Neutral Citation Number: [2019] EWHC 2712 (QB)

Case No: APPEAL REF BM80195A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Birmingham Civil Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 16/10/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Mansur Haider	**Appellant/ Claimant**
- and –	
DSM Demolition Ltd	**Respondent/ Defendant**

- -
- -

Ian Huffer (instructed by **AML Solicitors**) for the **Appellant/Claimant**
William Poole (instructed by **DWF**) for the **Respondent/Defendant**

Hearing dates: **17 July 2019**

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles:

1. This is an appeal with permission granted by myself on 12 March 2019 against the decision of His Honour Judge Tindal sitting at Birmingham County Court on 4 October 2018 in which he dismissed the Appellant/Claimant's claim for damages arising out of a road traffic accident on 10 July 2014. There is also an application for relief from sanctions and an application for permission to cross-appeal by the Respondent/Defendant in relation to the judge's finding that the claim was not fundamentally dishonest, in light of which he did not disapply Qualified One-Way Costs Shifting (QOCS) under CPR r 44.16(1). The Defendant/Respondent's Notice was served out of time and so it requires relief from sanctions in accordance with the *Denton/Mitchell* principles (see *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795 and *Denton v TH White Ltd (Practice Note)* [2014] 1 WLR 3926) as well as permission to appeal.

2. For clarity I will simply refer to the Appellant/Claimant as the Claimant, and the Respondent/Defendant as the Defendant.

The facts

3. The judge gave an *ex tempore* judgment, however I have a transcript which the judge has approved. He said the claim involved a 'straightforward' road traffic accident which took place on 10 July 2014 on the Worcester Road (A450) at about 5.45pm. The judge described the accident as follows at [2-3] of his judgment:

> "2. The Claimant, who was a taxi driver, was driving his BMW. There were a couple of cars in front of him. One car suddenly turned off to the left, the claimant said he slowed down to about 5 or 10 miles an hour, and suddenly without warning the defendant's vehicle collided into the rear of the car. So the claimant's case is that that this is very straightforwardly a rear-end shunt where the defendant was too close.
>
> 3.The defendant's case is that there were not two cars in front of the claimant's BMW but only the one, a hatchback, which went off to the left, and the claimant's BMW, rather than slowing for anything like that, effectively stopped dead in the middle of the road, and that was a dangerous thing to do and, as a result the defendant's vehicle, driven by Mr O'Sullivan, whose evidence I have heard today, did not have sufficient time to avoid the rear-end collision. The core of that case is broadly supported by a witness statement, which I have taken into account but I only attach the usual weight, from Mr Beech, who was in a car behind Mr O'Sullivan but who was not able to come and given evidence today."

4. The Defendant's case was that this was a deliberately staged accident and that the Claimant, in conjunction with the car in front of him, intentionally brought about the accident by braking unnecessarily and suddenly so as to cause Mr O'Sullivan to crash into him from behind. The judge referred at [4-5] of his judgment points made by the Defendant which it said undermined the Claimant's consistency and showed he had not

been honest in his disclosure or in his evidence. However, at [7] the judge rejected the claim of dishonesty and said that the Claimant was 'basically an honest man' whose recollection of the accident four years before was hazy.

5. At [8] the judge dealt with Mr O'Sullivan's evidence. He said in some respects it was inconsistent with Mr Beech's evidence; for example, Mr O'Sullivan said that there had been no need for the Claimant to brake, let alone stop, whereas Mr Beech said that the Claimant had been justified in braking, but not stopping. The judge went on to qualify his view of Mr Beech's evidence and saying he could be treated as an independent witness because he had been hit from behind himself, and was (or might have been) bringing his own case. Nonetheless, the judge said that Mr Beech had identified the real issue in the case, namely, whether the Claimant stopped. The judge said that this was the central question ([8]):

> "Because if the claimant stopped, the fact that Mr O'Sullivan may slightly earlier have been driving a little bit too fast and a little bit too close to the claimant would not be causative of the collision. Therefore, any negligence that there may have been at an earlier point in the journey between them would not establish a cause of action which the claimant needs to establish, which is that Mr O'Sullivan was negligent and that was causative of the collision and the damage and injury."

6. The key paragraphs of the judgment for the purposes of this appeal are [9-10]:

> "9. When one comes to the actual collision itself, one is left with the distinct impression from all the evidence that Mr O'Sullivan too, when one strips away some of his conspiracy theories, is ultimately trying his best to give a clear and essentially honest case, and his essentially honest case is that the claimant stopped. Given that Mr O'Sullivan was very, very clear on that, and that struck me as entirely credible and was supported to a certain extent by Mr Beech, albeit with the usual weight I can attach to a witness in their absence, and given that the claimant was very unclear about the circumstances of the accident, I find as a fact that the claimant in fact stopped. I find as a fact, based upon Mr Beech's evidence, that what in fact happened was that the claimant, entirely genuinely, was driving along the road, that there was a car either immediately or one in front of him, that that car performed a dangerous manoeuvre by turning left at the last moment, that the claimant braked, which was reasonable, but he over-braked and overreacted and came to a stop, which deprived Mr O'Sullivan of the opportunity - who by that stage, I am satisfied, may have been driving close to the claimant but perhaps was not driving at the 15 to 20 miles an hour he had been driving earlier - and that he did not have time to stop before the collision and, as a consequence of that, Mr 0' Sullivan hit the claimant.
>
> 10. Therefore, if there is any negligence in this accident, it is not by Mr O'Sullivan. There is an aspect whereby the Claimant perhaps in over-braking was negligent, but really it seems to me that the

> main party at fault was the vehicle which had gone to the left, and frankly it may well have been a better defendant for the claimant's target in the action. Be that as it may, I dismiss the claim accordingly, but I also do not make any findings in relation to fundamental dishonesty."

7. In light of his finding on fundamental dishonesty, the judge did not disapply QOCS and ordered that the Claimant pay the Defendant's costs, not to be enforced without the leave of the court (see CPR r 44.13 et seq).

The issues arising

The Claimant's appeal

8. On behalf of the Claimant, Mr Huffer submitted that the judge failed to give adequate reasons for his decision that the driving of Mr O'Sullivan was not negligent and at partially causative of the collision. He relied on what Lord Phillips MR said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, [19], on the standard of reasoning required by judge's at first instance. I will return to this decision later.

9. Second, he submitted that the judge's findings that Mr O'Sullivan's driving was not negligent and so not at least partially causative of the collision was not supported by the weight of the evidence. Mr Huffer pointed to Mr O'Sullivan's oral evidence which, he said, was to a large extent in accordance with [25] of his witness statement and to the effect that at the time the Claimant braked and stopped he was approximately one car length behind the Claimant's car and travelling at between 15 and 20 mph. He points to the Highway Code, and to the fact it specifies a duty on drivers to maintain a safe distance from the car front to allow for sudden stops; that it specifies the safe rule as being never to get closer than the overall stopping distance as shown in the table in the Code; and that the stopping distance for normal road conditions for a vehicle driving at 20 mph is 40 feet or 'three car lengths'. Stopping distances for speeds under 20 mph are not given.

10. Mr Huffer does not challenge the judge's finding that the Claimant was negligent. He submits that, both parties being at fault, a just and proper apportionment 'by assessing the respective responsibilities of the parties in a broad and common sense way' is 60% to the Defendant and 40% to the Claimant. In support of this contention, the Claimant relies upon the Court of Appeal decision in *Ali v D'Brass* [2011] EWCA Civ 1594.

11. In response, Mr Poole submitted as follows. First, he said that the appeal is essentially against findings of fact made by the judge which I should be slow to disturb and should only do if I am sure the judge was plainly wrong. He relies in particular on *Watson Farley and Williams v Ostrovizky* [2015] EWCA Civ 457, [8], and the cases there cited.

12. Mr Poole pointed out the finding by the judge that the Claimant stopped his car when he did not need to and was therefore negligent. He also pointed out that the judgment at [8-10] is to the effect that having considered the speed of the Defendant's vehicle and its proximity to the rear of the Claimant's vehicle, the judge was satisfied that the Defendant was not in breach of duty: 'if there is any negligence in this accident, it is not by Mr O'Sullivan.' In other words, said Mr Poole, it is implicit that the judge found

that Mr O'Sullivan was not driving too quickly or too close to the Claimant's vehicle. Given the simple issues in the case, that was sufficient.

13. As to the second ground, Mr Poole submits that it was open to the judge to conclude on the evidence that Mr O'Sullivan had not driven too close to the Claimant, or too fast at the material time.

14. He therefore invited me to dismiss the appeal.

The Respondent's applications for relief from sanctions and for permission to cross-appeal

15. Mr Poole submitted I should grant relief from sanctions under CPR r 3.9 by way of extending time for the filing of the Defendant's notice of cross-appeal in relation to QOCS. This was due on 2 April 2019 but was not filed until 13 May 2019. The reasons put forward are, first, a delay in obtaining the transcript of evidence which Mr Poole said was necessary before the Notice could be lodged. This was ordered from the transcribers promptly but not received until 1 May 2019. One the Defendant's legal team then had an episode of ill-health which further delayed matters.

16. On behalf of the Claimant Mr Huffer did not strenuously oppose the application for relief from sanctions, but queried whether a transcript of the evidence was necessary.

17. Turning to the merits of the application for permission to appeal, Mr Poole submits that: (a) the judge was wrong to hold that the Claimant was honest because the Claimant presented a claim that was not only dishonest but fundamentally so; (b) the failure to find the Claimant fundamentally dishonest has different consequences depending on my decision in relation to the Claimant's own appeal. On the one hand, if the I dismiss the Claimant's appeal, I should nevertheless quash the trial judge's costs order and replace it with an order whereby QOCS is aside and the Claimant ordered to pay the Defendant's costs in an enforceable court order on the grounds that the Claimant presented a claim that was fundamentally dishonest; (c) if, on the other hand, I overturn the decision of the judge on the issue of liability for the collision, I should dismiss his claim and his appeal in any event on the grounds that the Claimant presented a claim that was fundamentally dishonest; (d) finally, in the event that I overturn the decision of the trial judge but decline to make a finding of fundamental dishonesty against the Claimant, the Defendant invites me to order a retrial on the basis that the judge wrongly excluded important aspects of the evidence in relation to whether this was a staged crash.

18. Mr Poole submitted that the Claimant's case was fundamentally dishonest about all of the following matters: (i) the accident circumstances; (ii) staged accident; (iii) his credit cards; (iv) his bank statements; (v) the issue, therefore, of impecuniosity; (vi) his disclosure statement; (vii) his injuries; (viii) his journey after the accident.

19. On behalf of the Claimant in response, Mr Huffer says in relation to the first three issues that they are without real prospects of success in that the Defendant has failed to establish that the judge's decision that the Claimant was honest was plainly wrong or not properly open to him on the evidence. He relies heavily on the fact that the judge had the big advantage of hearing from the Claimant, and was therefore in the best position to assess his credibility and I should not overturn his findings: *Benmax v Austin*

Motor Company Ltd [1955] AC 370, 375 ('… it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness.')

20. On the fourth issue he says that the judge did not exclude evidence in relation to the accident being staged amounting to a serious irregularity in the trial process that gives rise to an appeal with real prospects of success. The judge allowed the issue of staged crash to be explored.

Discussion

The Claimant's appeal

21. A failure to give adequate reasons (or any reasons) may found a basis for an appellate court interfering: *Flannery v. Halifax Estate Agencies Ltd* [2000]1 WLR 377; *English*, supra. In the latter case Lord Phillips MR said at [19] and [26] (emphasis added):

> "19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.
>
> ….
>
> 26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, *in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did*. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this court, in the light of *Flannery's* case [*Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377] in *Ludlow v National Power plc* (unreported) 17 November 2000; Court of Appeal (Civil Division) Transcript No 1945 of 2000. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial."

22. The italicised words in [26] are important. In considering whether the judge properly explained his conclusion, or whether his reasons were inadequate, I can have regard to the evidence and to the submissions made by counsel in order to determine these questions. I am not limited to the judgment alone.

23. Mr Huffer's core submission is that the judge failed to give adequate reasons for his decision that Mr O'Sullivan's driving was not negligent and partially causative of the collision.

24. I begin with some preliminary observations. First, the trial was a short one. It was concluded well within a day. The compass of the evidence was limited. The issues in the case were, as the judge remarked at [1] of his judgment, 'straightforward'. Earlier, in pre-trial discussions with counsel he described the case as 'bog-standard'. What the judge meant was that the issues involved were ones which commonly arise in road traffic cases. The judge indicated at [4] of his judgment that he had very considerable experiences of such cases at the Bar and on the Bench.

25. Given this context, it does not seem to me that this was a case where there was a need for a lengthy or elaborate judgment. Indeed, the judge's judgment was very short, occupying just eleven paragraphs and two and half sides of A4. He delivered it immediately after submissions had ended. The question for me is whether, with the assistance of counsel's submissions, I am able to understand why the judge reached the decision that he did.

26. The relevant legal rule in relation to braking is as follows. The duty of persons driving in a line of traffic is to drive at such a distance behind the car in front as to be prepared for reasonable emergencies which may arise: *Thompson v Spedding* [1973] RTR 312, 314. In *Brown and Lynn v Western Scottish Motor Traction Co Limited*: 1945] SC 31, 35, Lord Cooper said:

> "The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors – the speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up and many other things. The following driver is, in my view bound, so far as is reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal with all traffic exigencies reasonably to be anticipated: but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following driver acted within the alertness, skill and judgment reasonably to be expected in the circumstances."

27. That said, a driver is not expected to anticipate 'folly in all its forms': *London Passenger Transport Board v Upson* [1949] AC 155, 172.

28. The common law duty is encapsulated in Rule 126 of the Highway Code. This provides that drivers should drive at a speed that will allow them to stop well within the distance they can see to be clear. They should leave enough space between themselves and the

vehicle in front so that they can pull up safely if it suddenly slows down or stops. The safe rule is never to get closer than the overall stopping distance as shown in the table in the Code. At 20mph the suggested stopping distance is 40 feet, or three car lengths. No distances are given for speeds below 20mph. While a breach of the Highway Code does not of itself lead to a finding of negligence, any such breach can be relied upon as tending to imply negligence: s 38(7) of the Road Traffic Act 1988.

29. I consider that it is clear from the judge's reasons, briefly expressed though they were, that he reached the conclusion he did about Mr O'Sullivan's driving because he was satisfied that *at the point of collision* Mr O'Sullivan was not driving too close and too fast to the Claimant and so was not negligent, even though when the Claimant overbraked and stopped unnecessarily Mr O'Sullivan was not able to stop in time. I do not therefore consider his reasons were inadequate. The Claimant is able to understand from the judgment and from the other material which can be taken into account, why the judge decided as he did. My reasons are as follows.

30. First, the judge could not have failed to have been alive to what the Claimant's case was, and what the issues were. As I have said, these were straightforward, and the parties put them clearly before him. They were, first, whether the Claimant stopped and, second, whether Mr O'Sullivan was driving too fast and too close to the Claimant at the point the collision occurred. As to the second issue, Mr O'Sullivan was extensively cross-examined about his speed and distance in the moments leading up the crash. It was put to him that he was driving too fast and too close at the point of impact (viz, 15 to 20 miles per hour, at one car length). His evidence was that it was more like about 10 to 15 miles per hour at one car length.

31. The relevant exchanges are as follows:

> "Q. Okay. But you were all travelling at around, what, 20 miles per hour ?
>
> A. I said 10, 15.
>
> Q. Who was travelling at 10, 15.
>
> A. All the traffic.
>
> Q. All the traffic at 10 to 15.
>
> A. Mmm.
>
> Q. Including the hatchback ?
>
> A. Yes.
>
> Q. So you are saying that this hatchback suddenly veered left –
>
> A. Yes.
>
> Q. – at 10 to 15 miles per hour without using his brakes.
>
> A. Yes.

Q. Are you sure about that ?

A. Yes.

Q. At this point you say you are travelling at 10 to 15 because you all are ?

A. Yeah.

Q. Is that correct ?

A. Yes.

Q. You say 10 to 20 miles per hour in your witness statement at that point.

A. Okay.

Q. You may shrug your shoulders and think that that is not significant, but it is when you speak about stopping distances, is that not correct ?

A. Yes, I agree.

Q. As we have just said. You have got a stopping distance doubling the difference between 10 miles an hour.

A. Mmm.

Q. So is it not what is in your witness statement that is closer to the truth of this, 15 to 20 miles per hour you were all travelling at ?

A. Just estimating that is, all the time."

32. Later he was cross-examined as follows:

"Q. At this point [ie, of the collision] you were one car length behind the BMW, is that not correct ?

A. Approximately, yeah.

Q. One car length –

A. Yeah.

Q. – travelling at 15 to 20 miles per hour –

A. No.

Q. At 20 miles per hour you need to be 3 car lengths. This is in your witness statement: one car length at 15 to 20 miles per hour. It is page 434 paragraph 25. I will give you a moment. Take your time. Page 434 paragraph 25. This is towards the Tandy Lane junction.

A. In the region of 15 to 20 miles an hour.

Q. Yes. You are one car length behind –

A. I said somewhere in the region of 15. One car length, yeah.

Q. 15 to 20 miles per hour. Okay. Even if you are at 20 miles per hour you need to be 3 car lengths. Yes ?

A. Mmm.

Q. It is quite clear, is it not ?

A. Yeah.

Q. You have travelled far too close to the BMW ?

A. No.

Q. One car length on a hazardous road ?

A. One car length, yeah.

Q. At 15 to 20 miles per hour.

A. It didn't happen like that.

Q. Worse than that, you say in your evidence that the BMW was tailgating the vehicle in front

A. Yeah.

Q. A vehicle in front that you say was unsure of the road. Why on earth did you not brake and hold back and create more like what you should do whenever you are travelling at 30 miles per hour, or 20 miles per hour, or even 30 miles per hour, which is 3 to 6 car lengths ?

A. Because we weren't going that fast."

33. Second, the issues were clearly laid out in closing submissions. The relevant extracts are as follows:

"MR POOLE: Your Honour indicated before any evidence had commenced that the main question is that of negligence. My submission is that the defendant's driving did not fall below the standard to be expected.

JUDGE TINDAL: You are presumably going to say that the claimant does not seem to know whether he braked or not, and in those circumstances I can probably infer that he stopped. If I infer that he stopped, the question of braking distances is a bit academic.

> MR POOLE: Yes … I think the primary finding for you to make is that there was no basis for the claimant to have stopped his car, or even to have slowed it."
>
> …
>
> MR MULLAN (who then appeared for the Claimant): [Mr O'Sullivan] cannot be relied on. Let us get to what he says actually happened. There is a third, one-car length in front in which this vehicle stopped for absolutely no reason, and came to a stop, a vehicle on which there were no brake lights. He did not see any brake lights. You will have a note of my cross-examination and the various inconsistencies in respect of what he has said regarding his own negligence, and admissions in respect of his own negligence. He is travelling far too fast behind the vehicle in front with far too short a distance from the vehicle.
>
> JUDGE TINDAL: You skilfully pointed out that his witness statement would suggest that the stopping distance was too short, but then he suggested that he must have wrongly estimated the speed. So it becomes a bit less stable, does it not ?
>
> MR MULLAN: No, because what you know from that without a doubt, in my respectful submission, is that if he is even travelling, and you only go by what he says and the evidence that he has put before the court, 15 to 20 miles per hour, and prior to that 30 to 40 miles per hour, at any of those speeds at the distance that he said, he is clearly negligent in that regard – quite clearly significantly negligent, and especially at the point where this occurs.
>
> …"

34. Later, Mr Mullan said:

> "… Then what we had is other than the defendant driver's case, which is that he is travelling one car length in front of a vehicle in front (sic) at 15 to 20 miles per hour. He is quite clearly negligent at that point."

35. In the light of this material, in my judgment it is clear that in [8]-[10] of his judgment the judge was accepting Mr O'Sullivan's estimate of having been travelling at a lower speed than the 15 to 20 mph which was put to him. In other words, the judge accepted that his speed was one at which no stopping distance is provided for in the Highway Code. At [8] he referred to Mr O'Sullivan having ('may') been driving a 'little bit too fast and a little bit too close' to the Claimant *at a point before the accident*. But this is to be contrasted with what he said at [9] at the point the Claimant stopped, when he said '… by that stage, I am satisfied, may have been driving close to the claimant *but perhaps was not driving at the 15 to 20 miles an hour he had been driving earlier*' (emphasis added). Then, in the first sentence of [10] the judge concluded: 'Therefore, if there is any negligence in this accident, it is not by Mr O'Sullivan.' This can only be read as a conclusion that the Claimant had not proved (the burden being on him) that

the combination of speed and distance at which Mr O'Sullivan was travelling at the point of collision was not such as to make him negligent, notwithstanding that he could not stop in time.

36. I accept that the judge's reasoning could have been more fully expressed. For example, he could have made reference to the standard of driving that is required in relation to braking and stopping distances (see above). However, given that neither of the parties referred to the relevant test in their closing submissions, it can be inferred that everyone was fully cognisant of what the relevant test was. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 Lord Hoffmann said:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as given by the District Judge. These reasons should be read on the assumption that unless he has demonstrated the contrary, the Judge knew how he should perform his functions and which matters he should take into account. … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

37. The question is whether the material to be considered sufficiently explains why the judge reached the conclusion that he did, in accordance with *English*, supra, at [19]. In my judgment it does, and the first ground of appeal therefore fails.

38. As to the second ground of appeal, and whether the judge's conclusion was supported by the evidence, in my judgment it was open to the judge to reject the Claimant's case on speed and to find on the material before him that Mr O'Sullivan had driven at a speed closer to 10 miles per hour at the point of impact. The passages I have set out show that Mr O'Sullivan's consistent evidence under oath was that he was not driving at fast as 15 to 20 miles per hour at the point of impact, but was travelling more slowly than that. It was for the judge to evaluate this evidence in light of all the other evidence, including what Mr O'Sullivan had said in his witness statement, and to assess, to the extent there were inconsistencies, how those were to be resolved. The judge plainly accepted the explanation that Mr O'Sullivan had been estimating his speed in his witness statement (because the judge said so in his exchanges with counsel during closing submissions). Such issues arise in very many road traffic cases and they are, *par excellence*, the sort of issues which experienced judges (like the judge in this case) are well used to resolving.

39. I am therefore not satisfied that the judge's finding of fact on the issue of speed was plainly wrong such that I can properly differ from him. It is to be noted that it was not submitted on behalf of the Claimant that even if Mr O'Sullivan had been travelling at the speed and distance he claimed then he was negligent in any event. Hence, given (a) that the burden of proving negligence was on the Claimant; (b) that Mr O'Sullivan's evidence was that he was travelling approximately one car length behind; and (c) the absence of any stopping distances in the Highway Code for speeds lower than 20 miles per hour, I conclude that it was open to the judge to conclude that the Claimant had

failed to discharge the burden of proving that Mr O'Sullivan had been negligent in the face of a sudden negligent manoeuvre by the Claimant.

40. There is nothing in *Thompson v Spedding*, supra, which compels a different conclusion. Ultimately, cases such as this are fact specific. In *Thompson* the plaintiff's counsel had conceded contributory negligence in a case where the speeds had been 25 to 30 miles per hour. The judge nonetheless rejected the concession on an erroneous legal basis. No distances are given, but the concession means that the distance at which the plaintiff must have been travelling when she collided with the car ahead must have been less than the safe distance required by such speeds, in accordance with the duty which the Court of Appeal articulated. The facts of the present case are different.

41. The second ground of appeal therefore fails.

42. It follows the Claimant's appeal is dismissed.

The Defendant's applications

43. I begin with whether I should grant the Defendant relief from sanctions and treat its Notice as being in time.

44. I reviewed some of the relevant authorities in this area in *Deutsche Leasing (UK) Ltd v Zaskin College* [2018] EWHC 1977 (QB). I said that in *Denton*, supra, the court affirmed the guidance given in [40–41] of *Mitchell*, *supra*, on the approach to applications for sanctions relief, and had explained the approach in more detail as follows, at [24]:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in CPR r 3.9]'."

45. Given the Claimant's stance, I do not propose to deal with this issue in detail. The breach here was serious and substantial. I am not persuaded that there was a particularly good reason for the lateness of the Notice so far as the delayed transcript was concerned, and an application for an extension of time could and should have been made before the relevant deadlines expired. That said, the lateness of the Notice fortunately did not imperil the date of the appeal hearing, and the Claimant was able to deal fully, orally and in writing, with the Defendant's submissions,

46. Having regard to the circumstances overall, in my judgment it is in the interests of justice to grant the application and to extend time. However, I should emphasise the importance of complying with the time limits specified in the CPR and the less indulgent approach to rule breaches which the decisions in *Mitchell*, supra, and *Denton*, supra, were intended to lay down. The notes in the *White Book 2019*, Vol 1, at [3.9.13]

make clear that just because a hearing date is not imperilled does not mean relief from sanctions will be granted. Nothing in this judgment should be taken to suggest a different approach; my decision is based entirely on the facts of this case.

47. Turning to the merits of the application for permission to cross-appeal, the grounds appear to me to be arguable, and I therefore grant permission.

48. In support of his submission that the judge was wrong to have held that the Claimant had not been fundamentally dishonest, and so wrong not to have disapplied QOCS, Mr Poole referred me to various authorities on dishonesty and fundamental dishonesty both in relation to QOCS and also s 57 of the Criminal Justice and Courts Act 2915. These included *Howlett v Davies* [2018] 1 WLR 948, approving *Gosling v Hailo*, 29 April 2014, Unreported; *Ivey v. Genting Casinos (UK) Ltd* [2018] AC 391 and *London Organising Committee of the Olympic Games v Sinfield* [2018] EWHC 51 (QB). In *Howlett*, the Court of Appeal said:

> "16 As noted above, one-way costs shifting can be displaced if a claim is found to be "fundamentally dishonest". The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (unreported) 29 April 2014. He said this in his judgment:
>
> > '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.'
>
> 17 In the present case, neither counsel sought to challenge Judge Moloney QC's approach. Mr Bartlett spoke of it being common sense. I agree."

49. In *Ivey*, supra, the Supreme Court restated the common law test for dishonesty and, in summary, held that whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards. Lord Hughes said at [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."

50. By CPR r 52.21, an appeal to this court from the County Court is limited to 'a review of the decision of the lower court'. Pursuant to CPR r 52.21(3) the appeal court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings. Martin Spencer J helpfully summarised the approach to taken on appeal to first instance findings of fact in this area in *Molodi*, supra. That was a case about fundamental dishonesty. He said at [39]:

> "39. The scope of an appellate court was further elucidated by the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 where it was held that there is a distinction between the finding of a specific fact and the finding of fact which is really an inference drawn from facts specifically found. In the case of "inferred" facts, an appellate tribunal will more readily form an independent opinion than in the case of "specific" facts which involve the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing. In the course of his judgment, Viscount Simmonds LC cited from the judgment of Lord Cave LC in *Mersey Docks and Harbour Board v Proctor* [1923] AC 253 at 258–9 where Lord Cave said:
>
> > "It is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."
>
> Viscount Simmonds went on to say:
>
> > "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact,

> and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts."

51. The Defendant submits, first, that the judge should have found the Claimant to have been fundamentally dishonest because (a) he did not disclose either on his list of documents or on his response to Part 18 questions that he held two credit cards; (b) he did not disclose that he held a second bank account. He only admitted this when it was put to him in cross-examination, but claimed that the second account was opened by the bank in error.

52. The context of these submissions is as follows. Many road traffic cases involve claims for credit hire charges. These arise where the claimant is supplied with a replacement car on credit by a credit hire company whilst his/her own car is off the road, and s/he then seeks to recover these charges from the defendant. Frequently these charges are large, and they can exceed the claimed personal injury damages. The charges levied by credit hire companies are generally greater than those levied by ordinary car hire companies. Where credit hire charges are claimed, the defendant's insurer is generally concerned to find out whether the claimant could have afforded a replacement vehicle by some other means than by using a credit hire company, thus avoiding the increased charges (eg, by taking out a loan or by using his/her own credit card). The position was considered generally by the House of Lords in *Lagden v O'Connor* [2004] 1 AC 1067, [42]. Lord Hope referred to what the Court of Appeal had said at [2003] QB 36, [128], namely that in some cases it would be necessary to consider the financial ability of a claimant to pay car hire charges, and that his was a question that trial courts should be easily able to cope with. Lord Hope said of this:

> "That seems to me to be a fair assessment. In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty."

53. It is against this background that the Defendant says that the Claimant made a false disclosure statement in his List of Documents, which was verified by a statement of truth dated 22 March 2018, when he failed to disclose his credit cards. It says that that non-disclosure was a lie, which the Claimant then compounded in his reply to the Defendant's Part 18 questions. Question 8 asked him whether he could have afforded to hire a vehicle other than on credit, and question 10 asked, if the earlier answer was 'no', that he list all his credit cards and supply supporting information such as credit limits and statements. To question 10 the Claimant replied, 'I did not have any credit card accounts.'

54. In fact, when he came to give evidence, the Claimant admitted to having two credit cards at the relevant time, namely a Barclaycard and a card issued by Vanquis Bank. When pressed why he had not disclosed these, he said that the Barclaycard account was 'closed'; that he did not have any access to credit on it; and that he had defaulted on his

repayments. When asked by the judge, 'Why did you not say, "I have an account but there's nothing in it because of X, Y and Z" ?' the Claimant answered, 'I should have. That's an error on my part on that.' He did not give evidence about the other card.

55. In relation to his bank accounts, in his Part 18 replies the Claimant disclosed one account with HSBC ending **34. When he came to give evidence it was put to him that the statements he had disclosed for this account did not show the paying in by him of a cheque for £3800 from the Defendant's insurers by way of interim payment. It was therefore put to him that he must have had another account that he had failed to disclose. The exchange was as follows:

> "Q. So I suggest to you that the only possible conclusion to be drawn from that by the trial judge is that that is because you had another account.
>
> A. Which I can disclose. I can –
>
> JUDGE TINDAL: Yes, but did you have one, because the whole point is that the order is that you were supposed to be disclosing all your relevant accounts. So are you admitting that you have not disclosed a relevant account ?
>
> Q. Again it's a difficult one, because no, I didn't have another account. HSBC made an error. The bank's made an error on that. They gave me for the same account, I don't know why I was given 2 cards for the same account, the same account. And like I said, I can get access to the HSBC and show you where the money went into, my HSBC account. So there was nothing hiding, that I'm storing away thousands or whatever you're trying to …
>
> …
>
> Q. Are you denying having more than one bank account ?
>
> A. I'm not denying it. I opened one account. They made an error, and they gave me another account. I opened one account."

56. The judge dealt with the credit card and bank account evidence in his judgment at [5]-[7]. He said that 'the position was that [the Claimant] did have a credit card, but it was 'maxed out'; that there had been points about 'whether there had been sufficient disclosure of bank statements'; that there had 'not been particularly good disclosure; but that none of it had given him the impression that the Claimant had been dishonest. The judge said that his inconsistencies were explicable on the basis he was trying to recall events four years ago and that he was 'basically an honest man'.

57. In my judgment this conclusion was not reasonably open to the judge. It was plainly dishonest for the Claimant not to have disclosed his credit cards or his second bank account and the accompanying documentation. The questions he was asked were not difficult (and he did not say that he had not properly understood them); they were in writing; he had time to consider his documentation; and he had the opportunity to take legal advice if he was unsure about how to answer and what to disclose. Even if he

was telling the truth about his Barclaycard account having been closed, that did not relieve him of the obligation to disclose it and the associated paperwork. He gave no explanation at all for not disclosing his Vanquis Bank card, and his claim that somehow the bank had given him another account in error, into which he had just happened to pay his interim payment, was not credible. The Claimant's actual state of knowledge was that he knew full well that he had two bank account and two credit cards, and that he had concealed this information. Nor, for the reasons I have given, could the Claimant's failure be explained on the grounds that he was being asked to recall events from four years previously.

58. I have set out the judge's reasoning but, with respect to him, he did not properly address the evidence. This was not simply a case where there had just been 'not particularly good' disclosure by the Claimant. He deliberately failed to disclose highly material evidence. There was simply no basis on which the judge could properly have concluded that the Claimant had simply got confused on these issues. The only possible reasonable inference from the evidence was that the Claimant intentionally failed to make full disclosure, and that failure can only be labelled as dishonest.

59. Was this dishonesty 'fundamental', in the sense explained in *Howlett*, supra ? In my judgment it was. The dishonesty in question did not relate to some collateral matter, but went to the root of a substantial part of the claim. The claim for credit hire charges (and associated losses) exceeded £30 000. The importance of the Claimant giving proper disclosure about his financial circumstances needs to be emphasised. Part of the purpose of a statement of truth is to bring home to party signing the solemn nature of what s/he is doing, and importance of telling the truth. To knowingly give a false statement of truth is a contempt of court: CPR r 17.6(1). Moreover, as the Defendant correctly observed in its Skeleton Argument, the County Court cannot carry out an assessment of the issue of impecuniosity when a litigant fails to give full financial disclosure. By doing as he did, the Claimant prevented the Defendant from carrying out a proper investigation into his claimed impecuniosity. This skewed and distorted the presentation of his claim in a way that can only be termed fundamentally dishonest.

60. It follows that the judge was wrong not to have concluded (*per* CPR r 44.16(1)) that the claim was not fundamentally dishonest so as to allow the order for costs made against the Claimant to be enforced to its full extent.

61. The Defendant relied on other matters but in light of my conclusion on the credit cards and bank accounts it is unnecessary for me to deal with them. Suffice to say I was not persuaded that the Claimant's evidence about whether or not he applied his brakes was evidence of dishonesty, let alone fundamental dishonesty. That is something, as the judge observed, which could be explained by difficulties in recollection relating to a fleeting incident some years previously.

Conclusion

62. The Claimant's appeal is dismissed. The Defendant's appeal is allowed to the extent that I have indicated. I invite the parties to draw up an order reflecting the terms of his judgment.