

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH  
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2024] SC EDIN 18

EDI-SF 124-22

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

ARIF KHAN

Pursuer

against

AXA INSURANCE UK PLC

First Defender

and

MOHAMMAD ARSHAD

Second Defender

**Pursuer: Bergin, Advocate; Stewart Legal, Solicitors**  
**First Defender: Marney, Advocate; Horwich Farrelly Scotland LLP**  
**Second Defender: Not present or represented**

EDINBURGH, 2 April 2024

The Sheriff, having resumed consideration of the cause, MAKES the following findings in fact:

[1] The pursuer is Arif Khan who resides at [redacted for Data Protection reasons].

[2] The first defender is AXA Insurance UK PLC which has a place of business at 20 Gracechurch Street, London, EC3V 0BG. At the material time they were the road traffic insurers of the second defender.

[3] The second defender is Mr Mohammad Arshad who resides at [redacted for Data Protection reasons].

[4] On 9 July 2020 a road traffic collision occurred on Dalkeith Road, Edinburgh. There is no credible or reliable evidence to allow the court to determine the precise time of day when the accident occurred.

[5] The collision involved vehicles being driven by Mahmut Tas and the second defender.

[6] Mahmut Tas was driving a Vauxhall Sharan Registration Number BA57 URK along Dalkeith Road at the time of the collision. The second defender was driving Skoda Octavia registration number GK14 UTJ along Prestonfield Crescent towards Dalkeith Road. The second defender drove out of the junction at the end of Prestonfield Crescent onto Dalkeith Road when he ought to have given way to traffic on Dalkeith Road. His vehicle collided with the offside of Mahmut Tas' vehicle.

[7] The pursuer was a front seat passenger in the vehicle being driven by Mahmut Tas.

[8] Following the collision, Mr Tas exited his vehicle first. The pursuer then exited the vehicle through a front door.

[9] The collision was not reported to the police by anyone at the time, or since.

[10] Behzad Ali Shah was a passenger in the vehicle being driven by the second defender at the time of the collision.

[11] The second defender deliberately drove his vehicle into the side of Mahmut Tas' vehicle. Following the collision, Mr Tas' vehicle was not driveable.

[12] Shortly following the collision, Mahmut Tas telephoned Kwik Claims. An employee of Kwik Claims, known as Nabi, arranged for a recovery vehicle to attend the accident locus to uplift Mr Tas' vehicle and take it to a storage yard.

[13] Subsequent to the collision, the second defender telephoned an unknown person who collected him and took him home. The second defender subsequently telephoned a recovery company to uplift his vehicle and take it to his home address.

[14] The pursuer did not seek any medical assistance or advice as a result of the collision, whether from his GP practice, hospital or otherwise.

[15] Akdeniz Supermarket Limited trades from premises at 84-90 Leith Walk, Edinburgh EH6 5HB and did so throughout 2019 and 2020. Mahmut Tas has been and remains a director of Akdeniz Supermarket Limited since 15 June 2012.

[16] The pursuer, as at the date of the accident, had worked for Akdeniz Supermarket Ltd, for a two to three week period immediately prior to the accident. He did not have set hours. Mr Tas would call the pursuer to ask if he was available to work whenever required.

[17] Mohammed Irfan was appointed as a director of Kwik Claims Edinburgh Limited on 14 May 2019 and remained so as at 9 July 2020. Kwik Claims have a place of business at 76 Leith Walk, Edinburgh, EH6 5HB, located two doors away from Akdeniz Supermarket. Mr Irfan and Nabi bought their lunch from the supermarket two to three times per week. Mohammad Irfan previously bought meat from the supermarket.

[18] Mohammad Irfan knew all occupants of the vehicles involved in the collision prior to the collision occurring.

[19] Mahmut Tas and the pursuer knew of, and engaged in conversations with Mohammad Irfan and Nabi from Kwik Claims prior to the accident.

[20] Mohammad Irfan has been friends with the father of Behzad Ali Shah for the last 20 years, going back to their time in Pakistan. They remain friends.

[21] On 4 August 2020 Mr Irfan visited Loch Lubnaig with Behzad Ali Shah and Mr Irfan's nephew.

[22] The pursuer had attended Kwik Claims office prior to the collision to meet their employee, Nabi, in Nabi's capacity as Chair of the Pashtun Society.

[23] On 18 July 2023, 10 months after the raising of these proceedings, the pursuer introduced adjustments to his pleadings to the effect that prior to the collision to which the action relates, the pursuer had previously met and spoken to Mohammed Irfan and Kwik Claims Edinburgh Ltd otherwise he would not have known he could obtain any advice and assistance from them.

[24] Mohammad Irfan telephoned the second defender prior to the collision to arrange for him to pick up Behzad Ali Shah and give him a lift in his car. The journey to which the lift related ended in the collision.

[25] On 26 April 2023, Valerie Pitt, Solicitor, partner at Horwich Farrelly Scotland, telephoned the second defender. The purpose of the call was to obtain a statement from the second defender regarding the collision on 9 July 2020. The second defender understood the reason for the call but said that he wanted to discuss matters with his agents prior to giving a statement to her. He named his agents as Kwik Claims.

[26] The first defender paid damages to Mahmut Tas in respect of his personal injury claim arising out of the collision on 9 July 2020.

[27] On 17 February 2021 the pursuer intimated a compensation claim for injuries arising from the collision to the first defender as insurers of the second defender, under the compulsory pre-action protocol for personal injury claims via Stewart Legal. He did so at a time when Mr Tas' compensation claim was nearing settlement.

[28] Stewart Legal are a firm of solicitors who were appointed to act on the pursuer's behalf by Kwik Claims Ltd.

[29] AXA Insurance wrote to Stewart Legal dated 1 March 2021 accepting breach of duty on the part of their insured in relation to the pursuer's claim, but disputing any loss had been suffered by the pursuer. AXA queried why the claim had been intimated at such a late stage. They stated in the letter that they had been told by their policy holder that the collision was at very low speed, that Mr Khan had made previous claims without delay and the evidence to date suggested that Mr Khan had failed to seek the medical advice and/or treatment which would be expected of someone who was genuinely injured. AXA stated that they did not intend to make any offers of compensation.

[30] On 20 June 2023 the first defender withdrew indemnity under the second defender's policy of insurance on the basis they believed the accident was not genuine.

### **Findings in fact and law**

[31] The road traffic collision on 9 July 2020 was a staged one.

[32] The pursuer, along with Mahmut Tas, Mohammad Arshad, Mohammad Irfan and Behzad Ali Shah were complicit in perpetrating or attempting to perpetrate an insurance fraud.

### **Finding in law**

[33] The pursuer is not entitled to reparation from the first or second defenders.

### **Background**

[34] This summary cause personal injury action arises from what at first glance is a straightforward road traffic accident. The pursuer's position is that he was a passenger in a car being driven by Mahmut Tas. Their car was proceeding along Dalkeith Road when a car

being driven by the second defender, Mohammad Arshad, pulled out of a side street, Prestonfield Crescent, without giving way and collided with the passenger side of Mr Tas' vehicle. The first defender, AXA Insurance UK Limited were the insurers for Mr Arshad's vehicle at the time of the accident and were convened by way of Regulation 3 of the European Communities (Rights Against Insurers) Regulations 2002. However, the first defender avers that in so far as a collision did occur it was staged and the pursuer, along with others, participated in a fraud. They have since withdrawn indemnity under the second defender's policy. They remain obliged to satisfy any award of damages which the pursuer is awarded against the second defender under section 151 of the Road Traffic Act 1988.

[35] Liability was therefore in dispute. Quantum was agreed in the sum of £4000 inclusive of interest to the date of the proof, in the event that the court determines the liability position in favour of the pursuer. A lengthy joint minute had been signed and, in so far as is material to the decision, is reflected in the findings in fact.

### **Summary of witness evidence**

#### *Witnesses called by the pursuer*

##### *Mahmut Tas*

[36] Mr Tas gave his evidence through a Turkish interpreter. He said that he was taking the pursuer to a Cash & Carry to get stock for his shop, driving his Volkswagen Sharan BA57 URK along Dalkeith Road. On the way a car pulled out of a side street and collided with the passenger side of his vehicle. He initially said he had picked up the pursuer but later in his evidence said they both left from his shop. He described the weather conditions as slightly rainy. The only occupants of his vehicle were him and the pursuer. The collision

occurred around 6.00pm or 6.15pm. He disputed the accuracy of documentation which stated that the collision was either in the morning or earlier in the afternoon.

[37] He exchanged insurance details with the other driver and phoned Kwik Claims to arrange a recovery truck to uplift his vehicle. He had the phone numbers for the director of Kwik Claims, one of their employees and the switchboard number stored in his mobile although denied having any prior business dealings with Kwik Claims. This was because Kwik Claims had left marketing leaflets on the counter of his shop which showed their telephone numbers and he had stored them in case he ever needed to contact them for insurance.

[38] He was unable to answer whether he had cover under his own insurance policy for recovery of a vehicle but did not call his own insurers as he thought it would be too difficult to get through to them at that time of day. He could not answer whether the other driver, Mr Arshad, remained at the scene until Mr Arshad's vehicle was uplifted.

[39] He confirmed the police were not called as he did not think the police would deem the accident to be serious enough. He described the front of the other vehicle as a complete mess. He was a bit sore but did not go to hospital as it was during Covid and he worried about attending hospital due to having diabetes.

[40] He made a claim for his injuries and the loss of his vehicle which was deemed to be an economic write-off as the repair cost exceeded the £8000 car value. He received assistance from Kwik Claims to do so. Whilst he denied knowing the people from Kwik Claims in any business sense before the accident he knew who they were because they were customers of his shop. He denied any suggestion that the accident was staged or knowing the occupants of the other vehicle. He was not sure whether the pursuer knew anyone from

Kwik Claims before the accident and denied knowing that the accident was going to happen.

*Arif Khan*

[41] Mr Khan gave his evidence through a Punjabi interpreter. Prior to the accident he was a university student, studying computer science. He found a job at Mr Tas' supermarket, stating he was employed there for 1½ to 2 months. He stated that when they left the shop, (on the day of the accident) Mr Tas was driving to his home to get cash before heading to the cash and carry.

[42] He was a front seat passenger and as they were travelling along Dalkeith Road a car suddenly pulled out of a side street and collided with the passenger side of Mr Tas' vehicle. He was checking messages on his mobile phone at the time. He described being moved around in circles as a result of the impact. He remained in the vehicle for 2 to 3 minutes, tried to get out of the front passenger door but was unable to do so and climbed into the back to exit through a rear door. He asked Mr Tas if he should stay. He did not speak to the occupants of the other vehicle. His head was spinning. He then took the bus home.

[43] Pain did not set in immediately and it took 3 or 4 hours for him to develop left sided neck, lower and mid back pain. He did not know what to do. He contacted his GP practice that night and was given advice over the telephone. He did not seek any additional medical advice or treatment from his GP or hospital at any point. His symptoms lasted for a year and thereafter he only suffered pain when it was cold.

[44] After 5 to 7 days off work he returned to work at Akdeniz Supermarket at which point Mr Tas asked him if he wished to make a compensation claim. He was too busy at University but would do so when he had more time. He took one of the Kwik Claims

marketing leaflets and phoned them around 6 months later, in February 2021.

A compensation claim was intimated on his behalf that month. He did not know what Kwik Claims would do for him but thought they may be able to claim back his loss of earnings when he was unable to work.

[45] He denied having any dealings with Kwik Claims prior to the accident and denied knowing their offices were two doors down from the supermarket.

[46] He was asked about the medical report which Mr Foxworthy, orthopaedic surgeon, prepared in relation to his injuries and in particular why it said the accident occurred at 4.00pm. He denied saying 4.00pm. His position was he had said the accident happened between 4.00 and 6.00pm.

[47] The medical report states that the pursuer, on contacting his GP practice, had been advised by staff to self-mobilise and take Paracetamol and Ibuprofen. The expert was told that the worst of his symptoms lasted for around 6 months and by the end of the year he had mostly recovered. However in his parole evidence he said that he did not start to recover for a year.

[48] He denied any suggestion of taking part in a fraudulent scheme.

[49] Under cross-examination, he accepted that his university course is taught in English but insisted on an interpreter in case he made any mistakes due to not being familiar with words that might be used. He had worked for Mr Tas for 2-3 weeks before the accident on a part-time/20 hours per week basis. Start and end times varied. He was off work for about a week, then said 5 to 7 days. He then returned to work at Akdeniz. He was referred to the Foxworthy report where it is stated that at the time of the accident he had been doing the job for 7 months and was off work for approximately 4 weeks. That was wrong and he was off work for up to 7 days.

[50] He denied knowing, prior to the collision, that Kwik Claims were situated two doors down from the Akdeniz supermarket. He accepted he may have spoken to Mr Irfan as a customer of the supermarket. He denied knowing Mr Irfan or what he did for a living. He denied knowing the second defender or Mr Shah before the accident.

[51] Mr Khan was referred to a previous version of his pleadings where adjustments were made on 18 July 2023 stating that prior to the accident the pursuer had previously met and spoken to Mohammed Irfan and Kwik Claims Edinburgh Ltd, otherwise he would not have known he could obtain any advice from them. This had since been deleted out of the final version of his statement of claim. He did not know why that had been in his pleadings and reiterated that he had not consulted Kwik Claims until 6 or 7 months after the collision.

[52] He had been working in the shop before setting off for the cash and carry. He believed they set off in the evening and the weather was cloudy with light rain. They were heading to Mr Tas' home so he could get cash.

[53] After the collision he did not know why the police were not called. He saw Mr Tas on the phone. He left the scene before the recovery truck arrived, taking the bus home. He did not attend hospital because he was not bleeding.

[54] He confirmed that it was the night of the accident that he contacted his GP practice although could not explain why he did that when it would have been closed. He said he started taking Ibuprofen and paracetamol as that is what GPs normally recommend.

[55] He denied knowing the collision was going to happen.

#### *Mohammed Irfan*

[56] Mr Irfan gave his evidence without the services of an interpreter. He has been the sole director of Kwik Claims Edinburgh Ltd since 2019. He has had business premises two

doors down from Akdeniz Supermarket since then. The business services include selling cars, storing damaged vehicles, making referrals to solicitors to pursue claims and generally assisting people with any issue they need help with including filling out tax returns and getting the best insurance quotes. They mainly, but not exclusively, assist persons from the Pakistani and Bangladeshi communities in Edinburgh.

[57] Their main sources of income stem from vehicle recovery, vehicle storage and referrals.

[58] He became aware of the collision involving Mr Tas on the following day when he noticed Mr Tas' vehicle in their storage yard and was told by Nabi why it was there. He thought Nabi had dealt with Mr Tas on the day of the accident, arranging for the vehicle to be recovered from the scene.

[59] He stated that they have marketing literature which they leave in local shops for distribution. Whilst he, Nabi and the office all have telephone numbers, nothing was said about whether they all appear on the marketing literature.

[60] Mr Tas had not been a client of Kwik Claims before 9 July 2020. He simply knew of him because he would buy lunch from his shop two or three times per week and had previously bought meat there.

[61] He thought Nabi had signed up Mr Tas for a compensation claim and referred the case to Stewart Legal who recovered personal injury money, recovery and storage charges.

[62] He knew of the pursuer prior to the accident, firstly, because he regularly attended the supermarket where the pursuer worked for 2 or 3 weeks, and secondly, the pursuer had visited Kwik Claims office in Leith Walk to be introduced to Nabi as chair of the Pashtun Society in Edinburgh. The pursuer on that occasion had been offered tea or coffee. He was accompanied by an un-named person from the Day to Day shop.

[63] The pursuer came to them six or seven months after the collision to make a claim and he was also signed up and referred to Stewart Legal. Nabi dealt with him too. At that time, Mr Tas' claim had almost settled.

[64] Mr Irfan confirmed they do "cross check" information with other cases and in this case they crossed checked the pursuer's claim with that of Mr Tas. He said they do turn down a "pretty low" number of claims. He denied being involved in an insurance fraud stating he had a reputation in Edinburgh.

[65] He denied knowing Mr Arshad before the accident. When it was suggested that Mr Arshad had, during a conversation with the solicitors acting for AXA, referred to Kwik Claims as his agents Mr Irfan laughed and said he does not know why Mr Arshad would say that, that Mr Arshad had come to them to get a car insurance renewal quote about a year after the collision and had been referred to Kwik Claims by someone they both knew. No name was given. He recalled one of his employees looked at a price comparison site and got a quote. He could not explain why the file note of Valerie Pitt dated 26 April 2023, when discussing the collision, records Mr Arshad as saying that he wanted to speak to his agents before giving a statement.

[66] He had known the father of Behzad Ali Shah for 20 years from their time in Pakistan. They remained friends. Behzad Ali Shah came to Scotland to go to the same university as Mr Irfan's nephew. Mr Irfan and his nephew visited Loch Lubnaig on 4 August 2020 with Behzad Ali Shah where a photograph was taken of Mr Irfan and Mr Shah by the nephew. That day was referred to as the day of Eid.

[67] It was put to Mr Irfan that he had asked Mr Arshad to give Mr Shah a lift on the day of the collision. He denied that and stated his first involvement with Mr Arshad was a year later when he sought help with a car insurance quote.

[68] Mr Irfan was asked whether anyone at Kwik Claims had helped Mr Arshad complete the Motor Vehicle Incident Report Form. He said no one had helped Mohammad Arshad complete it – if someone else had come to Kwik Claims with the form someone (not Mr Irfan) might have helped them complete it. He was not sure but it was possible.

[69] When asked whether he thought it was simply a coincidence that the accident involved someone well known to him ie Mr Shah he said “it could be”.

*Witnesses called by the defender*

*Mohammad Arshad*

[70] Mr Arshad gave his evidence through a Punjabi interpreter. He denied knowing Mr Irfan in July 2020. There had been a mix up when he was asked about Valerie Pitt noting, on 26 April 2023, that he had told her that he wanted to speak to his agents Kwik Claims before giving a statement. His first dealings with Kwik Claims was when he had been given their number by a friend who works in a takeaway so he could get an insurance renewal quote.

[71] He had told Ms Pitt when she called that he was driving and needed to stop. He wanted an interpreter present when he was interviewed and wanted them to come to his house but no one turned up. He had no recollection of telling her that his agents were Kwik Claims.

[72] When referred to the Motor Incident Report Form, signed by him, he confirmed it was his signature, but denied filling out the form. A friend had filled it out for him but the answers were his answers. He was unable to remember the name of the friend. The form says there were three occupants in Mr Tas vehicle but Mr Arshad said that was an error, there were only two. He was in shock at the time and could not see very clearly.

[73] He was asked why the form did not name the passengers in either vehicle to which he said he maybe did not understand the notion of witness. He thought he had said there were two other people and accepted it was possibly an error on his part in not recording that on the form. When pressed on this under cross-examination he was referred to his statement which stated he noticed the claimant (referring to Mr Arshad) and two male passengers also came out of his vehicle. That was wrong and he meant to say the driver and one male passenger.

[74] Mr Arshad confirmed his signature appears at the end of his witness statement dated 7 September 2020 given to the first defender and he had read it before signing it. When asked about his passenger he said he was an acquaintance who he had found working at a local shop. He subsequently said the Polypak shop. If he ever needed him for medical assistance he would ask him.

[75] The statement was inaccurate when it says he was on his way to the local shop. He had called Mr Shah (although could not remember his name) and Mr Shah had said he was in the Dalkeith area and asked to be picked up from there. Mr Arshad had called Mr Shah to do a painting job.

[76] He was asked about the precognition taken by Ms Pitt on 30 May 2023. He is recorded as saying the collision happened on a Friday afternoon, maybe 3 or 4 o'clock but in his oral evidence said he was not sure of the date or time, but it happened in the evening, then said late evening. He blamed the passage of time since the collision for his uncertainty.

[77] He was asked about the section of the precognition that says he was asked if he could give a friend (ie Mr Shah) a lift to the city centre. The precognition records that: he knew the person's face from a time he saw him sitting in Kwik Claims offices on Leith Walk where he gets his car insurance; he collected the other person from his house in the

Prestonfield area; he could not recall the address; the people at Kwik Claims asked him to pick him up and give him a lift; it was Irfan from Kwik Claims who asked him to collect the gentleman who was in his car.

[78] It was a year after the accident that he was asked by Irfan at Kwik Claims to give the friend a lift. He denied this related to the day of the accident. He accepted that is not what is said in the precognition.

[79] In relation to recovery of his vehicle his oral evidence was that he had asked the recovery truck driver who had attended to collect Mr Tas' vehicle whether he could also recover Mr Arshad's vehicle. He was told by the driver that he would return after dropping off Mr Tas' vehicle. He paid the truck driver £75 or £80 in cash and handed over his keys, then took the bus home. He accepted none of that is recorded in his precognition, but said he did tell Ms Pitt that when she interviewed him.

[80] He denied knowing that the collision was going to happen. He had not been told by Ms Pitt, when she interviewed him, that he was going to be accused of fraud. He denied any knowledge of Mr Irfan or anyone at Kwik Claims prior to 9 July 2020.

*Valerie Pitt*

[81] Ms Pitt is a solicitor and partner at Horwich Farrelly Scotland based in Glasgow. She was admitted as a solicitor in 2007 and has been involved in civil litigation throughout her career. She had previously sworn an affidavit for this case which, in terms of the joint minute, was agreed to be her evidence in the cause. She was giving evidence to supplement the terms of the affidavit as the defence considered that there was a need to respond to certain matters which were spoken to by other witnesses.

[82] Ms Pitt spoke to a file note prepared by her on 26 April 2023 immediately following a telephone call with the second defender and that the terms of the note accurately recorded what was discussed as far as she could remember. She confirmed that the second defender was able to communicate in English and she had no concerns about his ability to communicate. She confirmed that he had said to her that before speaking to her he needed to speak to his agents. When she asked who they were he said "Kwik Claims". It was put to Ms Pitt that the second defender had said he did not mention Kwik Claims at that time, to which she replied "That's not true".

[83] Ms Pitt confirmed that Mr Arshad had not asked for an interpreter during the call. They spoke again on 30 May 2023 when she took a precognition from him. She stated his English was broken but she was of the view he understood her questions and she understood his answers, stating that if there was anything she did not understand she would ask him to clarify.

[84] Ms Pitt acknowledged that the precognition was not a verbatim account, but as far as she is concerned it accurately reflects what she was told.

[85] She was referred to the sentence "It was Irfan from Kwik Claims who asked me to pick up the gentleman who was in my car." She was asking him about the purpose of the trip and who he was picking up. She recalled he said it was Irfan who had asked the second defender to pick up the other person.

[86] She was asked about whether the discussion she was having with the second defender was to do with the date of the alleged road traffic accident. She confirmed it was. He told her, as recorded in the precognition, that he had seen the face of his passenger before in the office of Kwik Claims where he gets his insurance.

[87] She was asked whether he had told her that Mr Shah does odd jobs for him and replied "No". She was asked whether he had said that the lift he was asked to give Mr Shah happened a year or so after 9 July 2020 and replied "No". She also denied that anything had been said about a cash arrangement with the tow truck driver.

[88] She confirmed that she would have booked an interpreter if she felt there was a need for one.

### **Submissions**

[89] Outline written submissions had been prepared by the pursuer and first defender, supplemented by brief oral submissions.

#### *Pursuer's submissions*

[90] The pursuer moved the court to grant decree, jointly and severally or severally for the agreed sum of £4,000 with associated findings for expenses. The questions for the court and the applicable law were set out (as summarised below). The case turns on credibility and reliability. The pursuer argued that the pursuer, Mr Tas and Mr Irfan were all credible and reliable. It was said that Mr Arshad was unreliable and his parole evidence should be rejected in its entirety.

[91] The court could be satisfied that a collision occurred from: the fact that AXA admitted liability in both the claims intimated by Mr Tas and the pursuer; the terms of the incident report form and the photos of the damage to Mr Tas' vehicle.

[92] In considering whether inferences of fraud can be drawn from the evidence led, the reasons to justify drawing such inferences must be clear and cogent; possibilities other than fraud must be considered and there must be an adequate reason to discount them; any

inference of fraud must be more consistent with fraud than any innocent explanation and if the primary facts or inferences are equally consistent with honesty the benefit of the doubt favours the pursuer.

[93] There was no sufficiently clear evidence to allow the court to conclude the collision was staged or that it was likely that a dishonest claim had been made. The denials by witnesses re prior knowledge of other witnesses was highlighted. There was no credible evidence to say Mr Shah was in Mr Arshad's vehicle at the behest of Mr Irfan / Kwik Claims.

[94] Esto the court considers the accident to have been staged, it is still necessary for the court to accept that the pursuer knew of the conspiracy and was a willing participant in it. None of the evidence led could give rise to that inference. The pursuer denied being involved in a fraudulent scheme.

[95] It was accepted that the court was entitled to draw an adverse inference from Mr Shah not answering his citation to attend court to give evidence but caution needs to be exercised given Mr Irfan's evidence that he did not place Mr Shah in Mr Arshad's vehicle and Mr Arshad's parole evidence that he had not been asked to give Mr Shah a lift on the day of the accident. In any event, any adverse inference was only relevant to whether the accident was staged, not whether the pursuer was complicit in any fraud. There was no evidence to suggest Shah was in any way connected to the pursuer.

[96] As to why the police were not called at the time of the accident, it was submitted that was a perfectly reasonable approach as no one had been seriously injured and insurance details had been exchanged.

[97] As to why the pursuer had introduced averments into his pleadings in July 2023 to say he had previously met Mr Irfan and that is how he knew to contact him to make a claim, that was introduced without proper instruction from the pursuer and did not accord with

the pursuer's position. There were various sources of information which led to the pleadings being as they were. Pursuer's counsel, who had been instructed soon before the proof, reviewed the pleadings, consulted with the pursuer and took the view those averments should be removed as they did not reflect what the pursuer was saying.

### *Defender's submissions*

[98] The first defender moved the court to grant decree of absolvitor against both defenders.

[99] There was no dispute as to the questions for the court and the applicable law. The written submissions reviewed the implications of the withdrawal of indemnity and the implications of section 151 of the Road Traffic Act 1988, requiring the first defender to satisfy any decree awarded against the second defender. There followed a review of the salient points of all witness evidence, highlighting inconsistencies and areas of the evidence which were said to be incredible and from which inferences of a fraudulent scheme could be drawn.

[100] There were significant differences between what certain witnesses had said when interviewed or when forms had been filled in at earlier stages, compared to what was said in parole evidence.

### **Analysis of the witness evidence**

[101] The evidence of Mr Tas was in parts credible and reliable and in other parts incredible or unreliable. It was, in significant and material respects, inconsistent when compared to other evidence, leading to inferences that he was involved in a fraudulent

scheme. It is notable for what he failed to say as well as what he did say. The issues with his evidence can be summarised as follows:

- i. He contradicted himself when he initially said that he picked up the pursuer to go to the cash and carry but later said they both left from his shop.
- ii. He made no mention of going via his house to get cash before going to the cash and carry.
- iii. He referred to the front of the second defender's vehicle as being a complete mess as a result of the collision. This contrasts with paragraph 24 of the second defender's witness statement dated 7 September 2020, that there was damage to his front bumper and headlight which had smashed in.
- iv. He described the working arrangement with the pursuer as being an ad hoc one where he would phone the pursuer to see if he was available to work whenever he was needed. There was no set amount of hours mentioned. I accept his evidence on this point as being more likely to be true than the evidence of the pursuer that he was to work 20 hours per week as the pursuer was hired "to see how he got on" and required to be flexible having regard to the shop's requirements.
- v. When asked whether he knew the people at Kwik Claims before the collision he said he knew them to see them but did not know their names. I find that to be incredible. He said that he had their numbers stored in his mobile phone prior to the accident. These had been stored when Irfan and Nabi first came into his shop in case they were ever needed to help with insurance. It is a reasonable inference to make that the numbers would be stored next to an associated name

so he must have known the names of Irfan and Nabi as he had both numbers stored.

- vi. He said the pursuer stopped working for him after 2 to 3 weeks and he never saw him again. He did not specifically mention that the pursuer returned to work after the collision. This is contradicted by the pursuer's own evidence which suggested that he had gone back to work after 5 to 7 days and worked for another few weeks before he left. On balance, I consider it more likely than not that the pursuer only worked for Mr Tas up to the date of the accident.
- vii. He said the accident occurred at around 6.00pm or 6.15pm. This contradicts what was said in documentation pertaining to other occupants in the vehicles such as accident report incident forms, medical reports and statements which has the accident time as in the morning, at 4.00pm, between 4.00 and 6.00pm or late evening. I am not satisfied that there is any credible or reliable evidence upon which I can form a view as to the time of the collision.
- viii. Following the collision he immediately phoned Kwik Claims to tell them about the accident and they sent a tow truck. This is another source of evidence that he must have had names and numbers stored in his mobile phone for those who worked at Kwik Claims. It seems incredible to me that he chose to telephone a company he had no prior business dealings with to arrange for recovery of his vehicle if he was not part of the fraudulent scheme. It would be much more likely that someone in Mr Tas' position, having just sustained substantial damage to his vehicle, would have telephoned his own insurers. His evidence that it would take too long to get through to them at that time of day is incredible. Each insurance company has a dedicated accident line for the urgent

reporting of accidents and the provision of whatever assistance is required.

In any event, no evidence was led to suggest why Mr Tas would know that Kwik Claims could provide him with vehicle recovery services.

[102] The evidence of Mr Khan was in parts incredible, largely unreliable and led to inferences being drawn that he was involved in a fraudulent scheme. Those aspects of his evidence can be summarised as:

- i. I did not find the pursuer's evidence regarding the decision to delay making the claim because he was busy at university to be credible. The accident was in July 2020 during university holidays and the claim was intimated in February 2021 when a) the University academic year would be well advanced and b) Mr Tas' claim was nearing completion. The clear impression which I formed was that the pursuer was waiting to make sure Mr Tas' claim was successful before pursuing his own claim.
- ii. The version of his pleadings as at 18 July 2023 differed in material respects compared to his oral evidence in relation to whether he had previously spoken to Mr Irfan and Kwik Claims prior to the road accident. This was explained in submissions as a misunderstanding on the part of the pursuer's solicitor. I do not accept that as a reasonable explanation. Before positive averments are introduced into pleadings it is to be presumed that the solicitor acting for the relevant party has instructions from his client to make those averments. It is therefore to be presumed that Mr Khan told his solicitor that he had spoken to Mr Irfan and Kwik Claims before the accident.
- iii. His evidence that he did not know of Kwik Claims offices prior to the accident is incredible. He had attended there to be introduced to Nabi as Chair of the

Pashtun Society and in any event their offices are only two doors away from the supermarket.

- iv. His evidence on various occasions has altered in relation to the time of the accident.
- v. His evidence contradicts the evidence of Mr Tas in relation to the journey route and in particular where they were heading before the cash and carry.
- vi. His evidence about his period of employment at Akdeniz supermarket before and after the accident, and period of absence from work is inconsistent with other evidence.
- vii. His evidence about exiting the vehicle through the rear of the vehicle is unlikely to be true on the balance of probabilities.
- viii. His evidence about not knowing what to do when pain developed on the night of the accident and then attempting to get a GP appointment that same night is incredible.
- ix. He has given contradictory statements and evidence about the duration of medical symptoms and when he started to recover eg he indicated to Mr Foxworthy that he had begun to recover after 6 months and by the end of the year he had mostly recovered whereas in his parole evidence he said he began to recover after a year.
- x. Despite stating that he wanted Kwik Claims to help him with a claim for loss of income caused by the accident no such loss of income claim is included.

[103] Mr Irfan's evidence was also incredible and unreliable in parts, or led to inferences being drawn that he was involved in a fraudulent scheme:

- i. He spoke to the pursuer attending their office in Leith Walk prior to the collision to be introduced to Nabi as chair of the Pashtun community. I accept what he said about this but it contradicts the evidence of the pursuer.
- ii. He said that the second defender came to Kwik Claims for the first time a year after the accident having been sent by someone they both know. This contradicts what the second defender told Ms Pitt on 30 May 2023 (in the context of why Mr Shah was in the second defender's car at the time of the accident) namely 1) that he had been asked by Mr Irfan to pick up Mr Shah and 2) he knew Mr Shah's face from previously seeing him in Kwik Claims offices where he gets his car insurance, clearly referring to a time prior to the accident. Mr Irfan's denial of this was, in my view, incredible. The evidence which I have accepted on this point, coupled with Mr Irfan's denial of that evidence, is consistent with Mr Irfan's participation in a staged collision.
- iii. Within a month of the collision, on 4 August 2020, Mr Irfan was pictured, in a social media post, with the passenger in the second defender's vehicle, Behzad Ali Shah, at Loch Lubnaig. In his evidence he had suggested he simply knew Mr Shah because he was a long-time friend of Mr Shah's father. The trip to Loch Lubnaig suggests a closer connection than merely knowing someone's father.
- iv. He accepted the possibility that someone at Kwik Claims may have helped someone on behalf of the second defender complete the Motor Incident Report form which was then submitted to the first defender by the second defender.

He denied any personal involvement but indicated that someone else at Kwik Claims may have helped with filling out the form. The clear impression I got was he knew more than he was admitting to and it is likely that someone at Kwik Claims did indeed complete or help to complete the form in question.

- v. The second defender referred to Kwik Claims as being his agents when speaking to Ms Pitt on 26 April 2023. He did so in the context of a discussion about giving a statement regarding the collision. It is, in my opinion, highly unlikely that the second defender would feel the need to speak to someone at a company who he goes to for car insurance quotes before giving a statement about a road traffic accident claim. Mr Irfan's evidence that he could not explain why Mr Arshad said this is incredible. The second defender's assertion that he needed to discuss matters with Kwik Claims before giving a statement about the road accident is more consistent with his, and Mr Irfan's, participation in a staged accident than someone contacting a company who only arranged his car insurance.
- vi. Mr Irfan was entirely unconvincing when asked whether he thought it was simply a coincidence that someone who was well known to him ie Mr Shah was involved in a road accident. He said "It could be". The collision clearly involved not only the son of a good friend of Mr Irfan but also the shopkeeper and shopkeeper's assistant from a supermarket two doors away from his offices, and someone whom I am satisfied he had prior dealings with and who he had telephoned to arrange for Mr Shah to be picked up prior to the accident.

[104] Mr Arshad's evidence was riddled with inconsistencies and lies. His parole evidence was largely incredible and unreliable and is rejected unless consistent with his participation

in a staged accident and insurance fraud. The issues with his evidence can be summarised as follows:

- i. On the balance of probabilities, the second defender did mention to Ms Pitt on 26 April 2023, during their initial telephone conversation, that before he was willing to provide a statement he wished to discuss matters with his agents, Kwik Claims. That in itself is not inconsistent with him going to Kwik Claims a year after the accident for assistance with getting a car insurance quote but I do not believe him when he said Kwik Claims was not mentioned at all. The specific name of the agents is not something I consider Ms Pitt could or would record unless she was given the name by the second defender.
- ii. He has given conflicting information about the number of occupants in Mr Tas' vehicle. He said there were two in his oral evidence but three in his insurance claim form. The number three is clearly written on the form and was signed by him prior to being submitted to the insurers. If, as was suggested in his oral evidence, he was in shock at the time and could not see very clearly, absent an explanation, for example, that he was subsequently told that there were only two other occupants in the other car, there is no evidence to explain why he originally said three but is now saying two occupants.
- iii. In his witness statement he said he noticed the claimant and male passenger come out of the car but made no mention of the male passenger being unable to exit the front passenger door because of the damage caused and having to climb into the back to exit the vehicle.
- iv. The incident report form records him stating that the weather conditions were rainy but his witness statement said they were dry.

- v. His witness statement says his passenger was a friend of his but in his evidence he said Mr Shah (whose name he could not remember) was an acquaintance. He said he had “found him somewhere working” and if he ever needed him for medical assistance he would ask him for help. Later in his evidence he said that he first met his passenger in a PolyPak shop. The court might have expected an explanation of how it came to be that the second defender approached a complete stranger in their workplace and asked if they would do jobs for him when required. In any event, the evidence of Mr Shah doing jobs for him is completely contradicted by what the second defender told Ms Pitt when she spoke to him over the telephone on 30 May 2023 ie that he had been asked to give the gentleman a lift by Irfan at Kwik Claims. If his parole evidence was true he would no doubt have had Mr Shah’s name in his mobile phone so he would know who to call when he needed jobs done.
- vi. His signed witness statement of 7 September 2020 records that he was on his way to the local shop on Dalkeith Road but said in his oral evidence that he had phoned his passenger to ask him to do a “painting” job and he would then run him to where he needed to go in the city centre. He accepted that he had not mentioned this to Ms Pitt when she was taking his statement. The person whose premises was to be painted was not called to give evidence to confirm the position.
- vii. In his statement of 7 September 2020 he stated that following the accident he called one of his friends (again un-named and not a witness) to inform him of what had happened and he came to pick up the second defender and take him home. He also said that he left his vehicle on Dalkeith Road and called a

recovery company who later recovered the vehicle to his home address but in his oral evidence he said a) that he had asked the recovery truck driver at the scene if he could take his vehicle to his home. The recovery driver agreed, saying he would deal with Mr Tas' vehicle first and come back for the second defender's vehicle and b) that at that point he left the scene to take a bus home.

- viii. When asked about the date of the accident he said he thought the accident was on 7 July 2020 but was prepared to accept that it was on 9 July 2020. The incident report form submitted to AXA recorded the date as 9 July 2020 and time as 18.30 hours. He said the accident was on a Friday. It is within judicial knowledge that 9 July 2020 was a Thursday. No evidence was led to suggest the accident was on 10 July 2020. He also said in his signed witness statement of 7 September 2020 the accident happened at 6.30pm but in his precognition he is recorded as stating it was 3 or 4 o'clock. He then suggested he was not sure of the date or time, blaming the passage of time for any discrepancies.
- ix. a) His witness statement dated 7 September 2020, states that he drove along Prestonfield Crescent towards its junction with Dalkeith Road, stopped at the junction and waited. He looked right and left. He noticed a van parked in the bus lane which obscured his view to the right. It is within judicial knowledge that the bus lanes in Edinburgh operate between the hours of 4.30pm and 6.30pm Monday to Friday. The accident is said to have happened on a day when the bus lanes were operating. The photos lodged show the presence of double yellow lines on the bus lane on Dalkeith Road leading up to the junction

with Prestonfield Crescent<sup>1</sup>. They, along with the green markings which denote a bus lane, are clearly evident from the photos. Mr Arshad's witness statement goes on to record that he began to edge forwards and the front bumper of his vehicle was positioned about a metre over the white lines located at the Prestonfield Crescent junction.

b) Reasonable inferences to draw from that are i) Mr Arshad was aware that he did not have a clear line of site in relation to vehicles travelling along Dalkeith Road, ii) that edging forward means he proceeded slowly out of the junction and iii) going forward "about a metre" from the junction would mean his vehicle had not extended beyond the bus lane onto the lane of traffic which Mr Tas was driving in.

c) He goes on to state that as he steered right the [other vehicle] proceeded towards him on Dalkeith Road at 30mph. It is not clear how Mr Arshad was able to form a view of the speed of the other vehicle but in any event he is recorded as saying he instantly slammed on his brakes but could not stop in time and the front centre of his vehicle collided with the passenger side front door and middle panel of the other vehicle. He did not mention the rear passenger door of the other vehicle being damaged. The statement states he did not recall the speed of impact.

d) Mr Arshad states that he was aware of the presence of a van in the bus lane obscuring his view. I find it unlikely that such a vehicle was present, parked on

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<sup>1</sup>and forming pages 48-56 of the joint bundle

double yellow lines near a junction, especially if the accident is said to have happened during the hours when the bus lane was operating.

- e) If he was in the process of edging forward and steering right as he described in his witness statement, it is reasonable to infer that his vehicle would not have had a full frontal impact with the side of Mr Tas' vehicle but instead the front offside corner of the second defender's vehicle would have connected with the side of the other vehicle. It follows that the widespread damage to the side of Mr Tas's vehicle as shown on the photos forming pages 14-16 of the joint bundle would not have occurred. A car turning right would have caused more focussed damage to the offside area of Mr Tas' vehicle rather than the damage extending across both front and rear passenger doors. This whole line of evidence was intended to mislead the court into thinking that there was an innocent explanation for a negligent collision ie parked vehicles obscuring the view of a driver proceeding slowly out of a junction albeit he failed to give way. It makes no sense. If the second defender had been driving in the manner he stated it is debatable whether a collision would have occurred at all as he says he was cognisant of the danger the parked vehicles posed and was edging forward. If a collision was inevitable, it was certainly not one that would have led to the level of damage which is evident from the photographs and engineer's report. This whole line of evidence is more consistent with a staged collision and fraudulent insurance claim than a simple road accident due to the negligence of one driver.
- x. The precognition framed following a telephone call between Ms Pitt and the second defender on 30 May 2023 records that he was going from the passenger's house (again, whose name he could not recollect despite saying he contacted him

to do various jobs from time to time) to the city centre. He picked him up from outside his house but could not remember the address. The statement narrates that “The insurance people asked me if I had time to give him a lift. Kwik Claims asked me to pick him up and give him a lift.” In his oral evidence he stated this was incorrect and the time he was asked to give his passenger a lift by Kwik Claims was around a year later when they were both in Kwik Claims offices. This is not reflected in the precognition. I found the second defender to be wholly incredible on this issue. It is clear that when read in context, the discussion between Ms Pitt and the second defender related to questions and answers about the day of the road traffic accident on 9 July 2020. Any suggestion by him that he was talking about a journey a year later is untenable.

- xi. His statement of 7 September 2020 says that after the accident he continued ahead and parked in a safe spot away from traffic with the claimant (referring to Mr Tas) parking in front of him. As the second defender was turning right that would logically mean completing his right hand turn and parking on the opposite side of the road facing the opposite direction to Mr Tas. It is difficult to envisage a scenario where the second defender and Mr Tas would have been facing the same direction on Dalkeith Road in the aftermath. In any event the evidence led suggested Mr Tas’ vehicle was not driveable and if that were the case Mr Tas would not have moved his vehicle from the point of impact. There was no evidence from Mr Tas to say that he did so.

[105] I found Ms Pitt to be entirely credible and reliable. She gave her evidence in a straightforward, unembellished, manner. She is a solicitor with lengthy experience of undertaking civil litigation. She acknowledged that she would have booked an interpreter

for the interview if language barriers necessitated that but she did not perceive such a need. It is clear to me that during the call on 26 April 2023 she was told by the second defender that before he gave a statement he wanted to talk to his agents, Kwik Claims. The subsequent interview on 30 May 2023 when she was told that Mr Irfan from Kwik Claims asked the second defender to give the gentleman (Mr Shah) a lift was a discussion about the day of the accident, not some event around a year later.

### **Questions for the court and the applicable law**

[106] A number of authorities were referred to. There was no real dispute on the questions which the court requires to answer in considering whether a claim is fraudulently made nor the law to be applied in answering those questions.

### **The questions to be answered**

[107] Did a road collision occur? If the answer is no the pursuer will fail. If yes:

[108] Was the accident a staged one?

[109] If it was a staged accident, was the pursuer a party to the staged accident?

[110] If a collision did take place and it was not staged, the pursuer will succeed on liability as there was no dispute that if there was an accident, and it was not staged, the second defender had driven negligently.

[111] If the road collision was staged it is still necessary to consider whether the pursuer was complicit. It does not automatically follow that just because the accident was staged that the pursuer knew that an accident was going to happen. The court needs to carefully consider the evidence to assess, on the balance of probabilities, whether the pursuer was party to the staged accident and has therefore made a fraudulent claim, or was an unwitting

passenger in an accident that he did not know was going to happen and had been staged by others.

[112] If he was an unwitting passenger with no prior knowledge of the staged accident, the pursuer will succeed and be awarded the agreed damages of £4000.

### **The law and the approach to be adopted in it's application**

[113] *Civil Fraud: Law, Practice & Procedure* 1<sup>st</sup> edition at paragraphs 34-072 to 34-073:

“34-072: In proving fraud or dishonesty, it is usually necessary to persuade the court to draw inferences from primary facts; direct evidence of fraud is relatively rare.<sup>2</sup> The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than an innocent explanation.<sup>3</sup> It is important to have in mind that it is of the essence of establishing a case based on inference from circumstantial evidence that the whole is greater than the individual parts: an allegation of, for example, a dishonest state of mind can therefore be made out by inference from an accumulation of primary facts, none of which on their own would prove the allegation to the requisite standard.<sup>4</sup>

34-073: The primary facts relied upon for the inference of dishonesty or fraud must nevertheless be sufficient in aggregate to tilt the balance in favour of a finding of fraud. Findings of fact which are equally or more consistent with innocent conduct, bearing in mind that in most circumstances an innocent explanation is more likely than a fraudulent one, will not suffice for a finding of fraud.<sup>5</sup> If the allegation is, by its nature, one that is inherently improbable, the court may conclude that it can only draw the inference of fraudulent or dishonest conduct if that is the inescapable conclusion to be drawn from the primary facts.<sup>6</sup>”

[114] *UK Insurance Limited v Geary*<sup>7</sup>

A case where the court held there to be cogent circumstantial evidence that the collision was staged based on the fact that the drivers of cars involved in a road accident were friends at the time, that neither driver informed their insurer that they were friends, that Mr Geary

<sup>2</sup> *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 A.C 1 at 186

<sup>3</sup> *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20]

<sup>4</sup> *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 per Rix LJ at [52]

<sup>5</sup> *Hussain v Hussain* [2012] EWCA Civ 1367

<sup>6</sup> *Silvera v Urquhart* [2003] EWHC 809 (Ch) at [302]

<sup>7</sup> [2018] EWHC 37 (QB)

denied to his insurer that was the case and lied to the effect that they had become friends following the collision.

At paragraph 74 of his judgment Teare J stated:

“In cases of this nature it is necessary to stand back and have regard to the whole of the evidence... Having done so I am persuaded the accident was staged. I have asked myself whether there is a real or substantial possibility that the accident was genuine which the claimant has been unable to exclude. ... I do not consider that there is. The only credible explanation for the steps both drivers took to hide their friendship from the Claimant (UK Insurance) is that they knew it was a staged collision and that to reveal they were friends would give the game away.”

[115] *Hussain v Hussain*<sup>8</sup>

An English Court of Appeal Decision where the court overturned the first instance decision on the basis that the reasons given for finding fraudulent involvement were not sufficiently cogent to justify an inference of fraudulent complicity on the part of the claimant in a staged collision, because there were other possible explanations than collusion between the two drivers to which the judge had not given sufficient consideration. The reasons given by the first instance judge were that (i) economic common sense required the claimant's complicity in the fraud and (ii) there was an absence of a reference to the collision in the medical records. The court went onto highlight the need to carry out a balancing assessment of the various points which point to or against the claimant being complicit in a fraud.

[116] The onus of proof in relation to establishing that a road accident occurred in the manner averred in his pleadings rests with the pursuer. If he fails to do so the pursuer's claim will fail, regardless of whether there was fraud. If he succeeds in doing so, the onus of proof in relation to establishing that he was complicit in a fraud rests with the defender.

The standard is on the balance of probabilities.

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<sup>8</sup> *Hussain v Hussain* [2012] EWCA Civ 1367

**Decision**

[117] As the analysis of the evidence above highlights, there are numerous inconsistencies in the evidence of those who were involved in the road traffic collision, including the pursuer. The inconsistencies are so widespread that I cannot have any confidence that any of those witnesses, nor indeed Mr Irfan, are credible, let alone reliable when it comes to assessing whether the accident was staged and whether the pursuer was complicit. There is no direct evidence of fraud. A dishonest state of mind on the part of the pursuer can however be made out by inference from an accumulation of the proven primary facts, none of which on their own would prove the allegation to the requisite standard but, looked at as a whole, give rise to an inference of dishonesty or fraud which is more probable than an innocent explanation.

[118] I am satisfied having regard to all the oral and documentary evidence led in this case that the inescapable conclusion to be reached is that the pursuer along with the others who took part in the road collision on 9 July 2020, as well as Mr Irfan, are complicit in an insurance fraud. The circumstantial evidence, looked at as a whole, strongly favours that inference being drawn. The court cannot speculate as to the reasons why the accident was staged. I shall therefore answer the questions set out in paras [107] to [109] as follows:

- a. Did a road collision occur? Yes.
- b. Was the accident a staged one? Yes.
- c. Was the pursuer a party to the staged accident? Yes.

[119] I accordingly grant decree of absolvitor in favour of the first defender.

[120] I shall dismiss the action brought by the pursuer against the second defender with no expenses due to or by the pursuer and second defender, on the basis that whilst it was not defended a) a decision was not sought by the pursuer against the second defender which

means that the action falls to be dismissed in terms of the summary cause rules and b) in any event, it would be wholly inappropriate to grant the pursuer a decree against the second defender given the above findings.