IN THE COUNTY COURT AT BOURNEMOUTH & POOLE

CLAIM NO: E01YM157

BETWEEN:

CHRISTOPHER SIMS

Claimant

-and-

PRAHLAD LUCHOOMUN

Defendant

This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on a day and Court to be confirmed. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court.

Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to Mr Recorder Bebb QC by email to

Gordon.Bebb@outertemple.com by 4pm on April 6th 2020, so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

1. This is a personal injuries claim arising out of a road traffic accident which occurred on July 20th 2015. Liability is admitted. Most heads of damage have been agreed between the parties. Loss of earnings and loss of services remain in issue.

Background.

2. At the time of the accident the Claimant was aged nearly 27. He worked as a self-employed labourer in the building industry with declared net annual earnings of £4,598, £7082, and £4050 in the previous three years. He left school at 16 without educational qualifications, started but did not finish a plumbing course and then worked for his father doing groundwork and general building jobs. This included operating diggers and other site machinery. His father died in 2012 leaving the Claimant to find similar work elsewhere. He used contacts, mainly members of the extended family to carry on with the same type of work. At the time of the accident he was part of a labouring team building a swimming pool in Oxford.

Injury.

3. The relevant injury was to his left foot, which involved a number of fractures. This was initially managed by surgery. However, the fracture of the navicular bone did not achieve union. This required further fusion surgery in December 2016.
4. After the accident the Claimant was able to find a small amount of digger work and work fitting kitchens until the further surgery was carried out on his foot. This was followed by a further period of unemployment until August 2018 (save for a

week's work in February 2018) when he worked firstly as a digger operator carrying out groundworks and then as a site supervisor.

Issue.

5. It is the Claimant's case that he has suffered a permanent disability to his foot, which has limited the scope of work he can do. In particular he has difficulty going up and down ladders because of pain and lack of flexibility in the foot. He says he cannot carry loads, such as bricks, up ladders. He has difficulty walking on rough ground, for example, ground covered with loose and crushed rubble. His foot increasingly aches as the day progresses and gets worse in cold weather. Walking up and down is painful and difficult as is heavy labouring work, including pushing a wheelbarrow over rough ground. These problems likewise limit his ability to carry out DIY and domestic services around the house. His past loss is calculated at about £101,000 and his future loss at about £605,000. His loss of services is claimed at £60,000. In respect of future loss of earnings, it is contended that the correct method of calculating loss is by applying the Ogden multiplier/multiplicand approach. It is the Defendant's case that any application of the Ogden approach leads to a wholly unrealistic size of award and that, subject to other submissions, at best the Claimant is entitled to a Smith v Manchester award.

Evidence.

6. I have heard oral evidence from the Claimant, Christopher Sims, Gary Squires, Mark Green, James Watson and Gina Sims. I have read the expert reports of the respective Consultant Orthopaedic Surgeons Mr Bowyer, for the Claimant, and Mr Hepple, for the Defendant, together with their joint statement. I have also

considered descriptions of the surveillance evidence, some of which I have viewed.

7. In making any determination of fact I do so applying the civil burden and standard of proof. It is for the Claimant to prove his case on the balance of probabilities.

Evidence of Claimant.

8. The Defendant has attacked the credibility of the Claimant both as to his declaration of earnings received before and after the accident and as to the extent of his reported injuries. The Defendant applies to strike out the Claimant's claim for fundamental dishonesty. On this issue the burden and standard of proof falls on the Defendant. I deal with this at the outset.

9. There are various matters on which the Defendant relies. These are set out in Counsel's opening and closing written submissions and I do not propose to repeat them. I have taken all the points made into consideration. The Claimant was appropriately cross-examined during the trial as to his earnings, the various accounts he gave to the respective experts and to Ms Stewart on May 24th 2016 during his INA assessment. The most marked discrepancy relates to his assertion to Ms Stewart that he had not been working since the accident and that he could manage a light bag of shopping. In fact, he had just started a job for Binns Building fitting kitchens. Further, the surveillance evidence demonstrates that six weeks later he was using a cement mixer and carrying a bag of cement without apparent discomfort. The evidence further suggests that for a time the Claimant continued on benefits after he had started employment. I take into account those matters and criticisms made in respect of his disclosure of earnings pre-accident and post-accident.

10. However, I reject the submission that it was inherently unlikely that the Claimant would from time to time work for friends for free. I have heard the Claimant give evidence and been able to judge his credibility. Whatever reservations I may have about some aspects of the Claimant's evidence I accept the broad thrust of his evidence that prior to the accident his declared earnings represented his real earnings and after the accident he sometimes worked for friends for free.
11. I further accept Counsel for the Claimant's submission that any discrepancies in the context of the claim are relatively minor. Having heard the Claimant give evidence I am not satisfied to the necessary standard that he has been fundamentally dishonest in relation to the primary claim or to a related claim.

Loss of earnings.

12. I start with the agreed expert position. They would expect a patient with this sort of injury to have discomfort on uneven ground, problems using a ladder and not to be able to run for any significant distance or time. That is not to say that every patient with these injuries would suffer in this way at all times, or that it would be absolutely impossible for such a patient to do such activities infrequently or for short periods. The experts would, however, expect there to be some restriction regarding these activities which may hinder working in a physical demanding role. The Claimant will always be capable of sedentary work.
13. In assessing the extent to which the Claimant has been disadvantaged in the labour market as a result of his foot injury, I take into account the oral evidence from the witnesses, the surveillance evidence and the schedule of post-accident payments received by the Claimant.
14. In the period after the accident the Claimant was unable to work. Likewise, there was a period of unemployment after the Claimant underwent fusion surgery.

However, save for 2017, since March 2016 the Claimant has been in reasonably constant employment either fitting kitchens, as a digger operator or as a site supervisor. His charge out rates of £120 per day have remained at about the same level as before the accident. His earnings post-accident have comfortably exceeded his pre-accident earnings.

15. I accept that for the purposes of the 7th edition of the Ogden Tables he meets the necessary classification of being disabled. His foot injury is permanent. It substantially limits his ability to carry out normal day-to-day activities. I accept the Claimant's evidence that he feels no longer able to play football and avoids running. In terms of working in the building industry I also accept that his foot injury has had a substantial adverse effect on his ability to traverse rough ground and climb ladders. "Substantial" is defined by the S6 of the Equality Act 2010 as being more than minor and trivial. In my view the limitations arising from his foot injury are more than minor and trivial. The foot condition affects the amount of paid work he can do because, as I accept, he will not be able to take on work that involves, for instance, a significant amount of walking over very rough ground and carrying bricks up ladders.

16. The extent to which the Claimant's earnings will be affected in the future by his foot injury is a more nuanced question. The orthopaedic experts agree that there is some restriction to the Claimant's ability to carry out physically demanding work. Equally it is clear from their joint statement that any disability arising from this type of foot injury has to be judged according to the individual concerned.

17. I have had the advantage of viewing some of the video surveillance footage. It was clear to me that the Claimant was able to walk freely on level ground and lift and carry heavy weights. This appeared to be the case even before fusion surgery was

carried out. Overall this evidence also demonstrates that he was able to work a full day.

18. The medical records of July 18th 2017 and December 21st 2017 record that the Claimant was walking with minimal pain and complaining only of occasional discomfort when the weather was cold.

19. The fact that he has been in good employment since the accident demonstrates that he has a number of strings to his bow: digger work, fitting kitchens and site supervision in particular. Mr Green spoke highly of the Claimant's digger operating skills. In respect of his site supervision work it is asserted by the Claimant that this was a one-off job and not likely to reoccur. I am not persuaded by this assertion. Site supervision is now part of his experience and there is no reason why he should not find similar employment again. The Claimant himself agreed that the foot injury did not affect his ability to operate diggers, that it was an area of work he would look to develop in the future and that his damages award could give him funds to set himself up with his own digger.

20. I have reservations about the credibility of the Claimant as to the extent to which he says he is disadvantaged on the labour market. There is force in the submissions of Defence Counsel that the Claimant was less than open with the respective medical experts and with Ms Stewart as to the work he was able to do and was doing at the time.

21. I do not underplay the consequences of a foot injury of this type to someone seeking work in the building industry. However, my acceptance that the limitation arising from the foot injury is substantial is an acceptance that it is more than trivial. A disability can fall within a very broad spectrum.

22. Having considered the evidence, my assessment is that the disability here lies at the lower end of the spectrum. It does not preclude the Claimant carrying out building work where there is some infrequent ladder work or where there is some unevenness in the ground. There may be offers of employment where the ground is so rough and uneven or where the amount of ladder work is such that the Claimant has to turn it away. Against that, there is a lot that the Claimant can do in and around the building trade. It is likely that digger work will be an ever-increasing source of work in the future.

Past loss of earnings.

23. The Claimant's case is that he would have earned £23,145 net from August 2015 increasing to £29,471 net after 3 months. This is in marked contrast to the earnings declared for the three years preceding the accident.

24. The Claimant relies on the evidence of Gary Squires to the effect that but for the accident he would have secured the employment of the Claimant as a concrete floor layer with Nationwide Concreting starting at £120 per day with the prospects of progressing to a machine operator at £150- £170 per day.

25. I am bound to observe that this evidence smacks of being a little too good to be true. For three years prior to the accident the Claimant had not earned in excess of £7,100 per annum. It would mean a jump in earnings to about £29,000 per annum net within a short time of the accident. The first witness statement of Mr Squires was made about two years after the accident. When cross-examined Mr Squires lacked conviction when pressed about when and on what terms the offer of employment was made, whether it had been taken up by the Claimant and if so, why the Claimant was not already employed by Nationwide Concreting at the time of the accident. Mr Squires is a friend of the Claimant's family. I also found the

evidence of the Claimant unconvincing on this. I am not satisfied on the evidence that at the time of the accident there was a firm offer that had been accepted by the Claimant.

26. The task of calculating past loss is therefore necessarily imprecise. The evidence suggests that, save for a couple of days, there was a period of about seven months unemployment after the accident. There was also a period of unemployment of about 21 months after the Claimant underwent fusion surgery. However, the video evidence demonstrated that within seven months of the fusion surgery the Claimant was fit enough to carry out labouring and digger work for his friends. The medical evidence suggests that within twelve months of the fusion surgery he was only suffering from minimal pain in his foot. The fact that he was not paid for the work carried out for friends either reflects a lack of inclination to seek paid work elsewhere or a lack of availability of such work.

27. I am asked by the Claimant to ignore the level of pre-accident earnings on the basis that he was emerging from a black period in his life following the death of his father. However, the accident occurred three years after his father's death. It is unrealistic to suggest that the accident coincided with such a marked change in the Claimant's working pattern so as to move him from modest pre-accident earnings to earnings of £23,145 net from August 2015 increasing to £29,471 net after 3 months.

28. I am not satisfied on the evidence that when the Claimant was working post-accident his earnings were below the level he would have earned but for the accident. I accept that there was loss of earnings arising in the two main periods of unemployment after the accident when he was recovering from the accident itself and from the fusion surgery.

29. Because of the imponderables in this case I have to take a broad-brush approach in calculating those loss of earnings. The periods of unemployment post-accident and post fusion surgery totalled about 28 months. However, the overall history in this case suggests that the Claimant's work pattern included periods of unemployment. These were substantial prior to the accident and I heard evidence from the Claimant's mother to the effect that he was then living something of a hand to mouth existence during which she would give him financial handouts from time to time. Against that, the Claimant's work since the accident appears to have been more sustained.

30. Taking all these matters into account I assess damages on the basis that post accident the Claimant would have been in remunerative employment for a further twelve months but for the accident. As a yardstick for calculating the Claimant's lost earnings over a 12-month period I take the median earnings of an employee in the elementary construction business, that is £22,065 gross (Facts and Figures) £19,500 net. I note that the Claimant's gross earnings from 1 March 2019 to 28 February 2020 the Claimant was about £28,600 gross. However, this figure was partly derived from a one-off employment as a site supervisor and does not reflect labourer's rates. I see these earnings as being broadly in line with the median earnings of a labourer in the construction business.

31. On the broad brush approach I assess past loss of earnings at £19,500.

Future loss of earnings

32. The Claimant contends that future loss of earnings should be calculated by following the multiplicand/multiplier approach. A multiplicand/multiplier approach would calculate the Claimant's damages at in excess of £600,000.

33. The law in this regard is considered in a number of authorities. The Court of Appeal in the case of *Irani v. Duchon* [2019] EWCA Civ 1846 supported the proposition that what is described as a *Blamire* broad brush approach should only be taken where there is no real alternative. Not following a multiplier/ multiplicand approach would only be appropriate if it produced an "obviously unreal result". This was the position in the case of *Kennedy v. London Ambulance Services NHS Trust* [2016] EWHC 315 where reference was made to the decision of the Court of Appeal in *Billett v. Ministry of Defence* [2015] EWCA Civ 773. In both *Kennedy* and *Billett* the Court considered that the Claimant's actual earning capacity was much greater than that which would be assessed on a multiplier/multiplicand approach following the Ogden Tables. Similarly, in *XX v. Whittington Hospitals* [2017] EWHC 2318 (QB) Sir Robert Nelson sitting as a Deputy High Court Judge did not follow a multiplier/multiplicand approach in circumstances in which he accepted the Claimant was disabled by reference to the relevant definition, but the approach would result in an obviously unreal outcome. In that case, whilst the Claimant had significant ongoing problems, she had been able to continue working and had indeed been promoted at work.

34. I have made findings as to the impact the foot injury has and will make on the Claimant's employability in the building trade. I have accepted that, for the reasons rehearsed, he meets the necessary classification of being disabled. However, the disability in respect of his employability lies very much at the low end of the spectrum. In my judgement he will still be able to find good employment should he wish to continue to work in the building industry. I do not accept that he has lost the best chance of high paid employment. As an example, digger work gives him the opportunity to earn at a higher level than a labourer.

35. In my view the application of a multiplicand/multiplier approach does result in an obviously unreal figure for future loss of earnings. Even if I were to adjust the multiplicand the figure would still be unrealistically high. The Court of Appeal in *Billett* discourages Judges from making adjustments to the Reduction Factors in an attempt to produce a fair result. Making such adjustment is no more scientific than a *Smith v Manchester* assessment.

36. In this case the best I can do is make a broad assessment of the present value of the Claimant's likely future loss as a result of a handicap on the labour market following guidance given in *Smith v Manchester, Moeliker and Blamire.* I make it on the basis that there is a real risk that on occasion the Claimant will have to turn down work on construction sites. I have no real evidence on how often this will occur. On the evidence I have heard the Claimant's aptitude as a digger operator will enable him to develop this line of work and reduce the need for manual labouring jobs. I conclude that an appropriate award on a *Blamire* basis is two years loss of earnings.

37. The Claimant earned about £29,000 from March 1st 2019 to February 28th 2020. I agree with the Defendant's submission that this equates to net earnings of around £22,650 per annum. I round this down to £22,500 as being an appropriate annual loss of earnings figure for a *Blamire* award. I therefore make an award of £45,000 for future loss of earnings.

Loss of services

38. The claim asserts that the Claimant will be restricted in his ability to carry out the usual domestic and DIY services, in particular where it involves work from a ladder and on uneven ground.

39. I disagree. The Claimant is not prevented from using a ladder so long as it does not require prolonged work. From the evidence I have seen and heard I find that the Claimant is fit and able to carry out most if not all DIY tasks. I make no award under this head.

Award

40. General damages have been agreed at £42,500 inclusive of interest. Save for the loss of earnings claim, all heads of past loss have been agreed at £10,000 inclusive of interest. I make an award £19,500 for past loss of earnings and £45,000 for future loss of earnings. The total award of damages is therefore £117,000. To this will have to be added interest in respect of past loss of earnings.

41. I have considered the written submissions submitted by Counsel for the Claimant seeking permission to appeal. In essence he submits that I was wrong in (a) my assessment of past loss of earnings (b) taking a broad brush approach when assessing future loss of earnings alternatively in my assessment of such loss and (c) failing to make an award for loss of services. Having considered those submissions, I refuse permission to appeal.

Mr Recorder Bebb QC

HHJ ... on behalf of Mr Recorder Bebb QC

20.4.20.