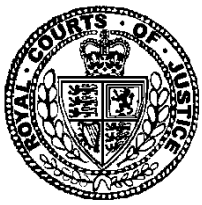

Case No: CA-2024-000788-B; CA-2024-000788
NCN: [2025] EWCA Civ 223

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(Mr Justice Sweeting)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 11 February 2025

Before:

LADY JUSTICE WHIPPLE

Between:

MR OMAR ELBANNA

Claimant/Respondent

-and-

MR TOM CLARK

Defendant/Appellant

Transcript of Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR N BLOCK KC and MR J HOLBORN (instructed by Weightmans LLP) appeared on behalf of the **Defendant/Appellant**
MR J CLARKE (instructed by Slater and Gordon Solicitors) appeared on behalf of the **Claimant/Respondent**

Judgment

LADY JUSTICE WHIPPLE:

Preliminaries

1. The trial of this matter took place in January 2024 before Sweeting J. By the time of trial there was no issue as to the causation of injuries, a position which was reflected in a recital to Sweeting J's order which was sealed on 17 June 2024. By that date the defendant, Mr Clark, accepted that the collision on the pitch was causative of at least some damage. Therefore, the only live issue before Sweeting J was breach of duty (this was a liability only trial). Mr Clark, the defendant, said he had not been in breach of duty by his actions on the day in question. The claimant, Mr Elbanna, argued that Mr Clark was at fault because the contact was negligent.

2. The parameters of the negligence test were agreed before the judge, set out at paragraphs 14 and 15 of the judgment, and not now challenged by Mr Block and Mr Holborn who appear for Mr Clark, who is now the appellant. It was common ground that the test was whether Mr Clark had failed to exercise such degree of care was appropriate in the circumstances. That test is explained in the case of *Czernuszka v King* [2023] EWHC 380 (KB) which draws on *Condon v Basi* [1985] 1 WLR 866 at [36]. The test, shortly put, is whether the defendant failed to exercise that degree of care which was appropriate in all the circumstances.

3. It appears that during the course of the trial and indeed in closing submissions there was discussion with counsel as to different levels of culpability for injuries in civil law and thus there was reference not only to negligence but also to the concepts of recklessness, intention and carelessness.

4. Nevertheless, the case before Sweeting J was directed at one question only, which was whether Mr Clark had been negligent by reference to the agreed legal test. For reasons which are not clear, the judge expressed his conclusion at [33] in terms of recklessness. That was not a concept the judge had explained or described in his judgement. It was not the test which was agreed.

Ruling

5. In my judgment, there does seem to be a lack of symmetry between the judge's earlier analysis of the legal framework at [14] and [15] arriving at the encapsulation of the legal standard in negligence and his conclusion at [33] which refers to the defendant, Mr Clark, being reckless. The lack of symmetry is not, to my eye, explained in the main judgment or indeed in the consequentials judgment issued by the judge on 14 June 2024.

6. Mr Clarke, for Mr Elbanna, having received my order dated 18 December 2024, which perhaps unhelpfully explained the problem without offering a solution, says that the judge here was simply adopting the same approach as had previously been adopted in *Czernuszka* and was applying the higher recklessness standard, in essence for the avoidance of doubt: see [60] of *Czernuszka*. Thus, it is submitted that the judge's conclusion was that the negligence standard was at least met, indeed surpassed, because the judge could be satisfied to the higher recklessness standard.

7. However, Mr Block KC and Mr Holborn, who appear for Mr Clark, the appellant, submit that the judge failed to explain his reference to recklessness at [33]. They say that the judge's reasons are inadequate and the reference to recklessness amounts to an error of law, or at least an arguable error for present purposes.

8. There is merit in what Mr Block and Mr Holborn argue and, with a somewhat heavy heart, I grant permission on the recklessness point which is, in my judgment, most aptly covered by ground two of the amended grounds of appeal (taking the grounds from paragraph 2 of that document). It is appropriate for the full court to determine what the judge decided and why because that is not clear from the judgment. The appellant, Mr Clark, should have the opportunity of putting his appeal before the full court.

9. Grounds one and five are associated with ground two, because (and I summarise) grounds one and five go to what would be the components of a recklessness test if that was indeed the test. I am just – only just - persuaded that grounds one and five should

have permission as well. However, it is important to recognise that there was no dispute about the legal test before the judge and, indeed, there is no dispute before me that the appropriate test was one of negligence which involves taking an objective approach looking at reasonableness to be judged in context. That being so, there would not appear to be any need for a detailed analysis of the law of recklessness which falls (or should fall) by the wayside. However, this is something for Mr Block KC and Mr Holborn to consider and it is for them to decide whether there is any point in pressing grounds one and five. I grant permission for them because I see them as part of a package with ground two, relating to the judge's reference to recklessness.

10. The findings of fact made by the judge are, in my judgment, clear and unassailable. The judge was entitled to prefer the evidence of Mr Debney for the reasons the judge gave. Further, in my judgment, the judge was entitled to rely on Mr Debney in the way that he did. There is no sharp dividing line between what an expert sees occurring on the pitch and the judge's formation of his or her own view as to whether those actions were negligent or not.

11. In my judgment, grounds three, four and seven are simply an attempt to reopen the evidence and the facts found on the evidence. That is not permitted at this stage and I refuse leave for those grounds, that is three, four and seven.

12. As to ground six, that is a discrete point but one that is, in my judgment, based on a misreading by Mr Clark's legal team of paragraph 33. In my judgment, it is not reasonably arguable that the judge was making a causation finding at paragraph 33 where he said that the soft contact which should have taken place "would not have caused injury". No causation finding was needed because causation was agreed and had fallen away by this point. Perhaps that phrase was a slip, I do not know. This much is clear: the judge was making findings that the collision was avoidable or, at the very least could have been reduced to a soft contact. That was the important aspect of what is set out at paragraph 33. I therefore refuse leave for ground six because it goes to a point that was not before the judge and seems to involve a misreading of what the judge decided.

13. I direct that a transcript of these short comments be included with the papers for the full court. I will hear counsel on any consequential matters that need to be the subject of directions.

Order: Applicant for leave to appeal allowed on grounds one, two and five.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk