Neutral Citation Number: [2020] EWHC 1245 (Ch)

Case No: CH-2019-000219

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM ICC JUDGE PRENTIS

By Skype for Business
Date: 22/05/2020

Before:

THE HONOURABLE MR JUSTICE ROTH

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Between:

TERRY GREGORY (METAL FABRICATIONS) LTD	**Appellant/ Claimant**
- and -	
(1) WENDY GOLLEDGE **(2) JEFF GOLLEDGE** **(3) JJ PAULMAN CONTRACTS LIMITED**	**Respondents/ Defendants**

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Alexander Robson (instructed by **Knocker & Foskett**) for the **Claimant**
William McCormick QC and Max Cole (instructed by **Barringtons Solicitors**) for the **Defendant**

Hearing date: 23rd April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This Judgment was handed down by circulation to the parties' representatives by email and by release to Bailii. It was not handed down in court due to the present COVID19/coronavirus pandemic. The deemed time for hand-down is 10.30am on 22 May 2020.

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THE HONOURABLE MR JUSTICE ROTH

Mr Justice Roth:

INTRODUCTION

1. This is a sad case. It is a dispute between a brother, on the one hand, and his sister and her husband, who are the First and Second Defendants, on the other hand. The Third Defendant, JJ Paulman Contracts Ltd ("JJP"), is the company which the first two Defendants run together.

2. The claim concerns the operation of the Claimant ("the Company") which had been a family company set up by the eponymous Mr Terry Gregory and which his son and daughter, Ashley and Wendy, effectively inherited from him and of which they are now the sole and equal shareholders. So bad has been the falling out between them that this claim has been brought by the Company with allegations of fraud based on the evidence of Mr Ashley Gregory against the First and Second Defendants, Mrs Wendy Golledge and Mr Jeff Golledge. It has apparently been fuelled by a consultant to the Company, Mr Nigel Barrett, who the trial judge found was a driving force behind the litigation. For her part, Mrs Golledge has issued an unfair prejudice petition against Mr Gregory and the Company.

3. This appeal is from the decision on a trial of preliminary issues directed by Mr Registrar Jones. The Registrar's order of 5 February 2018 provided that the Court should "consider in the first instance the Claimant/Respondents' allegations of fraud by reference to invoices in a sample year." It was expressed that way since the preliminary issue was to apply in respect of both the Company's fraud claim and Mrs Golledge's unfair prejudice petition. The order further directed the service of a Scott Schedule listing all the invoices [from JJP to the Company] of the sample year and any issues raised by the Company in relation to those invoices based on the pleaded allegations. The sample year selected was 2009. But beyond that, there was no precise formulation of the preliminary issue.

4. It is clear from the judgment of ICC Judge Prentis ("the Judgment") that the preliminary issue or issues were therefore regarded as being the allegations of fraud made by the Company as against Mr and Mrs Golledge (and through them, JJP) with respect to the invoices issued by JJP to the Company in 2009. The invoices submitted by JJP were for work carried out for the Company as sub-contractor. It was Mr Golledge who carried out that work and it was he who determined the amounts to be billed for that work to the Company.

5. The Judge dismissed all the allegations of dishonesty as against Mr and Mrs Golledge. The Company's application for permission to appeal as regards the Judge's finding concerning Mrs Golledge was refused. This appeal therefore concerns only the alleged dishonesty of Mr Golledge.

6. The appeal was heard by a video link because of the situation resulting from the Covid-19 pandemic. Through the co-operation of all the lawyers involved and my clerk, it proceeded very smoothly, save for a problem with the recording. The Court is grateful to all those involved for making this possible.

BACKGROUND

7. I take the background facts from the Judgment. The Company is a sheet metal fabricator. It was set up in 1958 and in 1995 Mr Terry Gregory handed over the running of the company to his two children. Thereafter, Mr Ashley Gregory and Mrs Golledge carried out distinct roles. Financial and administrative matters were handled by Mrs Golledge whereas sales and production, including quoting for and pricing of jobs, was the responsibility of Mr Gregory. The Judge found that "while it was for Mrs Golledge to prepare the Company's invoices, she had no input in their content: she simply formalised what Mr Gregory gave her": para [27].

8. The Judge described the emergence of the relationship between The Company and JJP as follows:

> "23…. From about 2000 [the Company] hired the services of Mr Golledge for the provision of metalwork and glass and suchlike to retailers. Among its clients were such well-known names as Chanel, Balenciaga and H&M. Mr Golledge is an experienced shop-fitter who also carries out the necessary ancillary trades of carpentry, joinery, metalwork and site surveying.
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> 24. On 9 May 2006 JJP was incorporated as the vehicle for Mr Golledge's services. From that date until now Mr Golledge has been its director and Mrs Golledge its secretary, and of its 100 issued shares Mr Golledge has held 75 and his wife 25. According to its 2007 filed accounts JJP commenced trading on 1 January 2007, and from then on Mr Golledge's services to the company were provided through JJP.
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> 25. For the years 2007, 2008 and 2009 JJP worked exclusively for the Company. Its accounts show turnover to the year end 31 December 2007 was £163,842; in 2008 it was £175,249; and in 2009 it was £150,925…."

THE CLAIM

9. The claim form describes the Company's claim as:

> "A claim in fraud against a former Director and Secretary of the Claimant (D1), her husband (D2) and a company owned by them (D3)."

10. The Company's case, in essence, is that JJP, acting through Mr and Mrs Golledge, was systematically and dishonestly overcharging the Company in the invoices which it rendered. Thus, as the Judge stated at [22]: "This trial is about the credibility of the Golledges." As I have mentioned, the year selected for consideration was 2009, so the focus was exclusively on the invoices rendered by JJP in that year.

11. The main issue on appeal concerns only the finding regarding the conduct of Mr Golledge. As the Judge correctly stated, at [43]: "Central to that question must be the rates which JJP was entitled to levy, or, more accurately, which Mr Golledge believed it was entitled to levy."

12. At trial, the Company's case amounted to a root and branch challenge, putting the Defendants to proof of the charges in every invoice in their Scott Schedule and contesting a significant number of the elements in those charges. The focus was entirely on JJP's records and justification: The Company produced nothing of relevance from its own records as to the jobs on which JJP worked in 2009.

13. One of the problems in the evidence at the trial generally was that it concerned a time when relations between Mr Gregory and the Golledges were amicable. Understandably, the dealings between JJP and the Company were then conducted with none of the formality or documentation that one might expect not only from larger enterprises but in circumstances where the parties were dealing wholly at arm's length. This evidential problem was compounded by the fact that the witnesses were trying to recall details, sometimes at a very granular level, as to what happened very many years ago.

THE JUDGMENT

14. The Judge delivered a 62-page reserved judgment in which he rejected the challenges to JJP's invoices, although recognising that there were a number of unexplained or uncorroborated sums which Mr Golledge could not account for after all this time. In any event, he concluded that Mr Golledge was not dishonest in preparing the amounts to be billed in those invoices.

15. At [127] of the Judgment, the Judge set out the two questions which he said the court had to decide, in a formulation concurred in by both sides' counsel:

> "(a) Did, during the calendar year 2009, JJP overcharge [the Company] in respect of services rendered? and
>
> (b) Whether, if so, that over-charging was dishonest?"

Although it may have been helpful to analyse the matter that way, I should emphasise that this does not change the basic issue which the Court had to address: i.e., whether in submitting invoices for JJP in the amounts billed to the Company in 2009, the Defendants were acting dishonestly.

16. On this appeal, the Company's challenge to the Judge's conclusion is limited to one aspect, the so-called "Additional Charges" for what were described as "hard" and "very hard" work. This related to the way Mr Golledge calculated charges for breaks. It is a matter which emerged on the Defendants' completion of their column of the Scott Schedule.

17. It was common ground that there had never been a written agreement between the Company and, first, Mr Golledge and subsequently JJP; nor were there any written terms concerning the basis on which JJP would charge. Although clearly there was a contract with the Company for the ongoing provision of services, the Judge noted that

neither Mr Gregory nor Mr Golledge gave any evidence of the original contract. As the Judge observed (at para [150]) the effect of the preliminary issue was that the precise contract terms between JJP and the Company were not in issue. In consequence, he had to consider the contractual arrangement as to price in what he aptly described as "a contractual vacuum". That is significant since part of the Company's case on this appeal was that the Judge failed to apply the proper legal test for the establishment of contractual terms.

18. The Judge approached the matter in three stages. First, he considered what JJP could charge. Secondly, he addressed the question whether JJP was overcharging. Thirdly, he set out his conclusions. But in considering the Judgment and the way it is framed, it is important to appreciate that the "Additional Charges" which are the focus of this appeal was at trial only one of many parts of the charges in JJP's invoices that were contested.

19. The Company's case was that there were discussions between Mr Gregory and Mr Golledge at the outset and that they agreed that JJP was to be paid on an hourly rate basis, being the standard market rate, together with reimbursement of sub-contracted costs; and that this hourly rate was to be agreed from time to time between Mr Golledge for JJP and Mrs Golledge for the Company. The Judge roundly rejected that contention: see at [42]. Moreover, he proceeded to find that Mr Gregory had no contemporaneous knowledge of how JJP was charging.

20. Mr Robson, appearing for the Company on this appeal as he had below, in answer to my question, confirmed that there was no evidence that the hourly rate which Mr Golledge applied when calculating the charges to be included in the invoices had ever been agreed. Mr Robson further accepted that it was established by course of dealing that JJP's invoices presented to the Company would be drawn up on a lump sum basis without any breakdown.

21. It was the Defendants' case that JJP was paid not only on an hourly rate but that the lump sum basis charged in the invoices, included "labour costs, travel costs, materials supplied and any other costs or charges": Judgment at [158].

22. The Judge noted that he had been shown no document which supported the version of the contractual arrangement for charging set out in the Particulars of Claim, nor had there been any evidence as to prevailing market hourly rates: [161]. He continued:

> "162. Thus far the evidence points strongly towards a contractual agreement reflective of the course of trading over the previous years, being the lump sum billings for jobs and services inclusive of hourly rates and the other associated costs."

But he noted, at [163], that there was more to be said about hourly rates.

23. The way Mr Golledge arrived at the charge to be included in JJP's invoices for the hours he worked was on the basis of his notebook. He gave extensive evidence about that. The Judge found, at [177]:

> "The Notebook displays the vast number of hours which Mr Golledge was working during 2009, vast both in total and in

> individual periods, which were on occasion in excess of 24 hours. Beyond a general rounding of times I take those periods to be accurate."

24. It is appropriate to set out Mr Golledge's explanation of the "Additional Charges", as recited in the Judgment, at [169]:

> "I often worked for [the Company] for 18 hours or more at a time and took no breaks. I did this because the job needed to be finished, to a high quality. Ashley had a habit of calling me frequently during a job to see how it was going, when I would be finished and directing me to other work later that day or the next. Often, I would have to return to the workshop to pick up metals work which had only just been finished or which had been remade because of some manufacturing defect. I worked these very long hours and consequently earned a good living from it, but I did it because my brother in law asked me to. It is not an exaggeration to say that at that time his and Wendy's business depended on my willingness to work like this.
>
> I often marked work as 'hard' or 'very hard' in my notebook. When I had worked this way, I charged [the Company] an amount in lieu of breaks. In preparing Column 2 of the Scott Schedule I have attempted to specify how much of the charge was made up this way based on what I believe I charged at the time.
>
> I accept that I did not discuss this with Ashley."

25. The Judge proceeded to summarise the effect of Mr Golledge's further evidence, as follows:

> "172. There is a confusion in Mr Golledge's description of breaks, which also came out of his cross-examination. Breaks, as he accepted, would not normally be charged. Yet he was charging for breaks, although he had not taken them, and although he was charging for the time on the job, possibly even on a "hard" basis; and that was because others would have taken breaks, and the job would have therefore taken longer.
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> 173. As to "hard" he said it was a word he used for "excessive hard work" or "extreme work" far above what the average worker would do. He said that while he had not discussed it with Mr Gregory, although he could have done, he had not sought to hide it; albeit that it was not until completing the Scott Schedule that this practice came into the open.
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> 174. He also stated that it was his practice when working hard to try to save costs on return journeys. If he had worked like a normal person jobs would have taken longer leading to more

> costs. Mr Gregory would also telephone him regularly during a day, trying to get him onto the next job.
>
> 175. There can be no doubt that during 2009 Mr Golledge added additional amounts to JJP's invoices for work which was hard and/or which would have justified breaks. Although breaks are not referred to in the Notebook, there are a number of contemporaneous entries including the word "hard", sometimes underlined, sometimes double-underscored, sometimes "hard +" or another variant. These entries must have meant something and must have been intended to have some effect on the charge for the job."

26. Having accepted that the periods of work as set out in Mr Golledge's notebook were accurate, the Judge proceeded at [178] to find that the charges for Mr Golledge's work were fair to the Company and that Mr Golledge's approach to charging was rational.

27. At [179]-[180], the Judge noted that there was no evidence from the Company as to what any of the many jobs undertaken by JJP in 2009 should properly have cost or how long any of the jobs undertaken by JJP in 2009 should have taken, or that the amount charged for any job was excessive, whether by reference to market rates or the Company's own charges to its clients. Thus, there was no evidence that any of the amounts was unreasonable on an objective basis. Further, there was no reason to find that all the other items (travel, materials, parking, etc) included in the charge could not properly be charged.

28. Then at [181] the Judge observed that there is "the compelling point that what [JJP] had charged for, and the way it charged, had been the same for many years, invoice after invoice; unquestioned; paid." He concluded: "The contractual basis is thereby established."

29. The Judge discussed the alleged dishonesty of Mr and Mrs Golledge in the final section of the judgment. I shall turn to that when addressing Ground 2 of the appeal.

THE APPEAL

30. The appeal is brought on two grounds. The first concerns the finding that inclusion of the "Additional Charges" did not constitute overcharging by JJP; the second concerns his approach to the allegation of dishonesty of Mr Golledge.

Ground 1: Identification of contractual entitlement for "Additional Charges"

31. As set out above, it was common ground that Mr Golledge had never discussed with Mr Gregory these "Additional Charges" and it was not suggested that Mr Gregory was ever aware of them before these proceedings. On that basis, Mr Robson argued that those charges could not be permitted under the contract. He contended that the Judge was wrong in law to find that a term justifying such a charge could arise by course of dealing when the charge was never disclosed and was, indeed, unusual. Mr Robson stressed that there was wholly absent from the Judgment any analysis of how a term could be incorporated into the contract permitting JJP to introduce an additional charge for 'hard' or 'very hard' work by billing for breaks that were not taken; and he referred

to the classic test for contract analysis on the basis of offer and acceptance which, he submitted, had been wholly ignored.

32. However, it is important not to read a judgment as if construing a statute. I do not see the Judge's conclusion in para [181] as based solely on a continuous course of dealing. That conclusion applied to all the charges then under challenge. It is true that the Judge said in the previous sentence that the fact that charges had been arrived at the same way for many years was "compelling", but in my view, that applies also to the fact that JJP's invoices were expressed as a lump sum with only some expenses shown in addition. In any event, on any fair reading of the Judgment I consider that the conclusion at the end of [181] reflects what the Judge set out also in the immediately preceding paras [178]-[180].

33. I was told, in response to my question to Mr Robson, that although the parties concurred in the formulation of the questions to be considered at trial (see para 15 above) which are expressed in terms of contractual entitlement, they never addressed the Judge on the legal principles of contractual formation which Mr Robson addressed to this Court. I do not see that the Judge can be criticised for failing to carry out an analysis which neither side put forward in argument.

34. In my view, it is abundantly clear that the contract at issue was not a formally constituted agreement but an arrangement by a business (the Company) run by a brother and sister, in which both held a substantial shareholding, for the supply of services by the sister's husband through another company (JJP) run by the sister and her husband. At the time, they were effectively the members of a family working closely together.

35. That is highlighted by the fact that there was never an agreement as to the hourly rate that Mr Golledge would charge, which of course made up a much more significant part of the invoiced lump sums than these Additional Charges. Of course, as I have just mentioned, in legal terms there was a contract between the Company and JJP. Mr Robson submitted that there was no suggestion that this contract involved JJP charging a reasonable sum. But if, on the Company's own case, the major part of the contractual charge was to be computed on an hourly rate and that rate was never discussed or agreed, I consider it self-evident that it was implied that the charge must be reasonable. JJP could not have the contractual right to be paid at any hourly rate it might choose.

36. In that regard, I think that it is important to bear in mind that the "Additional Charges" now at issue were very limited in financial terms. Mr Robson effectively acknowledged that when he said that it would not be practicable to show that the inclusion of these further charges led to an unreasonable sum being invoiced since the "Additional Charge" on any individual invoice was "a very small amount." That is demonstrated vividly by the fact that for the whole year in question (2009), the "Additional Charges" in aggregate amounted to £2,949 out of JJP's invoiced charges of £172,502, i.e. just 1.7% of the total invoiced amount: Judgment at [131].

37. Mr Golledge said that he could have taken true breaks on these 'hard' jobs, but then the jobs would have taken longer to complete. Given both the working and contractual arrangements as I have described them, it seems to me that JJP could probably have increased the hourly rate charged for Mr Golledge by 2%, or at least it could have used a higher rate for those jobs on which he worked without breaks, as there is nothing to suggest that the resulting rate would be unreasonable. JJP, through Mr Golledge, did

neither of those things but instead took the course of incorporating these small "Additional Charges" as an extra. Given this context, I consider that the Judge was fully entitled to find, as he stated at [178]:

> "… Mr Golledge's evidence on this point is compelling, notably in his insistence that the work he was doing, and the charges levied for it, were fair and with a view to benefitting the Company in which he as a member of the family felt a direct interest, and ensuring it could comply timeously with the contractual undertakings it had agreed to perform. His evidence, written and oral, attests to this vividly…. That is also a perfectly rational approach."

38. That, in my judgment, amounts to saying that the charges were reasonable in the contractual context. It may be that when the focus is directed specifically at the inclusion of the "Additional Charges" it is inappropriate to place emphasis on a course of dealing. But I consider that there was ample foundation for the Judge's conclusion that the "Additional Charges" were not in breach of contract and, therefore, did not constitute overcharging by JJP.

39. Further and in any event, it should be remembered that the preliminary issue was not directed at an allegation of breach of contract: it is addressing an allegation of fraud. In that context, the question "was there overcharging?" should not, in my judgment, be understood in strictly contractual terms. The question whether there was overcharging is in my view to be understood in the more general sense of levying an excessive or unreasonable charge. That is particularly the case when the major element of the invoiced sums was calculated on an hourly rate which had never been agreed. Viewed in that sense, the conclusion of the Judge at [178] cannot be faulted on the evidence.

Ground 2 – Finding that practice of Additional Charges was not dishonest

40. As noted above, the Judge found that Mr Golledge believed that he was entitled to levy these "Additional Charges" on jobs involving 'hard' or 'very hard' work: para [178]. That is consistent with the Judge's overall assessment of Mr Golledge as a witness: "I found Mr Golledge … to have given a basically honest and reliable account…": para [22].

41. That is a factual finding by the Judge based on his assessment of the witness's evidence at trial. Mr Robson very properly does not seek to challenge it.

42. The issue under this ground of appeal concerns the application by the Judge of the test for dishonesty set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. Mr Robson contended that the Judge failed to address the second limb or stage of that test. And Mr Robson further submitted that if the Judge did address it, his answer was infected by the fact that he had found that there was no overcharge; so if the appeal was successful on Ground 1, the Judge's decision on dishonesty cannot stand.

43. Since I have held that the appeal on Ground 1 does not succeed, Ground 2 therefore becomes academic. But as it was fully argued, and in case I am wrong on Ground 1, I

shall address it. To do so, it is necessary to consider the judgment in *Ivey* and what that important case decided.

44. In *Ivey*, the Supreme Court reconsidered the legal meaning of dishonesty and unanimously disapproved the long-standing test for dishonesty in the criminal law set out in *R v Ghosh* [1982] QB 1033. *Ghosh* had held that where a criminal offence required proof of dishonesty, the jury must apply a two-stage test (as summarised in Lord Hughes' judgment in *Ivey* at [54]):

> "Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes."

45. Although applied for over 30 years, *Ghosh* had attracted strong academic criticism. Moreover, the House of Lords had subsequently held that the test for dishonesty in the civil law was different. For civil cases, the test was expressed as follows by Lord Hoffmann, giving the opinion of the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 at [10]:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.

46. The problem about the second limb of the *Ghosh* test, as explained by the Supreme Court in *Ivey*, was that it meant that a party could escape a finding of dishonesty where he genuinely believed that his conduct was honest based on *his* view of the standards of society. As Lord Hughes observed, at [59]: "it is not in the least unusual for the accused not to share the standards which ordinary honest people set for society as a whole." And he continued:

> "There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so."

47. The Supreme Court concluded that there should be no difference between the meaning of dishonesty as between criminal and civil cases. It was a "simple, if occasionally imprecise" English word and the test set out in *Barlow Clowes* should be followed throughout. Lord Hughes stated, at [74]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's

> knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

48. While there is an apparent linguistic difference between Lord Hoffmann's formulation in *Barlow Clowes* and Lord Hughes' articulation of the second stage in *Ivey* (the former referring to "mental state" and the latter to "conduct"), it is clear that the Supreme Court was not intending to create any distinction between them. The second stage set out in *Ivey* is not an objective assessment simply of whether what the defendant did would be regarded as dishonest: if it were, that would emasculate the subjective element entirely. It is the view which the defendant held of what he did which is to be assessed according to the standards of ordinary decent people. The significance of *Ivey* is that it held that it was immaterial whether the defendant himself realised what those standards are.

49. This rather lengthy analysis of *Ivey* enables this ground of appeal to be disposed of shortly.

50. The Judge included an extensive quotation from *Ivey* at [16] of the Judgment, and then stated, at [17], that he would apply this test. Mr Robson submitted that the Judge nonetheless failed properly to address the second stage of the *Ivey* test. I reject that submission which I regard as completely misconceived.

51. Dishonesty is addressed at the end of the Judgment at paras [201]-[203]. At [201], the Judge held that Mrs Golledge could be absolved of any dishonesty, a conclusion no longer open to challenge. He then turned to consider Mr Golledge and said (with my emphasis added):

> "202. As to Mr Golledge, his mode of billing in 2009 followed that in previous years. Those previous invoices had been rendered and paid without any question. He believed, *and on an objective view could fairly believe,* that he was entitled to render invoices during 2009 which contained the same elements, including as to uplift for hard work and breaks. The resulting invoices were, as he saw, fair in price; and I have had no evidence that they were unjustifiable either as against typical market price or as against the particular price of any of these jobs"

52. The Judge then referred to another aspect of the Scott Schedule (not pursued on this appeal) and stated his conclusion that that did not reflect dishonesty.

53. The reasoning in para [202] may be succinct, but it has of course to be read in the context of the Judge's findings at [178]-[179] referred to above. The Judge found that

Mr Golledge genuinely believed that he was entitled to include the "Additional Charges" in calculating the lump sums to be invoiced. Mr Robson accepted that the first stage or limb of the *Ivey* test was therefore addressed and answered in Mr Golledge's favour, and that this was a factual finding as to his state of mind which could not be disturbed on appeal.

54. However, the Judge also found that Mr Golledge's belief that these charges were justified was "a perfectly rational approach." That is unsurprising given that:

    i) the Judge found that Mr Golledge worked extremely hard and long hours on the jobs for the Company. Most of the work was carried out before 8 am and after 6 pm;

    ii) the Judge accepted that Mr Golledge felt at the time a commitment to what was a family Company, of which his wife was then a director and the secretary;

    iii) the Company advanced no case that the charges invoiced by JJP were excessive.

55. Accordingly, I consider that there was ample basis for the Judge to find that Mr Golledge's belief was one that could fairly be held "on an objective view". I regard that as a clear reference to the second limb of the *Ivey* test which the Judge had set out earlier in the Judgment. Nor had the Judge overlooked or failed to have regard to the fact that Mr Golledge had never mentioned to Mr Gregory his practice of including these "Additional Charges": that was acknowledged by Mr Golledge and is expressly mentioned at [173], in the section of the Judgment leading up to the Judge's conclusion as to Mr Golledge's belief at [178]. It is Mr Golledge's view, arrived at on those grounds, which would have to suggest to ordinary decent people that his conduct was dishonest. There is nothing perverse or irrational in the Judge's finding that it would not do so.

56. Although I have held that the Judge was correct in concluding as a matter of law that JJP was entitled to include the "Additional Charges" in the lump sums billed, I should make clear that if I had held otherwise that would not affect my conclusion on the question of dishonesty. The courts hear many cases where a party is found to have broken the terms of a contract, creating a liability in damages. That is a very different thing from finding that the party in breach was dishonest.

57. I would add that once an appellate court is satisfied that the court below has applied the correct legal test for dishonesty, the finding that an individual was dishonest is essentially an evaluative judgment for the trial judge. As Mr McCormick QC pointed out, appellate courts have repeatedly emphasised the caution to be exercised before interfering with such a judgment: see, e.g., the recent judgment of the Court of Appeal in *Prescott v Potaminanos, In re Sprintroom Ltd* [2019] EWCA Civ 932 at [72]-[78]. The Court there quoted the well-known summary of the position by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of

> these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
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> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

58. I therefore reject the further criticism of the Judgment at Ground 2(c) of the Notice of Appeal, that the Judge failed properly to assess the evidence in reaching his conclusion on dishonesty. I have already dealt with the fact that Mr Golledge did not tell Mr Gregory at the time about the "Additional Charges." All the other particular matters set out at para 68 of Mr Robson's skeleton argument, to which it was submitted the Judge failed to have regard, post-date 2009. However, the assessment of dishonesty is to be based on Mr Golledge's conduct and views as at the time, not on what occurred several years later and the Judge would only need to refer to such subsequent circumstances if he felt that they shed light on Mr Golledge's views at the time. Evidently, that was not the Judge's view and I see nothing perverse or illogical in that conclusion.

CONCLUSION

59. In assessing the application for permission to appeal on the papers, Morgan J observed:

> "The proposed appeal faces some serious obstacles, not least in so far as it challenges findings of fact and in so far as it invites

> the appeal court to make findings of dishonesty which were not made by the judge below."

60. I believe that I said much the same at the oral hearing of the application when, as I recall, I was just persuaded to give permission. In my judgment, the Company as appellant has wholly failed to clear those obstacles. For the reasons set out above, I reject both grounds of this appeal, which is therefore dismissed.