

Browne Jacobson successful in fundamental dishonesty appeal ruling on behalf of the Medical Protection Society

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Summary

In *Simpson v Payne*, the Defendant/Respondent (Defendant) was successful before Her Honour Mrs Justice Collins Rice in having the Claimant/Appellant's (Claimant) appeal against a previous finding of fundamental dishonesty dismissed resulting in a further enforceable costs order against the Claimant directly.

The Claim

The Claim was initially brought against the Defendant for the alleged negligent breast augmentation surgery by the Defendant in February and May 2013. The Claimant alleged that the surgery had left her unable to work as a glamour model for seven months and that she had to undergo revision surgery in Belgium in September 2013 to rectify the appearance of her breasts. It was pleaded that the Claimant had only become satisfied with her appearance after the surgery in Belgium and this is when she was able to work. The Claimant also made a claim for livery and stabling costs as it was pleaded that she was unable to ride her horses following the surgery.

The Defendant pleaded fundamental dishonesty in the Counter Schedule of Loss and the Claimant discontinued the Claim against the Defendant only 7 working days before Trial. The Defendant was granted permission to pursue allegations of fundamental dishonesty. Social media evidence was disclosed to the Claimant evidencing the Defendant's allegations of fundamental dishonesty which showed the Claimant working as a glamour model during the relevant period and which confirmed that she had been riding her horses.

Previous Judgement and Findings of Fundamental Dishonesty

The matter was heard before His Honour Judge Murdoch who concluded that the Claimant had been fundamentally dishonest in the primary and substantial part of her Claim. In particular he found fundamental dishonesty with regards to her claim for loss of earnings and horse riding.

Claimant's Appeal

The Claimant appealed the finding of fundamental dishonesty on the grounds that the lower Court should have given more weight to witness evidence and on the basis that she had not been fundamentally dishonest regarding horse riding. She abandoned the latter ground for appeal shortly before the hearing.

The Claimant argued that "the Judge erred in failing to attach any, or any sufficient, weight to the admissions made by her former solicitors that they had not transposed her instructions on loss of earnings into her schedule of loss or witness statement" and that a "very different conclusion would have been reached if he had."

During the appeal hearing the Claimant made the following arguments:

- The Claimant was being held accountable for actions of her solicitors who were representing her at the time and the Judge did not look at or pay sufficient weight to the two witness statements from her previous solicitors which referred to “Subtle drafting errors”.
- As a litigant in person, the Claimant would not have known the legal mechanisms to call her former solicitors to Court and any criticism in failing to do so is a harsh criticism.
- The Judge did not take into account the Claimant’s literacy issues in his finding of fact that the Claimant read her witness statement and that she was giving evidence based on her memory.

Appeal Hearing

The Defendant made the following arguments to show that the Judge had made no errors of fact:

- The Judge had the witness statements of the Claimant’s former solicitor and was referred to those by the Defendant’s counsel in closing submissions and the Claimant referred to these statements throughout the hearing.
- No good reason was advanced as to why the Judge should have placed any or any great weight on the statement of the Claimant’s former solicitor. He was not called as a witness to test his evidence and the Claimant herself called into question the reliability and credibility of her former solicitor as a witness.
- The evidence of the Claimant’s former solicitor provided further evidence of the Claimant’s dishonesty which set out what were purportedly her true instructions (that she was unable to work at full capacity and specifically stated her limitations were in respect of topless work). There was ample evidence before the judge that not only was the Claimant’s initially pleaded case true but so was the account given apparently by way of correction or amendment to her former solicitors.

Justice Collins Rice made two general observations about the conduct of the previous trial. Firstly she noted that the Judge was aware of the Claimant’s disadvantages as a litigant in person with some literacy issues. Justice Collins Rice held that “he actively sought to support her full participation in the proceedings and took steps to do so.”

Secondly, Justice Collins Rice noted “the consequences of leaving the witness box and not continuing to provide oral evidence under cross-examination were fully and fairly described to her at the time she was making her choice about whether or not to do so.”

Regarding the specific question of the claim for loss of earnings, Justice Collins Rice felt that it was clear all the witness statements dealing with the issue of the Claimant’s solicitor’s role were before the Court and the Claimant made her position on this very clear to the Judge. What Justice Collins noted was, it was “clear that the Judge did not give determinative or even very significant weight to this evidence” and reasons were given for this including the fact that the Claimant did not call the solicitors or adduce evidence of her own about the nature of her instructions and that she had gone out of her way to undermine her former solicitors’ credibility “that in itself was a proper reason for not giving it real weight.”

Justice Collins noted that two further points arose:

- “First, the Judge had found as a fact that the Claimant has read her witness statement, did understand what it said, and did assent to it. She clearly had ample opportunity to ensure that she knew what it said – and an obligation to do so”
- Even if the Judge had accepted the solicitor’s evidence, what it amounted to was a case that the Claimant was only able to do limited or unpaid work as she could not go fully topless. The Judge concluded that this could not be true as the social media evidence provided by the Defendant showed the Claimant working topless during the period in question. “So, in any event, the Judge found the evidence the Claimant put forward on this inconsistent and unpersuasive.”

The Decision

Justice Collins Rice held that “In all these circumstances I cannot conclude that his decision was wrong. It was one that was reasonably open to him, supported by a full and fair consideration of the evidence, and explained with a sufficiency of reasoning. I find no basis for interfering with the Judge’s decision. This appeal is dismissed.”

Impact of the Decision

The core issue for the Judge in the previous fundamental dishonestly trial was to “hear, assess and balance the evidence, especially the oral evidence a Claimant chooses to give or not to give, including under cross-examination, and reach an overall conclusion.” In doing so it is a Judge’s job to decide whether to give more weight to certain evidence over others which he did in this case and gave reasons for doing so.

In reaching her decision, Justice Collins Rice made it clear that “it is not enough to succeed on an appeal that the Claimant disagrees with the evaluation made or thinks that the Judge should have given more weight to the solicitor’s evidence and treated her own account more favourably” and it has to be shown that a Judge went wrong to the extent of reaching a conclusion not properly open to him.

Louise Jackson of Browne Jacobson was instructed by MPS, and Claire Watson, Counsel from Serjeants Inn Chambers, represented them at hearing.

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