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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **10/05/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

MAURICE WEIR

Plaintiff/Respondent;

-and-

THE COUNTRYSIDE ALLIANCE LIMITED

Defendant/Appellant.

Before: GILLEN LJ, WEIR LJ and MAGUIRE J

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from the decision of McBride J delivered on 16 February 2016 in which judgment was given for the plaintiff together with an award of damages totalling £62,080 plus interest. The claim is for loss of pigeons, consequential loss, costs of repairing aviaries together with damages for distress and injury to feelings on the basis that the defendant was negligent in and about the care, management and control of its dogs on 7 February 2009 and/or acted in breach of statutory duty as set out in Articles 29 and 53 of the Dogs (Northern Ireland) Order 1983 and Article 8 of the Animals (Northern Ireland) Order 1983 by allowing its dogs to damage livestock, trespass to lands and goods and thereby causing damage to the pigeons and aviaries.

[2] Mr Ringland QC appeared on behalf of the appellant with Mr Maxwell. Mr Stitt QC appeared on behalf of the respondent with Mr Terry Ringland. We are grateful to counsel for their helpful and extensive submissions.

Background

[3] The plaintiff's claim arises out of the alleged killing of 59 pigeons owned by the plaintiff by hounds belonging to the Kinnego Grange and Canary Hunt Club

("the Hunt") on 7 February 2009. The appellant's case was that the claim was a fraud, that the incident with the Hunt never occurred and that the plaintiff had killed his own birds by wringing their necks as part of that fraud.

[4] In correspondence between the solicitors acting on behalf of the parties prior to trial, an agreement had been reached as to the appropriate nomenclature of the defendant. In a letter of 18 July 2011 the plaintiff's solicitor had recorded:

> "We refer to your letter of 20 June last and the correct name of the defendant. Counsel had initially drafted the name of the defendant as being; 'Robert Irwin (Master of the Hunt) and the Officers and Trustees of Kinnego Grange and Canary Hunt Club'. To avoid any problems in this regard can you please confirm that you provide insurance cover for the above organisation and that if we do name the defendant as 'The Countryside Alliance Limited' that will cover the above organisation."

[5] In correspondence of 26 July 2011 the solicitors for the appellant replied:

> "We would advise that our instructing insurers have informed us that they have no objection to the title of the defendant as proposed within your recent correspondence."

Grounds of appeal

[6] In the course of a voluminous Notice of Appeal, stretching over eight pages in length the appellants listed 19 grounds of appeal asserting that the learned trial judge ("LTJ") erred in the following respects:

Ground 1 - In holding that Mr David Calvin was an independent expert witness.

Ground 2 - In holding that the plaintiff had suffered a loss of 59 pigeons when it was clear that only 49 pigeons had been killed.

Ground 3 - In finding as a fact that the plaintiff had contacted police by telephone on 7 February 2009 when there was evidence that the first and only report was made on 8 February 2009.

Ground 4 - In holding that the plaintiff had contacted the dog warden on 7 February 2009.

Ground 5 - In finding that the documentation provided by the plaintiff in respect of the repairs was genuine.

Ground 6 - In finding that the plaintiff was not a member of the Hunt Club.

Ground 7 - In accepting that the terms "racing pigeon" and "stock pigeon" were interchangeable in the context of the case.

Ground 8 - In accepting the plaintiff's evidence in light of his failure to produce paperwork to confirm the actual value of a single pigeon.

Ground 9 - In accepting the plaintiff's claim for consequential loss in principle and in substance.

Ground 10 - In failing to have proper regard to the unsatisfactory documentary evidence and unexplained absence of documents.

Ground 11 - In failing to place any or sufficient weight on the plaintiff's failure to call witnesses who might have been expected to be called.

Ground 12 - In failing to place proper or any weight on the evidence of the plaintiff's engineer as to the difficulty of gaining access to aviaries.

Ground 13 - In failing to place any or sufficient weight on the evidence of Stuart Scull, animal behaviour expert as to the unlikelihood of hounds splitting up and attacking birds.

Ground 14 - In placing any or any substantial weight on the evidence of Gerald Weir the plaintiff's son.

Ground 15 - In accepting the evidence of Mr Calvin as an expert or, if his valuation was admissible, the valuation had occurred as at November 2013 whereas a proper valuation date was 7 February 2009.

Ground 16 - In failing to apply the principles set out in Summers v Fairclough Homes Limited [2012] UKSC 26.

Ground 17 - In concluding that the club's hounds had killed the plaintiff's pigeons.

Ground 18 - In ignoring the veterinary evidence of the defendant's expert witness Mr Griffith who had found no evidence of damage consistent with an attack by hounds.

Ground 19 - In disallowing cross-examination as to the credit of the plaintiff in relation to his eligibility for legal aid.

[7] In order to introduce some systematic approach to these wide-ranging grounds of appeal we have divided them into five categories:

(i) The plaintiff's credibility – Grounds (2), (3), (4), (5), (7),(8), (10), (11), (17) and (18).

(ii) The credibility of the independent expert Mr Calvin – Grounds (1), (2) (9), (15) and (16).

(iii) The weight to be attached to or the credibility of other witnesses namely the plaintiff's engineer at ground (12) (on the issue of access), Mr Scull at ground (13), and Mr Weir at ground (14).

(iv) The discrete issue of the plaintiff's club membership at ground (6).

(v) Cross-examination of the plaintiff as to credit at ground (19).

Principles governing this appeal

[8] The role of an appellate court has recently been defined in the United Kingdom Supreme Court in Carlyle (Appellant) v Royal Bank of Scotland Plc (Respondent) (Scotland) [2015] UKSC 13.

[9] At paragraph [21] et seq Lord Hodge said as follows:

> "But deciding the case as if at first instance is not the task assigned to this court or to the Inner House. … In Thomas v Thomas 1947 SC (HL) 45 the House of Lords re-asserted the need for an appellate court to defer to the findings of fact of the first instance judge unless satisfied that the judge was plainly wrong …… Lord Greene MR (*said in*) in Yuill v Yuill [1945] P 15 (at p 19):
>
> > 'It can, of course, only be on the rarest occasions, and in circumstances where

> the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'

At page 9 Lord Reed summarised the relevant law in para 67 of his judgment in (Henderson v Foxsworth Investments Limited) in these terms:

> 'It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.'

When deciding that a judge at first instance who has heard the evidence has gone 'plainly wrong', the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal.

22. The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence."

[10] Whilst not citing Carlyle's case, counsel did cite a large number of other cases summarising the general approach to be adopted by appellate courts including Murray v Royal County Down Golf Club [2005] NICA 2, Savage v Adam [1895] WN (95) 109 (11), Coghlin v Cumberland [1898] 1 Ch 704, Lofthouse v Lester Corporation [1948] 68 TLR 604, Northern Ireland Railways v Tweed [1982] NIJB 4, McClurg v Chief Constable [2009] NICA 37 and Biogen v Medeva plc [1996] 38 BMLR 149.

[11] The principles outlined in these cases are well-trodden and have been repeated in an array of cases in this jurisdiction. They add little to the principles already set out in Carlyle's case but, as an addendum to those principles, we cite Lord Hoffmann in Biogen's case at p165 where he said as follows:

> "The need for appellate caution in reversing the judge's evaluation of facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation."

[12] It is also worth quoting from this court's decision in Haughey v Newry & Mourne Health & Social Care Trust [2013] NICA 78 where the court invoked the words of Lord Reid in Benmax v Austin Motor Co Ltd [1955] AC 370 namely:

> "Apart from cases where an appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the Appeal Court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is or not trying to tell what he believes to be the truth, and it is only in rare cases that an Appeal Court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that; the trial judge may be led to a conclusion about the reliability of a witness's memory or his

> powers of observation by material not available to an Appeal Court. Evidence may read well in print but may be rightly discounted by the trial judge, or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an Appeal Court is and should be slow to reverse any finding which appears to be based on any such considerations."

[13] We observe that the LTJ cited Thornton v NIHE [2010] NIQB where Gillen J at paragraph 13 stated:

> "In assessing credibility the court must pay attention to a number of factors which, inter alia, includes the following -
>
> - The inherent probability or improbability of representations of facts.
> - The presence of independent evidence tending to corroborate or undermine any given statement of fact.
> - The presence of contemporaneous records.
> - The demeanour of the witnesses e.g. does he equivocate in cross-examination.
> - The frailty of the population at large in accurately recollecting and describing events in the distant past.
> - Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication.
> - Does the witness have a motive for misleading the court.
> - Weigh up one witness against another."

[14] The essence of the defence raised in this matter was that the plaintiff had been guilty of fraud. Gross v Lewis Hilman Ltd [1970] Ch 445 is an illuminating case in considering the appropriate approach in such instances. It was a case which arose out of an action by a plaintiff to rescind a conveyance and for damages for deceit on the ground or fraudulent misrepresentation. The plaintiff's action was dismissed and on appeal Ross LJ said at 459f:

> "A Court of Appeal is not entitled to disturb findings of fact made by the trial judge, which depend to any appreciable extent on the view that he took as to the

> truthfulness or untruthfulness of a witness whom he has seen and heard and the Court of Appeal will not do so unless it is completely satisfied that the judge was wrong. It is not enough that it has doubts, even grave doubts, as to the correctness of the judge's finding. It must be convinced that he was wrong".

[15] The judgment of Widgery LJ in that case is also instructive where at p464C et seq he said:

> "It is, I think, a commonplace that, when a witness is charged with a serious offence, whether it be in a criminal court or a civil court, he may show reluctance to answer a question. Such a witness, when asked questions which he cannot really answer, thinks that he must say something to `fill in' and puts forward a combination of recollection and supposition. When he is asked the same question several times he produces different answers because his suppositions are different each time and he forgets what the supposition was on the previous occasion. Such conduct on the part of a witness stamps him as unreliable in regard to the matters in respect of which he contradicts himself, and such conduct may well be an indication of a liar, because one of the clearest badges of a liar is that he tells different stories at different times. On the other hand, it is a very common experience for witnesses faced with serious charges to commit themselves to answers without sufficient care and possibly with insufficient candour to say `I do not know'. It is also quite a usual experience for the judge or tribunal at first instance to be able to pick out, nevertheless, the difference between a man who is lying and a man who is merely `filling in' in this way."

Category 1 – Grounds (2), (3), (4), (5), (7),(8), (10), (11), (17) and (18).

[16] In considering the grounds of appeal in this category where the plaintiff's credibility is the thread running through all the grounds, a key component is to determine whether there is any substance to the appellant's case that the incident concerned never actually happened and that in truth the plaintiff killed his own birds by wringing their necks. In short the appellant would have to have established that the hounds had no propensity to attack or kill pigeons and, more importantly, that they had never been on the plaintiff's lands and that this whole scenario depicted by the plaintiff and his witnesses was a complete farrago of lies

manufactured without the slightest foundation in truth. Not only would he have created this fiction, but Mr Calvin and Mr Gerald Weir would have lent themselves to it by perjuring themselves in court corroborating his version and that further Mr Nooney, who was not in court on grounds of ill health and that Mr Henning, who was out of the jurisdiction, would have been prepared to make statements corroborating the plaintiff's version of events. In other words the appellant would have to have established that there was a conspiracy involving these five people all of whom presumably would have known that the plaintiff had decided to kill his pigeons and who then decided to join the conspiracy to completely fabricate a set of facts which never existed.

[17] This would of course have amounted to a criminal conspiracy with serious consequences for all those involved if it was uncovered in circumstances where the rewards for joining this criminal conspiracy, split into five shares, could not have been that large in any circumstances.

[18] We are therefore particularly conscious in this case of the comments made in Gross's case by Ross LJ and the role of the appellate court in considering such an allegation of fraud.

[19] Secondly, of crucial importance, we bear in mind that the plaintiff was in the witness box before McBride J for a total of 5 days. The LTJ therefore had an unusually long opportunity, denied to this court, to assess his credibility in the face of robust cross-examination by experienced senior counsel.

[20] We were reminded of the comments of Widgery LJ in Gross's case (see paragraph 15 above) and the need for a judge to be qualitatively observant when reading what the LTJ said at paragraph 45 of her judgment:

> "I observed and listened to the plaintiff over a number of days. I found that he was a witness who did not always listen carefully to the question and frequently answered a different question. When he listened carefully he was able to give credible evidence. The plaintiff was cross-examined at length over a number of days and it was obvious from his demeanour that he found this a very stressful experience. I formed the impression that the plaintiff was an honest and straightforward witness. This was strengthened by the fact that sometimes he volunteered information which was not always advantageous to his claim, for example he volunteered evidence that the cost of repairs would have led to betterment and indicated that therefore there should be a reduction in the compensation due. Further when he produced vaccination sheets during the course of the hearing he indicated to the court that `he brought it as it

> was'. The document was incomplete and as such could have been used against him. The fact he failed to fill in the missing details, which he could have done without anyone knowing, indicates again that he was an honest witness."

[21] We also observe that at paragraph [71] she again returned to her assessment of the credibility of the plaintiff when she said:

> "Additionally I have heard and seen the plaintiff giving evidence in the witness box over a number of days. It is clear from his demeanour that he loves pigeons and was visibly distressed as he recalled the scene of devastation he met on 7 February 2009 when he came out from lunch. I find it incredible that such a person would kill pigeons he had raised for many years for no good reason. This is especially so in light of the evidence he gave that he has never put down any of his pigeons even though they were no longer of any profitable use to him. He indicated that he allowed them to live `out their day'".

[22] It was this period of observation which allowed the judge to analyse his responses in a manner that a reading of the transcript would never have allowed Thus for example when he was questioned about omissions in his explanation to the dog warden, the Judge made specific reference to his appearance in the witness box:

> "Having observed the plaintiff give evidence, I noted that he appeared very stressed and pressurised in the witness box. He focused intensely on the incident and as he was concentrating on it so much he failed sometimes to carefully listen to questions which related to other matters"

[23] With characteristic caution, the LTJ followed the guidelines in Thornton's case and looked for the presence of independent evidence tending to corroborate the statements of fact. She found that Mr Calvin and Mr Weir, both of whom were cross-examined at length, were "unswerving in stating that the incident did occur and that they witnessed it. Nothing was suggested to indicate that they have anything to gain by supporting the plaintiff or that they were being manipulated by him."

[24] The LTJ also found corroboration in the evidence of Mr Willis who gave evidence on behalf of the defence and who accepted that he had been standing with Mr Irwin at the very point where the plaintiff said he had been standing.

[25] McBride J then proceeded to carefully analyse whether there was evidence that:

- the hounds were in the vicinity of the plaintiff's premises on the day in question,
- they had gained entry to the plaintiff's loft and aviaries, and
- the hounds had killed and injured the plaintiff's pigeons. Thus paragraphs [52]-[70] of her judgment afford a detailed and careful analysis by the Judge of all the evidence in respect of these matters. We find no reason to conclude that she was mistaken in her determinations.

[26] Given that the Judge has heard this evidence over an extended period she undoubtedly had a greater familiarity with the evidence and a deeper insight in reaching the conclusions of fact than this court can have. On the basis of the assessments of the witnesses which she has made, we are therefore unable to conclude that she has gone "plainly wrong" in arriving at the conclusion that on the balance of probabilities the incident alleged by the plaintiff did occur.

[27] Once this fundamental conclusion on his basic credibility is reached, then the various grounds of appeal set out in this category have to be measured in that context. This finding leads us to the following conclusions -

[28] The dispute over the dates of reporting to the police and the absence of any evidence from the police about a report on 7 February 2009 as asserted by the plaintiff (ground 3) and the failure of the dog warden to carry out a search to ascertain if a complaint had been made to that body on 7 February 2009 as alleged by the plaintiff on the basis that the alleged reference to 2 February 2009 by the plaintiff was a typing error (Ground 4) are not only relegated in terms of importance in their overall significance in the case but make the explanations of the plaintiff comfortably sustainable.

[29] The finding that the incident occurred effectively disposes of the appeal about the cause of death of the pigeons (Ground 17).

[30] The issue of the plaintiff's explanation why his brother was not called to give evidence and his supposition that his solicitor was unlikely to remember events so long ago and thus was not called to give evidence are all easier to accept given the overall impression of the credibility of the witness that the incident occurred (Ground 11).

[31] The issue about the number of dead birds – originally the claim was for 49 rather than 59 dead birds – rests on the credibility of the plaintiff's assertion that it was difficult to be precise about the exact number of birds killed because they were "in bits and pieces". In this context the LTJ looked at the photographs of the dead pigeons and was satisfied that it would have been difficult to accurately assess them and indeed it is perfectly reasonable that some birds may have died after the initial

count was made. Mr Calvin corroborated the plaintiff's figure of 59 albeit he made a typing error in recording it initially as 49 pigeons. The court had the opportunity to assess Mr Calvin's credibility also on this matter and accepted his explanation of erroneously typing in 49 pigeons in his original report. This again is essentially a matter of credibility arising out of the Judge's assessment of the plaintiff over the 5 days that she observed him (Ground 2).

[32] Ground 5 which asserts that the aviary repair documents were patently false and were created by the plaintiff or at his direction, ground 8 which challenges the plaintiff's evidence in light of his failure to produce relevant paperwork confirming the value of a single pigeon or paperwork associated with the acquisition of birds he had not bred etc and ground 10 which challenges unsatisfactory documentary evidence and the unexplained absence of documents that ought to have been available including the valuations prepared by the expert Mr Calvin/ring number valuations/vaccination sheet undated and unsigned and an allegedly bogus "Mr Fix-it" document all carry a similar flaw within them from the appellant's point of view when making a case of fraud. The flaw is that explanations given by the plaintiff of being a poor and unprofessional record keeper essentially depend upon the Judge's assessment of the plaintiff's credibility and her reasonable conclusion that this was not fundamentally a fraudulent claim.

[33] As Widgery LJ cautioned in Gross's case it is "very common experience for witnesses faced with serious charges to commit themselves to answers with insufficient care and possibly with insufficient candour. It is the Judge's task to pick out the difference between if such a person is lying and a person who is merely "filling in" in this way."

[34] We are satisfied that the LTJ applied herself to this precise task. As she recorded at [39]:

> "It is clear from the evidence of a number of witnesses that the plaintiff was a poor record keeper. He was not professionally organised. I find that he did his best to produce what he could to the court. I accept that he did not keep a stock book. The other handwritten records were discarded when the reports were typed up. The Plaintiff only produced some bird rings as many were missing as they were eaten or destroyed by the dogs. He also produced, when requested, documentation in relation to vaccination. I therefore do not find that he deliberately concealed documents from the court."

[35] Moreover when dealing with the impugned invoices for the lofts and aviaries produced by him and Mr Harty (who repaired them), the LTJ had recognised the frailties but nonetheless concluded as follows at paragraph [37]:

> "Whilst there were many respects in which the documentation provided to the court for the costs of repairs was confusing and would have raised suspicions, I find that all the inconsistencies were adequately addressed in evidence. I find that the documents were not forgeries. They were generated by Mr Harty's office. I further found Mr Harty to be a straightforward and honest witness who had no motive to mislead the court. I therefore find that the plaintiff did pay for the materials to carry out the repair works and that he paid Mr Harty £800 for his labour costs."

[36] One of the problems that the appellant faced in this matter is that for his case on fraud to be established, Mr Harty had to be yet a further conspirator in the whole operation. On the other hand it is right to say that unquestionably this aspect of the case did present us with more than a measure of concern in circumstances where for example the first Harty invoice dated 10 February 2009 for the completed work was clearly prepared before the work had been completed, the materials supplied or indeed any payment made. The telephone numbers purporting to be those of Mr Harty were in fact not his and the address was a variation on the plaintiff's own home address.

[37] However, whilst conceivably this aspect alone might have generated informed suspicion had members of this court been sitting at first instance, we must bear in mind, as previously stated, the LTJ had enjoyed a lengthy acquaintance with this plaintiff in the course of his prolonged cross-examination and was in the best position to determine whether these suspicious documents were a hallmark of an overall fraud or, more likely, the product of an inexperienced litigant taking shortcuts in pursuit of what was fundamentally a straightforward debt owed to Mr Harty for work that he had properly done to repair the aviaries.

[38] Similarly, the absence of relevant documents might well have excited rather more suspicion on our part than it evidently did on the part of the LTJ. Thus for example the racing record of the pigeons, the ring numbers of the dead birds, the stock book etc. were all missing allegedly through the carelessness of the plaintiff . McBride J's assessment of the plaintiff as a disorganised man who paid little attention to paperwork and who was his own worst enemy in belatedly drawing up paperwork in a wholly unsatisfactory manner is unimpeachable given her lengthy acquaintance with him in the witness box.

[39] Into this web of suspicion must also fall the valuation documents emanating from Mr Calvin which had clearly been typed by the plaintiff on the headed notepaper of a redundant club and which contained his own mobile phone. Once again judges must be in a position to read between the lines and determine where true justice lies. This we are satisfied the LTJ did when accepting the explanations of

the plaintiff and Mr Calvin. Her conclusions were within the general ambit of discretion that must be vested in a first instance judge over a lengthy trial.

[40] Ground 7 challenged the decision of the Judge to accept that the terms "racing pigeon" and "stock pigeon" were interchangeable in the context of the present case. There is, arguably, an important distinction between the two types and Mr Ringland went into a great deal of detail about this. However the fact of the matter is that the expert on behalf of the plaintiff namely Mr Calvin asserted that the terms were interchangeable for valuation purposes. This was an assertion by an expert which the LTJ had the opportunity to evaluate in the course of his evidence. She concluded that he had grounds for blurring the division and she accepted his proposition as correct. The evidence which emerged from Mr Calvin was that if one valued the plaintiff's racing pigeons because of their parentage, the value could be considerable. Racing pigeons apparently breed as well as stock pigeons according to Mr Calvin. Once again we find it impossible to diverge from that conclusion given the opportunity the judge had to assess the witness before her in order to evaluate the strength of the point that he was making.

[41] Finally in this context arising out of the plaintiff's credibility ground 18 challenged the plaintiff's failure to produce the rings from the dead pigeons and criticised the LTJ's conclusion that the plaintiff "only produced some bird rings as many were missing as they were eaten or destroyed by dogs".

[42] Mr Stitt validly argues that these rings were requested some 6/7 years after the incident and there was no reason why the Judge should not have accepted the evidence that the rings had ended up being eaten by the dogs or were lost in the interim. In the context of a disorganised plaintiff this may not have been unsurprising. This is another example of where the Judge's assessment of the evidence and of the plaintiff were crucial in terms of credibility.

[43] We are therefore satisfied that in terms of this first category of grounds of appeal, the appellant's case must fail because the conclusions reached by the LTJ were well within the general ambit of discretion vested in a Judge at first instance to assess the credibility of the witness. This is essentially a matter of fact and we have not come to the conclusion that she has gone plainly wrong in any of these findings. It is a classic case where the appellant has attempted to reopen questions of fact for redetermination in circumstances where they have failed to adduce sufficient material to justify interfering with her findings of fact.

Category 2 – The evidence of Mr Calvin in grounds (1), (2),(9) (15) and (16)

[44] Ground 1 asserted that the LTJ had erred in law in holding that Mr David Calvin was an independent expert witness, the case being made that he clearly lacked independence and competence to value the plaintiff's pigeons.

[45] We commence our views on this point by citing again the judgment of this court in Haughey v Newry & Mourne Health & Social Care Trust [2013] NICA 78 which was a clinical negligence case where the appellants had challenged the independence of a local medical expert called on behalf of the defendant doctor. At paragraph [19] the court said:

> "In clinical negligence cases the parties are entitled to call such witnesses, expert or as to fact, as they consider appropriate. The fact that Northern Ireland is a small jurisdiction, that there are limited numbers of specialists, that they may be known to one another or are members of the same specialist medical society are not of themselves reasons to deprive the parties of their expert advice or evidence. In Toth v Jarmin the Court of Appeal of England and Wales held that membership of the Cases Committee of the Medical Defence Union .. would not disqualify an expert from acting as an expert witness in case in which the MDU acted for the defendant."

[46] Precisely the same principles apply in this instance. This is self-evidently a specialist field. There will not be many experts in the field of pigeon valuation and within the racing world of pigeons in Northern Ireland. Those that exist may well be known personally to pigeon fanciers as a whole.

[47] The LTJ was well aware of the issues raised in cross-examination of Mr Calvin concerning his association with the plaintiff's family and with the plaintiff as a co-founder of two pigeon racing clubs. She was therefore in a perfectly good position to assess whether the expert was aware of the primacy of his duty to the court and the effect that his relationship with the plaintiff might have had upon his evidence. His expertise had been gained through long years of experience in breeding pigeons, attending meetings, auctions and races, attending sales on a weekly basis and he purported to have particular expertise in knowing the value of pigeons through his own interest in pigeons and had apparently frequently given advice to other pigeon fanciers in relation to value. None of those matters prevented his evidence being admissible as an independent expert provided the Judge has, as occurred in this instance, addressed such matters. The minutiae of the alleged failure to disclose the details of his connection with the plaintiff were not such as to bring into question his suitability to give independent expert evidence and we have no reason to disturb this conclusion on the part of the LTJ.

[48] In ground 9, the appellant challenged the plaintiff's claim for consequential loss in principle and in substance. The attack essentially centred around the evidence produced by Mr Calvin and in particular the changes in his valuations, his belated entry of consequential loss, the failure to distinguish between stock pigeons and racing pigeons, the birds were valued at the date of valuation in November 2013

and not the date of the incident in February 2009 and the alleged failure of the plaintiff to produce documentation of the sale or disposal of large numbers of pigeons which would have been generated as progeny etc.

[49] Once again the Judge had a full and lengthy opportunity to consider the examination in chief and cross-examination of Mr Calvin. She was fully aware of the deficiencies that emerged in his evidence and set these out for example at paragraph 79 of her judgment.

[50] Moreover she carefully indicated that she had entertained reservations about the quality of his expert reports initially. However she went on to make it perfectly clear that she was satisfied that the oral evidence of Mr Calvin remedied those defects. In particular she recorded:

- He had all the necessary materials before him to carry out a valuation. He had breeding cards, pedigrees and he knew the performance records of the plaintiff's pigeons.

- Although the correct valuation date was February 2009, it was accepted by the appellant's expert Mr Robinson that valuations would diminish over a time and therefore the LTJ was entitled to conclude that the valuations given by Mr Calvin if anything "were less than the true value of the plaintiff's claim." We pause to observe that this effectively disposes of ground 15 of the notice of appeal.

- He gave evidence, which was apparently unchallenged, that it could take 5 years to build up stock to the point of breeding, that many would not breed at all, and that it would take 5 years before the plaintiff was able to tell if cross-breeding had been successful.

- The problems with the ring numbers were that they were very similar and he had made some typing errors in recording them.

- She accepted his explanation of a typing error in originally claiming for 49 pigeons instead of 59 (ground 2).

- She accepted the evidence of Mr Calvin that the reduction in valuation was in the wake of his expressing his second valuation of £300 per bird as being an average figure and that his final figure reflected individual valuations. He was pressed closely in cross-examination about this matter but the LTJ, having watched him deal with this issue at length, accepted his explanation of the change of valuation.

[51] In terms the LTJ confronted the deficiencies which opened up in his case but was satisfied on the basis of the oral evidence that he gave that they could be met and that essentially he was an honest witness. It had to be recalled that he had never

given expert evidence before to the court and that was obviously a factor to be taken into account in the somewhat haphazard approach he had adopted to valuation in some instances.

[52] However as the LTJ pointed out, no other expert valuer was called to counter his valuation. Thus for example the appellant could have called a local auctioneer or another breeder to challenge the valuations. Moreover Mr Robinson the appellant's expert accepted that if a valuer had all the information which Mr Calvin had then he could carry out a valuation. Mr Robinson was an ornithologist and therefore could not be placed arguably in the same category of expertise in pigeon valuing as Mr Calvin.

[53] Accordingly we are satisfied that the LTJ did not fall into error in failing to apply the principles set out in Summers v Fairclough Homes Ltd [2012] UKSC 26 (see ground 16) because there was not an abundance of evidence that the plaintiff had advanced a wildly inflated or dishonest claim or put forward false documentation or concealed other relevant documentation as set out in the notice of appeal.

[54] In these circumstances we find no basis for the grounds of appeal set out at numbers 1, 2, 9, 15 and 16.

Category 3 – The other witnesses in the case namely the plaintiff's engineer Mr McBride at ground (12), Mr Scull at ground (13) and Mr Weir at ground (14)

[55] At ground 12, the appellant's charge that the LTJ failed to place proper or any weight on the evidence of the plaintiff's engineer as to the difficulty of dogs gaining access to the aviaries.

[56] This is a reference to the evidence of Mr McBride the engineer who gave evidence to the effect that if the wire was attached onto a good base and properly fixed it would have been difficult to remove it. However this was again a question of the LTJ weighing up the relative strengths of the evidence called. The evidence was that the wire was simple chicken wire and the wood was old and had not been treated. Mr Harty who examined the bases opined that they were not of good quality and that they required complete replacement. It has to be recognised that the appellant did not call any contrary engineering evidence.

[57] This has also to be taken into the context of the evidence given by Dr Scullion who had examined the birds and considered that the most likely cause of death was dog attack. His evidence had been to the effect that this type of hound could break into these aviaries. The Judge was in a much better position to assess the credibility of these apparently conflicting witnesses than this court.

[58] The evidence of Mr Scull forms the background of ground 13 in that the appellant contends that the LTJ failed to place any or sufficient weight on the

evidence of Mr Scull who was an animal behaviour expert who gave evidence as to the unlikelihood of hounds splitting up and attacking birds.

[59] This is a classic case for a Judge to decide whether his evidence was preferable to that of Dr Scullion who indicated that the most likely cause of death to these pigeons was dog attack.

[60] Moreover in cross-examination Mr Scull seemed to accept that if the aviaries were close together it was foreseeable that the hounds could split up and go to each aviary. Hounds need to be kept together to avoid the risk of them getting out of control.

[61] In addition the LTJ had before her an article produced to the court which specifically stated:

> "Dogs may gain access to poultry houses and game bird pens, inflicting heavy losses."

[62] We therefore consider that there was ample evidence before the LTJ to come to the conclusion which she did that "hounds have the propensity to attack pigeons and can inflict heavy losses."

[63] Finally, in this category, at ground 14, the appellants claim that the LTJ erred in placing any substantial weight on the evidence of Gerald Weir, the plaintiff's son, contending that there were good grounds for believing he had not been present at the scene because as a sole hairdresser he was unlikely to abandon his hairdressing business on the busiest day of the week, he was heavily under his father's influence allowing his name to be used by his father to make up numbers when his father was trying to raise a quorum to start a new club although he had no interest in pigeons and that he had signed a witness statement which it is contended had been prepared by the plaintiff.

[64] These highly speculative grounds of challenge are clearly confounded by the LTJ's assessment of Mr Gerald Weir to the effect that, along with Mr Calvin, he was "unswerving in stating that the incident did occur and that [he] witnessed it. Nothing was suggested to indicate that [he] had anything to gain by supporting the plaintiff or being manipulated by him".

[65] The attack upon Mr Weir by Mrs Weir was dismissed from the Judge's assessment on the grounds that she had an axe to grind, had ongoing proceedings against the plaintiff and had volunteered to come to court to give evidence against him as she wanted to "destroy his claim". This ground of appeal is therefore quite hopeless.

[66] Accordingly we have come to the conclusion that there is no basis for sustaining any of the grounds of appeal in this category.

Category 4 – Disallowance of cross-examination as to credit of the plaintiff in ground 19

[67] Ground 19 of the Appeal Notice asserts that the plaintiff had the benefit of being an assisted person. When counsel for the appellant sought to ask the plaintiff about his ownership of an advertised commercial property which would prima facie have affected his eligibility for Legal Aid and whether its existence had been disclosed to the Legal Aid authorities, the LTJ disallowed the line of questioning which was as to credit.

[68] The factors to which a court should have regard in deciding whether to exercise its discretion for or against compelling a witness to answer a question or questions directed solely to credit were set out by Sankey LJ in Hobbs v Tinling [1929] 2 KB at p51 (cited with approval by Carswell J in Eastwood v Channel 5 Video Distribution Ltd [1992] 2 NIJB 58):

> "In the exercise of its discretion the court should have regard to the following considerations:
>
> 1. Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.
>
> 2. Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

[69] Accordingly the Judge has power to disallow questions which impugn the witness's credibility if they are of minimal relevance to his credibility or grossly disproportionate to the importance of his evidence. His answers on credibility are final and cannot be contradicted by evidence in chief, subject to a number of well-trodden exceptions. (See Valentine on Civil Proceedings: The Supreme Court at paragraph 13.71 et seq).

[70] In the instant case the LTJ clearly felt that it was a worthless exercise to deal with a matter which had been already investigated by the Legal Services Commission and where the proposition now being forwarded by counsel for the appellant could have been produced to the Legal Services Commission for investigation if it was meritorious.

[71] We are satisfied that the view formed by the Judge clearly was exercised within the ambit of the principles set out in Hobbs' case. We find no basis therefore for this ground of appeal.

Category 5 – Club membership as in ground 6

[72] Ground 6 of the Appeal Notice contends that the LTJ erred in finding that the plaintiff was not a member of the club at the date of the incident and invokes Prole v Allen [1950] 1 All ER 476.

[73] This was purely a factual matter to be determined by the Judge on the basis of the facts before her. She determined that Mr Irwin, the Treasurer of the Hunt Club, had accepted in cross-examination that the plaintiff had not paid membership fees since 2007 and that the payment of membership fees was a pre-requisite to membership.

[74] The LTJ carefully considered the fact that the plaintiff had filled in a claim form on the basis of membership and reasonably determined that this did not change the *reality* of the situation. The rules of the club were clearly to the effect that if payment was not received membership would be invalidated. There were therefore ample grounds for the LTJ to reach the conclusion she did.

[75] In passing, we note in any event that the original letters of claim to the Master of the Hunt Mr Irwin and to Mr Willis made clear the allegation that they as individuals were being charged with negligence not merely as officeholders. Mr Irwin's solicitors understood that and sent a letter of claim to the solicitors acting on behalf of the appellant Murphy & O'Rawe. Subsequently the plaintiff's solicitors made it clear by letter of 28 September 2009 to Murphy & O'Rawe that their client was blaming Mr Irwin personally for failing to properly control the Hunt. Aware of that, Murphy & O'Rawe advised the plaintiff's solicitors by letter of 20 June 2011 that "the defendant should be cited as The Countryside Alliance Limited". This would have made it extremely difficult for the appellant now to be heard to say that the intended defendant was the Hunt Club rather than Mr Irwin personally. However given our finding that the LTJ was entitled to conclude that the respondent was not a club member this matter does not arise.

Conclusion

[76] We find no foundation for any of the grounds of appeal put before us and accordingly this appeal is dismissed. We shall hear counsel on the question of costs.