The Thirteen Axioms of Fact-finding

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Briggs v Drylined Homes Ltd [2023] EWHC 382 (KB) (judgment here) concerned a claim by the widow of Mr Brian Briggs, who died in 2017 after contracting mesothelioma. The Claimant brought a claim against one of her husband's former employers, Drylined Homes Ltd ("DHL"). DHL had engaged Mr Briggs between approximately 1975 and 1979 to carry out 'drylining', namely putting up plasterboards during house construction.

As the Deputy High Court Judge, Dexter Dias KC, observed at [3], the decision ultimately turned on two critical findings of fact. These were ([11]):

1. Has the Claimant proved on a balance of probabilities that, when it was raining, carpenters came into buildings where Mr Briggs was working and cut soffit boards near him?

2. Has the Claimant proved that it is likely that the soffit boards being so cut contained asbestos?

At [12]-[13], the judge said this:

Everything turns on these two questions of magnetic importance. It is essential to be clear about the issue these questions go to. In the conventional four-part rubric for proving negligence (duty-breach-causation-damage), these questions go solely to the question of breach. They are the two cumulative elements to the breach allegation. Therefore, this breach question is a "fact in issue" (see Lord Hoffmann in Re H *[2008] UKHL 35 at [2]). The court's task is clear. The judge is not "a mere umpire", as Denning LJ (as then was) said in* Jones v National Coal Board *[1957] 2 QB 55, at 63-64. Instead:*

"*[The] object above all … is to find out the truth … and in the end to make up [one's] mind where the truth lies.*"

This, naturally, is within the confines of the legal system and the evidence before the court (see, for example, Phipson on Evidence, *20th Ed. at §45-05). In the simplest sense, the case comes to this: if the claimant proves both issues, her claim succeeds. If she fails on either, her claim fails.*

Upon considering the evidence, both questions were answered in the negative. At [91], the judge concluded:

... tragically, Brian Briggs was exposed to asbestos dust or fibre at some point in his working life. But the claimant has not proved on a balance of probabilities that it happened (or also happened) while working for DHL.

The claim therefore failed. The judge's compassionate conclusion at [94]-[98] is worthy of consideration.

The Judge's Thirteen Axioms

This was plainly a decision on its own facts. What is interesting about the judgment, however, is the judge's distillation of "*thirteen axioms of fact-finding*", drawing on numerous authorities from different contexts. These are set out at [14] and are reproduced in full (including footnotes) below:

My sole task is to make findings of fact in that search for truth. Thus, I limit my account of the law to that. My decision is fundamentally grounded in the following thirteen axioms of fact-finding that I have drawn together from a wide range of relevant authority, starting with the most elementary propositions:

(1) The burden of proof rests exclusively on the person making the claim (she or he who asserts must prove);

(2) Each determination is governed by the conventional civil standard of a balance of probabilities;

*(3) The court must survey the "wide canvas" of the evidence (*Re U, Re B (Serious injuries: Standard of Proof) *[2004] EWCA Civ 567 at [26], per Dame Elizabeth Butler-Sloss P (as then was)); the factual determination "must be based on all available materials" (*A County Council v A Mother and others *[2005] EWHC Fam 31 at [44], per Ryder J (as then was));*

*(4) Evidence must not be evaluated "in separate compartments" (*Re T *[2004] EWCA Civ 558 at [33], per Dame Elizabeth Butler-Sloss P), but must "consider each piece of evidence in the context of all the other evidence" (*Devon County Council v EB & Ors. *[2013] EWHC Fam 968 at [57], per Baker J (as then was));*

*(5) The process must be iterative, considering all the evidence recursively before reaching any final conclusion, but the court must start somewhere (*Re A (A Child) *[2022] EWCA Civ 1652 at [34], per Peter Jackson J (as then was)):*

"*... the judge had to start somewhere and that was how the case had been pleaded. However, it should be acknowledged that she could equally have taken the allegations in a different order, perhaps chronological. What mattered was that she sufficiently analysed the evidence overall and correlated the main elements with each other before coming to her final conclusion.*"

*(6) The court must decide whether the fact to be proved happened or not. Fence-sitting is not permitted (*Re H *at [32], per Lady Hale);*

*(7) The law invokes a binary system of truth values (*Re H *at [2], per Lord Hoffmann):*

"*If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*"

*(8) There are important and recognised limits on the reliability of human memory: (a) our memory is a notoriously imperfect and fallible recording device; (b) a greater confidence displayed by a witness does not necessarily correlate with a correspondingly more accurate recollection; (c) the process of civil litigation subjects the memory to "powerful biases", particularly where a witness has a "tie of loyalty" to a party (*Gestmin SCPS S.A. v Credit Suisse (UK) Ltd *[2013] EWHC 3560 (Comm) at [15]-[22], per Leggatt J (as then was));*[3]

*(9) The court "takes account of any inherent probability or improbability of an event having occurred as part of the natural process of reasoning" (*Re BR (Proof of Facts) *[2015] EWFC 41 at [7], per Peter Jackson J); "Common sense, not law, requires that ... regard should be had, to whatever extent appropriate, to inherent probabilities" (*Re H *at [15], per Lord Hoffmann);*

*(10) Contemporary documents are "always of the utmost importance" (*Onassis v Vergottis *[1968] 2 Lloyd's Rep. 403 at 431, per Lord Pearce),*[4] *but in their absence, greater weight will be placed on inherent probability or improbability of witness's accounts:*

"*It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts.*" (Jafari-Fini v Skillglass Ltd *[2007] EWCA Civ 261 at [80], per Moore-Bick LJ);*

And to same effect:

"*Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence*" *(*Natwest Markets Plc v Bilta (UK) Ltd *[2021] EWCA Civ 680 at [50], per Asplin, Andrews and Birss LJJ, jointly).*

*(11) The judge can use findings or provisional findings affecting the credibility of a witness on one issue in respect of another (*cf. Bank St Petersburg PJSC v Arkhangelsky *[2020] EWCA Civ 408).*[5]

(12) However, the court must be vigilant to avoid the fallacy that adverse credibility conclusions/findings on one issue are determinative of another. They are simply relevant:

"*If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything.*" *(*R v Lucas *[1981] QB 720, per Lord Lane CJ);*

Similarly, Charles J:

"*a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B…*" *(*A Local Authority v K, D and L *[2005] EWHC 144 (Fam) at [28]).*

*(13) Decisions should not be based "solely" on demeanour (*Re M (Children) *[2013] EWCA Civ 1147 at [12], per Macur LJ); but demeanour, fairly assessed in context, retains a place in the overall evaluation of credibility: see* Re B-M (Children: Findings of Fact) *[2021] EWCA Civ 1371, per Ryder LJ:*

"*a witness's demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable*" *(at [23]); so long as "due allowance [is] made for the pressures that may arise from the process of giving evidence" (at [25]).*

[3] *The* Gestmin *principles approved variously (but see next footnote), including* R (Bancoult No.3) v Secretary of State for Foreign and Commonwealth Affairs *[2018] UKSC 3 - see Lord Kerr at [103], where they were said to have "much to*

commend them"; however, the Court of Appeal subsequently stated that Gestmin *is "not to be taken as laying down any general principle for the assessment of evidence … [instead] it is one of a line of distinguished judicial observations that emphasise the fallibility of human memory" (*Kogan v Martin *[2019] EWCA Civ 1645 at [88-89], per Floyd LJ).*

[4] *It must be remembered that* Onassis*, like* Gestmin*, was a dispute about recollection of business conversations, where typically there will commercial documentation. Ryder LJ sounds a necessary warning note about "simply harvesting obiter dicta expressed in one context and seeking to transplant them into another" (*Re B-M (Children: Findings of Fact) *[2021] EWCA Civ 1371 at [23]).*

[5] *At [120], per Males LJ, "… once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed." A dishonesty case, but I discern no valid reason that a different kind of impairment to credibility, such as unreliability or inaccuracy, is not capable of the same approach. It is an application of the principle of judging evidence in the context of all other evidence.*

Application of the Axioms: An Example

An example of the judge's applicaiton of these principles, with further discussion of demeanor (again including the judge's footnote), can be found at [29]-[31]:

Mr Vine was a site supervisor for McLeans, one of the main construction companies involved in these large projects. McLeans regularly contracted DHL to do the drylining of the properties they were building. That is how Mr Vine came across Brian Briggs in the 1970s. I found Mr Vine's evidence particularly persuasive. He plainly knew his stuff. A prime example was when he was challenged by counsel for the claimant about the trimming soffit boards to width. This was not something addressed in his witness statement. But immediately ("spontaneously" as Mr Rai submitted), Mr Vine was able to give a coherent and convincing account about how there was a certain "tolerance" as soffits on their inner aspect would rest atop the building frame/wall. It had the ring of truth. He spoke with authority. It is entirely clear why Mr Vine was promoted to site supervisor. He was thoughtful and measured. This is not an assessment of demeanour equating to truthfulness. I place little weight on that. I note the research results cited by Leggatt LJ in R (SS)(Kenya) v Secretary of State for the Home Department *[2018] EWCA Civ 1391 at [39]:*

"*… social scientists have tested the legal premise concerning demeanor as a scientific hypothesis … According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.*"[6]

But further on at [41], Leggatt LJ acknowledged that it was "perhaps undesirable to ignore altogether the impression created by the demeanour of a witness giving evidence". This must be right. It is a question, ultimately, of balance and judgement - before judgment. I explicitly direct myself as Macur LJ recommended (albeit in a family appeal) in Re M (Children) *[2013] EWCA Civ 1147. She said at [12] that judges:*

"*should warn themselves to guard against an assessment solely by virtue of their [i.e. witnesses'] behaviour in the witness box and to expressly indicate that they have done so.*"

*I do. Although Mr Vine gave evidence with great assurance and confidence, I set little store by that presentational impression. What was more impressive was his command of detail - the substance. Mr Vine accepted the limits of what he knew and saw and did not. He gave evidence that was nuanced, consistent and that made sense when measured against the canons of probability (*Re H*). He was also in a conceptually different position to either Mr Briggs or Mr Kenneth Parkes, who are most connected to the parties in this case. They each have a powerful incentive to advance a partial version of the past. However, Bruce Vine did not work for DHL. He worked for the main contractor McLeans. It must be recognised that knew Mr Parkes and was "quite close to Mr Parkes in the early days". That is many decades past. However, subsequently they "went their separate ways". He "got in touch again" when he heard that Mr Parkes had been diagnosed with Parkinson's. Therefore, although there was a historic connection between them, Mr Vine did not have any direct or personal interest whatsoever in the outcome of the litigation. To that extent, he provided evidence from a position of qualified and quasi- (although not complete) independence.*

[6] *OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997), [1997] EWLC 245 "Evidence in Criminal Proceedings", paras 3.9–3.12. See also Lord Leggatt, speaking extra-judicially, "Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony", At a Glance Conference, 12 October 2022. https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf*

Comment

It is suggested that the judge's synthesis of principle represents a useful guide to the assessment of witness evidence and the fact-finding process. It is noteworthy that the judge drew on authorities ranging from children proceedings to heavyweight commercial litigation. This serves as a reminder that the approach to fact-finding is the same in all civil litigation, though the composition of the 'canvas' of evidence will, of course, vary.