Joe Armstrong & Nicola Connor v First York [2005] APP.L.R. 01/17

CA on appeal from Liverpool County Court (HHJ Stewart QC) Before Brooke LJ (VC) Arden LJ; Longmore LJ. 17th January 2005

JUDGMENT : LORD JUSTICE BROOKE:

1. This is an appeal of the defendant from His Honour Judge Stewart QC, sitting in Liverpool County Court, on 11 March 2004 when he found for the claimants on issues of liability in this road traffic accident and, subject to this appeal, the amount of the damages was then agreed in the sum of £1,023 in respect of one of the claimants and £2,156 to the other.

2. The effect of the claimants' evidence was that they had suffered soft tissue injuries to their spines in the accident that they had sustained. Put in broad terms, the effect of their evidence was that the impact forces generated by the accident caused their spines to hyper-extend and hyperflex and injury resulted.

3. The issue at the trial was whether the forces generated by the impact were sufficient to jolt them in their seats. The case does not involve a very large sum of money. But His Honour Judge Stewart QC, who has immense experience in this particular field, granted permission to appeal, saying, when he did so, that guidance could be given because there are many other potentially similar cases in the pipeline.

4. The interesting aspect of this case is that the claimants and the defendant submitted written instructions to a forensic engineer called Mr Childs, who was the single joint expert. He was of the clear view that no occupant displacement, as it was called, could have occurred as a result of the impact. The claimants never applied to instruct a second expert although arrangements were made for Mr Childs to attend the trial and to be questioned orally after having answered written questions on his report.

5. In its defence the defendant raised a charge of fraud in the alternative, and the case was allocated to the multi-track because it raised issues which could not conveniently be handled in a fast-track trial.

6. So far as the facts are concerned, Mr Armstrong was a prison officer and Miss Connor a recruitment counsellor. They lived together. He was driving her Ford Fiesta car at the time. The judge said that, so far as he knew, they were of blameless character and that they gave their evidence in a transparently truthful, honest and guileless way.

7. The effect of that evidence was along these lines. She was in the front passenger seat of the car. They were going to a hotel in York for the weekend. They came to a junction in the city centre of York very close to their hotel. They were both wearing seat belts. The car stopped at traffic lights at a cross-roads intending to turn right. Mr Armstrong either had his foot on the footbrake or his handbrake was on ready for the lights to change. Mr Smith, the bus driver, was driving a bus owned by the First York Bus Company who is the defendant. He thought he could squeeze his bus down the nearside of the Ford Fiesta, but he caused it a glancing blow to his rear nearside corner. The damage to the Ford Fiesta was minor. It sustained a scratch that was 5 inches long and 200 microns deep - which, the judge said, was double the normal thickness of paint - on its rear nearside panel. The judge said that, on any view, it was a very shallow scrape.

8. The judge found that the bus was probably driving at 10 to 15 mph and the bus driver only braked after the impact. Mr Armstrong and Miss Connor had a discussion with the driver afterwards. Mr Armstrong did not feel any pain at all at that stage. Miss Connor said that she felt pain shortly afterwards. She was suffering from shock. She got out of the car and was shaking so much that she could not put her shoes on. She got back into the car. She then bent down to pick up her handbag with some cigarettes in it and she felt pain in the back. Mr Armstrong told the judge that she did not mention the pain in the back to him until they got to the hotel. Before they left the scene of the accident, about ten minutes after it happened, a police car stopped. The claimants told the police they were all right. The judge did not find this surprising because, he said, people tend to make light of things even if they are not totally all right.

9. On the judge's findings, they felt pain during that weekend, and on their way back to Liverpool they called in to the hospital at Ormskirk. It was documented there that they arrived at 5.17 pm and they were both complaining of neck pain. They waited some time, but they were told they would have to wait a lot longer because of a much more pressing problem for the accident and emergency department that cropped up on that Sunday afternoon and they might have to wait for 6 hours. They saw the triage nurse who suggested that they saw their GP the next day. They both went to their different GPs on Monday, 2 July. He was complaining of pain in the region of his neck and shoulders. She was complaining of pain in the region of her neck and back.

10. Later that week they went to the solicitors who now act for them. In due course they were referred to separate medical experts. On 30 October 2001 Miss Connor went to see Dr Shepherd. On 22 November Mr Armstrong went to see Dr Nolan. Miss Connor told Dr Shepherd that she was looking straight ahead at the moment of impact. She was very shocked. She said she had experienced virtually immediate pain in the mid-line of her low back area. She had been involved in two previous road accidents, one at the age of 16 and one in March 1999. In both accidents she had suffered whiplash type injuries, but she had made a full and complete recovery in 6 to 8 months. She had a bit of a weak back, the judge found. She would take tablets herself and also go to her GP from time to time to get something stronger.

11. Mr Armstrong, for his part, told Dr Nolan that he was aware of the impending incident. On impact, he was thrown forcibly forwards and sideways and the seat belt tightened across his chest.

12. They both described the impact as a bump. In her second statement Miss Connor said that she felt a jolt at the time of the collision. At the point that the bus collided with them there was movement. She said:

    "I jerked forward, not violently, but there was definite movement."

    That was the evidence she gave. In essence, it was supported by the evidence of the doctors they saw. They were giving a consistent story. Of course the doctors had to guard against the possibility that they were not telling them the truth about their symptoms.

13. The judge then had to turn to the evidence of Mr Childs, who is a forensic motor vehicle engineer. He has premises at St Austell in Cornwall. He has great experience in giving evidence in this type of case. He gave details of his experience in his report in which he said he had been engaged in the motor vehicle engineering sector since 1981. He believes he has gained a wealth of experience over a very broad area. He describes his speciality as motor vehicle forensic examinations and accident reconstruction. The effect of his evidence, as the judge recorded, was that there was minor damage to the bumper and the rear nearside panel of the Ford Fiesta, but not much more than a paint mark on the bumper and a scratch to the panel. There was also some very minor damage to the bus.

14. Mr Childs was instructed about 18 months after the accident occurred. He was reporting on the basis of what he had been told about the damage to the bus and an inspection that had been made on his behalf to the Ford Fiesta after repairs had been carried out. His evidence was that in order for the Fiesta to move just on its springs, without the vehicle's wheels moving, the impact would have had to be such as to cause some distortion to the panels of the vehicle, but there was not any. But if there was no distortion to the panels of the vehicle and the vehicle did not even move on its springs, there would be no movement of the occupants of the vehicle, much less any movement which would possibly injure their spines. Mr Childs said that unless the person in question is peculiarly vulnerable the vehicle would have to move on the road surface in order to cause injury. There was no evidence that this vehicle moved across the road surface at all with either the footbrake or the handbrake on. Mr Grant encouraged us to read the transcript of Mr Childs' evidence, which I have done; and he stood up to a lot of questioning by counsel instructed by the claimants and also by the judge himself. His thesis, as the judge found, stood up to this questioning.

15. When the judge heard counsel's submissions he was referred to a very recent unreported case in this court called ***Cooper Payen Ltd v Southampton Container Terminal Ltd*** [2003] EWCA.Civ 1223. In that case a Mori 600 ton press toppled off a mafi flat trailer which was being towed by a tug at Southampton Container Terminal and sustained damage - and this was not in dispute - totalling nearly £48,000. The judge held that the authorities at the Southampton Container Terminal were not liable as bailees or sub-bailees. The particular findings that she made were that the tug and the mafi were proceeding at a slow walking speed of 2 to 3 miles per hour, which might be translated into 3.6 to 4.8 kilometres per hour, and the single joint expert had said that for the load to topple in a turn of 15 metres diameter it must have been travelling at about 9.8 kilometres per hour.

16. The Court of Appeal held that the only fair conclusion that could have been reached from this evidence was that the casualty was caused by the truck proceeding too fast and/or at too tight a turn. The case was particularly noted for the supporting judgment of Mr Justice Lightman who, in paragraphs 66 and 67, said this:

> *"66 On the issue of negligence the critical question at the trial was the speed at which the trailer was travelling when it toppled over. The defendants' witness, Mr Strange, gave evidence that it was travelling at a slow walking pace not exceeding 3.6 to 4.8 kph and certainly was not exceeding 5 kph. If this evidence is accepted and correct, the defendants could show that the toppling over was not attributable to any negligence on their part. The expert, Mr Krabbendam, however, gave evidence that the only possible explanation for the trailer toppling over whilst doing a U-turn must have been that it was travelling at at least 9.82 kph. If this expert's evidence is correct, the claimants establish that the speed was excessive and that for this reason the defendants were negligent.*
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> *67 Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situation is somewhat different. If the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of two opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact. The judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept. The circumstances may be such as to require the judge to reach only one conclusion."*

17. In the leading judgment, Lord Justice Clarke said this at paragraphs 40 to 43:

> *"40 Mr Russell submits that it should be the rare case indeed in which it is appropriate for the court to disregard the evidence of a single joint expert, and such a case will be limited to circumstances where the witness has failed to comply with his over-riding duty to the court or has plainly erred. He further submits that where such evidence is disregarded the judge must give clear and cogent reasons for doing so. There is force in those submissions.*
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> *41 Mr Buckingham by contrast, summarised his relevant submissions in this regard as follows:*
> *(i) Generally the expert's report will be his evidence, without the need for amplification or cross-examination.*
> *(ii) However, in some circumstances it will be appropriate for the parties to have the opportunity to cross-examine the expert; for instance, as in this case, where the report was produced very late and the expert has not considered all the written questions that had been put to him.*
> *(iii) The report and the expert's oral evidence, if applicable, is then the evidence of the expert.*
> *(iv) This evidence must then be weighed in the balance with the other evidence in the case and the judge will come to a conclusion based upon all the evidence.*
> *(v) The principles set out by Lord Woolf in **Peet v Mid-Care Healthcare Trust** are directed at the first three of those points. The case does not establish that the evidence of the expert must then be accepted by the court. The court must take its own view of the expert evidence in the light of all the other evidence.*
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> *I would accept those submissions, as I think Mr Russell did, in the course of his oral argument. I would add these further observations.*
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> *42 All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.*

43 In the instant case the judge did not disregard the evidence of the joint expert. On the contrary in some respects she accepted it. A judge should very rarely disregard such evidence. He or she must evaluate it and reach appropriate conclusions with regard to it. Appropriate reasons for any conclusions reached should of course be given."

18. In that case the Court of Appeal overruled the trial judge because there was really no rational explanation for the way the accident could have happened on the trial judge's finding of fact. They were willing to overrule her because of the evidence of the single joint expert the accident could not have happened in a turn of that diameter at the speed the judge found.

19. The judge heard submissions about that case. After reciting the passages of the judgment to which I have referred, he said:

"The guidance given by the Court of Appeal is of enormous assistance. It does not, however, quite answer the dilemma which I face in this case because, simply and clearly put, the dilemma is this. Taking into account all the imperfections of the judge as man and the point made by Mr Grant [counsel for the defendants] that witnesses may seem to be very plausible and they may be the most dangerous witnesses because they are so plausible, nevertheless, on the evidence given, before I heard Mr Childs' evidence, I did not for one moment consider that there was any possibility that either of these two witnesses were lying, were misleading me or had made up this claim. Not one jot of evidence, not one shred, seriously undermined (I emphasis 'seriously' because there were minor imperfections to which I have referred) my confidence in their veracity and straightforwardness. That was the clear and unequivocal impression which I formed of them in the witness box and which, albeit that of course a person may and does make mistakes in evaluating witnesses, I feel and felt very confident in stating.

Equally, Mr Childs gave his evidence in a way which was logical and consistent and there is some force in Mr Grant's criticism that the claimants have not called or applied to call any engineering evidence from another expert, in which case, according to Mr Grant, the defendants would not have objected.

What is a court to do in such circumstances? Looking again at the guidance given by the Court of Appeal particularly through paragraph 67 in Lightman J's judgment, there is evidence, as it were, on both sides. Lightman J says, 'There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact'. He then says, and the Court of Appeal says, that the judge must consider whether he can reconcile the evidence. The truth of the matter here is that the evidence can only be reconciled if (a) I find that the claimants are lying, or (b) I find that there is in Mr Childs' evidence the potential that there has been some error which has not been detected before this court and to which the court cannot point."

I interpolate to say that it was not suggested in cross-examination that the claimants might have sustained their injuries from some other reason and were attributing it to the bus accident. The case was fairly and squarely put at trial that they were dishonestly deceiving the court. The judge continued:

"Lightman J goes on to say:

> *'If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept.'*

Mr Grant says that essentially this court has no choice on the findings I have made (which essentially were not really disputed by Mr Breheny [who appeared for the claimants]), namely that on its face Mr Childs' evidence in this particular case as a single joint expert was not undermined and was logical; that I must accept that evidence because I cannot point to any flaws in the reasoning, and Mr Grant's submission is that it follows, as night follows day in the circumstances of this particular case, that I must therefore find that the claimants have not proven their case and, in effect, that they have been dishonest. It is common ground between the parties that it would be disingenuous for me to find that the claimants had not proved their case but were not dishonest.

I do not read paragraph 67 in that way. First the court cannot sit on the fence; secondly, the court therefore must make a decision and a considered choice which evidence to accept; thirdly, this court is well aware that there are a number of cases in which this particular issue of low velocity impacts not being capable of causing injury are in the offing, and each case must be decided on its evidence and on the merits. There is no golden thread running through each case. Therefore, fourthly, is it sufficient for this court to say that it is as convinced as it can be that these two people were honest? Not only is the court's finding based on their demeanour, on the way they gave evidence, what they said, it also has some, albeit limited (and I emphasise 'limited' because certainly Dr Shepherd accepted that he could possibly have been misled theoretically) but their evidence, according to their medical witnesses, was consistent. It did not seem to me to be in any way exaggerated or the pudding over-egged.

Is the court forced to say there is no discernible flaw in Mr Childs evidence and therefore, in effect, these claimants are liars? I do not accept that as a submission of law, albeit I can see that the decision of the Court of Appeal, helpful though it is, does not fully and finally determine the matter. It seems to me that in refusing to find fraud and therefore in finding that these claimants are honest, there must be, although I fully accept I cannot say what it is, something which is not accurate in Mr Childs' evidence in this particular case. I cannot reconcile the evidence of the expert witness with the witness of fact. I can only say that there must be a possible error in Mr Childs' evidence, and I make a considered choice because of my clear and unequivocal impression of the claimants as witnesses.

For those reasons I find that the claimants have, on the balance of probabilities proven their case, and I give judgment for the claimants."

20. Mr Grant in his admirable submissions in this court has reminded us of the dilemma facing defendant insurers who have to prepare their case doing the best they can in testing a claimant's evidence, and that they should be entitled, he says, to be able to rely on the evidence of an accident reconstruction expert of Mr Childs' quality when it has been tested in court and found to be proof against testing. Once that has happened that should be the end of the case. He submitted it would have been open to the claimants to incur greater expense. We were told that they incurred £40,000 of expense in bringing these two claims to court and Dr Grant said that if they choose not to incur this further expense of calling an expert of their own, then it follows, as the night the day, that the defendants must succeed, and that the evidence of their expert which they called must be dispositive of the case.

21. He referred us to the judgment of Henry LJ in ***Flannery and Another v Halifax Estate Agencies Ltd*** [2000] 1 WLR 377, particularly at pages 382 A-B and 383 B-C. One will remember that that case was one in which expert evidence was called on both sides on an issue in the action and the trial judge did not explain why he had preferred the evidence of one side rather than the other. Henry LJ said:

"Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases."

A little later on at page 383 B, he said:

"Referring back to the passage quoted from Bingham LJ in ***Eckersley v Binnie,*** *18 Con.LR 1, 77-78, it seems to us that the judge's preference for the defendants' expert, which was decisive, should have enabled him to give his reasons in the form of the 'coherent reasoned rebuttal' therein referred to."*

22. All these cases are different. That was a case in which experts had been called on each side, and it could not be ascertained from the judge's judgment why he had preferred the evidence of one expert to the other.

23. In the later case of ***English v Emery Reimbold & Strick Ltd*** [2002] EWCA Civ 605, [2002] 1 WLR 2409, Lord Phillips MR, giving the judgment of the court, qualified part of what Henry LJ had said in ***Flannery,*** (a judgment which gave rise to a string of appeals to this court on the basis of inadequate reasons) without reducinng the force of what Henry LJ said.

24. In this case the judge did give very clear reasons. He said there was evidence on one side which particularly impressed him by its clarity and its reliability and was supported, to some extent, by the evidence given by the medical experts. He not only had the evidence of what the witnesses said, he also had the reliable evidence that they had called at the District Hospital on their way back to Liverpool, complaining about back trouble. The issue which he detected in the case was "Were they telling a pack of lies to the court?" as was alleged in the defence, which reads:

"The defendant accepts as a matter of record that each claimant contends that they attended a hospital on the day after the accident and also attended upon their GP. Such attendances (even if corroborated) do not provide independent corroboration that they suffered injury in this accident. However it would be open to the court to find that these claims for compensation have been brought fraudulently in an attempt to claim damages dishonestly following the misfortune of their being involved in a non-fault road accident. In the light of the evidence of Mr Smith [the bus driver] and Mr Childs, the defendant reserves the right in this amended pleading to put questions to each claimant in cross-examination that these claims have been brought fraudulently."

25. This was the issue that the judge had to decide on the way to determining whether, on the balance of probabilities, the claimants had suffered injury as a result of the bus driver's admitted negligence. So it was not a case like ***Cooper Payen*** where there was really no evidence on the one side to rebut the expertise of the evidence given by Mr Childs on the other.

26. In my judgment, in this very difficult case the judge directed himself correctly as a matter of law. He was entitled to consider the evidence he had been given by the claimant extremely carefully, directing himself about the dangers of witnesses who may seem to be very plausible but in fact are telling a pack of lies, and directing himself to consider very carefully the evidence given on behalf of the defendant. He formed the view that he could not be satisfied that these witnesses were telling a pack of lies. He was very impressed by their evidence, and he concluded, when he had to balance the evidence of each side, that there must be - although he accepted fully that he could not say what it was - something which was not accurate in Mr Childs' evidence in this particular case.

27. In my judgment there is no principle of law that an expert's evidence in an unusual field - doing his best, with his great experience, to reconstruct what happened to the parties based on the secondhand material he received in this case - must be dispositive of liability in such a case and that a judge must be compelled to find that, in his view, two palpably honest witnesses have come to court to deceive him in order to obtain damages, in this case a small amount of damages, for a case they know to be a false one.

28. In ***Liddell v Middleton*** [1996] PIQR P36 Stuart Smith LJ, who had immense experience of personal injury litigation, said this at page 43:

"We do not have trial by expert in this country; we have trial by judge."

In the last resort it is for the judge - or it may be the jury in a criminal trial as the triers of fact - to determine, on the balance of probability, on all the evidence they receive, where the probabilities lie. It may be that they are impelled to that conclusion when they are weighing two different types of evidence, one from extremely honest- appearing witnesses of fact and the other from an expert doing his best in his particular field of expertise.

29. In my judgment, if we dismiss the appeal in this case we are not opening the door to a whole lot of dishonest claimants to recover just because there may be cases in which the honesty and force of a claimant's evidence impresses a trial judge in the way the evidence of these claimants did on this particular occasion. In very many cases the evidence of a witness like Mr Childs may very well be sufficient to tip the balance strongly in the defendant's favour.

30. For these reasons, in my judgment, there is no point of law of the type on which Mr Grant sought to rely in support of this appeal. This was very much a matter for the judge to determine on all the different types of evidence he received. There was evidence which pointed one way, which he was entitled to accept from the claimant if he thought fit. There was evidence that pointed the other way for the defendants.

31. I can find no flaw in the judge's reasoning in this case. I would therefore dismiss the appeal.

32. **LADY JUSTICE ARDEN**: I agree with the judgment of Lord Justice Brooke and the reasons he has given.

33. I would like to add one further short observation. It is directed towards the appellant's contention that in order to reject Mr Childs' expert evidence the judge in this case would have to have been able to explain why that expert evidence was wrong. In my judgment, that is not the law. The authorities show that a trial judge must evaluate expert evidence and should not reject it without having grounds to do so. I would particularly refer to ***Coopers Payen Ltd v Southampton Containers Terminal Ltd*** [2003] EWCA Civ 1223 to which my Lord, Lord Justice Brooke has referred. In parenthesis, in this case my Lord, Lord Justice Brooke, has explained why there were grounds on which the judge could reject the expert evidence, in particular his view of the credibility of the claimants and the medical evidence and records. Put another way, there is no rule that a judge has to explain why he cannot accept expert evidence at a technical level and on that evidence's own merits. On the other hand, if

there are grounds on which he can reject that evidence on a technical level he should certainly explain why he has not accepted that evidence. His explanation for his decision to reject the expert evidence should meet the test for the giving by judges of reasons for their decision set out in ***Enghohr Emery v Reimbold and Strick*** [2002] 1 WLR 2409.

34. I agree with the order that my Lord proposes.

35. **LORD JUSTICE LONGMORE**: Mr Childs' expert opinion was certainly powerfully argued. The consequence of accepting it had to be that the claimants were bringing a fraudulent claim. Mr Grant, for the appellant/defendant in this court, submitted to us that the Judge Stewart QC had no option other than to conclude that the claim was a fraudulent claim if he could not point to a reason why Mr Childs' evidence was wrong. Since the judge could not do that, it follows, according to Mr Grant, that the claim was a fraudulent claim. This is artificial logic. It would mean that cases were decided by experts rather than by judges. There must almost always be a possibility that an expert, particularly an expert in a developing field, such as the field described here by Mr Grant as bio-mechanics, which I understand to include assessments of vehicle occupant displacement, could be wrong even if a judge cannot say precisely why. This is especially so if the consequence of accepting the expert is to hold that a claimant is making a dishonest claim. Judges up and down the land tell juries in criminal cases that they do not have to accept the evidence of a expert witness even if it is unchallenged. Juries do not of course give reasons whereas judges must. If a judge is convinced, on proper evidence, that the claimants are in fact telling the truth and are not fraudulent, that conviction may well be a reason for declining to accept expert evidence to the contrary effect.

36. For those reasons, I agree with my Lord and my Lady and I would dismiss this appeal.

Order: Appeal dismissed

MR MARCUS GRANT (instructed by DLA of Birmingham) appeared on behalf of the Appellant
MR TIMOTHY KING QC and MR MICHAEL JONES (instructed by Linskells of Liverpool) appeared on behalf of the Respondents