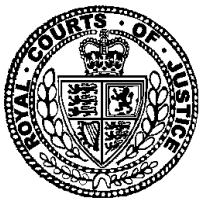

Neutral Citation Number: [2023] EWCA Civ 838

Case No: CA-2022-002119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT MAYOR'S AND CITY OF LONDON
DEPUTY DISTRICT JUDGE SNEDDON
H25YJ270

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 July 2023

Before:

LORD JUSTICE STUART-SMITH
LORD JUSTICE SNOWDEN
and
LADY JUSTICE WHIPPLE

- -

Between:

RAPHAEL DE LIMA SANTIAGO

Appellant/Claimant

-and-

MOTOR INSURERS' BUREAU

Respondent/Defendant

- -
- -

Ben Williams KC and **Shannon Eastwood** (instructed by **Bond Turner Solicitors**) for the **Appellant**
Simon Browne KC (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date: 18 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. Where, in a case to which Section IIIA of the fixed costs regime in CPR Part 45 applies, a Claimant reasonably requires and retains the services of an independent interpreter at trial, may the interpreter's reasonable fees be recovered as a disbursement falling within CPR 45.29I(h) ["sub-paragraph (h)"]? Although, as I shall explain, this issue is time limited and, as things stand, will not arise in proceedings issued on or after 1 October 2023, the issue is important both for claimants who need the services of an interpreter in order to participate fully in a trial or other hearing of a claim issued before that date, and for defendants in such cases. We are told that there are many cases that have been stayed to await our ruling in this appeal.

2. In the present case, after Mr Santiago's claim had settled on the morning of trial, Deputy District Judge Sneddon said that her instinct was to allow as a disbursement the cost of the interpreter who had attended. However, though she regarded it as persuasive rather than strictly binding authority, she felt herself constrained by the decision of this Court in *Cham (A Child) v Aldred* [2019] EWCA Civ 1780, [2020] 1 WLR 1276 ["*Cham*"] to hold that she had no discretion in the matter and that a person's lack of linguistic ability could not be regarded as "a particular feature of the dispute" within the meaning of sub-paragraph (h). She did not address the question whether, if she had a discretion, she would exercise it in respect of all or part of the sum claimed as the interpreter's fee, which was £924.

3. The DDJ gave permission to appeal, observing that the recoverability of interpreters' fees is raised frequently as an issue in fixed costs cases. On 21 September 2022 HHJ Hellman transferred the appeal to this Court.

The factual background

4. The appellant, Mr Santiago, is a Brazilian national who speaks Portuguese and has a poor grasp of English. He was involved in a road traffic accident on 22 May 2018. On 17 May 2021 he issued proceedings against two defendants claiming damages for personal injuries and financial losses. The Claim Form stated that he was claiming damages exceeding £25,000 including damages for personal injury exceeding £1,000. The first defendant, who has taken no part in this appeal, was the person who Mr Santiago alleged was negligently responsible for the accident. The second defendant and respondent to this appeal ["the MIB"] was joined on the basis that the first defendant was uninsured so that, under the provisions of the 2015 MIB Uninsured Drivers' Agreement, the MIB is liable to meet any unsatisfied judgment obtained by Mr Santiago against the first defendant.

5. Mr Santiago's witness statement was prepared in Portuguese, as required by CPR PD32 paras 18.1, 19.1(8) and 20.1, and it was translated into English as required by CPR PD32 para 23.2. That translation was carried out in house by his solicitors, which is permissible. However, giving what we understand to be standard directions in such a case, on 31 January 2022 HHJ Freeland QC directed that:

> "If a witness who has made a statement is to give evidence or be cross-examined and is unable to do so in spoken English by

> reason of English not being their primary language (or Welsh if the hearing is in Wales), the party relying on that witness must ensure that a suitable independent interpreter is available. It is the responsibility of the respective party's solicitor to ensure that a suitably qualified independent interpreter is available at trial."

It was therefore not open to Mr Santiago to use the employee of his solicitors who had translated the witness statement to act as interpreter at trial, since the employee would not be suitably independent.

6. An independent interpreter was booked and attended to provide translation services before the trial began and, as necessary, to interpret during the trial. In the event, Mr Santiago and the MIB agreed terms before the trial started, and those terms were recorded in a Tomlin Order. The settlement figure was £20,000. Mr Santiago's solicitors' recoverable fees were fixed and uncontroversial. The claim for the interpreter's fees was resisted and led to the DDJ's ruling that, as a matter of principle, they were not recoverable. It is against that ruling that Mr Santiago now appeals.

The legal background to the appeal

CPR Part 45

7. CPR Part 45 sets out the rules for the recovery of fixed costs in specified categories of cases. It is divided into various Sections of which Section IIIA is directly relevant and applicable to this appeal. Other Sections adopt a similar approach in relation to other types of case; but the approaches of the different Sections are neither identical nor entirely consistent. I set out the relevant provisions of Section IIIA first since they are the provisions that are directly applicable to Mr Santiago's claim.

8. Under the heading "Application of fixed costs and disbursements - RTA Protocol", CPR 45.29B provides that, where a case falls within Section IIIA:

> "the only costs allowed are –
>
> (a) the fixed costs in Rule 45.29C;
>
> (b) disbursements in accordance with rule 45.29I."

9. Under the heading "Amount of fixed costs – RTA Protocol" Rule 45.29C provides (subject to irrelevant qualifications) that the amount of fixed costs is set out in Table 6B, which is headed "Fixed costs where a claim no longer continues under the RTA Protocol" and provides as follows:

A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7

Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000
Fixed costs	The greater of- (a) £550; or (b) The total of- (i) £100; and	The total of- (a) £1,100; and (b) 15% of damages over £5,000	The total of- (a) £1,930; and (b) 10% of damages over £10,000

	(ii) 20% of the damages		

B. If proceedings are issued under Part 7, but the case settles before trial

Stage at which case is settled	On or after the date of issue but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial
Fixed costs	The total of- (a) £1,160; and (b) 20% of the damages	The total of- (a) £1,880; and (b) 20% of the damages	The total of' (a) £2,655; and (b) 20% of the damages

C. If the claim is disposed of at trial

Fixed costs	The total of- (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) The relevant trial advocacy fee

D. Trial advocacy fees

Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

10. Under the heading "Disbursements", CPR 45.29I provides:

> "(1) Subject to paragraphs (2A) to (2E), the court—
>
> (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but
>
> (b) will not allow a claim for any other type of disbursement.
>
> (2) In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements referred to in paragraph (1) are—
>
> (a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;
>
> (b) the cost of any non-medical expert reports as provided for in the relevant Protocol;

> (c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;
>
> (d) court fees;
>
> (e) any expert's fee for attending the trial where the court has given permission for the expert to attend;
>
> (f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
>
> (g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and
>
> (h) any other disbursement reasonably incurred due to a particular feature of the dispute.
>
> …
>
> (3) In a claim started under the RTA Protocol only, the disbursements referred to in paragraph (1) are also the cost of—
>
> (a) an engineer's report; and
>
> (b) a search of the records of the—
>
> (i) Driver Vehicle Licensing Authority; and
>
> (ii) Motor Insurance Database."

11. It may be noted at this stage that, as elsewhere in CPR Part 45, the fixed costs regime in section IIIA distinguishes between, and makes separate provision for, the recovery of "fixed costs" and the recovery of "disbursements". This is explicit in CPR 45.29B and reinforced by the different structure and approaches set out in Table 6B and CPR 45.29I respectively. In general terms, this appears to signify that that there is a distinction drawn between "disbursements" which cover costs, fees and expenses incurred by or on behalf of a client (which are dealt with in CPR 45.29I), and "costs" which cover charges for the services of legal representatives, both solicitors and counsel (which are dealt with in Table 6B). We were shown neither evidence nor any reason based on principle or authority to suggest that the fixed costs provided for in Table 6B included any notional or real element or amount in respect of an independent interpreter's fees.

Cham

12. *Cham* was decided on 25 October 2019. The Claimant's claim was heading for settlement. Because the Claimant was a child, CPR 21.10(1) applied, which provided that "no settlement, compromise or payment … shall be valid … without the approval of the court." CPR Practice Direction 21 as then in force provided that "an opinion on

the merits of the settlement or compromise given by counsel or solicitor acting for the child … must, except in very clear cases, be obtained." The claimant obtained an opinion from counsel which recommended acceptance of the defendant's offer. The offer was duly accepted and the settlement approved by the Court. The claimant then claimed the cost of obtaining counsel's opinion as a disbursement. At first instance, the District Judge allowed the cost of obtaining the opinion in addition to the fixed costs under Section IIIA of CPR Pt 45. That decision was upheld on appeal to the County Court Judge but reversed by this Court on a second appeal.

13. Coulson LJ gave the leading judgment. After referring to the history of the fixed costs regime, at [16]-[30] he set out relevant parts of Sections II, III and IIIA of CPR Pt 45. This showed that counsel's opinion was the subject of specific mention in Sections II ("Road Traffic Accidents – Fixed Recoverable Costs") and III ("The Pre-action Protocols for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims") but not section IIIA ("Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols ... Fixed Recoverable Costs"). These provisions remain unchanged though, as I shall explain, the context for their interpretation has changed since the decision in *Cham*.

14. Dealing first with the fixed costs regime under Section II, under the heading "Application of fixed recoverable costs" CPR 45.10 provides:

> "Subject to rule 45.13, the only costs which are to be allowed are— (a) fixed recoverable costs calculated in accordance with rule 45.11; and (b) disbursements allowed in accordance with rule 45.12."

15. The amount of fixed costs recoverable in a case falling within Section II are shortly stated in rule 45.11 without there being a table of fixed costs. Allowable disbursements in a case falling within Section II are set out in rule 45.12(2)(b) which provides that the Court may allow a claim for a disbursement:

> "Where they are necessarily incurred by reason of one or more of the claimants being a child … - (i) fees payable for instructing counsel; or (ii) court fees payable on an application to the court; or (c) any other disbursement that has arisen due to a particular feature of the dispute."

16. Section III adopts a different approach, which is closer to that adopted for Section IIIA. Under the heading "Application of fixed costs, and disbursements", CPR 45.17 provides that:

> "The only costs allowed are— (a) fixed costs in rule 45.18; and (b) disbursements in accordance with rule 45.19; and (c) where applicable, fixed costs in accordance with rule 45.23A or 45.23B"

17. Under the heading "Amount of fixed costs", rule 45.18 includes Tables 6 and 6A (covering fixed costs in relation to the RTA and EL/PL protocols respectively), each of which provides for the recovery of "Type C fixed costs". "Type C fixed costs" are

defined by rule 45.18 (2) as being "the costs for the advice on the amount of damages where the claimant is a child." Accordingly, as Coulson LJ noted at [24], where the claimant is a child and the provisions of Section III are applicable, the table expressly provides that the cost of the advice on the amount of damages is included within the fixed costs recoverable under rule 45.18.

18. Disbursements in a case falling within Section III are governed by rule 45.19, which relevantly provided:

> "(1) Subject to paragraphs (2A) to (2E), the court— (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but (b) will not allow a claim for any other type of disbursement.
>
> "(2) In a claim to which either the RTA Protocol or EL/PL Protocol applies, the disbursements referred to in paragraph (1) are— (a) the cost of obtaining— (i) medical records; (ii) a medical report or reports or non-medical expert reports as provided for in the relevant Protocol; (aa) Driver Vehicle Licensing Authority; (bb) Motor Insurance Database; (b) court fees as a result of Part 21 being applicable; (c) court fees payable where proceedings are started as a result of a limitation period that is about to expire; (d) court fees in respect of the Stage 3 Procedure; and (e) any other disbursement that has arisen due to a particular feature of the dispute."

19. As Coulson LJ noted at [25], in contrast to rule 45.12(2)(b) of Section II there is no express provision in this list of allowable disbursements for the cost of instructing counsel to advise on settlement where the claimant is a child. He considered that to be because the cost of that advice was already included in the fixed costs at Table 6. I respectfully agree.

20. At [26]-[27] Coulson LJ set out the main provisions of Section IIIA, which I have summarised or set out at [8]-[10] above.

21. Coulson LJ identified two issues in the appeal. First, was counsel's advice "due to a particular feature of the dispute" within the meaning of sub-paragraph (h)? Second, if the advice was due to a particular feature of the dispute, were the costs thereof a disbursement reasonably incurred which the Court should allow, in addition to the fixed recoverable costs?

22. Having recorded that previous decisions had adopted different approaches and reached different conclusions on Issue 1, the kernel of Coulson LJ's reasoning was set out at [35]-[38]:

> "35. … The fact that, in a particular case, a claimant is a child, or someone who cannot speak English, or who requires an intermediary, is nothing whatever to do with the dispute itself. Age, linguistic ability and mental wellbeing are all characteristics of the claimant regardless of the dispute. They are

> not generated by or linked in any way to the dispute itself and cannot therefore be said to be a particular feature of that dispute.
>
> 36. The particular features of the dispute in an RTA claim will commonly be matters such as: how the accident happened, whether the defendant was to blame for the accident, the nature, scope and extent of the injuries and their consequences, and other matters of that kind. For example, the particular circumstances of the accident may be sufficiently unusual to require an accident reconstruction expert, or the injuries may be so complex that they require a number of different experts' reports. Such additional involvement of experts may also require specific advice from counsel. Depending always on the facts, such costs may be said to be a disbursement properly incurred as a result of a particular feature of the dispute.
>
> 37. In contrast, the cost of counsel's advice in the present case was not necessitated by any particular feature of the dispute, and was instead required because it is an almost mandatory requirement in all RTA cases where the claimant is a child. It was therefore caused by a characteristic of the claimant himself and does not fall within the exception.
>
> 38. I reach that conclusion based on the plain words of rule 45.29I(2)(h). I do not derive any particular assistance in that interpretation from the similar words used in rule 45.12(2)(b) and rule 45.19(2)(e), in Sections II and III of Part 45 respectively. However, I do consider that my reading of these words, which would limit recoverability of sums over and above the fixed costs to disbursements due to specific features of the dispute which has arisen between the parties, is consistent with the overall purpose of the fixed recoverable costs regime, and in particular its aim of ensuring that, save for express exceptions, the amount recoverable is limited to the sums set out in the tables by way of fixed recoverable costs. I come back to that topic again, in a slightly different context, in the next Section of this judgment."

23. Accordingly, Coulson LJ considered that the fee for the advice did not fall within sub-paragraph (h). Nicola Davies and McCombe LJ agreed with Coulson LJ's analysis and conclusion on Issue 1.

24. That was sufficient to allow the appeal; but Coulson LJ went on to express his view "as to the wider argument about the recoverability of this fee as a disbursement within the fixed recoverable costs regime as a whole." He did so on the assumed basis that he was wrong on Issue 1 and that the respondent's age was a particular feature of the dispute: see [40].

25. It appears that, assuming the respondent's age *was* a particular feature of the dispute within the meaning of sub-paragraph (h), the defendant still argued that rule 45.29I should be construed narrowly, and that since an advice on quantum could be provided

by either solicitors or counsel, to hold that the fee for an advice from counsel was recoverable in addition to the fixed costs that would be recovered in any event would merely encourage solicitors not to do the work themselves but to instruct counsel so as to reduce the work that they (the solicitors) would have to do in order to recover the fixed costs element. For the claimant it was argued that since the advice was required and since it was not expressly provided for in Table 6B (though it was expressly provided for in Section III by Tables 6 and 6A) it must be recoverable as a disbursement. In addition, the claimant submitted that since Practice Direction 21 required the provision of an advice it would be inequitable if the fixed cost regime was interpreted as permitting no possibility of the recovery of the cost of that advice.

26. Coulson LJ dealt with Issue 2 at [41]-[66]. Put shortly, he held that any fee for counsel's advice on quantum for the purposes of approval of the settlement must be deemed to be included within the fixed recoverable costs in Table 6B and that to allow the fee to be recovered additionally under sub-paragraph (h) would be to permit double recovery, which was contrary to the scheme of the fixed costs regime. He reached his conclusion by an intense focus on the terms of Section IIIA alone, considering that the other Sections did not provide any real assistance when interpreting the relevant rule as it appeared in that Section. For present purposes, the critical finding was that the fee for counsel's advice was included in the fixed recoverable costs and was therefore remunerated by the application of Table 6B.

27. McCombe and Nicola Davies LJJ agreed with Coulson LJ in the result on Issue 2 but expressed reservations about the extent to which Coulson LJ had excluded consideration of other parts of the CPR in reaching his conclusion. Their reservations were summarised by McCombe LJ at [72], including the observation that "It is necessary that the CPR and, even more so, particular Parts of them are approached and interpreted as a coherent whole. The fixed costs rules should not be allowed to hold within their various Sections different meanings for essentially similar words."

Subsequent and prospective developments

28. On 19 May 2020, the Supreme Court refused the claimant permission to appeal the decision of the Court of Appeal in *Cham* because "it [did] not raise a point of law of general importance which ought to be considered at this time." However, it went on to add that "the panel expressed the view that it is appropriate that the Civil Procedure Rule Committee consider this matter." In the view of at least one leading commentator on civil procedure, this was recognition of the "anomaly" that the additional cost of counsel's opinion was not recoverable notwithstanding that it was required by the rules: see *Zuckerman on Civil Procedure, 4th Ed* at 28.203, footnote 441.

29. There are two potentially relevant changes to the CPR since October 2019 when *Cham* was decided. One is in force; the other is prospective.

Amendment of the Overriding Objective and PD1A

30. In February 2020 the Civil Justice Council [the "CJC"] published a report entitled "Vulnerable Witnesses and Parties within Civil Proceedings/ Current position and Recommendations for Change" ["the CJC Report"].

31. The scope of the CJC Report, and the critical need to ensure fair access to justice was set out in its first paragraph:

> "Access to justice, just procedures and fair hearings are essential elements of our justice system. To ensure the system works properly such elements need to cater for parties and witnesses, who by reason of mental or physical disability/disorder, impairment of intellectual or social functioning, fear or distress, or other reason, are vulnerable such that their ability to participate in proceedings, or to give their best evidence, may be impaired."

32. Although the MIB submitted that the report was primarily concerned with other sources of vulnerability, the CJC plainly approached the concept of vulnerability by reference to one of its effects, namely the inability of a person to participate in proceedings or to give their best evidence. It is self-evident that an inability to speak or understand the language of the proceedings falls squarely within that approach to "vulnerability". On that basis, Mr Santiago was just as vulnerable a participant in the proceedings because of his inability to understand or speak English as another person whose inability was caused by learning difficulties or other innate conditions. This was recognised by the CJC Report at para 103 where, "if the court is alerted to vulnerability", the use of an interpreter was identified as a step which "can be … taken to facilitate the progression or defending of a claim or the giving of evidence by a vulnerable party". It was taken as given that "the court allows the use of interpreters at hearings when necessary". The CJC considered in detail (both in its prior consultation report and in the CJC Report itself) whether to provide a definition of vulnerability that could be incorporated into the rules, but concluded that the better approach was to amend the overriding objective with an accompanying practice direction to provide information and clarity: see para 178 of the CJC Report.

33. The CJC report was not commissioned in response to *Cham*. Its publication preceded the observations of the Supreme Court in refusing permission to appeal and its roots go far deeper. That said, *Cham* was referred to twice. Footnote 128 stated that "if a party requires and pays for an interpreter … the costs incurred are ordinarily recoverable as a disbursement, subject to the wording of any applicable fixed costs regime: see *Cham* …". The second was as a footnote to a citation from *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220 where the Court of Appeal had said:

> "We consider that, when the judge comes to consider proportionality, there are some elements of costs which should be left out of account. The exceptions are those items of costs which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed."

Footnote 229 stated "c.f. the decision of the Court of Appeal in *Cham* … ." After citing the observations of Coulson LJ from [35] of *Cham* the footnote continued: "This comment should be seen against the limits of the specific fixed costs provision in issue."

34. All the responses to the CJC's consultation paper which commented on the CJC's proposals for rule changes "recognised the lacuna and the need for specific rules

covering vulnerable parties/witnesses either by amendment or addition to the overriding objective and/or by way of a new rule with substantially the same content as the existing rule 3A of the FPR": see para 158 of the CJC Report. The thrust of the new rule should be to ensure unimpeded access to justice by enabling the effective participation of lay users: see paras 159 and 160 of the CJC Report.

35. At paras 162 and 164 the CJC Report stated:

> "162. … [I]t is the Council's view that consideration should now be given by the Civil Procedure Rule Committee to a rule change by amendment to the overriding objective to make specific reference to ensuring full participation by all parties and the giving/obtaining of best evidence.
>
> 164. The Council believes that the aim of the rules and best practice within the civil justice system should be to ensure that all parties can fully and equally participate in progression of a case and, any witness should be able to give their best evidence. Only through achieving these aims will there be adequate access to justice and full and fair consideration of the issues within any litigation. …"

36. There is nothing in the CJC Report that would support a submission that a person such as Mr Santiago should not be treated as being "vulnerable" as that term is used in the Report. To the contrary, the various passages to which I have just referred indicate that Mr Santiago would be a paradigm example of someone who should be treated as vulnerable (as that term is used in the CJC Report) and for whom steps would need to be taken to enable him to have effective access to justice.

37. As recommended by the CJC Report, the overriding objective was amended and a new practice direction was introduced by the Civil Procedure (Amendment) Rules 2021, which came into force on 6 April 2021 ["the 2021 Amendments"].

38. When *Cham* was decided, the overriding objective of enabling the court to deal with cases justly and at proportionate cost was said by rule 1.1(2) to include so far as practicable:

> "(a) ensuring that the parties are on an equal footing;
>
> (b) …
>
> (c) …
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> …"

39. The 2021 Amendments added to rule 1.1(2)(a) so that it now provides that dealing with a case justly and at proportionate costs includes, so far as is practicable "ensuring that the parties are on an equal footing *and can participate fully in proceedings, and that parties and witnesses can give their best evidence*".

40. The new Practice Direction 1A is headed "Vulnerability" and includes the following provisions:

> "1. The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.
>
> 2. Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.
>
> 3. A person should be considered as vulnerable when a factor – which could be personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.
>
> 4. Factors which may cause vulnerability in a party or witness include (but are not limited to)—
>
> (a) Age, immaturity or lack of understanding;
>
> (b) Communication or language difficulties (including literacy);
>
> (c) …
>
> …
>
> 5. When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—
>
> (a) understand the proceedings and their role in them;
>
> (b) express themselves throughout the proceedings;
>
> (c) put their evidence before the court;
>
> (d) respond to or comply with any request of the court, or do so in a timely manner;
>
> (e) instruct their representative/s (if any) before, during and after the hearing; and
>
> (f) attend any hearing.
>
> 6. …
>
> 7. If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be

> diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective. …"

41. The Practice Direction deals with other sources of vulnerability and measures that may be taken but are not directly relevant to a case such as Mr Santiago's. That said, the objective of the 2021 Amendments is expressly an attempt to ensure that parties and witnesses are able to participate fully and on an equal footing in proceedings, with a particular emphasis on their ability to give their best evidence. This applies equally to parties whether they be claimants or defendants.

42. The 2021 Amendments introduced an amendment to the general costs provisions under CPR Part 44 to the effect that costs are proportionate if they bear a reasonable relationship to any additional work undertaken or expense incurred due to the vulnerability of a party or witness. It should, however, be noted that nothing is said in the 2021 Amendments to change the wording of the fixed costs regimes under CPR Part 45 or about how that Part should be interpreted.

Prospective Changes to the CPR

43. In March 2023 the Civil Procedure Rule Committee approved draft amendments for the implementation of an extended fixed recoverable costs regime. As things stand, it is intended that the amendments will come into force on 1 October 2023. The amendments include provision that in certain claims that have been or should have been started under Part 8, the disbursements to be allowed include "any other disbursement reasonably incurred due to a particular feature of the dispute or any requirement of these rules": see draft paragraphs 45.28 and 45.58(f); and in most claims that would normally be or are allocated to the fast track and which are started under the relevant protocols, the disbursements to be allowed include any interpreter's or translator's fees: see draft paragraphs 45.44 and 45.59(a)(v).

44. These prospective provisions cannot influence the interpretation of the Section IIIA provisions with which we are concerned. The most that can be said is that the presence of express provision relating to interpreters' fees in the prospective amended rules may be contrasted with the absence of express provision in the existing rules: but that does not say anything useful about the proper interpretation of the existing rules. Assuming that the prospective rules are implemented as intended, the issue that arises for determination in the present appeal will become time-limited.

Submissions

Mr Santiago's submissions

45. By his written and oral submissions Mr Williams KC, who appears for Mr Santiago, submits that the express reference to linguistic ability being a feature of the claimant rather than of the dispute in [35] of *Cham* is obiter and not binding on this Court. That said, Mr Williams mounted a full-scale assault on the reasoning of the Court of Appeal in *Cham*, both as it applied to the need for counsel's opinion because the claimant in that case was a child and as it applied to the need for an interpreter.

46. Mr Williams started by tracing the use of the word "dispute" in the CPR back to the provisions relating to costs-only proceedings that are now found in CPR 46.14, pursuant to which the costs of a "dispute" could be assessed by the court and recovered by a party even if no proceedings had been issued. Accordingly, he argued, "dispute" may be used as a synonym for "case" or "claim" and is well capable of including as one of its features that there is a need for an interpreter. He submitted that there was no need for the Court of Appeal to hold in *Cham* that the need for an opinion was not a feature of the dispute simply because it arose from the fact that the claimant was a child: in other words, being a feature of the claimant and a feature of the dispute should not have been regarded as mutually inconsistent. As part of this argument, Mr Williams conducted a conventional analysis of the structure and words of the relevant provisions of the CPR as they stood at the time of *Cham*. He included in that analysis one point not mentioned by the Court of Appeal when discussing Issue 1 in *Cham*, namely the use of the words "any *other* disbursement reasonably incurred due to a particular feature of the dispute." On normal principles, Mr Williams submitted that the word "other" indicates that the disbursements listed in sub-paragraphs (a) to (g) are to be regarded as "disbursements incurred due to a particular feature of the dispute". If travel and accommodation expenses (sub-paragraph (f)) and loss of earnings or loss of leave (sub-paragraph (g)) incurred by a party or witness for the purpose of attending a hearing are disbursements incurred "due to particular feature of the dispute", then so are the costs of engaging an interpreter to enable a party or witness who has attended the hearing to secure their best evidence and full participation.

47. Mr Williams, however, goes further in two important respects. First, he submits that the changes to the overriding objective and to PD 1A, which I have set out above at [38]-[40], have been strengthened by the express reference to the protection of those who are vulnerable because of linguistic inability, whatever the cause of that vulnerability may be. The effect of the amendments is to change the context for the interpretation of sub-paragraph (h) by expressly requiring that the rules should be interpreted so as to ensure that a vulnerable person such as Mr Santiago "can participate fully in proceedings and give their best evidence": see CPR 1.2(b).

48. Second, he submits that the need for an interpreter is different in kind from the need for a child to obtain counsel's opinion on settlement and that the need for an interpreter engages principles of access to justice that are not raised by the decision about counsel's opinion in *Cham*. He submits that if this Court were to extend the decision in *Cham* to the need for an interpreter, that would conflict with the Article 6 Convention right to a fair trial and would discriminate on grounds of race, language, national origin and/or disability in breach of Article 14. Sub-paragraph (h), as applied to the need for interpreters, should therefore be interpreted in such a way as gives effect to those Convention rights.

49. These extended arguments do not feature in the judgments in *Cham*. Mr Williams submits that there are two possible reasons for this apparent omission. The first is that the decision in *Cham* is *per incuriam*. The second is that there was no need to address such questions when considering counsel's opinion for a child settlement since that particular disbursement does not raise the same questions of access to justice as the need for an interpreter.

The MIB's submissions

50. Mr Browne KC, who appears for the MIB, makes two submissions that may be shortly stated. First, he submits that, whether or not the reference to interpreters in *Cham* was technically obiter, the reasoning that led to the exclusion of counsel's opinion is directly applicable to an interpreter's fees and that, since the reasoning cannot be distinguished, *Cham* is binding authority which we are bound to follow and to apply to the interpreter's fees in this case. Second, he submits that no question of access to justice arises in this case because the interpreter's fees should be treated as being within the fixed costs awarded pursuant to CPR 45.29B(a) and Table 6B.

51. The first of these two submissions requires little elaboration. Mr Browne does not accept that the amendments to the overriding objective and PD 1A are material or relevant to the facts of a case such as this. Nor does he accept that there is significance to be attached to the presence of the word "other" in sub-paragraph (h).

52. The second submission is founded on the twin propositions that (a) the engagement of an interpreter is already included in Table 6B; and (b) the Fixed Fee regime is a "swings and roundabouts" regime under which solicitors will be under-rewarded in some cases and over-rewarded in others, depending upon whether the work that the solicitor must undertake in order to earn the fixed fees provided for under Table 6B is higher or lower: see *Lamont v Burton* [2007] EWCA Civ 429 at [9]. Mr Browne points to the fact that the recoverable fixed fees increase progressively until the maximum possible fixed fee is recoverable at trial. So, in the present case, the solicitor will recover under Table 6B a total of £8,360: (£2655 *plus* (£4,000 - 20% of the agreed damages) *plus* (£1,705 - trial advocacy fees)). Had the case settled on or after the date of allocation under Part 26 but prior to the date of listing (so that no interpreter's fees would have been incurred), the solicitor would have recovered only £5,880: (£1880 *plus* (£4,000 - 20% of the agreed damages)). He submits that "there can be no suggestion that increased fees, namely fixed profit costs, plus an uplift in profit costs, plus counsel fees are not recovered in going to trial."

53. Mr Browne also does not accept that the terms of a solicitor's retainer by a person such as Mr Santiago could or would require the client to fund the interpreter's fee as a disbursement rather than being included in the solicitor's legal costs; and, if they did, he submits that the client would be able to insure against such a liability. As a consequence of this analysis, Mr Browne submits that there is no question of a party in the position of Mr Santiago being required to pay the interpreter's fees out of his own resources. There can therefore be no "chilling effect" on the unimpeded access to justice. He submits that the prospect of a claimant such as Mr Santiago having to go to court without an interpreter is illusory.

54. By a respondent's notice, the MIB raises two further points, namely that the interpreter's fees (a) are not a disbursement and (b) do not fall within CPR 45.29I.

Discussion

55. For reasons that I will explain below, I do not accept that *Cham* was decided *per incuriam*. It is therefore essential to identify at the outset that the issue in *Cham* was whether the fee for counsel's advice on settlement was a recoverable disbursement within the meaning of sub-paragraph (h). As set out above, the Court of Appeal held that it was not (Issue 1) and that, even if it were, it should not be recoverable because it was already included in the fixed recoverable costs provided for in Table 6B (Issue 2).

The Court in *Cham* was not required to rule on the recoverability of interpreter's fees and, to the extent that [35] of *Cham* appears to exclude the possibility of an interpreter's fees being recovered as a disbursement, I consider that it was strictly obiter.

56. By CPR 1.2(b), the Court "must" seek to give effect to the overriding objective when it interprets any rule. The first issue, therefore, is one of principle: does the overriding objective affect the interpretation that we should place upon sub-paragraph (h)? In my judgment it is clear that it does. Even before its amendment, rule 1.1(2)(a) and (d) established the objective of ensuring that the parties are on an equal footing and that the case is dealt with fairly. Now there is the added express obligation on the court to deal with a case, so far as practicable, so as to ensure that "the parties can participate fully in proceedings, and that parties and witnesses can give their best evidence." It follows that the Court is obliged to seek to give effect to that objective when interpreting sub-paragraph (h). Subject to the MIB's submission that the costs of the interpreter are included within the allowance made by Table 6B, it seems to me to be clear beyond argument to the contrary that an interpreter is essential if a person or witness who does not speak adequate English is to participate fully in proceedings or give their best evidence.

57. As I have already indicated at [11] above, there is no basis for a submission that the costs of an interpreter are included in Table 6B. The broad division that permeates CPR Part 45 is between lawyers' fees, which (subject to specific exceptions) are remunerated by the fixed recoverable costs, and disbursements that are not lawyers' fees, which must be recovered, if at all, under the provisions for disbursements. The fact that the provision of independent interpreting services will *not* be provided by a party's solicitors or counsel as part of the provision of their legal services provides strong support for the submission that they must be recovered, if at all, under sub-paragraph (h): see the standard directions set out at [5] above. The question of "swings and roundabouts" under the fixed costs regime therefore does not arise.

58. I reject the MIB's submission that the question of interpreter's fees does not involve a question of access to justice. Since the fees of an independent interpreter are not remunerated as part of the fixed fees for the provision of legal services, they are an additional expense that will fall upon the vulnerable party or their solicitor. The MIB is correct to say that we have no evidence of how the question is dealt with in retainers; but it is possible to consider the question in the abstract. If the fees of an independent interpreter fall upon the solicitor, they will act as a financial disincentive to a solicitor who is contemplating whether or not to take on the case of someone who cannot speak adequate English. If they fall upon the vulnerable prospective party, they may have the same disadvantageous effect on her or him, whether they are to be paid up front or from any damages that may be recovered. It is no answer to say that there may be insurance available to the party. We have no evidence about the ease with which or the terms on which such insurance may be available. That being so, the reference to insurance only serves to emphasise the significance of the potential outlay for the individual party.

59. The question then arises: what, if anything, is the difference in terms of access to justice between counsel's fee for an opinion in a child's case and the fee of an independent interpreter? To my mind there are two distinctions, which are fine but critical. First, by the time that counsel's opinion is required, the claim will have settled or settlement will be in the offing, whether proceedings have been issued or not. If there is no opinion the claim can proceed to judgment without impediment and with the parties on an equal

footing, or the settlement can be concluded (but not approved by the Court) with the child having the option of adopting or repudiating it on achieving their majority. The child's access to justice is therefore secured. By contrast, without the services of the interpreter the claimant (or witness) who cannot speak or understand English is precluded from having access to the court that will permit them to participate fully on an equal footing and to give their best evidence. Second, the cost of the opinion is deemed to be remunerated because it is included in Table 6B. By contrast, if the interpreter's fee is not recoverable as a disbursement, it is not remunerated at all, either actually or notionally.

60. I would therefore hold that an interpretation of sub-paragraph (h) that precluded the recovery of reasonably incurred interpreter's fees in a case such as the present would not be in accordance with the overriding objective because it would tend to hinder access to justice by preventing a vulnerable party or witness from participating fully in proceedings and giving their best evidence. I would go further and say that it would not be in accordance with the objective of ensuring that the parties are on an equal footing, for essentially the same reasons.

61. That conclusion would not justify allowing the present appeal if the application of normal principles of interpretation precluded it or we were bound by *Cham* to take a different view. I deal with these points in turn.

62. I accept Mr Williams' submission that the words "the dispute" are capable of bearing the broader construction for which he contends i.e. one which is not simply the mutually exclusive opposite of "the claimant" for the two main reasons he gives, which I have summarised at [46] above. First, analysis of the varying uses of the word "dispute" in the rules lends no support to a single exclusive meaning being attributed to it in the present context. Second, the use of the word "other" in sub-paragraph (h) supports the broader interpretation because it implies that the travel expenses and loss of earnings incurred by a party and allowed under sub-paragraphs (f) and (g) are disbursements that are "due to a particular feature of the dispute." The common feature of such costs is that they facilitate the attendance of a party or witness and thus put the parties on an equal footing by enabling the party or witness to participate fully in the hearing. That is also a defining feature of the cost of an interpreter, without whom the party or witness cannot participate fully in the hearing and, specifically, cannot give their best evidence. Allowing the interpreter's fee to be recovered under subparagraph (h) is therefore consistent with the inclusion of the disbursements allowed under sub-paragraphs (f) and (g). I would therefore hold that the application of normal principles of construction does not preclude the interpretation of sub-paragraph (h) for which Mr Williams contends. Far from it: in my judgment, the application of normal principles strongly supports his proposed interpretation. I would have reached this conclusion before the 2021 Amendments. The effect of the 2021 Amendments is to clarify and reinforce the overriding objective and, thereby, to make express the obligation of the Court to interpret the provisions with which we are concerned so as to enable a party or witness to participate fully and to give their best evidence.

63. Turning to *Cham*, the first and most striking feature of the decision is that there is no mention of the overriding objective which, even then, required the Court so far as possible to put the parties on an equal footing and to deal with the case fairly. Although the terms of the overriding objective have since been clarified and reinforced, it is difficult to accept that the Court in *Cham* would not have referred to the overriding

objective *unless* it considered that the facts of that case did not engage the principles of access to justice that I have discussed above. I have identified at [59] above what I consider to be the two critical points of distinction between counsel's opinion and the fees of an interpreter when considered through the prism of access to justice. What appears clear is that the Court in *Cham* did not have to consider, and did not expressly consider, the implications of disallowing the interpreter's fee when viewed through that prism; and, for the reasons I have given, counsel's fee for the opinion did not raise the same issues as those that arise in this case. These points of distinction, to my mind, provide the key to answering the questions (a) whether *Cham* was decided *per incuriam* and (b) whether we are bound by *Cham* to dismiss the present appeal. The Court in *Cham* may have concluded that an opinion of counsel was not required in order for the child to have access to the Court to resolve their claim. That, in my judgment, is not a conclusion that is open to us in the present case when considering the interpreter's fee.

64. This distinction permits us to conclude that we are not bound by *Cham* to adopt an interpretation of sub-paragraph (h) which is not in accordance with the overriding objective on the different facts that are in play in the present appeal. I would accept that the effect of *Cham* is that a disbursement should ordinarily be held to be "reasonably incurred due to a particular feature of the dispute" within sub-paragraph (h) if it was required to enable the determination by the Court of a particular issue in the case rather than because of a particular characteristic of a party or witness. However, where considerations of access to justice arise, a broader interpretation is necessary to enable the dispute to be determined by the Court in accordance with the overriding objective. It follows, in my judgment, that the independent interpreter's fee (assuming it to be reasonably incurred) is properly to be regarded as a disbursement falling within sub-paragraph (h).

65. I would allow the appeal on this basis. It follows that it is not necessary to rule on Mr Williams' submissions on Articles 6 and 14 and I do not do so.

Lord Justice Snowden

66. I agree.

Lady Justice Whipple

67. I also agree.