

IN THE LEICESTER COUNTY COURT

Case No: C34YM237

Date: 21/01/2019

**Before :**

**H H JUDGE HAMPTON**

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**Between :**

**Spencer Smith  
- and -  
Ashwell Maintenance Limited**

**Claimant**

**Defendant**

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Hearing dates: 26.11 – 5.12.18; 23.1.19  
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**JUDGMENT**

**H H Judge Hampton :**

(Unless otherwise stated, page numbers refer to the trial bundles)

**INTRODUCTION**

1. The Claimant is a qualified gas engineer and at the time of his accident was employed by the Defendant. On 14<sup>th</sup> July 2013, in the course of his employment, the Defendant was working on gas installations at a site occupied by De Montfort University in Leicester when he slipped and fell approximately four foot into a hole, which had a pipe in the bottom. His foot struck the pipe. The Claimant injured his ankle. It is the gravity of that injury and the extent of any continuing disability arising from it which has been the principal subject of this litigation. Until partway through the trial, Contributory Negligence was also an issue, but the Defendant withdrew this issue before its only factual witness gave evidence.
  
2. It is the Claimant's case that he suffered a significant injury as a result of the fall, that he continues to suffer debilitating pain and as a result is unlikely to find gainful employment and has a need for ongoing care from his family. The Defendant's case is that the Claimant suffered a time limited injury from which he recovered within months. Further, it is asserted that the Claimant's presentation to the medical witnesses and his approach to the claim overall is so exaggerated as to amount to fundamental dishonesty.
  
3. Accordingly the court is invited by the Defendant to dismiss the Claimant's claim either pursuant to the principles established by the Supreme Court in **Summers v Fairclough Homes [2012] UKSC 26**, or pursuant to Section 57 of the Criminal Justice and Courts Act 2015 (the 2015 Act). The Defendant relies on covert surveillance evidence and the Claimant's appearance in filming carried out on behalf of a Channel 4 programme "Selling Houses with Amanda Lamb" which was carried out

in March and April 2014. In the filming for Channel 4, referred to during the trial as the Reef footage, the Claimant can be seen undertaking do-it-yourself and decorating activities, negotiating stairs apparently without difficulty. However in the course of the filming, he attended an appointment with Mr Allen, the first orthopaedic expert to report in this case, to whom he described being unable to squat or kneel and that he was struggling with stairs. In the Reef footage, the Claimant is seen engaging in such activities apparently without difficulty. In the surveillance footage filmed over a number of occasions in 2014 and 2016, the Claimant is seen to be driving, apparently walking without any or any substantial difficulty and engaging in activities that the Defendant argues are work related.

4. The trial of this case, which has proceeded over seven court days, has been characterised by contradictions throughout. It has also been characterised by a hostility to the Claimant on the part of the Defendant's representatives and medical experts, which I find surprising in the context of modern litigation, particularly from the medical experts engaged.
5. The history of the hostility arose at an early stage. An accident report compiled by or on behalf of the Defendant dated 15<sup>th</sup> July 2013 describes the accident as occurring when the Claimant "slipped into a hole". By 17<sup>th</sup> July 2013, this description had been changed to "jumped into a two foot six inch hole". Notification by the Defendant to the HSE describes the Claimant as having jumped. The reference to a four foot hole was altered to read two foot six inches. The significance of the alteration, is that a two foot six inch deep hole would not require being shored up.
6. In early denials of liability, the Defendant relied on witnesses who were not in fact on the site at the time. After the early denial of liability, primary liability was admitted on 5<sup>th</sup> October 2016. In the Defence, the Claimant

is put to proof of the accident, with further reference being made to the accident documentation, asserting that the Claimant jumped into the hole. The only factual witness relied upon by the Defendant at trial was Mr Price, who was on the site at the time of the accident and heard but did not see the fall. He persisted with the suggestion that the Claimant jumped into the hole, notwithstanding the admission of primary liability.

7. In addition the Claimant has been subject to a high level of surveillance. This has been undertaken on eighteen occasions (on five of which the Claimant was not seen. Subsequent evidence establishes that he was on holiday during this period in 2017). Much has been made of the Claimant's participation in the Channel 4 television programme. At the Case Management stage, I required the filmed evidence to be compiled into no more than one hour of surveillance and no more than one hour of the Reef footage. This was prepared and I have observed it in the course of preparation for the trial, and several times in the course of the hearing.
8. In the course of disclosure, the Claimant was requested to provide bank statements, and these were disclosed. In the course of the trial the Claimant has been subjected to lengthy and occasionally hostile cross-examination on the contents of these bank statements. The Defendant asserts that the activity established by the bank statements establishes that the Claimant was working for financial reward during the period he has claimed to be unable to work. In addition, entries in the bank statement have been relied upon to establish that the Claimant has not suffered the financial hardship he complains of.
9. The Claimant is a qualified commercial heating engineer and has appropriate training and certification to provide gas safety certificates pursuant to the "Gas Safe" Register. The Register fulfils the statutory function relating to the installation and repairs of gas installations. The

Register is a public document. The Defendant has followed up entries from that Register indicating that the Claimant has certified gas installations in the period following the accident. The Defendant has contacted householders occupying the properties referred to on the Register. As a result of the Defendant's activities, the Claimant has also contacted a number of the customers. Those customers have been put to the trouble of attending court to give evidence, although on analysis, their evidence has not supported the Defendant's assertions.

10. There are, however, significant contradictions in the Claimant's case which I find troubling. The Claimant's presentation in the Reef footage marks a considerable contrast to his description of his continuing difficulties on examination by Mr Allen on 8<sup>th</sup> April 2014.
11. The activities seen on the surveillance footage, showing the Claimant driving, walking to and from his vehicle and a local supermarket, the Defendant and its medical witnesses argue, without apparent difficulty, contrasts with the presentation to the relevant medical experts who were examining the Claimant at the time some of the footage was obtained.
12. The Defendant relies on these contradictions to invite the court to conclude that the Claimant has been fundamentally dishonest in relation to the primary claim or a related claim within the meaning of Section 57 of the 2015 Act.

### **THE ISSUES**

13. Accordingly the issues which the court must determine are:
  - (a) the nature of the Claimant's injury (it is agreed that there was some injury);
  - (b) the persistence of the disability, if any caused by that injury;

- (c) the continuing effect, if any of that injury with regard to future disability and effect on the need for care and the Claimant's working life;
- (d) whether the Claimant's presentation to the court and to the medical witnesses is such that there has been fundamental dishonesty on his part.

### **The Evidence**

- 14. To help me determine those issues, I have heard factual evidence from the Claimant, his wife and son. I have also heard evidence from a number of the customers revealed in the gas certification documents and entries on the Claimant's bank statements. I have been provided with and viewed the edited surveillance and Reef footage and I have heard from medical experts instructed by both parties.
- 15. Mr Allen, was the orthopaedic expert first instructed by the Claimant. He provided two reports in 2014 and 2015. Unfortunately he was then overtaken by ill-health, and has not been able to give evidence to the court. However, his reports have some evidential value, in providing a history of the Claimant's injuries and presentation to a medical expert. Mr Forward was then instructed by the Claimant and he too has reported and has given oral evidence. I have also heard from a Consultant in Pain Management, Dr Miller and a Consultant Clinical and Health Psychologist, Dr Laher, both instructed by the Claimant.
- 16. For the Defendant I have heard evidence from an orthopaedic consultant, Mr Beverley, a Consultant in Pain Management, Dr Luscombe and a Consultant Psychiatrist, Dr Wise.

17. As expected, all these eminent gentlemen have examined the Claimant and provided written reports which I have read. They have also conferred and provided joint reports for the court.
18. In reaching the findings set out below, I adopt the civil standard of proof, noting the guidance given by the Senior Courts in **Re H and Others [1996] AC 563** and **The Ocean Frost [1985] 1 Lloyd's Rep 1**. The burden of proving the claim rests with the Claimant at all times. Matters relating to mitigation of loss arise, and the burden of proving a failure to mitigate rests with the Defendant.

### **The Claimant's Evidence**

19. I am troubled by the extent to which I can rely on the Claimant's evidence. There are some very obvious contradictions, for example in what the Claimant has said to successive medical experts about the effect of the accident and consequential disability on his ability to function in activities of daily life and what can be seen on the filmed evidence. The contradiction is particularly apparent in the Reef footage, filmed during the period when the Claimant saw Mr Allen for the first time on 8<sup>th</sup> April 2014. The Claimant reported to Mr Allen that he was unable to squat, kneel or run. Mr Allen recorded that the Claimant walked with a limp. The Claimant reported that he could no longer help around the house and that he struggled climbing the stairs. In the Reef footage, the Claimant is seen climbing stairs without apparent difficulty, kneeling and getting up from kneeling when undertaking decorating activities and moving beds around with the assistance of his son, and later making a bed together with his wife.
20. Despite these contradictions, there were objective signs of injury found by Mr Allen in the course of his examination in April 2014. Mr Allen reports "marked soft tissue swelling over the lateral aspect of the ankle indicating

a serious injury". Mr Allen tested stability and reports that the "ankle appeared to be unstable" and that the Claimant had a positive anterior draw suggestive of possible damage. It was accepted by the orthopaedic experts in their oral evidence, that this is an objective test and cannot be feigned by a patient.

21. In addition, in paragraph 63 to 67 of the Claimant's witness statement he describes previous annual long-haul holidays. He states that, although he could still do this, it was not without difficulty and so he had only travelled long haul once, referring to a holiday in Florida. On examination with reference to his bank accounts, it was established that the Claimant also visited the Dominican Republic in 2014 and took a holiday in the United States of America in June 2017. There is also evidence from the bank statement of other short stays and holidays in Portugal.
22. When cross-examined about these contradictions, the Claimant suggested that he had forgotten about them. I found this assertion unconvincing.
23. When cross-examined about the contradictions between what is seen in the filmed evidence, and the presentations to various of the medical experts over time, and to the clinicians who have treated the Claimant, the Claimant asserted that his condition, and the pain it causes is variable. He explained he was on strong painkillers and that these enabled him to behave in the manner seen in the Reef footage. It is notable that such variation is not described either to treating clinicians, or to the medical experts until the Claimant was seen by Mr Forward and Dr Miller.
24. The Claimant's accounts to the medical experts as to whether he can drive have also been contradictory. When he saw Mr Beverly in December 2016 he reported that he no longer drives but travels as a car passenger. (This

was challenged by the Claimant, who says it was mis-recorded by Mr Beverly, of whom he makes significant complaint.) The Claimant is seen in the surveillance footage driving on a number of occasions in 2016.

25. Although the Claimant is described in a physiotherapy note dating from November 2014 as “mobilising unaided”, he has attended examinations with Mr Forward , Mr Miller, Mr Beverly and clinicians who have treated and or examined him, using either crutches or a stick as a walking aid. In none of the filmed evidence is he seen using such an aid. He has explained this by saying that his physiotherapist has told him to attempt to walk unaided whenever possible and that physiotherapy and painkillers have had some success in assisting him to walk. There was some divergence of view from the medical experts as to whether the Claimant’s gait appeared to be normal or unaffected in the filmed surveillance footage.
26. In the course of cross-examination, the Defendant has gone to considerable lengths to establish that notwithstanding the Claimant’s assertions, both in his witness statements and to the medical witnesses, that he is unable to work, he has been engaged in working activity. The surveillance evidence is relied upon in support of these assertions. The Claimant was also cross-examined at very considerable length, about entries in his bank accounts, which relate to receipts from customers and the purchase of plumbing and other building materials.
27. Despite the lengthy cross-examination on these issues, the Claimant within the bounds of his recollection, was able to give what I found to be an acceptable explanation for the various transactions, which was consistent with the evidence subsequently given by his son. He explained that his son was also a qualified plumber with his own business. However, his son is not a qualified gas fitter. He explained that he assists his son, by providing certificates for boiler installations, and from time to

time advising his son. He also assists his son by advising on the requirements at particular projects. As to the financial transactions shown in his bank accounts, his explanation was that his son, because of past difficulties, used the Claimant's bank account to receive payments from customers and to pay for materials. The Claimant also explained that because his son, Jayke Smith does not drive, he would take him to sites from time to time and collect materials for him, although he would not load or unload them.

28. It has been argued on behalf of the Defendant that it is surprising that the Claimant and his son kept no records of these transactions. When I asked Jayke Smith how he provides suitable material for his accountant, he told me he relies on receipts and invoices. The Defendant has argued that the Claimant's response to some of the questions about the financial transactions was vague and evasive. I do not agree. The Claimant was not forewarned about this line of cross-examination, by any Part 18 requests to explain transactions in his bank account. He was being asked about transactions occurring between 2014 and 2016, the most recent of which was over two years ago. I formed the view that the Claimant's ability to give explanations when he could and their consistency with the explanations given by Jayke Smith, were on this aspect of his evidence at least, reliable and convincing. Whilst it may seem surprising to experienced lawyers, that individuals engaged in building and allied trades do not engage in careful documentation of their transactions, it is the regular experience in the County Court that tradesmen and their customers regularly engage in, occasionally very valuable transactions and substantial projects, with very little documentation provided or requested.

29. The Defendant also raised entries in the general practitioner's notes suggesting that the Claimant had been working. On 25<sup>th</sup> June 2014, the Claimant is described as "working away". On 28<sup>th</sup> August 2015, a general practitioner notes records that the Claimant told him that a 45 minute wait for an appointment had "cost him a job". The Claimant's explanation for the earlier reference, was that he was frustrated by delay in obtaining an appointment. This reflects the experience of the court from a number of individuals engaged in personal injury litigation, and perhaps common knowledge of the problems obtaining general practitioner appointments from a health service which is known to be under strain. As to the latter entry, the Claimant's explanation was that he was angry about a prolonged wait and the job referred to was one for his son. I accept these explanations as entirely genuine.
30. The Defendant relies on surveillance evidence showing the Claimant attending work sites, in support of its argument that the Claimant has been working. The filmed evidence clearly shows the Claimant driving a van and wearing what might be described as workman's clothing. He is also attending sites where work activities are being carried out. He is not actually shown engaged in plumbing activities. When he is seen entering Waterstones with some light planks of wood, the Claimant explained that having been asked by his son for advice about work his son was undertaking at that site, the Claimant had attended and taken the opportunity to dispose of some rubbish from his home, as he knew that there was a skip on the site. The Claimant's son's evidence was consistent with this. As for the clothing, there is nothing remarkable about the Claimant's dress. The clothing was of the type that many people who are not office or clerical workers, or who are at leisure might wear.
31. The Claimant accepted that he visited a property in Market Harborough twice in late 2016. The Claimant is seen on the surveillance footage, entering the property with a silicone gun and a drill. Mr Everett, the

contractor who was carrying out a loft conversion at that property for its owner, was called to give evidence. He confirmed the Claimant's account, that Jayke Smith had done the plumbing work at the property, but there had been problems. The Claimant attended to assist with those problems. It was Mr Everett who had used the silicone gun and a drill that the Claimant was seen taking out of the van. The only actual work that the Claimant did was soldering a leaking pipe, to which access was gained from removing a panel in the stairwell. Although the Claimant would have had to negotiate stairs to do this work, it was notable that Mr Forward, an experienced trauma and orthopaedic surgeon considered that the Claimant's gait on the occasions when he was filmed in Market Harborough was not entirely normal. He also commented that Mr Everett's gait had some abnormality as well.

32. As a result of the approach taken by the Defendant in seeking permission at a very late stage in the weeks before trial to rely on evidence of individuals it was asserted were the Claimant's customers, I gave permission to both the Claimant and the Defendant to exchange further witness statements about the Claimant's alleged working activities. The customers were generally identified as the residents of properties referred to in the Gas Safe Register.
33. Three of these customers volunteered without prompting, that when they contacted the Claimant to seek his services in installing or repairing boilers, having followed up recommendations for the Claimant from various sources, the Claimant said he could not do the work himself because he was either not well enough or not fit enough. Such an account was volunteered by Mr Singh, Mr Fern and Ms Cozens. Most of the customers who were called did not actually see the work going on. Those who did, Mr Jackson and Ms Zubryckyj (whose statement was read) said that it was Jayke Smith who did the work. Although Ms Cozens and Mr

Fern referred to having paid the Claimant, this was consistent with the Claimant's evidence that he would receive payments on behalf of his son.

34. An indication of the vigour with which the Defendant has pursued its allegation that the Claimant was working, is demonstrated by the Defendant's contact with a Mr Reyat, who is engaged in a business with Mr Singh in managing and letting properties. The Defendant presented a witness summary from Mr Reyat dated 2<sup>nd</sup> November 2018 in which it is asserted that the Claimant fitted a boiler and that the Claimant became aggressive when the question of receipts was discussed. In stark contrast to that, the Claimant obtained a witness statement from the same gentleman dated 20<sup>th</sup> November 2018 and he was called at trial. Mr Reyat completely disavowed the contents of the witness summary under oath. He made it clear, that whilst he and Mr Singh had secured the services of the Claimant's son, after making contact with the Claimant, to carry out the boiler work to one of their properties, it was Mr Singh who dealt with the Claimant and his son and not Mr Reyat. He commented in the witness statement, which he adopted under oath in his evidence, that "I have notified the solicitors that I don't want anything to do with the case but they do not seem to want to listen".
  
35. I am driven to the conclusion that there was an element of bad faith on the part of the Defendant in seeking to introduce this witness summary in this way. If it were not for the efforts and application shown by the Claimant's solicitors in dealing with this aspect of the evidence, by tracking down relevant customers and securing CPR compliant witness statements, the witness summary might have been presented to the court uncontradicted. A witness statement was also obtained by the Defendant from Ms Rusu, the tenant of Mr Singh and Mr Reyat at whose home the boiler was installed. The witness statement obtained by the Defendants inferred that it was the Claimant who did the work. Ms Rusu also

provided a witness statement to the Claimant, and was called to give evidence. Although she referred to the older man and his son coming to do the work, and that they were both there all day, she did not see them work and she stayed in her bedroom. She was unable to say who actually did the work. It is the Claimant's case that on this as on other projects, the Claimant remained with his son but did not engage in any work activity. An account which was confirmed by Jayke Smith.

36. I also heard evidence from Mrs Smith, the Claimant's wife, who was also subject to lengthy cross-examination. It was apparent that Mrs Smith was a reluctant participant in the Channel 4 programme. She did not look comfortable on screen. When parts of the Reef footage were viewed in court, she looked visibly embarrassed, particularly in the scenes where the Claimant is clearly, in my judgment, playing to the camera and making silly jokes about her. Nevertheless her evidence is also characterised by contradictions between her description of the Claimant's difficulties and his presentation to the medical experts involved and what can be observed in the filmed evidence. She too explained that the Claimant took painkillers, which were effective and enabled him to participate in the Reef footage in the way that can be seen on the footage. However, she confirmed as did the Claimant and Jayke Smith, that the Claimant did not do all the work for the programme and that what can be seen on the screen is staged evidence.

37. I also note that there was no reference in the witness statements of either the Claimant, Mrs Smith, or Jayke Smith to the variation in the Claimant's condition which is put as an explanation for the contradiction between the presentation to the medical witnesses and the Claimant's appearances on the filmed evidence. I find that, with regard to the Claimant's family, there is an inevitable wish to be loyal and to put the Claimant's best case. In doing so there has been a degree of embellishment, a term used by Dr

Miller, (see paragraph below). Whilst this does affect the reliability of the evidence as to the effect of the Claimant's injury, I do not consider the evidence to be dishonest.

38. I take into account all the arguments that had been put by the Defendant. There are other details in the evidence, which I do not propose to rehearse. Simply because I have not referred to a particular detail or argument is not an indication that I have not taken it into account.

39. I conclude that this is not a case where there has been fundamental dishonesty by the Claimant or his family members in the presentation of this claim. Nevertheless, I find that this is a case where the effect of the Claimant's injury is not as severe as the Claimant presents. I find that the Claimant has been capable not only of putting on a show for the camera as seen in the Reef footage, but also putting on show for the medical experts.

40. There is an interesting quote in the report of Dr Luscombe (page 367) referring to an article in the learned journal *Clinical Medicine* published in November/December 2002 written by a Dr Christopher Bass Consultant Psychiatrist and Dr Tim Jack, Consultant Anaesthetist in which they state:

"Outright faking of pain for financial gain is rare, but exaggeration is not, especially if the patient is involved in litigation. It is often difficult to determine whether this represents an attempt to convince or deceive the clinician."

41. That observation succinctly sums up the court's own experience. I do not find in the present case that there has been outright faking of pain. I do however find that there is an element of exaggeration. It has been

necessary to consider carefully whether the exaggeration represents an attempt to convince or deceive the medical witnesses and indeed the court. I note the Defendant's attitude until half way through the trial, as to liability in this case. The Claimant must have constantly felt, that from the earliest intimation of a claim, that the Defendant has shown a determination to avoid fully compensating him (see the letter to the Claimant's solicitors from a Claims Handler dated 27<sup>th</sup> September 2013, in which liability is denied). In the early stages the Defendant put as witnesses, individuals who were not even present at the time of the accident. Thus, I find, that the Claimant's exaggeration and overstatement of his difficulties, are the result of an attempt by him to convince, rather than to deceive. I find that to some extent, the Claimant genuinely believes himself to be more significantly disabled by his continuing pain than, objectively, is in fact the case.

42. Faking pain, as described by the learned authors referred to above, would almost undoubtedly amount to fundamental dishonesty. Exaggeration, with mixed motives of attempting to convince or deceive, is not.

### **Medical Evidence**

43. The orthopaedic evidence is presented by Mr Allen, Mr Forward and Mr Beverly. Regrettably Mr Allen has been overtaken by ill-health and his opinion cannot be tested in cross-examination. However he does provide an account of an examination for objective signs of injury in April 2014. On examination he found that "the ankle appeared to be unstable ... he had a positive anterior draw suggestive of possible damage to the anterior talo fibular ligament". He also noted that x-rays taken on 15<sup>th</sup> July 2013 showed no evidence of any fracture, however there was marked soft tissue swelling .. "indicating a serious injury". Mr Allen, unlike Mr Beverly, was not satisfied with x-rays, and advised an MRI scan. Mr Allen saw the Claimant again in November 2015, after the Claimant had

sustained a fall down stairs, the previous year although he made very little comment about this. Mr Allen considered that there might be a chronic pain syndrome and suggested referral to a pain specialist.

44. Thereafter orthopaedic evidence has been provided on behalf of the Claimant by Mr Forward . Both Mr Forward and Mr Beverly, instructed by the Defendant, are consultant trauma and orthopaedic surgeons. The difference between the approach of these two witnesses was notable, this is unusual in the context of modern litigation. Both parties sought to convince the court that the curriculum vitae of their respective witnesses indicated that witness was a more reliable source of information for the court. I note that Mr Forward is still in active practice in one of the largest trauma clinics in the East Midlands area. Mr Beverly has retired from NHS practice, but nevertheless has a great deal of experience as a trauma surgeon in District Hospitals, where I anticipate he will have seen a very large number of ankle injuries. I find that both these gentlemen had the appropriate qualifications to provide a court with an opinion.

45. However I have a number of reservations about the quality of Mr Beverly's opinion. His report contains references to another patient's notes, but it is not clear that he has excluded them from his deliberations. Mr Beverly incorrectly stated that Dr Miller had diagnosed CRPS, notwithstanding the analysis given by Dr Miller, the consultant pain expert instructed by the Claimant in his reports in which he rejects the diagnosis of those treating the Claimant, that the Claimant had Complex Regional Pain Syndrome (CRPS) giving his reasons. Mr Beverly accepted this was a mistake, but did little to excuse it. I find that there was a want of care on the part of Mr Beverly in undertaking a proper analysis of the materials presented to him for his report.

46. There are contradictions in his evidence. In his oral evidence, Mr Beverly gave the opinion that the Claimant suffered an ankle sprain from which he would have recovered within three to four months. In his supplementary report dated November 2017, he observed that the Claimant would have been capable of returning to the same or similar employment within two to three months. He was prepared on the one hand to offer an opinion that the Claimant's cardiac problems and history of smoking, about which he professes no expertise, would have prevented and continues to prevent the Claimant continuing with his employment. Then has stated in his later report that he could have gone back to the same employment within two to three months of the accident.
47. Mr Beverly paid no regard to the report of Mr Allen, who using an objective examination method on 8<sup>th</sup> April 2014, found instability in the Claimant's ankle joint. This was 10 months after the accident, and therefore some 6 to 7 months after Mr Beverly had maintained the Claimant was fit to return to work. He disregards the swelling noted by successive medical reports, including that of Mr Allen in April 2014 and November 2014, the physiotherapy notes in November 2014 referring to "obvious effusion", the letter of a Mr Siddiqui a Specialist Registrar involved in the Claimant's treatment after his fall, who referred to "mild to moderate effusion". He made no reference to Mr Allen's report of "inflammation" on 11<sup>th</sup> May 2015, or Dr Miller's finding of swelling on 25<sup>th</sup> April 2016. There is also a description of swelling from Dr Tring, another clinician treating the Claimant on 28<sup>th</sup> September 2016. He appeared to disregard Mr Forward's evidence of discolouration and muscle wasting seen on examination on 4<sup>th</sup> July 2017. All these, I find, on the basis of the medical evidence I have heard from the Claimant's experts to be objective signs of injury, persisting long after the period for recovery contended for by Mr Beverly.

48. Mr Beverly preferred to adhere to his findings on weight bearing x-rays that he had carried out for his own report in December 2016. He describes these showing essentially normal and symmetric appearances. Other doctors who have sought to diagnose the Claimant's difficulties and treatment, have not been satisfied with simple x-rays but have requested or relied on MRIs. His opinion is in direct contradiction to the findings on the MRI reported in May 2015 as showing "significant lateral trauma with lateral ligamentous injuries as described".
49. Mr Beverly took photographs at his examination on which no noticeable swelling or discolouration can be seen. However, he was not the only one to take photographs. In the trial bundles, there was a photograph of the Claimant's foot taken in his home in October 2015, showing considerable discolouration. Dr Miller took a photograph in May 2018 showing discolouration in the same place. Dr Miller's explanation was that this showed underlying irritation from the relevant ligament, which had been reported in the MRI scan in May 2015 as being injured. I found Mr Beverly's dismissal of the discolouration as being simply bruising or an indication of poor circulation (a factor not referred to anywhere else in the medical evidence) unconvincing. Although Mr Beverly's own photographs do not appear to show obvious muscle wasting, he was unable to explain the muscle wasting reported by Mr Forward, and illustrated in the photographs taken by Dr Miller in May 2018. In the latter photographs, even to the untutored eye, muscle wasting in the right ankle can be seen. This is an objective sign of injury and is an indication of continuing difficulty.
50. The difference between the photographs taken by Mr Beverly and by the other medical witnesses, may well demonstrate the variation in the Claimant's condition, that the Claimant now relies on, as explaining the variation in presentation to the medical experts and in the filmed material.

However, I do accept that the description of his difficulties given to Mr Beverly in December 2016 is not consistent with the driving undertaken by the Claimant seeing in the surveillance evidence in November 2016 and 1 December 2016.

51. Mr Beverly's scornful dismissal of Mr Siddiqui, referred to above as "simply a registrar", notwithstanding that he has described in his letter as a specialist orthopaedic registrar, does him no credit.
52. The Defendant criticises Mr Forward suggesting that he has given little analysis to the filmed material presented to him, a criticism which I do not accept. Mr Forward is a man who expresses his opinions briefly and succinctly. The criticisms of Mr Beverly's lack of analysis of objective findings by the other medical experts and those who have treated the Claimant, is much more damaging to the quality of Mr Beverly's opinion. The Defendant's dismissal of Mr Forward's considerable experience from a large trauma centre, that one third of those who suffer ankle injuries develop chronic pain as being startling, is made without proper analysis. The term chronic in medical matters, does not necessarily equate to severe or disabling, but to long term and persistent pain.
53. In conclusion, I do not find Mr Beverly's opinion to be reliable. I accept Mr Forward's conclusions given in the joint orthopaedic report that the Claimant continues to have significant problems, and that the original ankle injury was a severe sprain with a minor fracture. I accept Mr Forward's opinion that some patients with apparently simple ankle sprains fail to fully recover and develop a range of permanent symptoms that may never be fully explained, diagnosed or treated. The fact, that as the Defendant suggests, this may be a tiny fraction of such patients, does not inevitably lead the court to the conclusion that the Claimant is not one of them. I find that he is.

54. I have also had conflicting evidence from the pain experts Dr Miller and Dr Luscombe. Dr Miller had the advantage of the most recent examination of the Claimant, carried out in May 2018. He requested the examination as, having seen the filmed evidence, and reviewed the medical evidence, he felt he wished to see the Claimant again before reaching a conclusion. This demonstrates a more measured approach than that taken by Dr Luscombe.
55. Dr Luscombe offered the opinion in paragraph 159 of his report that “it may well be that gout is contributing to his foot and ankle pain and swelling”. He is the only expert to reach this conclusion amongst those who have provided expert evidence, and those who have treated the Claimant. Nevertheless, he does conclude in paragraph 172 of his report that the Claimant’s presentation is explained by “some biomedical issues, more significant psychosocial issues and that there are issues relating to veracity and exaggeration to resolve”. He resiles from this opinion after seeing the surveillance evidence, see page 404 paragraph 21. However he states on the previous page at paragraph 7 that the Claimant “is clearly working”. This is not an assumption which I find to be justified from the surveillance material. The Claimant is never seen to carry or install a boiler, or to be actively engaged in any gas or plumbing fitting activities. On analysis, the surveillance material shows him attending work related sites, but not carrying any heavy tools, equipment or materials. This may be suggestive of working, but it is not conclusive of someone who is “clearly working”.
56. Dr Miller’s approach was more measured. After seeing the surveillance evidence he wished to re-examine the Claimant. His conclusions after that examination are clear. On page 243 he refers to “the surveillance (having) no bearing on the Claimant’s index accident related chronic pain

from my perspective". In the joint report, Dr Miller makes it clear that he accepts the filmed evidence confirms greater physical function and less disability than that stated by the Claimant. However I find that Dr Luscombe's assertion that Mr Smith is capable of a "high level of physical activity" to be an overstatement. There is no filming of the Claimant undertaking vigorous physical activities such as running, engaging in sport, walking over anything more than modest distances. Although the Reef footage shows the Claimant kneeling and engaging in fairly vigorous decorating activities, this predates the fall in November 2014. I accept Mr Forward's opinion, that the instability caused by the original accident contributed to the fall, and made the Claimant's injury worse as has been demonstrated by the MRI scans.

57. Dr Miller again took a more measured view, accepting that there had been embellishment of the disability, but also maintaining the opinion that the Claimant continues with index accident related organic right ankle pathology.
58. The final part of the medical evidence came from a psychologist instructed by the Claimant, Dr Laher and Dr Wise a psychiatrist, instructed by the Defendant. I did not find their evidence particularly helpful in reaching a conclusion. In some respects, I considered Dr Laher to be almost too sympathetic to the Claimant. He had a tendency to refer to generalities rather than specifically to the Claimant. Dr Wise, maintained his opinion that there was no psychiatric injury, but did not appear to wish to engage in analysis of Dr Laher's opinion that there was psychological difficulty in the form of what is described by Dr Laher as a somatoform disorder. Dr Wise told me that that was not what he assessed, he was assessing whether there was psychiatric injury caused by the effect of pain. I found Dr Wise's adherence to his opinion that if the Claimant was suffering any form of anxiety or depression, these were

caused by the other difficulties that he faced in his life, and not to pain and his loss of employment, was unrealistic. Dr Wise used a trauma scale to examine the Claimant, although it has never been suggested that the Claimant suffered a traumatic accident such as would be likely to cause a post-traumatic stress disorder. It appeared that the only reason this scale was used by Dr Wise was to support the Defendant's case that there was exaggeration. I was puzzled as to why Dr Wise felt this scale was relevant if it was not used for that purpose.

59. Dr Wise would not accept Dr Laher's diagnosis of a somatic symptom disorder with predominant pain. I find that the difference between the opinions of these two men is that explained by Dr Wise, a psychologist describes emotional reactions to pain. He as a psychiatrist was looking for and did not find any psychiatric disorder which in his opinion fell within the accepted international classifications.

60.

## CONCLUSIONS

61. For the reasons given, I do not find that the Claimant has engaged in fundamental dishonesty in this claim. I do not find that he has faked injury, or continuing pain, for the purpose of financial gain.

62. Nevertheless I find that there has been a degree of overstatement, in Dr Miller's words, embellishment, of the Claimant's pain and its affect upon him. I find that the Claimant has engaged in this conduct in order to convince rather than to deceive. I accept that the surveillance evidence can only be a snapshot. Nevertheless he is walking albeit, according to Mr Forward, not completely normally, with apparent ease and without walking aids. His conduct does not amount to the sort of conduct that would justify dismissal of his claim in accordance with the principles outlined in the Summers v Fairclough case. I note in that case

surveillance evidence demonstrated the Claimant was playing football and that the trial judge found the Claimant had engaged in work for reward. Even so, Mr Summers' case was not dismissed.

63. In this case, I find that although the Claimant has not engaged in work for reward, he has been actively engaged in assisting his son with his plumbing business. He has skills which, if he applied them to his son's plumbing business or another such business, has economic value.
64. It follows that I am not satisfied that the grounds are established for striking out the claim pursuant to Section 57 of the 2015 Act.
65. In case it is thought that I am wrong in those conclusions, I make it clear that I do not find that it would be appropriate under the principles stated in the **Fairclough Homes** case to strike out the claim rather than give judgment on quantum in the ordinary way. In the High Court decision in **LOCOG v Sinfield [2018] PIQR 8**, in which the Claimant fabricated receipts to support an unjustified claim for gardening services, the claim was struck out. The Claimant in this case has not been shown to have fabricated evidence to that extent.
66. Given that this Claimant has suffered a painful injury, and that I have accepted what the Claimant's medical witnesses have told me about that, that he has been required to resist the Defendant's vigorous attempts to avoid responsibility for an accident which it was accepted at the very last moment was entirely the fault of the Claimant's employer, I find that the Claimant would suffer substantial injustice if the claim were dismissed. I do not find that the Claimant has forfeited his right to have his claim determined.
67. Accordingly I will now go on to consider the value of this claim.

## QUANTUM

### **General Damages**

68. Adopting the analysis set out above, I find that the Claimant sustained a fracture and ligamentous tear of the right ankle. The injury was made worse after the fall, caused by the initial instability in November 2014. I accept Mr Forward's opinion that the fall and its consequential injury would not have occurred, but for the instability caused by the July 2013 accident. The ankle injury has caused an ongoing instability, pain, muscle wasting and skin changes as well as tenderness and swelling. The ongoing pain and difficulty has caused psychological injury, and I accept the diagnosis of Dr Laher that the Claimant has suffered a somatoform symptom disorder and adjustment disorder. I find that there was an improvement by spring of 2014 and that the Claimant was finding painkillers to be effective as demonstrated by the Reef footage filmed in March and April 2014, albeit he overstated his continuing problems when seen by Mr Allen at that time. The fall in November 2014 caused a deterioration.
69. Nevertheless, there has been improvement sufficient to allow the Claimant to walk unaided and provide beneficial assistance to his son in his son's plumbing business. The Claimant is capable of walking and driving and apparently coping with residual pain. I accept Mr Forward's opinion that the Claimant's symptoms will be permanent and may never be fully explained, diagnosed or treated, and that these will restrict his ability to work at anything other than light or semi-sedentary employment. Nevertheless, I note and adopt Dr Miller's opinion (page 477 paragraph 31) that the Claimant has greater physical function and less disability than he stated to Dr Miller.
70. When assessing general damages I have taken into account the psychological reaction to the pain and restrictions that I do find to be

proved. I note that both Dr Laher and Dr Wise recommended further treatment in this regard.

71. I take into account the Judicial College guidelines for ankle injuries, psychological injuries and chronic pain, whilst noting that there is not a diagnosis of CRPS in this case. I also take into account that where there are separate injuries to be compensated, one does not reach a figure and simply aggregate them. I find that the ankle injury justifies an award in the bracket between severe and moderate ankle injuries provided in the Judicial College guidelines. I find that the psychological reaction justified an award to the higher end of the moderate bracket for psychiatric and psychological damage generally. I note that the prognosis for the latter is reasonably optimistic.

72. The award of general damages is £44,000.

### **Loss of Earnings**

73. The Defendant accepts the Claimant's figures for pre-accident earnings, but has not pleaded to the Claimant's figures for the years following the accident based on an assumed increase of 2.5% per annum. In the absence of any other information, I adopt the Claimant's figures for net annual loss. However, I do not accept that the Claimant has been unable to pursue any remunerative employment since the accident. His ability to work has been affected by his psychological reaction to his predicament, which has been exacerbated by the other events in his life, particularly those which occurred during 2015 when he was the victim of an assault, was investigated for suspected cancer and had family difficulties which resulted in taking on Special Guardianship of one of his granddaughters. Thereafter, the Claimant has suffered episodes of chest pain and the death of his father. However I observe that many people in the working population cope with bereavement of an elderly parent and maintain their working life. An example of this is Mrs Smith.

74. At the time of the fall in November 2014, the Claimant was continuing to receive treatment in orthopaedic clinics in relation to the injury suffered, which I find to be caused by the continuing instability from the July 2013 accident.
75. The Claimant is a man whose skills are practical in occupations that require physical agility and effort. His witness statement dated 10<sup>th</sup> August 2017, in paragraphs 49 and 50 demonstrates that the Claimant has made efforts in the past to acquire and improve upon his practical skills. He studied for his gas qualification and to increase his knowledge in various types of heating systems. He has also been seen to participate in his son's business, as the video surveillance demonstrates. The Claimant's response to cross-examination on the information about payments into his bank account indicate that he has assisted his son with managing the financial side of that business. It may be that due to paternal benevolence he has not sought any share in the profit, or sought any payment for his services. Given the Claimant's extravert and friendly personality as demonstrated in the Reef footage, and by the fact that he has been able to obtain work for and promote Jayke's Smith's business, by following up enquiries from customers who have been recommended to him, as demonstrated by the evidence given by Jayke's Smith's customers, I have concluded that the Claimant has skills which would be of commercial value. He has been able to successfully promote Jayke's business and helps him manage the proceeds. He has assisted Jayke when Jayke had difficulty on a project e.g. at Waterstones. He was able to deal with a follow-up after problems arose at the Market Harborough property in 2016. The Claimant renewed his Gas Safe certificate in February 2015. He has been active since mid-2015 in certificating boilers. Accordingly, I find, that had he been sufficiently motivated, the Claimant might have been able to obtain employment for reward.

76. The difficulty which the court faces is the lack of material which could be used to make an assessment as to the level of earning capacity the Claimant could reasonably expect. The Claimant has approached the case on the basis that he is unable to work at all. The Defendant has approached the case on the basis that the Claimant could have returned to work some time ago. No alternative figures have been required provided. It is a matter of popular comment, that obtaining the services of plumbing and heating engineers can be difficult. There is some indication as to the health of Jayke Smith's business, demonstrated by the money received into the Claimant's bank account, however, the evidence of both the Claimant and his son was that some payments were made in cash. I accept Mr Forward's opinion that the Claimant is fit for light or sedentary employment. It is perhaps appropriate to note that in the County Court, we have plenty of experience of gas safety certificates being required by landlords of residential properties, when such landlords come to the court seeking injunctions to require access from their tenants to carry out inspections, or where the lack of a certificate compromises a landlord's ability to commence effective possession proceedings.
77. The court must do its best on the material available. Accordingly, I adopt the Claimant's figures proposed in the Schedule of Loss for the earnings that he might have received had he continued in employment with the Defendant. Noting that he was certificating boiler installations by August 2015, I find that he was physically well enough to engage in part-time remunerative employment at that stage. Accordingly, I award full loss of earnings to August 2015 and two-thirds of the figure claimed to the end of 2016, when the Claimant can be seen assisting his son by problem solving and follow-up at the Market Harborough property. I allow half the figure claimed for 2017 and 2018.

78. Accordingly I calculate past loss of earnings as follows:

|                                     | £                |
|-------------------------------------|------------------|
| 2013                                | 10,235.38        |
| 2014                                | 22,725.90        |
| 2015 (to 31.7.15)                   | 13,588.16        |
| 2015 (to 31.12.15: two-thirds)      | 6,470.00         |
| 2016 (two-thirds)                   | 15,917.59        |
| 2017 (one-half)                     | 24,473.30        |
| 2018 (to 25 <sup>th</sup> November) | <u>11,311.22</u> |
| <b>TOTAL</b>                        | 92,484.75        |
| Less received                       | 2,258.89         |

79. Accordingly the award for past loss of earnings is £90,225.86

#### **Future Loss of Earnings**

80. The Claimant's claim is based on an assumption that he would have continued in full-time work until the age of 70. Given his unconnected medical problems, the physical nature of his pre-accident employment I regard this as over-optimistic. It is the court's experience that those engaged in occupations that require physical fitness, rarely work beyond the state pension age. The Claimant has a residual earning capacity which it is hoped will improve after further treatment and Cognitive Behavioural Therapy as advised by Dr Laher. Again the court has very little further information from which to make a calculation. I recognise Mr Forward's opinion, that the Claimant will never completely recover from continuing pain. I take into account the fact that the claimant has had unconnected health problems.

81. I have been provided with no figures that might assist me with the availability of more sedentary work, or whether there may be

opportunities for the Claimant in providing management/assessment services in the plumbing and heating sector or alternatively offering training to young people entering that sector, in the skills which have been acquired by the Claimant. In the circumstances, it is almost impossible to approach future loss of earnings on a multiplicand/multiplier basis. I use the approach adopted by the court in *Blamire v South Cumbria HA* (1993) PIQR Q1. I take into account the Claimant age and unconnected medical problems. The lump sum award is £100,000.

### Care

82. Although the Claimant's Schedule of Loss suggests that an expert assessment would be carried out, this has not in fact been done. The court must therefore rely on family assessments and estimates given in the witness statements of the Claimant and Mrs Smith. There has also been assistance with, e.g. DIY tasks from the Claimant's son. Mrs Smith has provided some physical care and emotional support. I have observed the Claimant's behaviour in the Reef footage and in court. I do not accept the Claimant's arguments that he has required seven hours of care per day in tasks which Mrs Smith struggled to describe. Nevertheless, there has been some extra attendance, which has diminished over the years with personal care and household activities such as cleaning and cooking meals in which the Claimant would have taken a greater share had it not been for his injury.
  
83. I accept that in the early period after the accident and thereafter, after the fall in November 2014 (commented on by Mr Siddiqui in his letter dated 13<sup>th</sup> January 2015) that the Claimant's needs for assistance would have decreased and was probably minimal at the time of the Reef footage filmed in spring 2014. It then increased after the fall. Again there is little material upon which to make an assessment. The claim is put at £7.00 per hour relying on aggregate rates as provided for by the National Joint

Council Pay Scales spinal column point 8. I note that the level of pay has increased over the period since the accident from £6.98 per hour to £8.62. I also note that it is appropriate to discount the commercial rate to reflect the fact that the care is gratuitous and the award does not attract national insurance or tax. I adopt an aggregate rate of £6.00 per hour. I note that from mid-2016, the Claimant is seen out and about without walking aids.

84. Accordingly I allow an additional four hours of care per day for the two years following the accident, taking into account fluctuations within that period. Thereafter I acknowledge the need for assistance, both physical and emotional and allow for ten hours per week. I accordingly award:

|                                | £            |
|--------------------------------|--------------|
| 2013 to 2015                   | 8,748        |
| July 2015 to trial (179 weeks) | <u>7,620</u> |
| <b>TOTAL</b>                   | 16,368       |

#### **Future Care**

85. With further treatment both for the pain and psychological treatment, although I accept Mr Forward's opinion that the pain may never resolve, the Claimant's condition will become more manageable for him. I find that the Claimant is capable of driving. I note that he walked unaided at the trial. Nevertheless, I find that there is a modest need for future personal care and extra assistance from time to time at home and that greater responsibility will fall on Mrs Smith for domestic activities. I allow for seven hours per week, with additional time for e.g. medical appointments, extra assistance during periods of increased pain. Accordingly I make an award based on 400 hours additional care per annum. Adopting the Joint Council figure for 2018 discounted by 25% = £6.47. This produces a figure of £2,588 per annum x 41.44 = £107,246.72.

## **Pension Loss**

86. The Claimant's pleaded figure has not been supported by any evidential basis and I make no award.

87. I make no award on the claims for dog-walking, I note that the Claimant's son has assisted. Moreover, Dr Laher has encouraged the Claimant to undertake this task. I make no additional award for DIY and gardening, any assistance the Claimant requires for such matters is included in the care and attendance award. The Claimant has not paid for additional DIY or gardening services. I allow the sums claimed for travelling, the additional cost of holiday accommodation and the loss of the golfing subscription. I make no award for the training costs.

## **88. SUMMARY OF CONCLUSIONS**

Whilst I do not find that the Claimant has been fundamentally dishonest, I conclude that he is not as disabled as he presents himself to be, or as he believes himself to be. With appropriate retraining and motivation, he has marketable skills and a residual earning capacity.

|                       |             |
|-----------------------|-------------|
| 89. General Damages   | £44,000     |
| <b>Past losses</b>    |             |
| Loss of Earnings      | £90,225.86  |
| Care                  | £16,368     |
| Travelling expenses   | £349.70     |
| Holiday accommodation | £550        |
| Golf subscription     | £1,500      |
| <b>Future losses</b>  |             |
| Loss of earnings      | £100,000.00 |
| Future care           | £107,246.72 |

Dated this 23 day of January 2019

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HER HONOUR JUDGE HAMPTON