

197 East Road, Cambridge

Tuesday, 29<sup>th</sup> April 2014

Before:

HIS HONOUR JUDGE MOLONEY QC

B E T W E E N :

MICHAEL JOSEPH GOSLING

Claimant

- and -

(1)HAILO

(2) SCREWFIX DIRECT

Defendants

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MR. EDWARDS (instructed by Ashton KCJ Solicitors) appeared on behalf of the Claimant.

MR. J. FOY and MR. S. BRINDLE (instructed by Berrymans Lace Mawer Solicitors) appeared on behalf of the 2<sup>nd</sup> Respondent.

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**J U D G M E N T**

(As approved by the Judge)

## JUDGE MOLONEY QC:

- 1 This is my judgment on an application made in claim number 1UD17868 by Michael Gosling, the claimant, against the 1<sup>st</sup> defendant, a German company called Hailo, and the 2<sup>nd</sup> defendant, a British company called Screwfix Direct. The application before me is an application by the 2<sup>nd</sup> defendant, Screwfix, for me to make an order under CPR 44.16. This is in the new section of the costs rules dealing with QOCS (qualified one-way costs shifting), to which I shall return in a short time, and it provides for exceptions to QOCS, in relation to which permission is required. What is being sought is that I should give permission for the 2<sup>nd</sup> defendant to enforce against the claimant in this personal injury action an order for costs made as a result of the discontinuance by the claimant of his proceedings against the 2<sup>nd</sup> defendant. The essence of the QOCS system is that, as a general proposition, personal injury claimants have an immunity against such costs, unless the court grants permission for them to be enforced in accordance with the circumstances laid down in the rules.
- 2 I shall begin by summarising the chronology. On 31<sup>st</sup> July 2008, the claimant suffered a serious injury to his knee. It appears probable that he suffered it as a result of an accident of some kind involving a ladder manufactured by the 1<sup>st</sup> defendant and sold to him by the 2<sup>nd</sup> defendant. The injury to his knee was sufficiently serious that it required, in due course, an arthroplasty operation. Three years after the accident he commenced his claim in negligence against the manufacturer and the supplier, claiming that his accident was the result of deficient construction of the ladder. His claim was for general damages for pain, suffering and loss of amenity, together with a schedule of loss initially of some £39,000, of which some £17,000 was for future care.
- 3 The parties exchanged their statements of case, and in 2012/13, the defendants decided (as is not uncommon in such cases) to conduct some covert surveillance on the claimant, in order to see whether his level of disability was as great as he was alleging. In particular, on 30<sup>th</sup> October 2012, they surveyed him throughout a day on which they knew he was due to visit their expert, Dr. Shaolin, in the afternoon for an examination. I shall return to the results of that surveillance in a moment.
- 4 The surveillance material was then retained until after the service of the claimant's witness statement. That was done on 4<sup>th</sup> February 2013. In his witness statement he made certain assertions as to his ongoing pain, disability and so forth. On 21<sup>st</sup> March 2013, the surveillance evidence was disclosed. It was disclosed to the claimant and his solicitors but also to the medical experts, who, in their joint report of May 2013, said in summary:

*“Following the review of the surveillance footage and the DWP records:*

*(a) The claimant does not need to walk with a crutch;*

*(b) In general terms, the knee pain following a total knee replacement has two major causes: firstly, the diagnosis was not correct and there was no significant arthritis – this is not the case for Mr. Gosling. Secondly, that the patient has failed to rehabilitate their muscles properly. The surveillance videos show that this, also, is not correct.*

*Therefore, there is no evidence that Mr. Gosling has constant knee pain, except that he reports it. We are sure the court will take the inference that the disparity between the examination findings and the complaints that we found when doing the medical reports, and the surveillance video which suggests that there is no problem, is that Mr. Gosling is not being honest about his symptoms and problems.”*

5 The doctors then say, *“Of particular note, is Mr. Gosling only using his crutches when visiting the hospital”*. I shall explain that further when I come to give an account of the surveillance video. The doctors further say:

*“The only problem that Mr. Gosling is experiencing as a result of the accident is having a total knee replacement rather than a normal right knee joint. This usually limits certain activities such as sports, kneeling and climbing ladders.”*

6 That is the normal outcome from a total knee replacement. They then go into some details about the extent to which he might have suffered limited restrictions and disabilities for a period of some six weeks following the operation.

7 The next thing that happened was in August 2013 when the claimant, though continuing with his claim, served a revised schedule of loss that was drastically reduced. In particular, it abandoned the claim that he had previously made for substantial damages for future care. In August 2013, he also asserted, and invited the defendants to confirm, that he was protected against costs liability to them by the QOCS rules, certainly in relation to so much costs that had been incurred after those rules came into effect in April 2013. In November 2013, the 2<sup>nd</sup> defendant responded to that with the assertion that it would contend that the claim was fundamentally dishonest, (that being (as will be seen) one of the circumstances in which the QOCS costs protection, or amenity, can be disallowed).

- 8 The trial was listed for 10<sup>th</sup> December 2013, but in the early part of that month, the claimant disposed of the matter as follows: he settled with the 1<sup>st</sup> defendant for a damages payment of £5,000, costs payments of £27,000, and an indemnity against his liability to the CRU in respect of benefits which may be of the value of about £18,000. He discontinued against the 2<sup>nd</sup> defendant. The consequence of that was that the 2<sup>nd</sup> defendant, having been discontinued against, would, in the ordinary way, automatically have an order arising in its favour under CPR 38.6 for its costs. However, that order could not be enforced because of QOCS, unless an application was made under CPR 44.16 to permit enforcement. That application has been issued and is now before me.
- 9 The application was made on two separate but related bases. Firstly, that the discontinuance should be set aside in order that the action could be struck out, striking out being one of the circumstances in which QOCS protection is not allowed, or, secondly, that the court should find that the claimant was fundamentally dishonest. This is an application that can be made and dealt with by the court without the need to set aside the discontinuance.
- 10 Since it appeared to me that, first of all, the court's time today is limited, and, secondly, if I was not able to make some strong finding about fundamental dishonesty the likelihood that I would go down the discontinuance route was correspondingly reduced, I directed that we would deal today only with the second limb, the fundamental dishonesty limb, and leave the other part of the application unadjudicated for the time being. That is what has been done.
- 11 Following the issuing of the application, it came before the district judge. Directions were given for a four hour hearing, effectively a full day, before a circuit judge, namely myself, as has been done. The directions provided for exchange of skeleton arguments and the like, but no directions were sought or made in respect of oral evidence, disclosure or matters of that kind.
- 12 With that summary of the chronology, I shall now turn to set out, briefly, the applicable rules. I have already referred to what is, in one sense, "the starting point", which is 38.6. That provides at 38.6(1):

**“(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which the defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.”**

On that basis, absent anything to stop them, the 2<sup>nd</sup> defendants would be entitled to, effectively, their whole costs of the action - their costs up to the week before the trial.

- 13 We then come to QOCS, that is to say, Qualified One-way Costs Shifting. It might help if I quote from the note at para.44.0.5 of the 2014 White Book:

*“In his final report, Sir Rupert Jackson, having recommended that the recoverability of success fees and after the event insurance premiums should be abolished, asked rhetorically how the law should protect those claimants who, as a matter of social policy, should be protected against the risk of adverse costs.”*

- 14 He stated at chapter 9, para.5.2 of his report:

*“In my view, there is only one sensible way to give effect to that social policy, namely by introducing one-way costs shifting. The advantage of this solution is that costs protection can be targeted upon those who need it rather than offered as a gift to the world at large.”*

- 15 The phrase “qualified one-way costs shifting” is, if I may be pardoned for saying so, a piece of jargon. In the present context, it means, put shortly, an immunity for claimants in personal injury actions against liability for the costs of the defendant, that immunity being qualified by the considerations with which I am now going to deal. For present purposes, the relevant law is contained in the new Part 2 of Part 44 of the Civil Procedure Rules. Part 44.13 provides that this section applies to proceedings which include a claim for damages for personal injuries, and the present case is of course such a case.

- 16 Part 44.14 provides that:

**“...orders for costs made against a claimant may be enforced without the permission of the court, but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interests made in favour of the claimant.”**

- 17 In the present case, it is not disputed that the claimant, having recovered £5,000 in respect of damages from the 1<sup>st</sup> defendant, is liable to enforcement up to that amount in favour of the 2<sup>nd</sup> defendant. In other words, he can lose his damages but he will not be penalised in costs beyond that. (There is an open question, which I do not seek to resolve today, as to whether the CRU indemnity, also created as a part of that settlement, should or should not be treated as damages

for this purpose. I say no more about that other than the claimant is at liberty to make such application in respect of that as it considers appropriate. The matter will then be resolved.)

- 18 CPR 44.15 is as follows: “ **Exceptions to QOWCS where permission is not required:**

**“Orders for costs ... may be enforced to the full extent of such orders without the permission of court where the proceedings have been struck out on the grounds that –**

**(a) the claimant has disclosed no reasonable grounds for bringing the proceedings**

**(b) the proceedings are an abuse of process; or**

**(c) the conduct of –**

**(i) the claimant; or**

**(ii) a person acting on his behalf ...**

**is likely to obstruct the just disposal of the proceedings.”**

It is under that head that the other limb of the present application arises: the application to set aside the discontinuance so that the claim can be struck out, so that the costs can be enforced. That stands in abeyance because I have not dealt with it, preferring to deal with the matter on the other footing.

- 19 Finally, we come to the order relevant to the present case. Part 44.16: **Exceptions to QOWCS where permission is required:**

**“Orders for costs made against the claimant may be enforced to the full extent for such orders with the permission of the court where the claim is found, on the balance of probabilities, to be fundamentally dishonest.”**

- 20 That, in turn, is amplified by the provisions of Part 12 of the Practice Direction to CPR 44. Specifically 12.4:

**“In a case to which rule 44.16(1) applies (fundamentally dishonest claims) –**

- (a) The court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;**
- (b) Where the proceedings have been settled, the court will not, save in exceptional circumstances, order that the issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;**
- (c) Where the claimant has served a notice of discontinuance, [that is of course the present case] the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined, notwithstanding that the notice has not been set aside pursuant to rule 38.4;**
- (d) The court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.”**

21 Because this is all new law there are, as yet, no known cases on the points that I have been asked to decide. The best guidance that I have found as to the approach that might be adopted is in the third lecture in the implementation program, Jackson LJ’s paper on technical aspects of implementation dated 31<sup>st</sup> October 2011, which formed an important part of the training that the judiciary received prior to the new costs regime coming into effect. In relation to that, I note in particular the emphasis that Jackson LJ places on proportionality. At para.2.3 he refers to the topic of satellite litigation and says this:

*“Any major civil justice reform is followed by litigation in which parties test the boundaries of the new rule. A few robust Court of Appeal decisions are needed to deal with the points raised. If the rule is supplemented by an elaborate practice direction, opportunities for satellite litigation will increase exponentially, as practitioners explore the relationship between the provisions, possible interstices in the language, and so forth. One lesson from the costs war is that lawyers leave no stone unturned when it comes to arguing about costs.”*

22 In s.4 of the lecture he deals with QOCS itself, and in particular at 4.3 with the zone of QOCS with which we are presently concerned, where he says this:

*“What conduct will deprive the claimant of costs protection? This issue is discussed in the workshop materials. I agree that if the claimant’s*

*claim is fraudulent or is struck out as an abuse of process, the claimant should forfeit costs protection. However, I do not believe that either litigants or the court will be assisted by a practice direction which gives guidance on borderline cases. Any such guidance is likely to generate increased satellite litigation for the reasons set out in para.2.3 above. There is a whole Costs Bar out there just waiting to sink its teeth into the new provisions.”*

- 23 I mean no disrespect to the learned counsel before me when I make the following observations: firstly, I am informed by the defendant that its gross bill of costs in the original action, that I am being asked to order payment of, is of the order of £22,000. Secondly, according to the costs schedules before me, the costs on both sides of the present application up to and including this hearing are already about £30,000. At least on one party’s part, the suggestion is that I ought either to decline to deal substantively with this application, or else remit it to a two day trial, at which I should hear the oral evidence of the claimant himself and at least two expert witnesses before reaching my decision.
- 24 In considering that suggestion, I bear in mind the clear guidance of Jackson LJ as to the manner in which these rules should be approached. I take it to be one of proportionality, efficiency and the avoidance, where possible, of unduly elaborate satellite litigation, by the adoption on the court’s part of a just, but wherever possible efficient and summary approach to the questions that the court is required to decide. That would be appropriate in relation to any kind of litigation, subject to the overriding objective, but it is perhaps of particular importance when considering costs litigation itself.
- 25 With that background, I turn to the questions that confront me, arising out of the rules which I have just quoted, which are brief and to the point. The first question, arising under practice direction 44 12.4(c), is this: should I direct that the issues arising out of the allegation of the claimant’s fundamental dishonesty be determined, notwithstanding that the notice has not been set aside?
- 26 It appears to me that that gives the court a discretion as to whether to go down this road at all; the court may, following discontinuance, direct that, nevertheless, the costs issues arising out of the allegation of a fundamentally dishonest claim be determined, but it is not obliged to do so. Whether it does so, and in what manner it does so, should be determined in the light of the overriding objective and the considerations of proportionality to which I have referred.
- 27 So, should I go down this road at all? I should say that the claimant submits very firmly that I should not. Firstly because (as counsel frankly accepts) the

costs of so doing, if they necessitated a full trial with oral evidence of the kind he envisages, would be considerably disproportionate; and secondly, because he says that when I examine the grounds on which the application is based, I will see that it is flawed. He submits that there is no real prospect of establishing that the claim was fundamentally dishonest and, in those circumstances, there is no need to give any direction for determination because I can decide at an interim stage that the application is of such little merit that it does not deserve to be investigated further.

- 28 If, however, contrary to those submissions, I were to decide that the issues arising from the fundamental dishonesty allegation should be determined, the next question is essentially one of procedure. Should I deal with that application substantively now on the basis of the materials before me, which are essentially the papers in the case together with a witness statement from the 2<sup>nd</sup> defendant's solicitor explaining them and putting them in their context, and of course the submissions of counsel? Alternatively, should I give further directions for the manner in which the issue should be determined? For example, directions for an oral trial of the kind that I have described. The third question, assuming that I decide to deal with the application now, is what conclusions I should reach as to whether the claimant was dishonest and whether, more particularly, the claim itself was fundamentally dishonest.
- 29 It will be seen that there is considerable overlap and interaction between these questions, in particular because the claimant correctly asks me to reach a preliminary assessment on the merits of the application in order to decide what route to go down. On the other hand, the 2<sup>nd</sup> defendant asserts that its position is so strong that I can properly deal with the matter today and without a further hearing or oral evidence.
- 30 Having defined the questions and put them all "on the table", I directed that the matter should be argued out before me in all of its aspects, and I would then give my decisions on the issues before me. Having done so, I reach the following conclusions for the following reasons.
- 31 The allegation of dishonesty as to the issue of liability in this case, as distinct to dishonesty as to quantum, is based on a point that I have not yet mentioned, namely, the 2<sup>nd</sup> defendant's allegation that the claimant has put forward and relied on a dishonest version of the manner in which the accident occurred. In other words, he is lying about the very circumstances of the accident alleged to show the negligence of the 2<sup>nd</sup> defendant. This is based on the fact that he appears to have given two different accounts of how the accident occurred. The latter one, the one on which he subsequently relied, was, it is said, dishonestly tailored to meet notice, that he had received by letter, of the

defendant's expert's conclusion as follows: that his original version suggested that he (the claimant) had failed to erect the ladder correctly and was thus the author of his own misfortune, and that there was no negligence of the defendants.

- 32 The suggestion is that having been notified that the evidence appeared to suggest that he had failed properly to assemble the ladder, the claimant then, without explanation, put forward a second explanation, namely, that having correctly assembled the ladder, in climbing it he had leaned backwards with the result that the ladder had, in effect, come apart and caused his accident. This might involve some contributory negligence on his part but would get round the suggestion that he had failed to properly assemble it.
- 33 If that case could be established, that would be a way of establishing that the claim was fundamentally dishonest. However, first of all, it appears to me that the evidence in relation to it is not so clear that it could justly be determined on the papers alone without hearing oral evidence. Secondly, it would not be proportionate to have a substantial oral hearing involving calling the claimant and up to three expert witnesses who have opined on this topic. Thirdly, it would not be necessary given the conclusions that I have reached in respect of the different and, to my mind, much stronger and plainer case in relation to dishonesty in relation to damages. For those reasons, I have decided that I shall not direct that there be a determination of the issues arising out of the assertions as to dishonesty on liability, loosely speaking, the ladder side of the case. I direct that those issues shall not be determined by me under this application.
- 34 I turn to the allegation of dishonesty as to quantum. This is based on a frankly devastating surveillance video, a material part of which was shown to me in the course of the hearing. Crucially, what this shows is as follows. It relates to the events on Tuesday 30<sup>th</sup> October 2012. It is fair to say that the video is not complete and continuous, and that the claimant has not had the opportunity of seeing the whole of it.
- 35 Still, what does appear from it is this: on the morning of 30<sup>th</sup> October 2012, the claimant and his wife, who I should say is a disabled person herself, drove some 14 miles from their home to a warehouse superstore in Bury St Edmunds. They entered that building at 11:34, they were filmed inside it and left at 12:20. Throughout that period, although the claimant's wife was walking with one crutch, as appears to be her normal practice, and though as subsequently appears the claimant himself had a crutch in the back of his van, he left that crutch in the back of his van and spent the best part of an hour in the shop. He was walking around in a slow manner with, it is fair to say, a slight limp or a

waddle, but at no point using any kind of support. He sometimes puts his hands in his pockets, sometimes bends down to pick goods up. He pushes a trolley himself. He emerges with his wife and loads the purchases into his van. He then goes to an Asda establishment and has lunch with his wife, again, without using a crutch.

- 36 At 13:58 they drove approximately 3 miles to the West Suffolk Hospital, Bury St Edmunds, where he was due to attend a pre-arranged medical appointment with the 2<sup>nd</sup> defendant's expert, Dr. Shaolin. At the hospital he got out of the van, went to the back, got an elbow crutch and walked to the hospital with it. He had it with him throughout his visit to the doctor, and emerged using a crutch, before returning to his vehicle and driving away.
- 37 During his interview with the doctor, he told him that although some of his knee symptoms had improved, he still suffers from knee pain which limits his walking distance. He still uses one crutch in his left hand. The knee pain interferes with all daily activities, although his walking distance is not significantly different now compared to pre-operatively, he did not, prior to the accident, suffer from constant knee pain. The doctor said his clinical examination revealed an obese man walking with a crutch in his left hand.
- 38 The claimant describes his complaints as follows: he has a constant pain of the knee but this gets worse when walking. The more he walks the more painful the knee becomes. He walks with one crutch in his left hand. In the morning he gets from his bed to his bath holding onto his crutch in his left hand. He normally goes shopping with his wife, with him driving the car and waiting in the car whilst she gets the shopping done either using her wheelchair or walking with crutches.
- 39 I pause to make this observation: this claimant made that statement to a doctor within three hours of having spent 45 minutes going round a shop with his wife, he himself collecting the goods, and pushing the trolley, and taking it to the car.
- 40 The doctor at first concluded that the claimant suffers from constant pain:

*“This increases the likelihood of him requiring help from outside. It may not be inappropriate that they receive outside help from between one and two hours per week. The main impact of the accident has been the need for surgical procedures and the fact that he has been left with a painful knee requiring him to take morphine. All of his knee symptoms are a result of the accident. There is little likelihood that he will require*

*further surgery for the knee. I do not expect any change to his present level of symptoms.”*

- 41 In his witness statement prepared after that visit to the doctor but before the disclosure of the surveillance video, the claimant said:

*“I now have the same level of mobility that I had before my accident but the level of pain is far greater. I was not a blue badge holder before my accident but I am now. I did not use a wheelchair before my accident but frequently use one now. My life came to a stop for two years after my accident. There are now more places that I cannot go to and I am reliant on morphine for pain relief.”*

- 42 I have already quoted the reaction of both of these expert orthopaedic surgeons upon seeing the video, and their comments on the abilities of the man who was using it, and the fact that he did not need a crutch and appeared to be walking essentially normally and not to be suffering pain. The only evidence of pain in those circumstances was his own account.
- 43 The claimant’s first submission in relation to this evidence was that, even if I accepted that that evidence was proof of some degree of culpable exaggeration on the claimant’s part, it would not make the claim fundamentally dishonest as a matter of law. This requires consideration to be given of what is meant by a fundamentally dishonest claim in the context of these rules. Neither party took me to any authority on the term in question. Of course, the term “fundamental” is used in various legal contexts that are of little assistance to us here. Dictionary definitions were produced and relied upon; for example, that which was fundamental was “of, or pertaining to, the basis or groundwork of something”, “going to the root of the matter”, “serving as the base or foundation”, “essential or indispensable”.
- 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.
- 46 In applying that approach to the present case, it is worth going back to look at the valuation issues. As I have said, the claimant put the overall value of his claim, including the CRU refund, at the order of £80,000 before he received the notice of surveillance. This included a claim for general damages for pain, suffering and loss of amenity of the order of £40,000. In other words, the claim appears to have been made up of about 50% in general damages, and approximately 50% in special damages of one kind or other. A substantial element in the latter was a future care claim for about £17,000 which, as Dr. Shaolin’s evidence indicated, was substantially dependent on his evidence as to the knee pain and discomfort, and so forth, that he was experiencing in that regard.
- 47 As to the general damages claim, it is difficult to fit this case into the JSB guidelines because of the unusual feature that the arthroplasty operation took place at an early stage. The important point, it seems to me, is this: one would normally hope and expect that an arthroplasty operation would reduce to a minimum the continuing pain and continuing disability, or lack of function, occasioned by a serious knee injury. It is the conclusion of the doctors, on the basis of what they have seen, that that was in fact what happened here. However, this claimant has chosen to maintain that, notwithstanding the operation, he is suffering from continuing severe pain requiring the use of a crutch, and imposing on him the functional disability to which I have referred.
- 48 It appears to me, doing the best I can in the circumstances of a hearing such as the present, that it would be fair to say that around half of a claim for general damages for pain, suffering and loss of amenity of £40,000 attributable to a knee injury would be linked to serious ongoing pain and lack of function in the knee.
- 49 Overall, I therefore conclude that in relation both to that very substantial element of his claim, future care, and in relation to an even larger part of his claim, general damages for pain, suffering and loss of amenity, the dishonesty in question here, if established, is fundamental to those heads of damage, and thus to around half of the total claim in damage terms. It appears to me to be very clear that on any sensible definition of a “fundamentally dishonest claim”,

dishonesty crucial to such a large part of the claim under those two heads is sufficient to enable the claim to be characterised as fundamentally dishonest.

- 50 It was not suggested on the claimant's part nor, I think, could it be seriously maintained that as a matter of law it would be required that the dishonesty went to the root either of liability as a whole, or damages in their entirety. It must be the case that dishonesty fundamental to a sufficiently major part of the claim would suffice to deprive the claimant of his costs protection, and open him to the court's discretion as to how much of the costs he should pay. I therefore reject the preliminary suggestion that, even if made out, this claim for dishonesty would be insufficient to justify lifting the costs protection.
- 51 I turn then to the claimant's second submission that it would not be proper for me to decide an issue of dishonesty without hearing the oral evidence of the claimant himself, and allowing him to cross-examine the expert witnesses whose testimony lies against him. I have already indicated that the anticipated costs of doing that at a two day hearing would be very substantial and raise serious proportionality issues.
- 52 No authority was cited to me to support the proposition that before any finding of dishonesty is made, a person must either be heard in oral evidence or at least be given the opportunity to be so heard. It will depend on all of the circumstances, and it will also need to be considered in the context of proportionality. There will be some cases where the evidence is clear and overwhelming, perhaps even the subject of an admission. There will be some cases in which the issue can justly be determined by a limited enquiry. There will be some cases in which the issue can only justly be determined by the hearing of oral evidence and the opportunity of cross-examination. In that situation, the court would then have to consider, going back to the first question that I defined earlier in this judgment, whether it was appropriate and proportionate to pursue that enquiry at all, having in mind the amount of costs at stake.
- 53 However, in the present case I do not consider oral evidence to be necessary or appropriate, in the light of the summary that I have given of the video, and in particular of the dramatic and, it appears to me, essentially bulletproof contrast between the claimant's conduct in the morning and his statements to the doctor that afternoon. This is especially so when, as here, combined with that well-known hallmark of dishonesty in these cases, the person who uses a crutch when he is seeing the medical experts but not otherwise. (In very many cases of this kind that the court deals with, that is one of the most powerful elements because it demonstrates subjective dishonesty; it proves not merely the presence of the physical ability, but also that the user of a crutch in such

circumstances when he does not need to use it is surely doing so for a dishonest purpose, namely, to create a false impression on the doctor in order to advance his case.)

- 54 We have here both conduct that is only explicable as intended to deceive and statements, in particular about shopping, that are demonstrably false. This is combined with the expert evidence of the doctors having seen the video, both of them agreeing that it is quite inconsistent with the pattern of complaints that were put before them, and that they do not understand the mechanism under which he can suffer pain if he has that degree of ability.
- 55 Putting all of those together and adopting, I hope, a practical and pragmatic approach to the working of this jurisdiction, it appears to me that I can fairly describe this claimant colloquially as having being caught “bang to rights”. When the court concludes that the surveillance evidence is so strong that the claimant has been caught “bang to rights”, then it can properly and proportionately reach a conclusion of dishonesty in the exercise of its costs jurisdiction, without being required either to have an oral hearing, or to give the opportunity of an oral hearing.
- 56 I consider that in this case the surveillance evidence, and the doctors’ response to it, does pass the threshold which permits the court to deal with the application and make its findings summarily without need of a full hearing. I bear in mind that the claimant had the opportunity at the preliminary directions hearings to put in witness evidence if he wished to do so, or indeed, to seek disclosure, or to seek express directions, as to the manner in which the hearing should be conducted. He has not done so. He has allowed the matter to come to an all-day hearing, the costs of which, as I have said, already exceed the original costs in issue. At this point, he raised the supposed necessity of a further hearing with oral evidence. I do not consider, in the light of the strength of the evidence against him, that that course is required.
- 57 If the courts were too readily persuaded to approach the matter in that disproportionate way then the deterrence of dishonest civil litigation, both as to liability and as to quantum (which it is also a part of social policy to combat and which it is the function of these parts of CPR 44 to deal with) would be rendered ineffective.
- 58 My final conclusions are therefore these. Firstly, it is just and proper to determine the issue at this hearing without the need for oral evidence. Secondly, the surveillance evidence establishes to my satisfaction on the balance of probabilities as the rules expressly provide for me to do (and bearing in mind that there is no special intermediate standard of proof for fraud

cases) that the claimant was deliberately dishonest, in that knowingly and dishonestly he gravely exaggerated his symptoms to the doctors and to the court. Thirdly, the effect of his dishonesty was fundamental to a substantial part (both in size and importance) of his claim for damages

- 59 I therefore direct, pursuant to CPR 44.16(1) that the order for costs made against him, by necessary operation of CPR 38.6, may be enforced up to its full extent, notwithstanding QOCS. In that regard, I have to consider whether rather than make an order that the costs be enforceable to their full extent, I should, instead, as envisaged in practice direction 44.12.4(d), determine the costs attributable to the claim having been found to be fundamentally dishonest. In short, whether I should require the claimant to pay only a part of the 2<sup>nd</sup> defendant's costs rather than the full amount.
- 60 I have considered that but I have decided not to do so for two reasons. Firstly, this claimant has recovered a substantial proportion of his costs already. He has recovered them from the 1<sup>st</sup> defendant. Secondly, the effect of CPR 38.6, on discontinuance, is that the order that is made is an order for all the costs to be recoverable without any question of apportionment. It appears to me that in the present case, a claimant who has engaged in such serious and fundamental dishonesty cannot complain if he is required to pay the full amount of the defendant's costs when he discontinues after his dishonesty has been exposed.

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