exercise required of a trial Judge in deciding whether dishonesty was fundamental. To this end, The Respondent cited three authorities, namely:

(i) The concept of "review" in CPR Part 52.21 is key in appeals from such decisions: see *Assicurazioni Generali SpA v Arab Insurance Group [*2002] EWCA Civ 1642, *per* Clarke LJ at [§14]–[§22]. In contrast to findings about primary facts, Clarke LJ mentioned at [16] *that "some conclusions of fact... involve an assessment of a number of different factors which have to be weighed against each other this is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."* The judgment also refers to the considerable advantage which the judge had of seeing the witnesses and of assessing their evidence.

(ii) See *Re:Sprintroom* [2019] EWCA 932 at paras. 72 - 78. The correct approach is: *"... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".*

(iii) In *Elgamal v. Westminster City Council* [2021] EWHC 2510; [2021] Costs LR 973 (*"Elgamal"*), Jacobs J. accepted at para. 72 that whether dishonesty was sufficiently fundamental is essentially a simple 'jury' question. I shall return below to this.

33. As regards the relative value argument, the Respondent stated at para. 5.1 of its skeleton argument that the Appellant's *"appeal essentially states that the head injury claim valued independently would have minor worth compared to a nearly £50,000 claim."* The Respondent relied upon the LOCOG case in which a fraudulent claim was a self-contained gardening expense claim of over £13,000 comprising about 28% of the claim. The submission was made that if it had been only 2% of the total value, the dishonesty would have been no less serious or fundamental. Potential unfairness due to disproportionality in appropriate cases could be corrected through the disapplication of the section through the substantial injustice provision in s.57(2) of the 2015 Act.

34. Attention was drawn to the way in which Jacobs J in *Elgamal* obiter observed that a finding of fundamental dishonesty would be more likely in cases where injuries are not proven at all than where the effects of the injury had been exaggerated. He said at para. 113:

> *"If there indeed is a serious injury, and a claimant has been honest about that, then a court may readily conclude that a degree of exaggeration may not go to the heart of the claim, but would more appropriately be regarded (to use some of the words used in the authorities) as incidental or collateral or embroidery. By contrast, in a case where a judge dismisses a claim because the injuries have not been proved at all, then a finding of fundamental dishonesty may easily follow in a case where the claimant has asserted the existence of those injuries: see eg Pegg v Webb [2020] Costs LR 1001 (a case dealing with CPR 44.16 rather than s 57 of the Act) para [20]. The position will likely be similar if there is some injury, but it is not of any great significance, and the Claimant has exaggerated so as to make it appear very serious."*

35. The Respondent submitted that the effect in this case is that the head injury was invented and that is different from an exaggeration of a neck or shoulder injury, and so a finding of fundamental dishonesty ought easily to follow. This is irrespective of the small amount of the value of a head injury relative to the sums claimed for the injuries in this case or the amounts claimed as a whole in this litigation.

36. At para. 107 of his judgment, Jacobs J accepted that it was important *"to pay regard to the quantum of the claim and its component parts"*. He said that *"that must involve considering the extent to which the dishonesty relied upon had an actual or potential impact on the quantum of the claims advanced by the claimant, and the significance of that impact. The authorities and indeed s 57 itself show, however, that it is not an automatic answer to a case of fundamental dishonesty that it related to one component*

part of the claim, and that there were other components which were completely genuine."

37. The Respondent submitted that if relative value is considered here it should be £500 head injury compared with a £3,000 whiplash injury. (Other much lower figures were advanced in respect of the head injury and it was recognised by both Counsel that the neck and shoulder injuries might be regarded as higher than £3,000.) The Respondent submitted that the Judge was entitled not to weigh the value of the injury claim against the value of the hire claim when assessing if the dishonesty was fundamental. Further and in any event, the Judge had in mind that the amounts which could have been awarded for the head injury might be "nominal". Although the neck and shoulder injuries were not assessed because they were not proven, it can be assumed with confidence that the Judge recognised in para. 55 that they would have greatly exceeded any nominal valuation.

38. As regards the criticism of inadequacy of reasons of the judgment, the Respondent submitted that first this had to be seen in context of the detailed reasoning especially in para. 45 which preceded it. Second, the Respondent submitted that the Judge did fill any lacuna in the reasoning in para. 55 referring to the dishonesty going *"to the root of the claim."* This indicated why the Judge reached the view which he did. It was an evaluative conclusion that the head injury was a part of the narrative and was fundamental.

39. The Respondent went on to say that the head injury underpinned the legitimacy of the Appellant's injury. To that end, it sought to reinforce its position by a Respondent's notice saying that at para. 3:

> *"The deception of the head injury was a fraudulent device bolstering the claimant's case on other issues the claimant story of a head injury would lend credence to the following:*
>
> *a. the issues to whether the accident itself occurred (a marginal decision);*
>
> *b. whether he sustained significant neck and shoulder injuries of over six months duration."*

Discussion

40. The Court has had regard to the need to give great weight to the evaluative judgment of a judge's conclusion on whether dishonesty was 'fundamental', and to recognise the advantages available to the Judge and not to this Court. The Judge alone saw the witnesses and especially the Appellant. He saw it in live time rather than through the selective parts chosen by the parties designed to make and answer criticisms through the respective spectacles of the parties. The Court has had well in mind the oft repeated strictures of the higher appellate courts in this regard including the oft cited case of *Fage (UK) v Charbani* [2014] EWCA Civ 4, at para. 114 where Lewison LJ stated:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."*

41. I refer to the substantive law above as to what amounts to "fundamental" dishonesty for the purpose of section 57 of the 2015 Act. I observe from the authorities, namely:

(i) There is a danger about elaboration and metaphor. Otherwise, the Courts will be applying the elaboration and metaphors of previous judges such that the word of the statute will fade into history and will not be applied: see *Elgamal* at para. 70 per Jacobs J.

(ii) The statutory word "fundamental" should be given its plain meaning. The expressions "going to the root" or "going to the heart" of the claim are often sufficient to capture the meaning of the statutory word. Provided that it is understood in the same way, it might assist in some cases in respect of applying the word "fundamental" to consider whether the dishonesty *"substantially affected the presentation of (the) case, either in respects of liability or quantum, in a way which potentially adversely affects the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation"*: see *LOCOG* at paras 62-63.

(iii) The question whether the relevant dishonesty was sufficiently fundamental should be a straightforward jury question. As stated above, this judgment would return to this. *"It is a question of fact and degree in each case as to whether the dishonesty went to the heart of the claim. That must involve considering the dishonesty relied upon, and the nature of the claim both on liability and quantum which was actually being advanced"*: see *Elgamal* at para. 72 per Jacobs J.

(iv) It will often be appropriate in this holistic exercise to consider the extent to which the alleged dishonesty resulted in an inflated claim, that is the extent to which the dishonesty, if not exposed, would potentially have resulted in a higher quantum of recovery in respect of the claims made. This involves consideration of the various losses claimed by a claimant and assessing the potential impact of the alleged dishonesty on the award for those losses: see *Elgamal* at para. 73 per Jacobs J.

> *" In some cases, it will be obvious that the dishonesty had a potential impact on the amount that might be awarded for a particular head of loss. For example, a personal injury claim will invariably involve a claim for PSLA, and a dishonest description of symptoms and suffering will inevitably have a potential impact on the PSLA. The significance of that potential impact is a matter for consideration in the context of whether the dishonesty went to the root of the claim. Conversely, it may be clear that the alleged dishonesty has no*

material impact on a particular head of loss..": see Elgamal per Jacobs J at para. 74.

42. Applying the above law, the judgment is unsatisfactory in the following respects as regards the finding of fundamental dishonesty, namely:

(i) The finding that it was axiomatic that the dishonesty was fundamental is not reasoned.

(ii) Although the Judge rightly acceded to the request for reasons, para. 55 of the judgment does not provide any or any adequate reason for the finding: in particular, the references to the dishonesty going to the root of the claim is no more than an expression that the dishonesty was fundamental.

(iii) There is not explained how the dishonesty could be fundamental in circumstances where the head injury did not form a part of the pleaded case for PSLA. As submitted by Mr Deegan, there was not a head injury claim in any of the following:

(a) in the pleadings: the Particulars of Injury did refer to the neck and shoulder injuries, but did not to the head injury;
(b) in the CNF, there was reference to the neck and shoulder injuries, but not to the head injury;
(c) in the medical report of Dr Chishty, again there was reference to the neck and shoulder injuries, but not to the head injury**;**
(d) at trial, there was no attempt to claim for a head injury.

(iv) The judgment does not make reference to the fact that the head injury is not pleaded as part of the claim. The Judge refers to the submission that if the head injury had been suffered, the damages would have been nominal. The Judge appears to deal with that by finding that where the dishonesty is in respect of a small part of that which is claimed, such that the damages would be very small, that is not an answer to fundamental dishonesty. That does not deal with the instant point, namely that the damages would not even have been nominal for the back injury, because it was not a part of the injuries for which a claim has been made.

(v) At one point of the judgment, there is a reference to the claim in relation to the head injury. At para. 50, the Judge said the following:
"In my judgment Mr Denzil has been fundamentally dishonest in relation to the primary claim having regard to the matters that I identified a few moments ago in relation to the claim in relation to the head injury." (underlining added)

43. The term *"claim in relation to the head injury"* was imprecise, but it matters because of its context, namely a failure to deal with the important question as to how and why a head injury which does not form a part of the claim for personal injuries in this case can be treated as going to the root of the claim. Although it is an evaluative process in

each case, there is no reasoning from which it is apparent that a reference to a 3-4 day swelling of the head in the written and oral evidence of the Appellant, which was not relied upon as a head of claim, could lead to a finding that the dishonesty was fundamental in relation to the claim.

44. I have referred above to the part of the judgment of Jacobs J in *Elgamal* at para. 113 in which he referred to a person who claimed to have been injured but was dishonest about the entirety of the injury. That might render the claim as a whole fundamentally dishonest. That was not readily applicable to the instant case because in *Elgamal*, the reference was either to dishonesty about the entirety of the claim as pleaded or to dishonest exaggeration of the pleaded claim. In the instant case, there was no dishonesty found in respect of the entirety of the claim as pleaded because there was no finding that the neck and shoulder injuries were dishonest claims, simply that they had not been proven. There was dishonesty found in respect of the head injury, but this did not form a part of the claim for PSLA as pleaded.

45. Absent specific reasons given by the Judge for the finding that the dishonesty was fundamental, the Respondent was left to speculate. The Respondent's Notice, as quoted above, stated that (1) the head injury value was low but not trivial (Ground 1), and (2) it was a fraudulent device to bolster the case on other issues including whether the accident occurred and whether the Appellant sustained the neck and shoulder injuries (Ground 3). The Respondent submitted that the evidence was intended to lend authority to the case that there was a violent collision and to make the head and shoulder injury more plausible. In my judgment, this is to overstate the effect of the swelling to the back of the head. The alleged head injury was minor and very short-lived. It did not flow through to or affect the neck or shoulder injuries in a significant way or at all. It was minor and very short-lived both in itself and relative to the neck and shoulder injuries.

46. Applying the language of Julian Knowles J in *LOCOG* to the instant case, the evidence of a 3-4 day head injury, not forming a part of the claim for PSLA, did not substantially affect the presentation of the case, either in respects of quantum or liability or both, in a way which potentially adversely affected the Defendant in a significant way.

47. The Court has had in mind the purpose of the 2015 Act which the Judge must have had in mind and how dishonesty in personal injuries claims, in the words of Moses LJ quoted above prior to the 2015 Act, can "*undermine a system whereby those who are injured as a result of someone else's fault can receive just compensation."* At the same time, regard has to be had to the helpful citations in the case of *LOCOG* set out in paras. 24-26 above. These are reminders about the importance of giving effect to the language of section 57. It is not enough for a defendant to prove dishonesty. A defendant is also required to show that the dishonesty is fundamental in relation to the claim.

48. Although it is an evaluative process in each case, there is no reasoning from which it is apparent that a reference to a 3-4 day swelling of the head in the written and oral evidence of the Claimant, which was not a part of the pleaded claim, could make the claim fundamentally dishonest. In my judgment, the combination of the fact that the head injury was not a part of the pleaded claim and the fact that it was minor and very short-lived (3-4 days of swelling) in the overall scale of things render the decision wrong. The references to the head injury in the witness statement and in the oral evidence which are not even a part of the pleaded claim do not go to the root of the

claim nor do they substantially affect the presentation of the claim in a way which potentially adversely affected the defendant in a significant way.

49. I have concluded that the decision was wrong. In my judgment, there is no scope to find that such a minor and very short-lived injury, not forming part of the pleaded claim, but referred to in written and oral evidence, could be properly characterised or understood as being fundamental or going to the root of the claim. I therefore find that the conclusion that the dishonesty was fundamental cannot stand.

50. Nothing that I have said is intended to make light of the seriousness of making up a part of the evidence. Consideration can be given to visiting the same with consequences in the provisions relating to costs under the CPR to the extent the Court may have regard to the conduct of the parties which is broadly defined: see pt. 44.2 (4-5). It is a different matter whether the Respondent has made out that the Appellant "*has been fundamentally dishonest in relation to the primary claim or a related claim"* for the purpose of section 57 of the 2015 Act.

51. For the reasons which I have given, the finding of fundamental dishonesty must be set aside. The appeal is therefore allowed. The claim will no longer be dismissed. I ask the parties to consider whether they can agree an order to reflect this judgment and to deal with such consequential matters as follow from the judgment.