Neutral Citation Number: [2024] EWHC 1057 (KB)

Case No: QB-2021-001132

IN THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2024

Before :

Master Fontaine (sitting in retirement)

- -

Between :

Qaisar Mehmood **(By his Litigation friend Mrs Asma Islam pending determination by the court)**	**Claimant**
- and -	
Harry Mayor	**Defendant**

- -
- -

Santinder Hunjan KC (instructed by **Sintons LLP**) for the **Claimant**
Paul Higgins (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing date: 25 March 2024

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APPROVED JUDGMENT

Master Fontaine:

1. This is the judgment in respect of the Claimant's application dated 5 May 2021 for retrospective approval of an interim payment of £10,000 made on 13 August 2019 and for a further interim payment in the sum of £75,000. It is supported by the witness statements of Andrew McGowan dated 21 October 2021 and of Ellie Marriott dated 4 and 14 March 2024. There is no witness evidence in response from the Defendant.

Factual and procedural background

2. The claim is for damages for personal injury caused by a road traffic accident on 10 January 2019 when the Claimant was riding a motorcycle in a collision with the Defendant's vehicle. The Claimant suffered a significant brain injury classified as being in the Moderate to Severe range of the Mayo classification, the most severe category in that classification system, and a number of orthopaedic, soft tissue and related injuries. The Claimant is now aged 46. Prior to the accident the Claimant ran a restaurant and take away business. The Claimant brings this claim by a Litigation Friend, as it is claimed that he lacks capacity. The issue of capacity is disputed, and although this issue was originally to have been determined at a trial of capacity before Master Dagnall on 18 and 19 May 2022, it was adjourned, and Master Dagnall ordered that the trial on the preliminary issue of capacity be adjourned to the trial judge to be determined at trial.

3. Although Deputy Master Fine had ordered on 9 November 2021 that the Claimant's interim payment application was adjourned to be listed for hearing after the determination of the issue of capacity, Master Dagnall's order changed the circumstances in respect of which Deputy Master Fine's order was made, and in any event in so far as necessary I vary that order to enable the interim payment application to proceed.

4. By an Amended Defence dated 11 November 2021 the Claimant's lack of capacity was disputed, and a plea of fundamental dishonesty is made under section 57 of the Criminal Justice and Courts Act 2015, ("s. 57") relying on medical and surveillance evidence. Primary liability is admitted, and the claim

proceeds in respect of contributory negligence, causation and quantum, without prejudice to the plea under s.57.

5. The purpose for which the requested interim payment is intended to be used is for rehabilitation and additional treatment recommended by a number of the Claimant's medical experts and also by Dr Isaac, the Defendant's expert in neuropsychiatry. Since the interim payment application was issued both parties have obtained further reports from medical experts in the fields of orthopaedics neurology, neuropsychiatry, neuropsychology and reports in helmet expertise. The Claimant has also obtained reports from experts in neurorehabilitation and neuroradiology.

The issues in the application

6. The approach to application for interim payments pursuant to CPR 25.7 is outlined in the case of *Cobham Hire Services v Eeles* [2009] EWCA Civ 204. The Claimant contends that on general damages alone this is a case with a value exceeding £200,000, and that both limbs of the two-stage test set out in *Eeles* by Smith LJ at [43] to [45] are easily satisfied.

7. This is an unusual application, in that the Defendant does not contend that either of the two limbs of *Eeles* are not satisfied, but rather that the Claimant has not satisfied the pre-condition needed to enable the court to make an order for an interim payment set out in CPR 25.7(1)(a), namely that "*the Defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the Claimant.*" The Defendant relies on its Amended Defence which sets out the provisions of s. 57 and avers that the Claimant has been

fundamentally dishonest in relation to his primary claim (at paragraphs 4 and 5).

8. S.57 (1) – (3) states:

(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, 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 to dismiss includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

9. The Amended Defence seeks dismissal of the claim pursuant to s. 57, relying on medical evidence and surveillance evidence set out at Paragraphs 5-16. The Defendant accordingly submits that it has not admitted liability to pay damages or sum other sum of money to the Claimant. In the Amended Defence at paragraph 18 the Defendant relies upon the judgment in *LOCOG v Sinfield* [2018] EWHC 51 (QB), where Julian Knowles J stated at [63]:

> "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."

10. In its opposition to the application the Defendant also relies on CPR 25.7(4):

> "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

11. The Defendant therefore submits that the court is unable to order any sum by way of interim payment either pursuant to CPR 25.7(1)(a) or 25.7(4).

12. Leading Counsel for the Claimant submitted at the hearing that there was a good explanation for the surveillance footage that shows the Claimant going to work at the restaurant he/his company owns, namely that the Claimant is shown carrying out mundane tasks, such as taking orders, serving and taking payment from customers, cooking, dealing with delivery drivers and so on, whereas prior to the accident the Claimant was in charge of the administration of the business and others would carry out the practical tasks involved in running the restaurant. There is no evidence that the Claimant has gone back to his previous business activities and the difficulties that the Claimant suffers as a result of his injuries, in particular his brain injury, are supported by the medical evidence. The recommended rehabilitation and treatment would be to the benefit of both parties, as if the Claimant benefits from it his long-term prognosis may improve and his future loss would be less. The Claimant also relies on the case of *Salwin v Shahed* [2022] EWHC 1440 (QB). The judge was faced with a situation where there was almost completely opposing medical and care evidence in respect of the claimant's future requirements following a severe traumatic brain injury. The claimant's medical evidence supported a finding by the claimant's case manager that he required a continuing high level of case management, input from a variety of therapists and round the clock support, whereas the defendant's evidence showed that the claimant was able to undertake personal

care, travel and access the community independently and carry out a variety of domestic tasks, and a care expert supported the conclusion that the claimant was close to living independently with only limited support. In the face of that very conflicting evidence the judge concluding that there was a risk of an excessively high award if the calculation of the interim payment was based on the claimant's assumption as to his needs, but if the claimant's medical evidence was correct, he would suffer prejudice if he was not able to fund appropriate care and therapeutic input. The judge adopted a cautious approach and allowed for a further interim payment application in a year's time when better evidence might be available.

13. The Claimant relies on this authority to illustrate that the court may often be faced in an interim payment application with a situation where each party may be financially prejudiced whatever the amount of the payment, and the court is able to weigh up the relative prejudice to each party and come to a conclusion. It was submitted that here the amount sought is a modest financial element in the context of the importance of obtaining such a payment to the Claimant, to allow for rehabilitation and therapies recommended by the medical advisors.

Discussion

14. All experts have reviewed the surveillance evidence, and I summarise their conclusions in relation to that evidence below, and any parts of their reports prior to seeing that evidence that are relevant to the Defendant's allegations of dishonesty.

15. The joint statement of the neuropsychologists has very recently become available, and the experts confirm that they have both seen the same material.

Both Dr Ford (Claimant's expert) and Professor Powell (Defendant's expert) have considerable experience in assessing people with different cultural backgrounds and/or those for whom English is a second language. Their conclusions differ in respect as to the changes in their views having seen the surveillance footage. I set out their respective conclusions relevant the allegation of dishonesty both prior to and after receiving the surveillance evidence.

Dr Ford

In the joint statement:

"Dr Ford stressed that surveillance footage 'may not show the claimants reported deficits with memory, executive dysfunction, particularly problems with planning, organising, multitasking, social awareness, perseveration, insight, inability to inhibit responses, distractibility and impulsivity, which fluctuate with fatigue and mood issues. Doctor Ford considers that it is 'erroneous to form an opinion on the Claimant's neuro psychological functioning based on his presentation of the surveillance footage in the absence of additional, necessary evidence'. However, Dr Ford considers that the updated information indicates that although he needs care, this is qualitatively different to the care that was recommended in her first report. Rather than the 24 hour care with accommodation for carers annexed to the family home recommended in the first report, he now requires support that is supervisory and monitors his actions to accommodate his cognitive issues, particularly with memory and executive dysfunction. This means his care needs do not need to be as intensive as initially recommended and should be in the form of someone in the background supervising colour monitoring and keeping "an eye on him" instead of intensive input. It is considered that at work, he has co-workers/ other members of staff in the background, which is essential in case he needs assistance due to his TBI issues.

Dr Ford opines that the updated surveillance footage does not contribute in any appropriate way to the assessment of Mr Mehmood's capacity from a neuropsychological perspective or to reliably comment on his ability to undertake duties effectively required of him in his employment because of the qualitative aspects of his performance and the level/nature of support provided to him by co-workers is not known (or evidenced on the surveillance footage).

Doctor Ford states that given his ongoing index accident TBI issues, it is essential that Mr Mehmood receives input from a case manager who

is experienced in working with traumatic brain injuries and also a multidisciplinary therapy team (MDT) who is also experienced in working with patients with TBI, especially with executive dysfunction. Doctor Ford recommends, as part of the MDT, that Mr Mehmood has the input of an enabler/ personal assistant (PA) to assist him in undertaking meaningful activities in the community and not just for Mr Mehmood to undertake activities in his restaurant/take away."

Professor Powell:

In the report dated 29 October 2020 (prior to seeing the surveillance evidence):

"His performance was dire, far worse than I would have expected given his presentation and given that he had done some work even if not efficiently……I began to suspect that there are non-organic factors at play….his performance was in fact far worse than in 2019 when not even fully out of PRA and there can be no organic explanation for this.

Professor Powell had concluded, following an assessment of the Claimant on 29 October 2020, prior to the surveillance footage being taken, that the Claimant's performance was "*not credible*", and "*he was given a formal non-verbal test of effort, the Test of Memory Malingering which he comprehensively failed, not just performing below the cut-off point, but performing at below chance levels*".

In a letter to the Defendant's solicitors dated 3 October 2021 (after seeing the first batch of surveillance evidence):

"What I have seen in the surveillance evidence is grossly inconsistent with his presentation upon assessment and interview when I saw him on 13.9.21, the date that the evidence was recorded, and with what I was told at that interview by he and his wife.

I need to amend the conclusions of my report of 14.9.21 to conclude that:

- the assessment results obtained on 13.9.21 are likely to be unreliable, as hinted at on the Test of Memory Malingering, regarding which I gave him the benefit of doubt

- Someone with his skills and performance is not going to be a burden on his wife

- someone with his vocational skills level is not going to need rehabilitation input; He does not need a case manage, community rehabilitation package

- he does not require a support worker

- someone functioning at this level will have capacity to manage his own financial and legal affairs even if there are some residual

inefficiencies arising from the moderate to severe TBI sustained on.1.19 he has made an above average recovery"

In the joint statement:

"Subsequent to that report [*his report made before the surveillance evidence was seen*] Professor Powell saw the surveillance evidence which was 'grossly inconsistent with his presentation upon assessment and interview when I saw him on 13.9.21, the day that the evidence was recorded, and with what I was told at that interview by he and his wife' and amended his conclusions in a letter dated 3.10.21. He could no longer be given the benefit of doubt on the test results were likely to be unreliable as indicated by the TOMM. Someone with his skills and performance was not going to be a burden on his wife, was not going to need rehabilitation input, would not need a cased managed, community rehabilitation package, and did not require a support worker. Someone functioning at this level would have capacity to manage his own financial and legal affairs. Even if there were some residual inefficiencies arising from the moderate to severe TBI sustained on 10.1.19, he had made an above average recovery. Professor Powell reviewed further surveillance evidence in letters dated 13.10.21 and 31.10.21 and considered that this additional surveillance evidence confirmed his conclusion that even if there were some residual inefficiencies arising from the TBI he had made an above average recovery, and raised concerns that the account of he and his wife about his degree of recovery was unreliable.

In brief Professor Powell draws attention to what the surveillance evidence does show. He has responsibilities including opening and closing the restaurant. He typically works a long day, opening up the restaurant on his own at about 11:30 am and closing it at about 11:30 pm, getting home towards midnight. He serves behind the counter independently, taking orders, using the till. He converses normally with customers including the surveillance operative(s), with no obvious communication problem. Sometimes others are seen in the background or back room, but this is not new, Professor Powell being told, 29. 10. 20, that Lazzat [*the name of the restaurant*] had two or three staff aside from himself and the witness statements acknowledging that there were other employees pre accident. Professor Powell considers that accounts of his post-accident work activity have been inaccurate and have underplayed the extent of his work, and that this echoes his non-credible test performance."

16. It is apparent that although both experts agree that the Claimant's care/rehabilitation needs are less than they considered to be appropriate prior to seeing the surveillance footage, they differ in their views as to the extent of his

care/rehabilitation needs, and as to whether the footage suggests that the Claimant has been untruthful in his accounts to them at interview and in his responses to psychometric testing.

17. I note that the Claimant's leading Counsel submitted that it appears from Dr Powell's report dated 29 October 2020 paragraphs 5.9, and the joint statement at paragraphs, that he appeared to be unaware of the full extent of the work that the Claimant had previously carried out in managing the restaurant, and that it appeared he believed that the Claimant had carried out only the mundane tasks he was seen doing in the surveillance footage. It was also submitted that there was no evidence that suggested that the Claimant would be able to go back to the full time work he did before the accident.

18. **Dr Lohawala**, the Claimant's neuropsychiatry expert, comments on the surveillance footage in his report dated February 2024 at paragraphs 6.54 – 6.60, but primarily recounts what is seen in the footage, notes the claim of fundamental dishonesty and suggests taking evidence from the Claimant's wife and employees at the restaurant. His conclusion was that the footage revealed "*someone who is physically capable …but remained with significant Executive Function Difficulties.*" He does not elaborate further.

19. **Dr Isaac**, the Defendant's neuropsychiatry expert, second report dated 6 November 2023 states at paragraphs 3.8.43-3.8.4:

> "I have previously commented on video and sound footage from 2019-2021.
>
> The more recent video shows similar activities - and it includes evidence of him smoking after working shifts in the restaurant.

> My views remain the same: based on what would appear to be evidence of him working regularly in a client facing role, managing customers and money without support over long hours, I considered that notwithstanding the brain injury severity classification, Mr Mehmood has made a good recovery from this and has been able to return to work."
>
> 4.3.7:
>
> "I note the concerns regarding the honesty of the claimant. I have described my concerns about the validity of the account he provided to me in my assessment of 2019 when compared with the video surveillance- and my concerns remain, and Professor Powell shares these concerns. Doctor Ford (neuropsychologist) considered Professor Powell's assessment unreliable because he had not used a professional interpreter. But I note that through all the contemporaneous medical notes, no concerns about his ability to speak English are raised and that Dr Cockerell obtained an account from Mrs Mehmood that an interpreter was not required and that he was "fluent" in English [paragraph 3. 4.3]. *Overall, I believe Professor Powell's opinion is unlikely to be unreliable - but defer to his own opinion concerning this following his consideration of Dr Ford's criticisms*.
>
> 4.4.3
>
> "The video surveillance provides evidence that whereas he works with others, he can lead the interactions with customers without support. I think his abilities at work at this time are likely to remain the same."

20. The Claimant's neurologist **Dr Cockerell** states in his supplemental report dated 12 December 2023, after viewing the surveillance footage:

> "3.2.1 The Claimant's cognition cannot be assessed by viewing the surveillance evidence, but there does not appear to be any particular difficulties with interaction with other people. However, nothing I have seen on the surveillance evidence particularly contradicts what I was told (see section 3.1. 2.1, cognition section of my original medico- legal report dated 22nd March 2021)."

Dr Cockerell also commented that the neurological symptoms suffered by the Claimant will not be visible on the surveillance evidence.

21. The Defendant's neurology expert, **Dr Heaney**, comments on the first tranche of surveillance footage in a letter to the Defendant's solicitors dated 27 October 2021 and in his conclusion states:

> "As with all surveillance footage, the video reviewed reflects only a proportion of Mr Mehmood's overall functioning and might only reflect him at his very best.
>
> But the video footage I have viewed reveals behaviours and actions that appear to be discrepant with the account Mr Mehmood gave to me during the appointment (and that he has given other healthcare professionals in this case although I defer to their own views to judge whether this is the case). In particular he is seen working in what most individuals with brain injury would find a very demanding role: working unassisted in a client facing role for long shifts - having to multitask. I can offer no explanation for this apparent discrepancy.
>
> The video footage supports the view that Mr Mehmood has been able to return to a client facing role at work, and that many of the limitations he described to me (for example, in relation to his ability to be left alone and similar) may not be as significant or real as his account suggested. There is no neurological explanation for this discrepancy.
>
> Furthermore if it is the case that he had returned to work regularly in a client facing role (in 2019 or afterwards), and that he is able to function independently in a work and leisure setting, this is good evidence to support the view that there are no long term consequences arising from the index injury (notwithstanding the brain injury severity classification based on the circumstances of the accident)."

22. In Dr Heaney's second report dated November 2023, after considering the second tranche of surveillance footage he states as follows:

> "3.8.4 My views remain the same: based on would appear to be evidence of him working regularly in a client facing role, managing customers and money without support over long hours, I considered that notwithstanding the brain injury severity classification, Mr Mehmood has made a good recovery from this and has been able to return to work.
>
> 4.3.7 I note the concerns regarding the honesty of the claimant. I have described my concerns about the validity of the account he provided to me in my assessment of 2019 when compared with the video surveillance - and my concerns remain, and Professor Powell shares these concerns."

23. The orthopaedic experts (**Mr Jagernauth** for the Claimant and **Mr Wilde** for the Defendant) have provided a joint statement dated 6 March 2023. their evidence in respect of the surveillance evidence is as follows:

> "Having reviewed the video evidence, both experts agree that Mr Mehmood has a normal range of movement in his left shoulder. Mr Wilde describes in detail his review of the observation evidence in his supplemental report. In his opinion the claimant is not seen lifting anything heavy above shoulder height. Mr Jagernauth is in agreement with this and furthermore, observed no evidence of the claimant performing significant heavy lifting activity using his left arm.
>
> Discussion then occurred between the experts as to Mr Mehmood's likely working ability. He is clearly seen, in the extensive video footage, in the work environment. Ultimately, the work restrictions are a matter for the court. From an orthopaedic point of view, however, Mr Wilde feels that Mr Mehmood should be able to undertake most if not all, of the duties required to run his fast food restaurant. Mr Jagernauth partly agrees but in his opinion, he would have a reduced ability to undertake duties that involve heavy lifting."

24. The Claimant's leading Counsel made submissions in respect of the Defendant's failure to file a witness statement in response to the application, particularly in respect of the surveillance evidence. However, the description of that evidence (presumably the log of the surveillance operatives) is set out in considerable detail in the Amended Defence, signed by a statement of truth. There is no need to repeat it verbatim in a witness statement. There is no submission that the description of the surveillance evidence set out in the Amended Defence is not accurate, and I am informed that all the parties' experts have been sent a copy of the video accompanying the written description or log. Equally, the extracts from the medical reports commenting on the video surveillance evidence in the Amended Defence have been signed by a statement of truth and their accuracy has not been disputed. The Defendant's arguments were entirely legal points and did not require any further evidence that the Amended Defence and the medical reports that were before the court.

25. The issue as to whether the Claimant is exaggerating the effect of his injuries, and if so, whether he is being fundamentally dishonest in so doing, can only be

resolved at trial when the oral evidence of the medical experts and of the witnesses of fact is heard. That is not an issue that can be resolved on a summary basis with only documentary evidence.

26. Even if the trial judge considers that the conditions of s. 57(1) are satisfied, they will have different options as to what the consequence of such finding should be. It may be dismissal of the primary claim, but if the court finds that the Claimant would thereby suffer substantial injustice that is not obligatory. If the court found that there had not been substantial dishonesty, but, for example, found there had been exaggeration of the Claimant's symptoms and/or the effects of the injuries suffered which were not fundamentally dishonest, the damages claimed may be reduced to a greater or lesser degree depending upon the judge's findings. Alternatively, the judge may consider that there is no merit to the application for a finding of fundamental dishonesty and that the submissions made on the Claimant's behalf as to his inability to carry out the work he previously did are correct. But this is not a case similar to the position in *Salwin*, and indeed in many applications for interim payments in personal injury claims. The range of what the Claimant may expect to recover is from nothing to the full amount he is seeking. There is no "irreducible minimum" as referred to in *Chiron Corporation & ors v Murex Diagnostics Limited (No 13)* [1996] FSR 578 and *Trebor Bassett Holdings limited v ADT Fire & Security plc* [2012] EWHC 3365 (TCC) per Coulson J. at [13]. Thus, it is not possible for the court to conclude, in accordance with CPR 25.7(4), what would be "*a reasonable proportion of the likely amount of the final judgment*".

27. In any event, the Defendant is correct that the requirements of CPR 25.7(1)(a) are not satisfied in this claim, namely that "*the Defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the Claimant.*" By virtue of the plea of fundamental dishonesty the Defendant has denied liability to "*pay damages*" to the Claimant, and at paragraph 29 of the Amended Defence seeks dismissal of the claim under either s. 57 or under the jurisdiction outlined in *Summers v Fairclough* [2012] UKSC 26. That is the short answer to the application. There has been no Reply to the Amended Defence denying the allegation of fundamental dishonesty, nor any application to strike out that part of the Amended Defence or for summary judgment in respect of that plea, nor any witness evidence disputing the interpretation of the surveillance evidence. There is evidence supporting the allegations in many of the medical reports.

28. In reply submissions the Claimant's leading counsel submitted that the court also had power to make an order under the condition set out in CPR 25.7 (1)(c), which states:

> "[the court] is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;"

29. Exactly the same considerations apply in respect of CPR 25.7(1) (c) as apply to CPR 25.7(1) (a). For the reasons given, the court cannot be so satisfied.

30. Again, this is not a case which is assisted by the judgment in *Salwin*. It is not simply a question of the experts disagreeing as to the seriousness of the injury or its consequences. All the experts accept that the Claimant has suffered the injuries described in the Particulars of Claim. There is a fundamental issue as to whether the Claimant has been dishonest in relation to the consequences of those injuries. So the plea under s. 57 and under the *Summers* jurisdiction remains a live issue for trial. I accept that this may cause injustice to the Claimant if, at trial, he succeeds in his claim, and the Defendant's case on fundamental dishonesty is not accepted, in that he will not receive the funds for the recommended rehabilitation and therapy by way of an interim payment. But the requirements for ordering an interim payment are not met, for the reasons above, so I am unable to grant the application. It is accordingly dismissed.

31. For the same reasons I am unable to approve the previous interim payment of £10,000, and that will have to be dealt with at trial.