Case No: ASSYP999

IN THE COUNTY COURT AT BRIGHTON

Date: 15th February 2019

Before His Honour Judge Simpkiss

Between :

PAUL MATTHEWS

Claimant

- and –

BUPA CARE HOMES (BNH) LTD

Defendant

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- -

Claimant in person
Ms. Angela Rainey (instructed by DAC Beachcroft) for the **Defendant**

Hearing dates: 4th and 5th December 2018
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Introduction

1. The Claimant was employed by the Defendant as a maintenance manager. On 16th November 2011 he says that he was injured whilst swapping a defective bed for another, so that the former could be repaired. He says that he felt a sharp pain in his back as he lifted a bed and fell to the floor. He brings these proceedings in order to recovery damages for personal injury. When the claim was issued it was for between £50,000 and £100,000. It is now, potentially, a very much larger claim running to in excess of £1m.

2. As the claim precedes the QOCS regime, it was brought under a CFA with ATE insurance issued on 1st February 2012. Notice of funding was served on 13th October 2013 and the proceedings issued in February 2015.
3. The Defendant disputed liability and causation, however, on 19th April 2016 the Defendant accepted a Part 36 offer from the Claimant to apportion liability and contributory negligence 66.6 to 33.3 in the Claimant's favour. Judgment to this effect was entered on 27 April 2016. The matter has proceeded since then to resolve the issues of quantum and causation.
4. There have been 6 experts involved in these proceedings, with each side obtaining reports from a psychiatrist, a pain expert and an orthopaedic expert. Dr. Bass, Dr. Edwards and Mr. Wilde for the Defendant and Dr. Ambler, Dr. Saunders and Mr. Ross for the Claimant.
5. The Defendant became concerned at some inconsistencies in the Claimant's case and decided to retain surveillance specialists. The covert surveillance started in October 2016 and further surveillance evidence was obtained in April 2017 and August 2017. Of particular interest was footage taken on the day that the Claimant attended experts for examination as this showed the Claimant on the day of each examination, before leaving for London, outside the expert's consulting room and later, on return to the Claimant's home. The examination by Dr. Edwards was filmed inside the consulting room with the Claimant's knowledge and consent.
6. On 14th May 2018 the Defendant issued an application to strike out the whole of the claim as an abuse of the process, on the ground that the court should conclude that this is an exaggerated and dishonest claim and that the court should reach this conclusion even though a trial has not taken place.

7. On 30th August 2018 notice was given for the hearing of the application on 8th November 2018 before the Designated Civil Judge. On that day other urgent matters were listed which delayed the start and counsel for the Defendant's counsel stated that as the Claimant was in person, more than 1 day would be necessary. His solicitors came off the record on 20th August 2018 and the ATE insurance has also been cancelled by the insurers.
8. The Claimant has had the papers for the Defendant's application since it was issued and the witness statement in support is very full and explains very clearly why the application is being made and the evidence relied on in support of it. Although he has not had any representation since his solicitors came off the record, he had solicitors for 3 months after the application was issued and he has served no evidence in relation to it. District Judge Bell gave directions for the Claimant to file a supplemental witness statement setting out his evidence in response to the surveillance. The Claimant's experts were also to serve further reports in relation to the surveillance.
9. Shortly before this hearing Ms. Rainey provided a more detailed and colour coded version of a chronology setting out clearly the contrasting evidence of the expert reports and the surveillance footage, upon which the success of the application rests. I accept Ms. Rainey's confirmation that it was sent to the Claimant before the hearing but he says although he had the original version by the earlier hearing in November, he didn't get this version until the hearing. After Ms. Rainey had opened the application I told the Claimant to read it overnight and then to say what he wanted to me the next day. In any event, Mr. Laight's witness statement contains the same material and the chronology is simply an even clearer explanation of the case. I am satisfied that the

Claimant has had sufficient opportunity to prepare his opposition to the application.

10. Although he had served no evidence, he had written a letter to the court explaining why he says he was not dishonest. He attached and signed a truth statement at the hearing and I accepted it as evidence. He also handed up a letter from his GP on the day of the hearing, which stated that the Claimant suffered from fibromyalgia. This has been an important part of the Claimant's case for a long time, but there is absolutely no evidence of any such diagnosis in any of the medical notes and none of the experts refers to a diagnosis. I am not prepared to accept a letter from the GP at such a late stage in this application – particularly as it does not explain why it was written (it is addressed "*to whom it concerns*"), provides no documentary evidence and does not explain the absence of any relevant reference from the medical notes nor who made the diagnosis. In any case, it would have made no difference to my decision because this turns on the interpretation of the authorities and an analysis of the surveillance evidence, pleadings and expert evidence.
11. Five of the experts have viewed the surveillance footage and provided updated reports. Dr. Ambler has acknowledged receipt of the footage, but has chosen not to comment on it. I will refer to this later.

The Law

12. The questions that arise are: whether and in what circumstances a claim can be struck out for dishonesty without a trial; and, should the whole claim be struck out even though it is clear that the Claimant would recover some damages if he had not also made a dishonestly exaggerated clam?

13. In **Summers v Fairclough Homes Ltd**. [2012] UKSC 26 the Supreme Court gave judgment on the issue of whether the court could strike out a claim as an abuse of the process in circumstances where it had awarded damages after a full trial, but dismissed a significant part of the claim as fraudulently exaggerated. This was a personal injury claim where surveillance evidence showed that the claimant was fraudulently exaggerating his condition.

14. Lord Clarke gave the judgment of the whole court and said:

"41. The language of the CPR supports the existence of a jurisdiction to strike out a claim for abuse of process where to do so would defeat a substantive claim. The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made. The only restriction is that contained in CPR 1.1 and 1.2 that the court must decide cases in accordance with the overriding objective, which it to determine cases justly.

42. Under the CPR the court has a wide discretion as to how its powers should be exercised: see eg Biguzzi v Rank Leisure Plc [1999] 1WLR 1926. So the position is that the court has the power to strike out a statement of case for abuse of process but at the same time has a wide discretion as to which of its many powers to exercise. The position is the same under the inherent jurisdiction of the court, so that in the future it is sufficient for applications to be made under the CPR".

15. Lord Clarke then goes on to say at paragraph 49:

"It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be small."

16. The decision itself relates only to cases where the abuse is found at the end of a trial, where the factors which are relevant to a strike out before trial, such as saving the waste of further costs or court time, do not apply.

17. Lord Clarke went on to say:

"Nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. As the Court of Appeal put it in Masood v Zahoor … in a passage which we agree, one of the objects to be achieved by striking out a claim it to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined."

18. The circumstances when it is appropriate to strike out a claim as an abuse of the process of the court was considered by the Court of Appeal in **Alpha Rocks Solicitors v Alade** [2015] EWCA Civ 685 on 9th July 2015. In that case a firm of solicitors sought to recover their costs from a client, who alleged that the costs were fraudulently exaggerated. The trial judge had struck out most of the claim having made findings that the claim was partly false and deliberately exaggerated and in respect of part, based on false documents and a bill which the solicitors knew to be inaccurate.

19. The claim was struck out under the powers provided by CPR 3.4(2)(b) and the inherent jurisdiction of the court. At paragraph 21 Vos LJ referred to Lord Clarke's judgment in **Summers** and said:

"21. It is important to emphasise, as did Lord Clarke in Summers supra, the range of available remedies when a situation arises in which a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise. Establishing fraud without a trial is always difficult. An it is open to a defendant to seek summary judgment on the claim under CPR 24.2(a)(i), without seeking to strike out for abuse of process. As Masood and Summers supra also demonstrate, striking out is available in such cases at an early stage in the proceedings, but only where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to continue to prosecute the claim, and where the claim should be struck out in order to prevent further waste of precious resources on proceedings which the claimant has forfeited the right to have determined."

24. .....But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied upon has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved.

20. At paragraph 25 Vos LJ said:

"*In my judgment, it is perfectly apparent from a reading of the judgment itself that the judge forgot his own repeated warnings to himself about not conducting a mini-trial and about the draconian nature of what he was contemplating doing. He did conduct an inappropriate mini fraud trial without hearing any witnesses. He decided that a solicitor was lying and that other witnesses were untruthful without their being cross-examined. In my judgment, that was a most unsatisfactory state of affairs. Of course, it can very occasionally be appropriate to conclude that there has been fraud without oral evidence being heard, but in this case the judge relied on forensic deduction in a case where oral evidence at least might have put a different complexion on the allegations made"*

21. The question is therefore whether the judge can be satisfied that there is an abuse of process on the ground of a grossly exaggerated or false claim without a full trial. Ms. Rainey argued that the decision in **Alpha Rocks** does not prevent a finding of abuse of the process in this case, as Vos LJ acknowledged was possible, and that there is clear direct evidence of fundamental dishonesty and no real prospect of oral evidence putting a different complexion on matters.

22. She referred to section 57 of the Criminal Justice and Courts Act 2015. This section was enacted as a response to **Summers** and the decision that it would be difficult to strike out the genuine part of a claim at the end of a trial that had concluded that a significant part of the claim had been dishonestly exaggerated.

23. Section 57 does not apply directly in the present case, but as Lord Clarke and the other authorities cited to me indicate, it is possible to strike out a claim as an abuse of the process, provided the court is satisfied that it is a clear case. In such circumstances the court may also strike out the genuine part of the claim. Ms. Rainey cited a number of decisions made following the enactment of section 57, and I have made a decision along the same lines in another case following a trial. They make clear the degree to which dishonest or exaggerated claims place a considerable burden on the public - through the cost to the insurance industry and therefore increase in premiums; and the enormous waste of court resources.
24. Ms. Rainey submits that following the enactment of section 57 there have been a number of decisions about the meaning of "*fundamental dishonesty*" which the Court of Appeal in **Howlett v Davies** [2017] EWCA Civ 1696 and the Supreme Court in **Hayward v Zurich** [2016] EWSC 48 made clear would amount to an abuse of the process.
25. One feature that distinguishes this type of case from cases like **Alpha Rocks** is the use of video surveillance evidence and the heavy reliance that a claimant must place on the opinions of the experts. They in turn are heavily reliant on how the claimant describes his symptoms to them – particularly in cases of back and shoulder injury and in pain cases. This means that it may be easier to demonstrate that symptoms are clearly exaggerated or dishonest without any. The abuse is that the claimant has misrepresented his symptoms to the experts and where they agree that this is the case it is very difficult to see how there can be any other conclusion at trial than one that the claim is dishonest. There

is no real prospect of the Claimant succeeding in putting a different complexion on this evidence in oral evidence.

26. I was cited several examples of personal injury claims which have been struck out before trial on the grounds of dishonest exaggeration since **Summers**: **Fari v Homes for Haringey** (HHJ Mitchell Central London CC 09/10/12; **Scullion v RBS** (HHJ Cotter QC, Exeter CC 14/05/13; **Plana v First Capital East Ltd** (HHJ Collender QC Central London CC 15/08/13; and **Admans v Two Saints Ltd** (Recorder James Watson QC Swindon CC 24/06/16. **Fari**, **Scullion** and **Plana** all involved the impact of surveillance evidence.

27. An important factor to be taken into account in deciding whether the exercise the power to strike out the claim is the overriding objective. This point was emphasised in the pre-**Summers** case of **Arrow Nominees v Blackledge** [2000] EWCA Civ 200 (a very different case factually) by Chadwick LJ at para 53 to 55:

"The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the real effect of the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself."

Decision

28. Ms. Rainey submitted that this was the most blatant example of a dishonestly exaggerated injury that she had seen in her own practice. That is not of course

the test that I must apply, but for the reasons I will now set out, this is an extreme example.

29. The Defendant's case was painstakingly set out in the schedule produced by Ms. Rainey. I was taken carefully through the evidence in support of some of the examples. This comprised the Claimant's account of his injuries to particular experts on examination, video surveillance evidence taken on the day of the examination beforehand and afterwards without his knowledge, and in one case with his consent during the examination. Each expert has been given the opportunity of viewing the surveillance evidence and all but one have provided supplemental reports which either support their previous doubts or arrive at very different conclusions from their earlier reports.
30. I do not propose to set out in detail all of the evidence which I was shown, but will refer to some. I have viewed all the video evidence and am satisfied that the other examples given in the schedule are strongly supported by them.
31. Before the accident medical notes show that the Claimant had suffered from back pain sufficient to mention to his GP on 21st July 2011 and 3rd October 2011 telling the GP on 2nd November 2011 that it had not yet gone away – only 2 weeks before the accident. He did not inform any of the experts of this. The Claimant also contends that he has been diagnosed as suffering from fibromyalgia – producing a letter purporting to come from his GP at the hearing before me stating this. I excluded that evidence on the grounds that it was too late to produce it that its provenance was very uncertain. It did not say when the diagnosis was made nor explain where that information had come from. The fact of the matter is that throughout these proceedings no evidence

has ever been produced to confirm that such a diagnosis has ever been made, and there is no reference to one in any of the medical notes.

32. On 10th February 2015 the Claimant was examined by his orthopaedic expert: Mr. Ross, whose report is of the same date. He attended using 2 crutches and told Mr. Ross that his lower back symptoms had worsened over time and that he was in constant pain, had been diagnosed with fibromyalgia and needed to use walking aids intermittently.

33. He was next examined by Mr. Ross on 18th May 2017. His report notes that the Claimant had told him that he continues to experience severe pain in the lumber spinal region. "*Despite having been admitted to pain rehabilitation at St Thomas's hospital his lumbar spine remains unaltered*". His clinical examination by Mr. Ross remained as it had before although he only used one stick. His left arm was immobilised in a collar and sling which he said was as a result of a separate accident in the garden. It showed showed no clinical evidence of anything that might cause his condition but walked with an antalgic gait and very slowly and stiffly.

34. On 23rd May 2017 the Claimant was examined by his pain expert, Dr. Sanders. He records that the Claimant presented as "*profoundly disabled*" and stated that he was reliant on a walking stick in his right hand. Dr. Sanders described his mobility as very poor. Dr. Sanders had significant suspicions about the Claimant's credibility – even before the surveillance evidence was disclosed. On 25th May 2017 the Claimant was examined by Dr. Ambler, his psychiatric expert. Dr. Ambler recorded that the Claimant told him "*He had been incapacitated by [constant pain] being unable to walk without one crutch or to work*". He could drive but had difficulty getting into and out of a car.

35. Surveillance was carried out on 25th and 26th April 2017 which was not shown to me and which I have not seen. The evidence of what is shown is that it shows the Claimant walking outside his home at numerous and various times of the day without a walking stick and getting into and out of his car without manifesting any difficulty. He carries rubbish to his bins and a normal gait is recorded in relation to one incident.
36. The first surveillance dvd that I saw related to 1st and 7th August 2017. On 7th August 2017 he is seen outside his house before he goes to see Mr. Wilde, the Defendant's orthopaedic expert and later on his return after the examination.
37. Mr. Wilde's report records that the Claimant told him that he is in constant pain in the lower back which was present all the time. He would never go out without a walking stick to prevent him falling over. He could walk for a few minutes but would then need a rest. He could not drive for more than a short period. On examination he demonstrated very limited lower back movement of less than 10% normal.
38. The surveillance evidence on 1st August 2017 shows the Clamant outside his house. He comes out, gets into his car with no apparent difficulty and is driven away. He returns 28 minutes later and then walks round to the passenger side and bends down into the car. He takes out some items and then walks to his house with no difficulty. He is later seen on several occasions in his drive and garden without any stick.
39. The surveillance on 7th August 2017 is important evidence. He appears at first at 11.23 opening the boot of his car and reaching inside for something. He then closes it with his right hand. He is shown rubbing his back when bending but has exhibited a high degree of back movement and rising form a flexed

position when bending with a normal rhythm. When a neighbour arrives, he moves much less well but when she departs 2 minutes later. he recovers to his previous degree of movement. There are no walking aids used although after a short drive in his car, he returns and gets out demonstrating a slight limp. After going into the house, he then comes out to get into a taxi to Horley station. At this stage his arm is in a sling and he is carrying a stick.

40. He is next seen in Harley Street, London arriving for his examination with Mr. Wilde. The edited dvd shows the Claimant after his examination. He has a stick in his right hand but does not appear to require it for load bearing. He walks painfully slowly down the street while using his left hand to hold a mobile phone to his ear. He sits down on some steps for 12 minutes. He then gets up using his stick and then walks down the pavement with his arm only intermittently resting in the sling which clearly appears to provide no significant support. He then spends the next 30 minutes walking round Cavendish Square slowly, but without apparently using the stick to take any weight. When he returns to Harley Street he is not even using the stick and sits down on some steps without the need for the stick. After 16 minutes he stands up using the stick and then bends down to speak to a taxi driver, gets into the car and is driven away.

41. He is next shown 2 hours later arriving in a taxi at his house. The description in this paragraph is taken from Mr. Wilde's own description of the dvd evidence as it appears in his report following his observation of them. The Claimant walks to his house with his arm in the sling and using the stick. 4 minutes later he leaves the house with no sling or stick and gets into his car which he drives off. He returns 16 minutes later and gets out of his car to

speak to a neighbour. He then walks to his house without a completely normal gait, which could be consistent with discomfort to his back. He does not use any walking aids. 40 minutes later he comes out of the house and walks across the street showing a strange limping type gait but no stick. When he returns to the house 2 minutes later he has a normal gait and, although he limps occasionally, he is walking is with a gait more secure and confident that at any time earlier that day. He goes into the house and then comes out again, gets into his car and drives away. He has one more car trip later that evening.

42. Further surveillance took place on 14th August 2017 when the Claimant attended an examination by Dr. Edwards, the Defendant's pain expert. This is the most revealing evidence of all.

43. The first footage takes place as he arrives at Highgate Clinic to see Dr. Edwards. He emerges from the passenger side of a car wearing a sling and carrying a stick. As he crosses the road he places his arm into the sling and is seen to have a pronounced limp in is left leg.

44. Once inside Dr. Edwards' consulting room he exhibited "*pain behaviour*" which Dr. Edwards described as "*somewhat bizarre*". The video footage shows that he has very limited bending ability. He struggles to raise his arms to shoulder level and he is unable to kneel or squat. When asked to stand, he had to be handed his stick and then demonstrated that it was a very significant struggle to stand up. This was very marked when observing the dvd.

45. At 13.17 the Claimant is filmed covertly leaving Highgate Clinic after his examination by Dr. Edwards. The sling is still round his neck, but his arm is no longer in it and he transfers his mobile phone from his pocket with his right hand to his left hand. He then holds his walking stick in his right hand while

holding the phone in his left hand and walks with a limp until a car picks him up.

46. The final dvd footage that I will refer to was taken without the Claimant's knowledge outside his house at 15.13 once he has returned home from seeing Dr. Edwards. It is an astonishing contrast to the dvd taken in Dr. Edwards' consulting room.

47. At 15.15 he is seen leaving his house, holding the left side of his back but leaning forward to do something to some plants. He appears to walk fairly easily and goes into a garden shed. At one point he lifts a large mirror and carries it behind the garden shed. He is seen returning without it. He then carries another large object to the back of the shed and returns without it and enters his house.

48. At 15.26 he comes out of his house and gets into his car which he drives away. He returns at 16.23 and parks his car. He gets out of it easily with a normal gait, bends down to pick something off the ground, takes some shopping bags out of the front passenger side and takes this into the house. He returns and is seen bending into the front passenger side doing something. He takes some more shopping bags into the house and again in a further trip. There is no sign of a stick and the Claimant has no difficulty getting out of his car. At one point he raises his arm to waive at a neighbour, raising it far higher than he had previously demonstrated to Dr. Edwards.

49. The dvd evidence is also in very stark contrast to what Dr. Edwards records the Claimant telling him during the examination. There is no evidence from the Claimant disputing this, and it is difficult to see how there could be since it was all recorded. The following are relevant extracts:

a. The Claimant repeats his assertion that he has been diagnosed with fibromyalgia.
b. He is in constant pain down the backs of both legs to the heels.
c. On a good day he can only walk about 10 metres.
d. Walking is extremely limited, he always uses a walking stick, bending is very limited and he is unable to kneel or squat.
e. He struggles to lift anything more than 4 pints of milk.
f. He struggles reaching forward or above his head.
g. He would never shop alone, always having help from his mother.
h. He can drive, but never far or for more than 15 minutes.

50. All the experts have been offered the opportunity of viewing the dvd evidence. With the exception of Dr. Ambler (the Claimant's psychological expert) the Claimant's experts have all responded.

51. Mr. Ross concludes that the surveillance evidence indicates that the Claimant is independent and able to perform activities of daily living, including driving a car. His gait is slightly abnormal "*although not antalgic*". The surveillance demonstrates an alteration in, and probable exaggeration of his symptoms. He remains of his previous opinion that the Claimant presents with features of chronic lumbar spinal pain without significant evidence of neurological involvement with a degree of overlay with a psychological component. He originally recommended a psychological report, which was taken forward by Dr. Ambler's report. In his joint statement with Mr. Wilde (the Defendant's orthopaedic expert) Mr. Ross agreed that the psychological aspect was outside their area of expertise.

52. The Claimant's pain expert, Dr. Saunders, wrote a letter expressing his views following the surveillance footage. He points out that the footage shows the Claimant functioning "*in a seemingly normal fashion*" without walking aids and is able to carry shopping with a twisting movement. "*There is a clear discrepancy between his presentation walking into the Highgate Clinic and his presentation videoed as part of the examination [by Dr. Edwards]. There can be no pain explanation for the discrepancy and instead one is led to consider this inconsistency to be suggestive of motivational factors*". He does not exclude psychological factors as contributory but considers this unlikely. Nor does he consider that fibromyalgia would explain such a variability in presentation.

53. The Defendant's orthopaedic expert, Mr. Wilde, gave a supplemental report. He said that the surveillance evidence was consistent with someone who has some symptoms in their lumbar spine and that the footage depicted various levels of discomfort and disability. The maximum disability appeared to be when he attended for medical examinations in relation to these proceedings. He finds the evidence of the surveillance "*difficult to reconcile*" with what the Claimant told him his average level of activity was, suggesting that this might indicate that he was trying to mislead the experts. He also acknowledged, correctly, that this was an issue for the court. His view was that the footage indicated lower back ache consistent with the complaints he described to his GP prior to the index accident and not consistent with severe back pain. His original view that the Claimant had suffered a short term aggravation of existing back pain remained the same as in his earlier report.

54. I have discussed Dr. Edwards' evidence above, and he had always considered that there might be a conscious element in the Claimant's reporting of symptoms. He was unable to explain the discrepancies between the Claimant's reports of his condition and the presentation in the surveillance evidence and he concludes that the Claimant has consciously exaggerated his disabilities.

55. Dr. Bass, the Defendant's psychiatric expert, first examined the Claimant on 6th March 2017. He took a full history in which the Claimant explained his typical day and his current symptoms. He was able to move on the flat (but only up to 20 metres) with crutches and was not able to go shopping. His symptoms had been getting worse over 5 years. The Claimant also told him that he had been diagnosed with fibromyalgia and that there was a strong family history of this disorder. Whether or not the Claimant has in fact been diagnosed with fibromyalgia, Dr. Bass's clear view was that it had nothing to do with the accident.

56. Dr. Bass's supplemental report, following viewing the surveillance evidence, is dated 30th April 2018. His opinion is that the surveillance evidence starkly contrasts with the description that the Claimant gave to him in 2017 of his symptoms. His view was that he was unable to avoid the conclusion that the Claimant was intentionally presenting himself as being significantly more disabled that he is. There is evidence of conscious exaggeration for secondary gain. He does not suffer from a somatoform disorder nor any recognised psychiatric illness.

57. This leaves the evidence of Dr. Ambler. She examined the Claimant at his home on 30th May 2017. She has not commented on the surveillance evidence, even though the Claimant's solicitors remained on record until August 2018

and the Claimant's other experts commented. He gave her a similar description of his current condition to the one given to the other experts (although volunteered that he had driven on longer journeys in his car). He walked only with an elbow crutch and was limited to 20 yards at a time, with regular stops. She also was told of a fibromyalgia diagnosis.

58. Dr. Ambler concludes that there is nothing to raise any her mind any doubts about the reliability of the Claimant's account to her. She then refers to his description as signifying a psychological distress developing in reaction to unremitting pain which has incapacitated him in everyday functioning and diagnoses an adjustment disorder.

59. In my judgment, it there is no real prospect of this opinion standing up against the evidence from all the other experts that the surveillance evidence shows a very different picture of the Claimant's disability and his tailoring of his presentation to the experts to have examined him. I would expect Dr. Ambler, had she commented on the new evidence, to have reached the same conclusion as the other experts, at least to a significant degree. The fact of the matter is that she has not commented and her current evidence cannot stand as it is.

60. Although the Claimant put in no evidence to counter the Defendant's application, I agreed to take into account the letter that he had written which is undated. In it he says that his back continuously hurts. On some days his body seizes and he can't even get out of bed, but there are some good days when he can perform medial tasks in moderate pain until the intensity becomes too much. This is not mentioned to any of the experts and there is no explanation for the sharp contrast between his presentation on examination and the surveillance footage on his return home the same day.

61. The Claimant specifically comments on the surveillance on 14th August 2017 (wrongly stating 18th August 2017). He says that the stress of the long drive to Highgate Clinic coupled with the appointment itself, exacerbated his condition and severely affected his ability to function. He explains the later footage as being a visit to his mother (4 doors down) who was terminally ill and therefore the urge to see her overcame his disability. The movement of the mirrors was motivated by the need to put them in a safe place because his children were coming to visit. This simply doesn't stack up at all. The shopping he explains he did because his mother was terminally ill.
62. In the light of the evidence which I have set out above, and bearing in mind that the court should not strike out or dismiss a claim before trial unless it was satisfied that it was a clear case of abuse of the process. In my judgment this is a clear case.
63. I am satisfied that there is no real prospect of a court at trial finding that the Claimant has not intentionally exaggerated his disability to a significant extent and for the purpose of greatly increasing the amount of damages that he might be awarded. This is fundamentally dishonest within the meaning of expression defined by Judge Moloney QC in **Gosling v Halo** (unreported) as approved by the Court of Appeal in **Howlett v Davies and Anor**: "*If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim*". While the expression "*fundamentally dishonest*" has no direct relevance to his application, it is a useful approach to deciding whether the claim is an abuse and the consequence of such a finding to the overall claim.

64. The picture presented by the Claimant to all his experts is a false one. This leads to a number of consequences. Firstly, their reports are not of much relevance as they stand because they are founded on a false set of facts given to them by the Claimant. Secondly, the discrepancy between this picture and the evidence of the video surveillance evidence has meant that each expert's report needs to be supplemented following a view of the new evidence adding to costs. At this stage, those costs have been incurred. Thirdly, what should have been a relatively straightforward claim is in fact as much more complex and expensive one which will require further expert evidence and more extensive cross-examination at trial than necessary. The trial will concentrate on the credibility of the Claimant and not on what should have been straightforward issues of an accelerated back condition. Fourthly, the issue of liability is also likely to be re-opened. Although the Defendants admitted breach of duty, the position is now that there must be a serious question whether the Claimant's account of the accident and the cause of any injury as a result is in doubt. Fifthly, if the claim proceeds to trial the Defendant is very unlikely to recover any costs. These costs were already very substantial before the surveillance evidence came to light but are likely to increase considerably. Costs incurred by the Defending in continuing to defend this claim are therefore likely to be thrown away. Considerable costs have been incurred in relation to the dishonest part of the claim, which is much the most substantial proportion of the claim, and which are unlikely to be recovered in any event.
65. My conclusion is that the Claimant's claim to having suffered a long term a debilitating disability as a result of the Defendant's breach of duty is a dishonest one and there is no real prospect of a trial reaching any other

conclusion. It is an abuse because his false presentation undermines the value of the expert evidence and presents a completely false picture of his injuries. His claim that he suffered a short term exacerbation of an existing back condition may also doomed to fail because of the effect on his credibility. Even if that were not the case, he has forfeited the right to continue any part of his claim as a result of his abuse of the process in misleading the experts and bringing a dishonest claim.

Conclusion

66. I therefore strike out the whole of the claim as an abuse of the process on the ground that it is fundamentally dishonest, indeed a very significant part of it has been dishonestly exaggerated by the Defendant in his account of his disability to the experts and in his pleaded case.

67. It has been suggested that the court should indicate whether I was satisfied to the criminal standard of proof that the Claimant had deliberately exaggerated his disability. This is what Judge Bidder had done in the county court trial in **Aviva Insurance Ltd v Kovack** [2017] EWHC 2772 (the contempt application before Spencer J).

68. While the case against the Claimant is a very strong one, and I have found clear evidence that justifies striking the claim out as an abuse of process, the court should be very careful about making findings to a criminal standard at in a strike out application. Judge Bidder reached his conclusion after a trial. There is the possibility that there is a psychological explanation in this case, although the only relevant expert who has viewed the surveillance evidence thinks this unlikely. There is a set procedure for bringing claims for contempt and it is not appropriate for me, on a strike out application, to make any

findings or express an opinion on the criminal standard of proof. I have found that there is no real prospect of a trial finding that the Claimant had not deliberately exaggerated his disabilities for the purpose of increasing the damages that he might recover.