IN THE MANCHESTER COUNTY COURT

M16X052
B27YX178

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

Thursday, 16 June 2016

Before:

HIS HONOUR JUDGE HODGE QC

Between:

MARGARET EILEEN MEADOWS

Appellant

and

LA TASCA RESTAURANTS LIMITED

Respondent

MR SUFIYAN RANA *(instructed by Express Solicitors, Manchester M22 4HH)*
appeared on behalf of the Appellant.
MR HARRY EAST *(instructed by Plexus Law Limited, Horsham, RH12 1XL)*
appeared on behalf of the Respondent.

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APPROVED JUDGMENT
and APPROVED JUDGMENT ON COSTS
(Approved without reference to any papers)

Words: 8977
Folios: 125

Thursday, 16 June 2016

APPROVED JUDGMENT

JUDGE HODGE QC:

1 This is my extemporary judgment on an appeal by the claimant, Margaret Eileen Meadows, from a decision of District Judge Khan made on 11 February 2016 by which he not only dismissed the appellant's claim for personal injuries against the defendant, La Tasca Restaurants Limited, but also disapplied the protection afforded to claimants in personal injury cases by the qualified one-way costs shifting provisions contained within Part II of CPR 44. By CPR 44.13(1), the qualified one-way costs shifting provisions apply to proceedings which include a claim for, amongst other things (and so far as material hereto), personal injuries. By CPR 44.16(1), orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be "fundamentally dishonest".

2 By a claim form issued in the county court at Manchester on 12 June 2015, under Claim No B27YX178, the claimant claimed between £1,000 and £10,000 damages for pain, suffering and loss of amenity allegedly suffered as a result of a slipping accident, which it was said by the claimant had occurred at the La Tasca restaurant operated by the defendant company at the Trafford Centre at about lunchtime on 14 January 2014. There was a schedule of special damages in the sum of just under £400. The claim had been allocated to the fast track by an order of District Judge Hayes made on 21 September 2015 and it came on for trial before District Judge Khan, sitting in the county court at Manchester, on 11 February 2016. On that occasion, Mr Sufiyan Rana (of counsel) appeared for the claimant and Mr Harry East (also of counsel) appeared for the defendant. Those counsel have both appeared for their respective clients before me on the hearing of this appeal this morning. The district judge heard evidence for the claimant from the claimant herself and also from a Mrs Diana McGrath, who claimed to have been lunching with the claimant at the time she sustained her alleged injury and who claimed to have witnessed the accident. The district judge also heard evidence from two witnesses for the defendant company.

3 The district judge handed down an extemporary judgment on the day of the trial. At paragraph 1 he began by recognising that accidents happen from time to time, and that not every accident gives rise to a successful claim by a claimant against a defendant whom the claimant considers to be responsible for the accident. The district judge recognised that a claim can only succeed in circumstances where the court is satisfied, on the balance of probabilities, that the accident occurred in the way alleged, and that that accident occurred because of some fault on the part of a defendant, whether arising out of a breach of an Act of Parliament or some other duty which a defendant owed to a claimant. At paragraph 4, the district judge stated that the defendant denied

the claim on two bases. First, that it had no knowledge of the circumstances in which the claimant had entered the defendant's premises and had fallen, and that the defendant put the claimant to proof in relation to whether or not in fact she did fall on 14 January 2014 and the circumstances in which she fell. Secondly, and to the extent that the court decided that the accident did take place as the claimant alleged, the defendant claimed to have a defence, in that they had had a reasonable system in place to ensure that their premises were reasonably safe for visitors to the premises.

4 At paragraph 5 the district judge correctly identified his role as being to determine the following issues: First, did the claimant fall on 14 January 2014 in the circumstances that she described? Secondly, and as a consequence, did that fall cause her to suffer the personal injuries that she says she sustained? If she did, the district judge said that he then had to decide whether or not the defendant had a reasonable system in place so as to render their premises at the Trafford Centre reasonably safe for use by visitors. At paragraph 7 the district judge reminded himself that he decided the case on the balance of probabilities, and that the burden of proof rested with the party making the allegation or claim. At paragraph 8 the district judge stated that, on the facts of the case, the burden of proof rested with the claimant to satisfy him, on the balance of probabilities, that she had visited the restaurant on 14 January and that she had fallen in the circumstances that she had described. If she did so, then the burden of proof shifted to the defendant, which had to satisfy him that they had a reasonable system in place.

5 At paragraph 10 the district judge said that he did not propose carrying out a detailed and forensic analysis of the totality of the evidence that he had heard. He said that he said that because his experience of dealing with claims of the present nature was that when the parties came to court, all they wanted to know was who had won and who had lost and what factors had weighed in the court's mind to lead the court to reach the conclusion that it had reached. At paragraph 12 the district judge recorded that the evidence in relation to the first matter was evidence that Miss Meadows and Mrs McGrath had given. What the district judge had to ask himself was whether or not he was satisfied that they were reliable historians and that what they said was probable. If he decided that that was the case, then the district judge had to look at the defence advanced and ask himself whether or not the evidence that the defendant relied upon was reliable. At paragraph 13 the district judge said this:

> "I am not satisfied that Miss Meadows slipped while she was leaving La Tasca restaurant on 14 January 2014, and on that basis I must dismiss the claim. The reason that I have reached that conclusion is because to accept that Miss Meadows fell in the way that she claims would have me believe what Miss Meadows and Mrs McGrath told me in their evidence. Their evidence is so riddled with inconsistencies, both internally and in relation to the inconsistencies between the evidence of Miss Meadows and Mrs McGrath, which, when I test that evidence

against objective contemporaneous evidence, has led me to conclude that I cannot rely on anything that they tell me in relation to the circumstances giving rise to the claim."

6 At paragraphs 14 and following the district judge proceeded to set out, as he put it "by way of illustration and not in order of importance", the various matters that had led him to conclude that he could not accept the evidence of Miss Meadows or Mrs McGrath as regards Miss Meadows's claim that she had slipped on 14 January in the circumstances that she said. The district judge proceeded to set out some 14 or 15 matters on which he placed reliance at paragraphs 15-30. They included what was described as the curious mechanics of the fall; inconsistency in the evidence in relation to the precise substance that Miss Meadows said that she had fallen on; inconsistency in relation to the location of the accident; discrepancies in what Miss Meadows and Mrs McGrath had said that they did immediately after the accident; a failure by both Miss Meadows and Mrs McGrath to ask a third party, with whom they had a discussion, to identify herself or to give contact details; discrepancies in the nature of the various injuries said to have been sustained by Miss Meadows, and in her reporting of those injuries; according to Miss Meadows, the involvement of another member of staff, which had not been mentioned in her witness statement; and Mrs McGrath's inability accurately to recall the basic details in relation to the claim. At paragraph 31 of his extemporary judgment the district judge said that those were his reasons for not being satisfied that on 14 January 2014 Miss Meadows had entered La Tasca's premises and, on that date, while walking across the floor, had been caused to slip on some water or other liquid, as a consequence of which she had suffered personal injury. At paragraphs 32 and following the district judge went on to say that if he was wrong to reach that conclusion, and if he was wrong to criticise the evidence of Miss Meadows and Mrs McGrath in the way that he had done, and if they had actually visited the restaurant on 14 January, and if Miss Meadows had slipped on some liquid or fluid on the floor, the district judge was nevertheless satisfied, and found as a fact, that the defendant had at all relevant times instituted and operated a reasonable system for keeping their premises safe for use by visitors. The district judge proceeded to set out his reasons for reaching that further conclusion at paragraphs 32-37 of the approved transcript of his first extemporary judgment. Those were said to be the reasons for dismissing the claim.

7 In addition to the transcript of District Judge Khan's two extemporary judgments, there is also before the court a full transcript of the evidence and proceedings before the district judge. That shows that at the end of his closing submissions for the defendant, Mr East had indicated that in the event that the district judge should dismiss the claim, he would invite the court to clarify its position as to why the claim had been dismissed in relation to whether or not there were appropriate grounds for an application from the defence under CPR 44.16. The district judge indicated that he did not require any further assistance about the disapplication of qualified one-way costs shifting at that point.

8 Having delivered his first extemporary judgment on the substance of the dispute, District Judge Khan (at page 70 of the transcript of the proceedings) indicated that he believed that Mr East had an application to make. Mr East indicated that he would be making an application under CPR 44.16 for costs, on the basis that the district judge's decision indicated that there had been fundamental dishonesty on the claim that had been brought on the part of the claimant in the way she had brought the claim. Mr East submitted (at the foot of page 71 of the transcript of the proceedings) that the district judge had found that he could not be sure, or was not satisfied, that an accident had taken place. He referred to all the inconsistencies that the district judge had set out in his judgment; and he submitted that they indicated that if no accident had taken place, that must have been an accident that was made up and, therefore, if it was made up, it was said to be fundamentally dishonest from the outset.

9 Mr Rana then addressed the court for the claimant. Having referred to CPR 44.16 he submitted that, in essence, it set out a two-stage process where, first of all, there had to be a finding of fundamental dishonesty and, secondly, the court still retained a discretion even in the event that that finding was made. Mr Rana raised two procedural issues. First of all, he said fundamental dishonesty had never been pleaded. He submitted that that was an important point because the claimant really ought to know what she was having to deal with, and that had never been raised in the form of a defence. Moreover, it had never been put to her in cross-examination that this was a made-up case, or that she was dishonest. It was simply suggested to her that the accident might have happened elsewhere. Mr Rana submitted that that was a different point to making a positive averment that the case was one that had been brought on a false basis.

10 Those were the two procedural points that Mr Rana made and, on that basis, he invited the district judge to dismiss the application. If the district judge was not with him on that, he moved on to whether there had been a finding of fundamental dishonesty. Mr Rana submitted that the district judge had reached a finding that the claimant had not been able to prove her case on the basis of the various inconsistencies that had been highlighted. Fundamental dishonesty was said not to be one of those reasons that the district judge had put forward. It was said to be a very different issue to inconsistencies being highlighted. The district judge interrupted to say that where a claimant came to court and claimed to have fallen, and she was supported by a witness who supported that, and the court had identified so many inconsistencies that it could not believe what the claimant said, why was that not dishonest? Mr Rana said that that was the first he was hearing of the fact that the district judge said that there was something that could lead to a belief that the claimant and her witness could not be believed in respect of the evidence they had given. Inconsistency, in his submission, did not lead to the belief that a claim was fundamentally dishonest, or had been brought on a false perspective. That was the link that Mr Rana was trying to break away from. Inconsistency was said not to lead to a finding that the claim in itself was fundamentally or basically dishonest; and even if the district judge was against him on that, he still retained a discretion on whether costs should be

enforced. In his submission, they should not be for the basic reason that dishonesty had never been pleaded and never been put to the claimant during cross-examination, so that it would be unfair, and unjust, for cost orders to be enforced. The district judge pointed out that in re-examination Mr Rana had tried to deal with that by asking a question about whether or not she was telling the truth. Mr Rana acknowledged that that was the case. That was a reference to what had been said at page 31 of the transcript of the proceedings where, in re-examination, Mr Rana had said: "Miss Meadows, have you come to court today to lie?" Answer: "Absolutely not." And District Judge Khan had observed that he did not know how that arose out of cross-examination. On that basis, Mr Rana had no further questions to ask in re-examination. Mr Rana said that if the point that she was lying had been put to the claimant in cross-examination, he would have explored it further, but he had stopped because the district judge had told him to stop. The district judge then observed: "Forgive me, Mr Rana. My experience is that when that type of question is put to a party, 'Are you telling the truth?' they never say, "Well actually I'm telling a pack of lies." Mr Rana acknowledged that that might very well be the case, but that it was never put to the claimant; and even if the district judge was against him on the principal point of whether there had been fundamental dishonesty, he invited the court not to make an order which would enable the costs to be enforced, for the reason that it had never been pleaded and never put to her.

11 Mr East then addressed the court on the issue of the disapplication of CPR 44.16. He said that Mr Rana had tried to say that the fact that there were inconsistencies did not mean that there had been fundamental dishonesty; but the ruling by the district judge had been that those inconsistencies were such that the district judge had found that the accident could not have happened. If there was no accident, there could not have been the truth told; and if there was no truth told, it must have been a dishonest claim, especially the way that it was constructed, or at the very least the way it was construed and presented to the court, and therefore that itself was dishonest. Whilst inconsistencies might stop the court from finding, on the balance of probabilities, that the claim was brought, Mr East thought that the district judge's ruling was that the inconsistencies had led him to a finding that the accident had not taken place, and the claim was based on an accident having taken place and, therefore, it must have been fundamentally dishonest. District Judge Khan asked about the point that it was not in the defence or put to the claimant in cross-examination. Mr East acknowledged that fraud was not pleaded, and the district judge said that he had not needed to. Clearly, if fraud had been pleaded, it included fundamental dishonesty. Mr East concluded by saying that that did not mean that if the defendant did not plead fraud, the court could not find that there was a dishonest claim made. The rules said that where the claim is found, on the balance of probabilities, to be fundamentally dishonest, it did not have to be put explicitly to the witness. The defence had been quite careful not to raise that as a direct question.

12 That concluded the argument on CPR 44.16. The district judge then delivered a second extemporary judgment. He recorded that having dismissed the claim, Mr East had asked him to disapply the protection given by the qualified

one-way costs shifting under the provisions of CPR 44.16, which the district judge proceeded to set out. The district judge referred to Mr Rana's suggestion that the district judge had not reached the conclusion that the claim, on the balance of probabilities, was fundamentally dishonest. At paragraph 4 the district judge said that he did not wish to trivialise the expression used in CPR 44.16; but he did not see that the only basis upon which a defendant, on the facts of the case, could mount an application to disapply the qualified one-way costs shifting was where the court, in the course of its judgment, had used the magic words "fundamental dishonesty". At paragraph 5 the district judge said that the defendant, on the facts of this case, had not advanced a positive case in relation to the circumstances of the accident. That was said to be not surprising in the circumstances, having regard to the nature of the evidence advanced by the defendant. At paragraph 6 the district judge said that Miss Meadows, supported by Mrs McGrath, had asked the court to believe that the accident had occurred as they claimed it did on 14 January 2014. The district judge said that he did not believe either of them, for the reasons that he had given in his judgment. The effect of that was that the accident could not have happened on 14 January 2014 at the premises of La Tasca in the circumstances described. At paragraph 7 he said that, in those circumstances, it was difficult to see how this was not a dishonest claim. This was not, for example, a claim where there had been a misremembering of key events, or some confusion or lack of clarity in relation to dates, events, premises, or the like. The effect of the inconsistencies, as identified in the judgment, was such that the district judge had simply not believed what Miss Meadows had said to him, or what Mrs McGrath had said to him. At paragraph 8 he said that it was therefore not difficult for him to reach the conclusion that the claim was fundamentally dishonest; and he did not believe that the fact that he had not used that word in his judgment, although the essence of what he decided would be blatantly apparent from his reasons, prevented him from reaching the conclusion he had identified a few moments previously. At paragraph 9 the district judge went on to consider whether, in the exercise of his discretion, he should disapply the qualified one-way costs shifting protection. He said that he bore in mind that the issue of fundamental dishonesty was not pleaded. He said that the court rules did not provide that a defendant must plead fundamental dishonesty so as to mount an application under CPR 44.16. He said that he had also borne in mind that the question as to whether or not Miss Meadows and/or Mrs McGrath was being dishonest was not put to them by Mr East during the course of his careful cross-examination. At paragraph 10 the district judge said that he did not criticise the defendant or their insurers for either of those failures. There was no obligation to plead fundamental dishonesty. Sometimes it was pleaded, and sometimes not. When it was not, that did not prevent the court from making a direction under CPR 44.16. At paragraph 11 the district judge asked rhetorically: "Would it have made any difference if Mr East had put the questions to either Miss Meadows or Mrs McGrath?" He said that he doubted it, for the reasons that were apparent from the discussion that he had had with Mr Rana during the course of the submissions that he had made. In those circumstances, it seemed to the district judge that there was no good reason why he should not exercise his discretion in favour of the defendant. The reasons advanced by Mr Rana were

said not to be good reasons for exercising the discretion in the claimant's favour. In all of those circumstances, the district judge said that he was satisfied that, having decided that the claim, on the balance of probabilities, was fundamentally dishonest, there was no good reason why the qualified one-way costs shifting protection should not be disapplied, and he did so. He thought that the form of his order should be that the claimant would pay the defendant's fixed costs of £7,210, and that the protection given by CPR 44.16 to the claimant was disapplied.

13 By an appellant's notice, filed on 2 March 2016, the claimant seeks to appeal paragraph 2 of the district judge's order, which had provided that the claimant would pay the defendant's fixed costs of £7,210, and that the protection given by CPR 44.16 to the claimant was disapplied. Instead, the claimant sought an order that she should pay the costs assessed in the sum of £7,210, not to be enforced unless permitted by the court. The claimant also sought an order for the defendant to pay the claimant's costs of the appeal, to be assessed if not agreed.

14 The grounds of appeal are two in number: First, that the learned judge erred in the exercise of his discretion in concluding that the appellant's claim was fundamentally dishonest. Perhaps recognising that that finding did not involved an exercise of discretion, that ground of appeal has been reformulated, at paragraph 2(i) of Mr Rana's supporting skeleton argument dated 29 February 2016, so as to read that it was submitted that the district judge was wrong to conclude that the claim was fundamentally dishonest on account of the evidence he heard and saw, particularly in respect of the inconsistencies he had highlighted. The second ground of appeal was that, in any event, the district judge had erred in the exercise of his discretion in disapplying the provisions of CPR 44.16 and ordering the cost order to be enforced against the appellant.

15 The appeal is supported by Mr Rana's original appeal skeleton argument of 29 February 2016, and by a further skeleton dated 9 May 2016 and composed after a transcript of the proceedings and judgment had been obtained. Counsel for the respondent, Mr East, has produced a skeleton argument in response dated 7 May 2016. Permission to appeal was given by His Honour Judge Main QC on 9 March 2016. Paragraph 2 of that order provided that the appellant had permission to appeal on the ground that the appellant had a reasonable prospect of success, and there should be informed consideration of the court's exercise of its discretion to find fundamental dishonesty, and its knock-on costs effect under CPR 44.16, in circumstances where there had been no pleaded assertion of fundamental dishonesty or fraud alleged.

16 Mr Rana, for the appellant, addressed me for about 45 minutes in opening. At the end of his submissions I indicated to Mr East that he did not need to address me on the second ground of appeal, namely the exercise of discretion. Mr East therefore limited his submissions to the first ground of appeal, that of the finding of fundamental dishonesty. He addressed me for about 10 minutes. Mr Rana addressed me in reply for about 5 minutes. I then proceeded to deliver this extemporary judgment.

17 On the first ground of appeal, Mr Rana submitted that the district judge had been wrong to find fundamental dishonesty on the part of the claimant. On the test of fundamental dishonesty Mr Rana submitted that, for good reason, this had not been sought to be defined in the Civil Procedure Rules or any supporting Practice Direction. For guidance, he took me to the decision of His Honour Judge Moloney QC, sitting in the Cambridge County Court, in the case of Gosling v Hailo, decided on 29 April 2014. Mr Rana acknowledged that the facts of that case were very different from those of the present case. He took me to paragraphs 43-45 of Judge Moloney's judgment. In his submissions Mr East also took me to paragraph 50. In my judgment, I should follow the approach of Judge Moloney QC in the Gosling case. Judge Moloney (at paragraph 43) had referred to dictionary definitions of "fundamental" as "going to the root of the matter; serving as the base or foundation; and essential or indispensable". Judge Moloney QC said that it appeared to him that when one looked at the matter, what the rules were doing was to distinguish between two levels of dishonesty: one in relation to the claim which was **not** fundamental, so as to expose a claimant to costs liability; and dishonesty which **was** fundamental, so as to give rise to costs liability. At paragraph 45 Judge Moloney said that 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 was 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 appeared to Judge Moloney QC that it would be a fundamentally dishonest claim, a claim which depended as to a substantial or important part itself upon dishonesty. At paragraph 50 Judge Moloney said that it could not 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. In my judgment, that is a correct analysis of the meaning and scope of "fundamental dishonesty" in the context of the disapplication of the qualified one-way costs shifting rule in Part II of CPR 44.

18 It may perhaps be appropriate to draw an analogy with the court's approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest. In my judgment, the district judge was entirely correct to conclude that there was fundamental dishonesty for the purposes of CPR 44.16 if he found that, to the knowledge of the claimant and her supporting witness, the accident had never happened at all in the circumstances described by them. The real issue on this appeal, on the first ground of appeal, therefore seems to me to be whether the district judge was right to conclude that the accident had never happened at all, and that was known to both the claimant and her

supporting witness. If so, then it seems to me that there was clearly fundamental dishonesty on the part of the claimant in bringing the claim.

19 Mr Rana submits that the various matters relied upon by the district judge as inconsistencies or curiosities were simply incidental or collateral, and had not gone to the root question of whether the accident had happened at all. He went through the various matters relied upon by the district judge at paragraphs 13-30 of his first judgment. He submitted that they were all matters that involved a misremembering of key events, or some confusion or lack of clarity in relation to dates, events, premises, or the like. In other words, he sought to refute the point made by District Judge Khan at paragraph 7 of his second judgment, where he said that this was not, for example, a case where there had been a misremembering of key events, or some confusion or lack of clarity in relation to dates, events, premises or the like. He submitted that the district judge had not been entitled to conclude, with the required cogency of evidence, that there had been dishonesty on the part of the claimant. The district judge had not been faced with a binary choice of either upholding the claim or finding that the claim was entirely manufactured and fabricated. There had been, Mr Rana submitted, a third option open to the district judge, which was simply that the claimant had failed to prove her case on a balance of probabilities. Where the district judge had fallen into error, Mr Rana submitted, was that he had taken a step too far in concluding that the claim was fundamentally dishonest. He submitted that the inconsistencies and curiosities highlighted by the district judge did not lead, and should not have led, him to conclude that the accident could not have happened. That was because they related to matters that were, at best, collateral or minor, and did not go to the root of establishing that the accident had not happened. He contrasted the situation in the present case with one where the respondent had presented evidence, such as CCTV footage, demonstrating positively that the alleged accident had never occurred. Mr Rana submitted that the case was one in which the district judge had been perfectly entitled to conclude that the appellant had not proved her case, either on account of the perceived inconsistencies and curiosities identified by the district judge, or for any other reasons. The appellant did not seek to challenge the district judge's decision to dismiss her claim. However, Mr Rana submitted that the inconsistencies were ones for which plausible explanations existed, and did not lead, and should not have led, the district judge to conclude that the claim was fundamental dishonest. In support of that submission, Mr Rana relied upon the following: First, that a finding of fundamental dishonesty was no different to a finding of fraud, as both involved an attack on the credibility of the individual, resulted in a costs penalty that was likely to be considerable and personally enforceable, and might involve an investigation by concerned authorities. Secondly, the court should have been satisfied that more cogent evidence was needed in relation to allegations of dishonesty rather than placing reliance on inconsistencies within the appellant's evidence. Thirdly, the defence had merely put the appellant to strict proof of her case without advancing any positive case to the contrary or making any assertion of fraud or dishonesty on the appellant's part. Fourthly, the respondent's disclosure and witness evidence had not deviated from that position. Fifthly, at no point during cross-examination had the respondent ever suggested to the appellant

that she was dishonest, fundamentally dishonest, or had brought and prosecuted a dishonest claim. Indeed, when the appellant had been asked in re-examination by Mr Rana whether she had come to court to lie, the district judge had commented: "Sorry, I do not know how that arises out of cross-examination". Sixthly, at no point during the respondent's closing submissions had it ever been suggested that the appellant's claim was dishonest, fundamentally dishonest, or had been brought on a fraudulent basis. Mr Rana submitted that, in the absence of clear pleadings to the contrary, the court should have erred on the side of caution in concluding that inconsistencies could not be equated with dishonesty, particularly when witnesses were being asked to recall events that had taken place some 2 years previously, and which might be due to confusion or lack of clarity.

20 In support of his submissions, Mr Rana took me to observations of Lewison J in the case of Mullarkey v Broad [2007] EWHC 3400 (Ch) at paragraphs 41, 44 and 45. On his second ground of appeal - that the district judge had been wrong to exercise his discretion in allowing the provisions of Part 44.14 to be disapplied - Mr Rana submitted that the discretion contained within CPR 44.16 had been given for a reason and must apply to cases such as the present, where the appellant had not been told the case that the respondent was advancing and the allegation that her claim was dishonest. He repeated various of the submissions that he had made against the finding of fundamental dishonesty. He emphasised that the defence had simply put the appellant to proof and had raised no issues in respect of her bona fides. Moreover, at no point during the claimant's cross-examination had it ever been put to her that she was a dishonest individual, nor had she been given any opportunity of defending herself. Sadly, the district judge was said to have made a finding of dishonesty against the appellant without giving her any opportunity to defend herself. Mr Rana submitted that that was a factor that the district judge should have taken into account, or to which sufficient weight should have been attached, in determining whether or not to disapply CPR 44.14. In the course of his submissions, I put it to Mr Rana that on the second ground of appeal the appellant was seeking to challenge an exercise of the district judge's discretion. The points that Mr Rana had made in support of that challenge were points which the district judge had expressly identified in the course of his judgment, and had dismissed. On that basis, I suggested that Mr Rana had an uphill task in challenging the exercise of the district judge's discretion. Mr Rana's response was to submit that the district judge had attached insufficient weight to those particular factors when he had exercised his discretion as he had done.

21 As I have mentioned, I did not find it necessary to call upon Mr East to address me on the second ground of appeal. On the first ground of appeal, Mr East emphasised that a heavy burden lies upon an appellant who seeks to challenge a finding of fact based upon the credibility of witnesses. He illustrated the difficulties of an appellate court approaching findings of fact made by a judge who has observed the witnesses by taking me to page 27 of the transcript of the proceedings, where on no less than 3 occasions the transcript records the claimant having made gestures to illustrate and emphasise her evidence and answers to cross-examination. Mr East made the

valid point that it is not possible for an appeal court to gauge the impression conveyed by such evidence to the first instance judge. Mr East submitted that, for the reasons that he had given in his first extemporary judgment, the district judge had simply concluded that he could not believe, not simply that the accident had not taken place in the way alleged by the claimant and her supporting witness, but, rather, that the accident had taken place at all. Mr East, at paragraph 5 of his skeleton argument, summarised the inconsistencies and curiosities identified by the district judge at paragraphs 15-30 of his first judgment. He submitted that the district judge had effectively identified: (1) unconvincing descriptions of the mechanics of the circumstances of the accident and the injuries allegedly received; (2) inconsistencies as to the substance on the floor between the claimant and the claimant's witness and the accounts provided in their witness statements; (3) inconsistencies as to the location of the accident between the claimant and the claimant's witness; (4) unconvincing and inconsistent evidence as to the reaction of staff in the accident's aftermath and the claimant's behaviour in the accident's aftermath between the claimant and the claimant's witness and the accounts provided in their witness statements; (5) inconsistent and undocumented injuries, some of which were only put forward by the claimant whilst giving evidence, others of which had been pre-existing that the claimant had said were not, and, finally, inconsistent medical reports with regards to the injuries claimed to have been suffered; (6) inconsistencies between the injuries Mrs McGrath stated had been sustained (the claimant's ankle) and actually claimed by the claimant (her knee); and (7) Mrs McGrath's generally inconsistent and imprecise evidence. All of those matters had led to the conclusion (at paragraph 31 of the first judgment) that the district judge was not satisfied that on 14 January 2014 Miss Meadows had entered La Tasca's premises and, on that date, whilst walking across the floor, had been caused to slip upon some water or other liquid as a consequence of which she had suffered personal injury. Mr East relied upon not simply those 7 matters individually, but upon their cumulative effect. He emphasised that there was no need for the dishonesty to be absolute in respect of aspects of the claim; only that it should be relevant to a sufficiently major part of it for it to be considered fundamental. Dishonesty that went to the core of the claim was fundamental dishonesty. An accident that is asserted when it has not happened is fundamentally dishonest. The consequence of the cumulative effect of the inconsistencies and curiosities highlighted by the district judge had been that he could not find that the accident had happened at all. Thus, the dishonesty had unarguably gone to the root of the claim.

22 In his reply, Mr Rana posed the question whether the findings made by the district judge had been of sufficient cogency for him to have properly concluded that the claim had been dishonest. The district judge had been wrong to approach the case as one of binary choice. Mr Rana reiterated that there had been a third option open to the district judge - one of finding simply that the claimant had failed to prove her case. He submitted that the evidence was not sufficiently cogent or convincing to have entitled the district judge properly to have concluded that the appellant had been dishonest.

23 Those were the submissions. Although not referred to in the oral submissions, or in the written skeleton argument, amongst the authorities put before the court is the recent decision of the Court of Appeal in the case of Rizan v Hayes [2016] EWCA Civ 481 (on appeal from His Honour Judge Charles Harris QC, sitting in the county court at Oxford). That case is different from this, in that there there had been an express pleading by the defendant that either the alleged accident had been staged, and that the other driver had been complicit, or that a driver had brought his vehicle to a halt in the path of another one without reason, and intending to cause an accident. The trial judge had concluded (at paragraph 13 of his judgment) that the case was one in which he could not possibly be satisfied that the account given by the claimant was a satisfactory account; and, in those circumstances, the claim had failed. At the conclusion of his judgment, as recorded at paragraph 25 of the judgment on appeal of Tomlinson LJ, an exchange between counsel and the judge had been recorded, in which the judge had said this:

> "Do you want me to say whether or not I find positively that there is fraud here? I think more likely than not. Whether I am satisfied on the criminal burden of proof is perhaps more material since it is akin to a criminal burden of proof. A very high standard of proof is needed in civil proceedings in order to establish fraud. If it were necessary to do so, which it isn't, I would find that this was a fraudulent claim."

He then went on to address the costs position. That finding of fraud was addressed at paragraphs 32 in the only reasoned judgment of Tomlinson LJ, with which the other members of the court (Rafferty LJ and Briggs LJ), both simply agreed. Tomlinson LJ ventured the opinion that Judge Harris had been unwise to express a view on the question whether the claim had been fraudulent, and doubly unwise to do so without giving reasons for his conclusion over and above those which he had already given for his dismissal of the claim. Tomlinson LJ said that the judge would have been better advised to have cleaved to his initial correct view that as the claimants had failed to satisfy the burden of proof on them concerning the occurrence of the alleged accident, it was unnecessary to address the question of fraud. It was said to have been apparent that the judge would not have expressed a view on the point had he not anticipated that that was precisely what counsel was about to ask him to do. But he would, in Tomlinson LJ's view, have been better advised simply to point out, as of course he had, that resolution of that question was unnecessary, and to have left it at that.

24 In the present case, of course, District Judge Khan did have to express a view on the question of whether the claim was fundamentally dishonest because he had been invited to do so by Mr East. So the district judge cannot be criticised here for going on to deliver his second judgment. Moreover, in his second judgment the district judge did supply additional reasons for his conclusion that the claim was fundamentally dishonest, over and above those which he had already given in his first extemporary judgment for his dismissal of the claim. However, Tomlinson LJ went on (at paragraph 33) to point out that one particular problem about the judge's conclusion was that he

had not spelt out whether he regarded all three actors, the two claimants and Mr Hayes (the driver of one of the cars), as implicated in the fraud. The insurers had put forward two alternatives: one, that the accident had been staged and that the driver of the car had been complicit; the other that the first claimant had deliberately brought the vehicle to a halt in the path of an Astra without reason, intending to cause an accident. In the present case, that criticism cannot be levelled at the door of District Judge Khan. It is clear, or at least sufficiently implicit, in the second judgment that the district judge had concluded that the fundamental dishonesty lay in the claimant and her supporting witness getting together to concoct an entirely false account of an accident that had never taken place at all. At paragraph 34 Tomlinson LJ said that Judge Harris had plainly had in mind the guidance given in cases such as Re H and Others (Minors) [1996] AC 563 by Lord Nicholls of Birkenhead to the effect that: "When assessing the probabilities the court will have in mind as a factor…that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability...". At paragraph 35 Tomlinson LJ said that what the judge had not done was to enunciate his reasons for his conclusion that a fraudulent scheme, such as one or other of those proposed by the second defendant insurers, had occurred. He had not, at any rate overtly, asked himself whether there were any inherent improbabilities in that conclusion which needed to be overcome or explained, such as the good character of the actors involved, their different ethnic, cultural and linguistic backgrounds, the recent acquisition of the BMW and its use for chauffeuring or taxi services, and the potentially modest size of any award for whiplash injury – all of which might, at first blush, tell against a fraudulent conspiracy, or against one involving all three actors.

25 Many of those observations are specific to the facts of the case before the Court of Appeal; but it is fair to observe that in the present case District Judge Khan never expressly addressed the inherent probabilities in the claimant getting together with a long-standing friend, Mrs McGrath, to concoct a false account of an accident at a restaurant at the Trafford Centre in support of a claim for personal injuries limited to no more than £10,000. There was nothing to suggest that either the claimant or her witness were other than thoroughly honest individuals who had never engaged in this sort of behaviour before. At paragraph 36 Tomlinson LJ said that, for the reasons he had set out, he would set aside Judge Harris's finding that, had it been necessary so to decide, the claim was fraudulent. He went on to record that, on being informed, at the conclusion of counsel for the appellant's argument, that the court was minded to take that course, whilst nonetheless upholding the judge's dismissal of the claim, counsel for the respondent had very pragmatically not sought to support the judge's contingent finding. Later in the course of his judgment, Tomlinson LJ (at paragraph 38) cited an observation of Lord Mance in another case to the effect that there are cases where, as a matter of justice and policy, a court should say that the evidence adduced, whatever its type, is too weak to prove anything to an appropriate standard, and so the claim should fail.

26 In my judgment, for the reasons that have been advanced by Mr Rana, I am satisfied that District Judge Khan went too far, on the basis of the evidence before him, in concluding, not simply that the accident had not taken place as alleged by the claimant and her witness, but that no accident had taken place at all, and that the claim was a fabrication on the part of the claimant and her supporting witness. In my judgment, the district judge was perfectly entitled to say that the evidence adduced by the claimant and her supporting witness was too weak to prove the claimant's case to an appropriate standard, and that the claim should therefore fail. District Judge Khan gave reasons for regarding the evidence before him as unreliable, and I would certainly not be justified in interfering with his conclusion that the claimant had not made out her case. But, in my judgment, and recognising that this does involve a challenge to the district judge's findings of fact, with which an appeal court should interfere only with considerable reluctance, in my judgment, District Judge Khan's conclusion that the claim was fundamentally dishonest falls well outside the ambit of reasonable judicial decision-making. In my judgment, for the reasons that Mr Rana has advanced, it was not appropriate for the district judge to find that the accident had not happened in the circumstances described. He should have limited his decision, as he did in his first extemporary judgment, to a decision simply that the claimant had not made out her case on the evidence before him. In my judgment, the inconsistencies and curiosities highlighted by the judge did not entitle him to go further and to find that the claim had been fabricated, and thus was "fundamentally dishonest".

27 I therefore allow the appeal on the first of the grounds put forward by the appellant. Had I taken a different view on that ground, I would have dismissed the second ground of challenge to the district judge's decision. In my judgment, had the district judge been entitled to make the finding of fundamental dishonesty that he did, then the appeal court could not properly have interfered with the exercise of his discretion to disapply the one-way costs shifting provisions in CPR 44 Part II. Whilst the decision reached by District Judge Khan, on the assumption that there was fundamental dishonesty, is not necessarily one that this court would have reached, it seems to me that it is a decision that was entirely open to the district judge in the exercise of his discretion. Certainly it did not involve any appealable failure properly to exercise the district judge's discretion. This is not a case in which it can be said that the district judge had erred in principle in his approach. He did not leave out account some feature that he should have taken into account. He did not take into account some feature that he should not have considered. It cannot be said that his decision was wholly wrong because he failed properly to balance the various factors and weigh them fairly in the scale. The district judge expressly adverted to the failures to plead fundamental dishonesty, and to put that to the claimant and her supporting witness in the course of cross-examination. The weight to be attached to those factors was a matter for the district judge, and not for the appeal court. So had the district judge been right to find fundamental dishonesty, this court would not have interfered with the exercise of his discretion. However, I am satisfied, for the reasons that I have given, that the district judge was wrong to find

fundamental dishonesty on the part of the claimant in the pursuit of this claim and, therefore, the appeal must be allowed.

APPROVED JUDGMENT ON COSTS

JUDGE HODGE QC:

28 Having delivered my substantive judgment on the appeal itself, I now inevitably have to address the issue of costs.

29 Although this is a personal injury claim, the appeal itself related solely to the costs awarded in the court below. Therefore, it seems to me that the normal rule as to costs - that unless the court makes some other order they should follow the event - applies. The appellant has been the successful party. Although it was unsuccessful on the second ground of appeal, that did not add anything to the costs of the appeal itself; and, therefore, in my judgment, and in the exercise of the court's discretion, the court should order the unsuccessful respondent to pay the appellant's costs of the appeal.

30 Turning to the quantification of those costs, it is appropriate to undertake a summary assessment, which inevitably involves a broad-brush approach. I am concerned that the hourly rates claimed are in excess of the guideline hourly rates. I am also concerned by the fact that a very large number of hours has been spent in connection with this appeal, and that the total sum claimed of £19,295.20 is over 2½ times the amount in issue on this appeal. I am also troubled by the fact that solicitors attended in the person of a fee-earner charging £310 an hour when counsel is conducting the case.

31 As against that, it is, however, appropriate to bear in mind that there were issues transcending the actual money value of this appeal, in that the appeal was directed to, and has successfully expunged, a finding of fundamental dishonesty on the part of the claimant in bringing this claim. That is a factor that is clearly relevant to the proportionality of the expenditure of costs in this case.

32 Bearing all of those considerations in mind, and bearing also in mind that this is a summary assessment, it seems to me that there should be some reduction in the level of costs, but nowhere near as much as the £14,000 or so reduction for which Mr East effectively contended. In my judgment, the reasonable and proportionate amount at which to assess the costs of this appeal should be £12,500. So I will summarily assess the costs of the appeal in that amount.