Practico PodCost with Andrew Post KC

27 April 2023

Attending:

Andrew Post KC (APKC)
Jeremy Morgan KC (JMKC)
Andy Ellis (AE)

JMKC:

Our guest today who we're delighted to welcome is Andrew Post KC of Hailsham Chambers who has been a guest many times before on these chats and I'm sure is well known to all of you.

Moving to a quick outline of what we're going to discuss, we're going to look at a possible bombshell in relation to litigation funding in a case which is going on in the Supreme Court at the moment. We're going to have a very quick look at some comments made in the course of the phone hacking litigation about hourly rates, a quick reminder of the extension of fixed costs which is something we all need to bear in mind, a quick look at a decision of a costs judge on the challenging by a beneficiary of a solicitor's bill and then finally a discussion in quite general terms looking at how we are in relation to ADR, particularly in costs at present. I'd like to start with the Supreme Court case PACCAR which is considering litigation funding. We have to be very careful what we say here because the court has heard arguments, reserved judgment and we know that all the Supreme Court judges are frequent viewers of Practico's Podcasts so anything we say may well influence them. With that warning in mind – Andrew I pass it over to you to give us an introduction to the case of PACCAR.

APKC:

I'll not to be too persuasive in either direction given what you rightly say Jeremy about the deep influence that this podcast has on the shape of the law. Lots of the audience will be aware of the huge scale of litigation that is now going on in various claims in front of the Compensation Appeal Tribunal. This particular case (click here) arises out of a finding by the European Commission that all the truck manufacturers in Europe were running a cartel, so everyone who bought a truck between 1997 and 2011 paid too much and all of those people are therefore entitled to compensation. The way that claim is brought is in the Compensation Appeal Tribunal under an opt-out procedure. You don't need to opt into the litigation, you are by default included in the litigation if you were within the class of people who suffered the loss. It is huge scale litigation, it runs into hundreds of millions or

billions of pounds depending on how you do the calculation of losses and it needs funding. All these CAT cases have been funded by litigation funders. The first stage is the making of a collective proceedings order and in this case the truck manufacturers have taken the point that it is funded by the litigation funders, those funding agreements they have said are unlawful DBAs because the amount of the sum that is going to be recovered by the litigation funder is governed by the extent of the damages recovered. The argument is that Section 58AA of The Courts and Legal Services Act renders all DBAs unlawful unless they comply with the DBA regs. That's obviously right. Section 58AA does not merely apply to solicitors and barristers, it also applies to any person providing claims management services. Again, so far so uncontroversial.

The wrinkle is that the definition of claims management services is the definition in The Compensation Act 2006 and that definition includes Section 4, subsection 3. I'll just get the exact wording – 'for the purposes of this section a reference to the provision of services includes in particular a reference to the provision of financial services or assistance'. Claims management services includes the provision of financial services or assistance. So, the argument runs litigation funding is clearly the provision of financial services and/or assistance, therefore it is within Section 58AA, it doesn't comply with the DBA regs and therefore these DBAs are unenforceable. The point was taken in front of the Competition Appeal Tribunal and they rejected it, the point was taken in front of the Divisional Court on appeal and they rejected it on review.

The Divisional Court held that ultimately it was a question of construction of the relevant statutory provisions and that while litigation funding might fall within a literal reading of Section 4, claims management services meant actually managing the claim not merely funding the claim and therefore that section should be interpreted as applying only to those who are managing claims and not to those who are funding claims. Big sigh of relief from the Claimants and big sigh of relief at that point from the litigation funding industry, because if this point is good it doesn't merely apply to claims in front of the Competition Appeal Tribunal it applies generally to litigation funding because more or less all litigation funding, is based on terms, what is called a waterfall, whereby the litigation funder receives a share of the proceeds. If that's a DBA, those agreements are most unlikely to comply with the DBA regs so that is a real threat to a very large sector.

It didn't stop with the Divisional Court, because of course the truck manufacturers have appealed to the Supreme Court. The case is worth hundreds of millions of pounds, and this is a chance to knock it out at an early stage – why wouldn't they? The appeal was heard in February, judgment has been reserved and we do not know what they will decide, but it is striking that whereas the Claimants' representatives were treated broadly sympathetically by the Competition Appeal Tribunal and the Divisional Court, they were given a hard time in the Supreme Court. The argument that the Defendant's arguments could bring down the litigation funding sector and damage access to justice did not seem to get great traction with their Lordships and although it was made a big thing of in the written cases, it wasn't really the centre of the oral argument in front of the Supreme Court.

At least two of the judges, Lord Sales and Lord Leggatt, seemed to have been attracted by the plain meaning of the words and unpersuaded by the Claimants. PJ Kirby KC who was leading for one of the two groups bringing the collective proceedings was given a fairly torrid time when he was seeking to advance his arguments. This is of course just the argument. We don't know what the judges will decide. Whilst Leggatt and Sales were not sympathetic, Lady Rose was more sympathetic, and it is harder to read what Lord Stephens and Lord Reed were thinking. One has to say that one doesn't always know how judges are thinking. I've had the experience of being in the Court of Appeal where I think from their interjections, from the questions, from the debate, their minds are going in a particular direction, and one hopes one has addressed

that. Sometimes when you get the judgment it's completely different and the central point turns out to be something that was only dealt with relatively briefly in oral argument. One doesn't know from oral argument always what judicial appeal courts in particular are thinking. They do go away and think about it, and they go away and sometimes come to very different conclusions to those that you think that they are, you know their mind is often working in different ways.

JMKC:

It must have been a bit off putting though for PJ Kirby KC when Lord Reed said to him - well just help me with this, suppose we find against you, what can be done about it?

APKC:

Not a good moment for PJ, I completely agree. And I have to say very tough, very tough on an advocate when that is said relatively early in your submissions. It was not good. If it does go that way, it's very serious in the obvious respect that it's pretty catastrophic for litigation funders because their agreements do not work and pretty catastrophic for people who are dependent on litigation funding because the litigation funding agreements don't work. There's also an extra difficulty, or an extra opportunity, you can see this either way, we live in a world where difficulties are of course opportunities too, ha ha. If these agreements are unlawful, these agreements have always been unlawful and therefore all the people who have lost some of their damages to litigation funders under the working of the waterfall may very well have claims to recover that share of the damages from the litigation funders. That will be an interesting bit of litigation.

JMKC:

Isn't the sanction that the agreements are unenforceable, so that would give rise to questions where an agreement has been completed? Am I right in thinking that's the language, I think it's unenforceable?

APKC:

That's right, the language is unenforceable and so it will be about completion and whether those can be reopened effectively.

JMKC:

Then there will be lots of questions about misrepresentation and all sorts, it will go on forever, it will be tremendous.

APKC:

It will be huge and of course the question that Jeremy just raised about what they can do is a really interesting one. If it's an insurance company whose products are in difficulty, normally speaking the answer is to lobby the relevant government department to get the government department to change the rules so that they say what the insurance industry hoped they'd say. I'm not convinced that the litigation funding industry is going to have such an easy ride, because of course these huge claims can be brought against the government as much as they can be brought against anybody else so they may not mind as much if the litigation funding industry takes a hit.

JMKC:

Can I ask a question Andrew, which is very indiscrete and you don't have to answer, but I assume that in respect of all the litigation funding agreements which are in force at the moment, the litigation funders are taking some sort of measures to put in alternative agreements in case the litigation funding agreements are held to be DBAs. Is that something that all the costs Counsel are busy drafting?

APKC:

There's certainly activity in that general field. I think that's probably the discreet way to answer it, yes, contingency steps are being taken. It's interesting and difficult to know exactly what those contingency steps may be. Although you can draft fallback agreements if this is ineffective, it's quite

difficult to formulate ones that are particularly satisfactory.

JMKC:

And comply with the DBA regs …

APKC:

Well exactly. It's quite difficult to turn them into ones that comply with DBA regs and it's quite difficult to think of other things that aren't DBAs, that aren't contrary to or would take it outside of the DBA formulation. If you want a share of the spoils then depending on what the Supreme Court should decide, it may be very difficult to draft anything that doesn't make it an unenforceable DBA.

JMKC:

Anyway, we're now asking for your free advice for the litigation funding industry on this call.

APKC:

No, no. The free advice is what they are already doing at the moment, which is running around in circles screaming. Look at the sky and wonder when it falls on your head is the free advice at the moment.

AE:

My question is more aimed at Jeremy. I speculate that if this had all been happening ten years ago, it might have been you standing you there where PJ was the other day? Do you miss it or are you quite relieved that it wasn't you?

JMKC:

I was extremely relieved that was not me, because I was thinking exactly that. What's quite interesting is that they made reference in the argument to an article by Professor Rachael Mulheren in the Cambridge Law Journal in, I think, 2014, to show that although the argument now is that this is going to cause the skies to fall in because we've all worked on the assumption that these agreements are not DBAs, they made the point that she raised the issue in an article in 2014, so it's not a totally new issue. She raised it to dismiss it because obviously she's a great supporter of opt out litigation generally and of litigation funding as well with her Australian background, but quite an interesting point.

I actually had the same thought when the draft regulations came out which is a little bit before that. I can't remember if the Association of Litigation Funding was actually in force then, but there was a group of litigation funders and I had done some work for them. I said, I think you should be wary about this because on the natural reading of these regulations it could cover your business. I'm fairly sure that they got in touch with the Ministry of Justice at the time to say, look you need to reword this because it is potentially going to cover us. That's a problem because you're trying to back litigation funding as policy as it was at the time. The Ministry of Justice of course knew better and did nothing about it. Which is exactly the same experience as I remember in the days when CFAs were either just coming in or being amended, I forget which.

A similar discussion went on with Ministry of Justice officials in which they completely rejected expert advice from people who knew what they were talking about and took the view that they knew better. The result in that particular case was the cost wars which Andrew and I did very well out of, but I'm not sure that the world at large did and I think that the same risk is here.

APKC:

That's absolutely on point and because it's the plain meaning of the section there clearly is huge scope for this to go wrong for the industry and I'm not sure that the Government will row to the rescue. I think Jeremy has made it pretty clear that it was the Ministry of Justice that is considerably responsible for the mess that the industry may now be in, but I don't think for a moment that's going to mean that they think it's going to be a priority to sort it out by amendments.

JMKC:

The other issue which is quite interesting is the arguments which were run by those who were defending the litigation funding set up – if litigation funders are caught then almost everybody else who has got anything to do with the claim is, like the taxi driver who takes the person to Court and the barrister's clerk, because the language is very, very wide indeed. Probably banks were the most telling example – the bank who lends money to somebody for the purposes of litigation. Are they caught as well and are all these agreements unenforceable? I suspect that although, as Andrew has said, two of the members of the Supreme Court seemed to be quite taken with the natural meaning of the words argument, if they do reflect on the widespread consequences, they might come up with a different conclusion because it is, potentially, very wide and sweeping.

APKC:

That was definitely the best of the Claimant's argument. I think there is a difference between a bank lending and these much more complex funding agreements in which the litigation funders do have effectively an active part to play in shaping the litigation.

JMKC:

I didn't listen to the whole of Bankim Thanki KC's argument. He was very persuasive and very good, but it was just quite long. I don't know if examples of the amount of money that litigation funders take were raised before the court because that's a sort of prejudice point that anyone who is attacking litigation funding would always want to raise to say - how much money is being made out of litigation by third party funders in a way which thirty or forty years ago would have been unlawful for champerty.

APKC:

I think he didn't in the oral argument, but it may well have been in the written case. He deliberately pitched his argument in quite a high-minded Admin Court way - as a matter of statutory construction the consequence is this - rather than throwing buckets of prejudice here and there. It may well be in the written case, but it certainly didn't do large in his oral argument.

AE:

That sort of angle would seem to suggest that it should be more regulated rather than banned entirely?

APKC:

That's always the difficulty for the Supreme Court because they don't have any meaningful power to do anything about regulation. I'm very sympathetic because I've seen waterfall agreements that have eyewatering amounts. When you go through the analysis and think for whose benefit is this litigation really being brought? By the time you've added up all the bits that the lawyers and litigation funders are getting, the actual litigant's interests start to seem smaller and smaller. That is something that I can see might give concern in terms of the extent of regulation.

JMKC:

Standing back for a moment, do we think this is the end of litigation funding or do we think they'll find a way around any problems that might arise?

APKC:

I suspect, like Jeremy, that the Supreme Court will probably albeit possibly by a majority of 3:2 stand back from the brink. If they don't stand back from the brink, if they do in fact say that these were all unlawful DBAs, it's probable that some other form of legally compliant litigation funding can be hewn from the wreckage. Someone can put together something that amounts to litigation funding, I think it's relatively unlikely that all litigation funding will just die overnight.

AE:

I wondered, purely speculating and listening to some of those judicial comments, whether

although PJ was getting it with both barrels, it was more directed at the government along the lines of – that's another fine mess you've got us into, we'll have to get you out of it again. To quote Mark Twain, like many problems in my life, most of them didn't happen. We may be reflecting on a near miss in a month or two's time.

APKC:

Of course we may, that's perfectly possible, but even if it is a near miss it's a pretty important thing to be conscious of.

AE:

It's a near death experience really, not a near miss.

APKC:

Also, while the litigation funders are running around trying to do something about it, I haven't seen, purely anecdotally, enormous numbers of clients running around trying to do something about it so far and they too need to be thinking about what on earth they are going to do.

JMKC:

It's not only a question of litigation funding, but it will also be the death knell for collective proceedings wouldn't it in the way that they are seen at present, certainly opt out.

APKC:

I think it would probably have to be, yes.

AE:

And they are only just turning it up to full steam now as well. Merricks is motoring on now, but it has taken years to get that point.

APKC:

There's so much uncertainty and the Merricks case took such a long time because of the uncertainty about whether the whole thing was viable or not.

JMKC:

I think it's a really interesting area and I'm looking forward to reading the judgments. If we can go from the sublime to the Costs Office, something about hourly rate decisions in phone hacking cases.

APKC:

Right and since Jeremy mentions this is phone hacking this is great for him and me, because the third member of our panel was in fact acting for the Defendants in this case.

AE:

I'll leave this one to you Andrew.

APKC:

[26:54] OK, it's Master Rowley, it's a detailed assessment, it's another tranche of the phone hacking cases, it's Various Claimants v NGN Limited. Various preliminary points have been decided at enormous length. The point of general importance is hourly rates and what the Master had to say about the status of the guideline hourly rates.

There are three points:

- Proportionality doesn't just apply generally; it applies specifically to hourly rates.
- While guidelines rates are a starting point, they are only a starting point. There isn't any other starting point, but there's no real enthusiasm for the guideline hourly rates being a sensible basis for deciding hourly rates more generally. No one does expense of time calculations anymore and there are no other sensible surveys. Where is a Costs Judge to start other than with the guideline hourly rates?
- This Master is quite willing to allow costs significantly in excess of guideline rates and I think that's pretty general on detailed assessment. Although paying parties will trot them out and say we shouldn't possibly go higher, receiving parties are pushing at a relatively open door. If they can show aspects of the

> case that justify higher rates, it is relatively easy to do so.

Jeremy what are your thoughts? It's no good asking Andy because he is biased here.

JMKC:

I suppose it leaves guideline hourly rates assisting non-specialist judges in summary assessments. I thought there were at least noises from the next level up in the court system saying that the guideline hourly rates were not to be just automatically increased. You really had to show the reason why cases were particularly heavy to go beyond them, so is there a bit of a tension there?

APKC:

I think there is a bit of a tension there, but I think that the guidance from judges in the Court of Appeal is very much directed at non-specialist judges doing summary assessments. I don't think it's particularly directed at the detailed assessment process. It isn't perceived as being a particular problem with that. I think what is perceived as the problem is with summary assessment going back to being whatever number the trial judge wants.

JMKC:

It's not a major decision, but it's a footnote to the arguments about hourly rates and those are always welcome.

We wanted to give people a quick reminder about the extension of the fixed costs regime.

APKC:

[30:38] There are two reasons it's worth talking about.

First of all, it's April, so it's changes to the CPR season. As well as knowing this is coming, we now have the draft rules. On the general point of the extension to £100,000, there is a trap in the way that the new regime is being introduced. As it applies to personal injury and clinical negligence claims, it only applies if the accident or other cause of action takes place after 30 September 2023. There is a great long phasing period for personal injury and clinical negligence lawyers. They need not worry about it.

All other claims, whenever the cause of action accrued, issued after 30 September will be caught by the new regime. There is therefore an obvious elephant trap for people that do a lot of PI and do a little bit of cases that are not PI cases, because they are going to find themselves caught to their surprise by the new regime. There will therefore be a deluge of cases issued, in particular in September and especially in the last five days in September, because that's the way this always happens. Your clients Andy will be well advised to get on with it and do this now, but of course there's a bit of a Morton's Fork here. On the one hand if you've been instructed by a client and you think you might actually have to issue proceedings, well get on and issue proceedings. On the other hand, if you prematurely issue proceedings before you really know exactly where you stand, then you potentially face liability for the adverse costs consequences of having gone on and issued proceedings. You may be able to get around that by putting stays in place or agreeing that no one will do anything in the litigation, but absent that plenty of your clients Andy are going to be facing potential claims that don't only run one way. The obvious way they run is that inaction is hazardous, but action may be hazardous too unless they do the right things.

The more detailed point is that the rules are out and the rules are ridiculously complex. The amended versions of Part 45, Part 26 and Part 36 run gloriously to 144 pages. Part 45 has been entirely rewritten, Part 26 has been entirely rewritten, there is, you'll all be delighted to hear, a new intermediate track between the fast track and the multi-track. That's not where the pleasure and excitement for procedure nerds ends, because each of the tracks has complexity bands. There are four complexity bands on the fast track and there are four complexity bands on the intermediate track. There are different matrices of costs for each band. Some of those matrices are added together,

some include other elements. It's a procedural rule lovers', train spotters' charter, it really is. It's a ludicrously complex set of rules.

The significance for your clients is that there is now a whole marvellous industry to develop about allocation to track and allocation within track. Allocation to track is going to make an enormous difference, but so is allocation to complexity bands within tracks. It's not straight forwardly about amounts of money, there's a whole load of other stuff that's capable of being argued about. As we were talking earlier of costs wars, this is another area like the first days of costs budgeting in which the focus of the argument moves from the end of the case to the earlier stages of the case. Until the landscape is clear, all the money that is notionally being saved on detailed assessments is merely transferred to arguments about allocation.

AE:

Do you think it seems to run counter to the mood music around why are we still doing budgeting? I appreciate they won't be doing budgeting if costs are going to be fixed, but they want to take out too much case management resource and now they've introduced a load of other case management resource.

APKC:

Completely. Now that budgeting has sort of settled down to the point of being broadly manageable, in very broad terms it's working a lot better than it was. Not everyone is happy with the outcomes, but it's better than it was and now every District Judge and Master in the country is going to be faced with a deluge of litigation about this, particularly the District Judges of course because this is typically going to be County Court litigation. But it isn't all, there's plenty of High Court litigation under £100,000 and they are all going to be facing enormous amounts of argument about allocation. Inevitably there are going to have to be policy approaches and those are going to be challenged.

AE:

I'm not a fan of fixed costs but maybe when they've settled down. You might be shocked by that statement.

APKC:

It's awful. Who knew that there would be a strange system that caused you to try and advise clients as to baffling things and then it abolished both costs budgeting and detailed assessments. Who knew that that would in some way be antipathetic to you.

AE:

I don't think they think about the poor costs draftsman.

APKC:

Fortunately we've got a new Lord Chancellor, Alex Chalk, who was actually my pupil which makes me feel astonishingly old. In his pupillage he saw a little bit of costs litigation and I'm absolutely confident that as he walked to the office he said – what do I want to change about the Ministry of Justice? There has not been enough focus on cost lawyers – I'm sure that would have been his first two or three sentences when he walked into the private office.

AE:

Exactly I'm sure that's the case. Well make the most of it because on average is six months the average tenure of Ministry of Justice people?

APKC:

Don't forget that one of them was Liz Truss, it is not an office of state that perhaps has the gravitas it once had.

JMKC:

We all know now that if you've got a bit of an issue like when the Supreme Court makes a decision which may not favour litigation, all you have to do is have a word with Andrew

and he can have a word with his former pupil and it will get sorted.

APKC:

Of course, of course. I think probably having a word would be understating it. I think one would probably have to send a set of instructions. Sorry, that is a joke and all of that is absolutely untrue!

JMKC:

I was instructed in a case in the nineties when Blair had recently become Prime Minister. It was a Trade Union instruction and we had to have Cherie Booth as the leader in the hope that she would have a word with Tony over the pillow at night and it would all get sorted. In fact it was a time when anything to do with trade unions was anathema to Blair because he was trying to show that they were new Labour and they weren't dependent on unions in the old way. Politically it was a hopeless thing to do and Cherie was stuck arguing this very esoteric stuff she wasn't very familiar with, but she did it very well and it all worked out ok in the end. Some of this sort of political thinking can backfire occasionally. Interesting stuff and particularly about the dilemma that solicitors are going to face in relation to fixed costs if they've got instructions coming in now which could lead to the issue of proceedings in time.

Another decision of the Costs Office that I want to have a quick look at is Kenig v Thomson Snell & Passmore LLP which is the latest in a string of decisions that seem to have come to light more recently about the possibility for beneficiaries to challenge solicitor's bills. In this case it's the beneficiary under an estate. What do we need to know about that Andrew?

APKC:

[41:25] This is a case in which my colleague Alicia Tew, who spoke to you both a couple of months ago, acted on behalf of the solicitors. It's a decision of Costs Judge Simon Brown and the claim was by a beneficiary about the bills for administering an estate. The estimate was £10,000 to £15,000 to administer the estate, the actual cost was £54,000. The beneficiary was unsurprisingly not best pleased. The solicitors resisted on various bases, but the particularly important one is that they relied on a decision called Tim Martin Interiors Ltd v Akin Gump LLP. This was a case about third parties challenging costs in which a significant limitation was put by the Court of Appeal on the ability of a person other than a client who is liable to pay a bill to meaningfully challenge a bill. Effectively, there was a restriction to points that the client themselves would have been able to raise. The solicitors argued in the *Kenig* case that the Tim Martin decision meant that any assessment that was ordered would be of limited use and therefore should not be ordered because there would be so very little that was open to challenge because of the *Tim Martin* principle. That did not find favour with Master Brown. He held that there could be a meaningful assessment and ordered assessment of all the bills.

It's clear from his approach in the judgment that there's a perception certainly from him, and perhaps more broadly, that the *Tim Martin* decision shuts out non-clients who in fact end up paying bills. It may not be surprising that where there is prima facie evidence for overcharging, the courts are not keen to apply it. But the solicitors strongly think it's wrong and they are appealing the decision. Master Brown gave permission to appeal and allowed a leapfrog to the Court of Appeal and so Alicia is being led by Mark Friston on an appeal to the Court of Appeal. The concern that the solicitors have is that this decision opens up probate work to challenges from beneficiaries and they think this will be the next 'check my legal fees' parasitic litigation area. A whole load of speculative claims will be brought that will be expensive for solicitors to defend and those sorts of firms will move on from PI work to probate work and bring challenges.

My personal take is that the courts will not be very comfortable with the *Tim Martin* decision being used as a way to shut the door on challenging bills. I think it's going to be a bit of an uphill struggle for Mark and Alicia

in the Court of Appeal. I wouldn't be amazed if they found ways to limit the effects of the *Tim Martin* decision although on its face it does make it difficult for non-clients to challenge what the client has actually been charged, notwithstanding that they are the ones who have to pay it. There will be a discomfort about that. It's not a politically easy position to say that you've got evidence that the fees are a great deal higher than expected, but the only person who can challenge this is the person who isn't paying and the person who is paying isn't entitled to challenge. That's not what the Solicitor's Act was intended to achieve I think the Court of Appeal will feel. I think there will be a great deal of resistance to that. That said, the Court of Appeal as a matter of principle does stick with its previous decisions and *Tim Martin* is their previous decision so there's a tension there in how they are going to approach it. I'm afraid it's another one which is a 'watch this space' and find out what may or may not occur.

JMKC:

It's interesting how these issues have raised their ugly heads again. For a long time there was no litigation at all about this and one of the interesting things about reading the judgment was citations from Victorian judgments. It was clear that the Victorian Judges knew their costs law, and their solicitor's costs law in particular, extremely well and we find all those issues coming to the fore again and solicitors I'm sure will not be very happy about that. Equally there is an injustice.

In this particular case for reasons which are not clear, the actual executor who was the uncle I think of the beneficiaries, had decided to take no part in the proceedings, in fact probably hadn't even been told about them and this was one of the issues. It's a bit tough if, through the silence of the person who is nominally liable as the solicitor's client, the beneficiaries who are actually bearing the costs should have no recourse at all to what on the face of it were charges that required explanation to put it no higher than that.

AE:

That was exactly the point that I was going to make. That struck me. It was strange that there was no involvement from the executor at all.

APKC:

As Jeremy says, it's not apparent from the judgment why that was the case. It is an odd feature.

I mean I'm very interested in the more general point that Jeremy makes which is that this was all much argued about in the late 19th century. One analysis would be that what's happened in the last forty years is that the extent to which inherited wealth is tremendously important to the rising generations, which was very much the case in Victorian times, is back to being very important. Arguing about probate is gradually coming back into fashion. Just as happy endings in Victorian novels only happened because of a will, the same sort of thing is happening now. The young can only get a deposit on a property if the inheritance comes through. Being fleeced out of a significant part of that inheritance by a solicitor, as they may see it, is something well worth litigating about.

JMKC:

That's a wonderfully broad view that's actually a really fun thought on an otherwise rather mundane case.

We should move on to the final topic we're going to have a bit of a talk about which was the role of ADR particularly in costs. What are your thoughts on that? Both of you will have interesting and possibly different thoughts on this.

APKC:

[49:50] I have a lot of experience of various sorts of ADR both in costs and more generally in my other life of doing clinical negligence work in which ADR is very prominent and the courts are very keen to encourage it.

My general, personal, view is that the most effective form of ADR where both sides are represented by competent teams of lawyers is for the two teams of lawyers to sit down together and negotiate directly.

The default form of ADR in terms of judicial guidance is mediation but I have never really found, other people don't agree, but I've never found that mediators add very much. There have been absurd times when I and my opponent have had to ask the mediator to go and sit in a room so that he and I can negotiate directly with each other because the messages he was passing between us were getting more and more garbled. We were thinking, that can't seriously be what the opposite number actually said and so we eventually just met each other in the corridor and said – look, can we just negotiate directly – and so we just parked the mediator. I'm not a fan of that. I can understand what people say about this – where the other side have a fundamental misunderstanding or there's a fundamental disagreement or there are some sort of egos in play, so that it's really helpful to get a mediator in there. But my general feeling is that it ought to be possible if you've got teams of lawyers who both know what they are doing and both take a realistic view of the prospects of success and the value, you ought to be able to bash away to getting to a sensible solution if there's a sensible solution to be found. Of course, sometimes there isn't, sometimes there is no alternative. ADR will fail because your respective views and your clients' respective views are far apart and that applies as much in costs as it does in any other field.

The other mode of ADR that's a bit fashionable at the moment is expert determination. I think that can have a role where there are properly defined issues that make a real difference. If you can say to an independent barrister or solicitor or lawyer of some sort, here's the central issue in the case or here is a central issue in the case and we would like you to determine this as an expert, not as an arbitrator or a mediator but as a straightforward expert. That can be very useful and that can save an enormous amount of costs. You've got a binding agreement between the parties and that's been determined. Of course, choosing the expert is potentially something you end up arguing about but assuming you can, I think that's very useful.

My other thought about ADR and this is something I've been thinking about a lot in the last six months is that it has become apparent that even though the pandemic is over, the way we're talking to each other via Zoom or via Teams is now the default position. I'd be very interested to hear what both of you think about this. My personal feeling is that ADR works much less well remotely than in person. I think there are two big reasons for that.

The first is that there is a real investment in coming to a deal if people come together, if people make a journey, go to an office, one or the other's office and set aside a day and talk about it. There's a commitment to doing a deal and there's a momentum that we're all present. Now again of course we have all done this and it has failed, but generally speaking there is a benefit from that.

The other is where things go wrong. Things of course very easily go wrong in mediation or arbitration or a round table meeting or whatever it might be, it's very easy for things to go wrong. If things go wrong and the communication has failed and you're in person, then what I find usually works is I go and knock on the door, the other side's door and say can I have a quick word with your barrister, go out into the corridor, try and explain why you think it has gone wrong and try and get things back on track, re-establish trust between you. I've never known a barrister, when I go and knock on the door and say can I have a quick word, to say no. Whereas in a remote meeting you go into the plenary session, the barrister is there, the solicitor is there, the client is there. I say, can we talk about this privately just the lawyers with each other at which point the client says no, or indeed the barrister says no. Generally speaking it's very hard. In theory there could be a virtual chat in the corridor. In practice unless you know your opponent well already, it's very hard to get to that direct communication away from the sort of

cauldron pressures of everybody looking on and feeling tense. By definition this is a negotiation that is going badly and so you're in the plenary session, all these windows are up on the screen, everyone is glaring, everyone is feeling fed up and then I try and say - oh let's just have a chat – and everyone says no, because of course the immediate reaction in those circumstances is that they are trying to pull a fast one on us. I hope in those circumstances that I'm just trying to get the negotiations back on track, but my experience is that that's a real difficulty.

Of course it's anecdotal, but my experience is that when I'm negotiating remotely it's more likely to go wrong and less likely to be resolved. Annoyingly what that often means is that cases get resolved in the three weeks after the mediation or RTM, rather than actually being done on the day.

AE:

All of those aspects are really valid. What don't I like about ADR, well let's concentrate on mediation for a while. I've probably been involved in a lot more direct negotiations that end up getting very bad tempered, than I have mediations.

I would say that whereas I think the fact that a good mediator can be a calming influence and it's not just that you don't have so much time directly talking to the opponents, a good mediator can work really well.

It's very hard for me to generalise about whether I'm pro or anti a particular approach, we've had successful mediations with very skilled mediators. The bit I'm always a bit scared of particularly now is with the direction of travel towards potentially compulsory ADR, it's yet another layer of costs. There's a sort of weaponization sometimes of ADR – if you don't do this, is it going to count against you? We must do this. It can be quite obvious if you think your client might have undercooked the level of costs protection. You can't recycle and reuse all of the same material that you've used in mediation, because it's covered by mediation privilege. There are some things you can borrow, but a note of introduction for a mediator is not quite the same as the opening of an assessment, there are differences. I still tend to favour it for big numbers, because the unwieldy nature of detailed assessments when you're talking about very large bills of costs is a real concern.

There's nothing scientific about this, but I think I've noticed something that Andrew has picked up on which is that some clients are far more concerned to put the straight jacket on their advisors and conditions upon them talking to each other. I don't know whether it's a trust thing or a control thing or whether there are legitimate concerns about that. I'm sure there's all those things, but I think some clients could be sceptical about barrister's union, cost draftsman's union, carve ups etc, just because of the dynamics of that, not because there's any evidence that that sort of thing would actually take place.

JMKC:

That actually shows both the good and the bad. I'm thinking of the bar in particular.

Andrew's point is that it's not that often that you suggest to an opponent you have a chat and they just tell you to go away, because there's generally quite a good relationship between people in the profession. Equally that does give rise to the fear on the behalf of the client that they are being sold down the river because these two get on, and they were in chambers together ten years ago or whatever it is you know. It's interesting – on the inside you think oh this is great, but actually looking from the outside maybe you can see the problems.

AE:

I completely relate to what Andrew said about remote mediations. I've been involved in both. You have to have one or the other – you can't have a hybrid it seems to me. The ultimate client who is making decisions and you're getting instructions from can be elsewhere, it's probably right that they are, and they are normally too busy to be there anyway. Again, it's two competing ends. Should resolution be driven by fatigue which

is what can happen in the early hours of a one-day mediation or even the early hours of the second or the third day of a mediation. Then you've literally battered yourselves into submission, but is that necessarily the right result? At times it is, at times it isn't. It's sometimes very helpful to have experienced clients who are not with you, they are not sharing the same fatigue level but they are checking in from time to time. They are not overly influenced by the fact that our advisors have been doing this for sixteen hours – and I'm sure they are asking me to settle this for reasons other than the fact that this is the best deal I'm going to get. I still like the idea that there is somebody there who can act as a filter for privileged information in perhaps a more dynamic and helpful way than happens formally in a costs assessment. You find ways of being enlightened and being able to have proper reasons to talk to your client and give them decent advice about whether they should move up or move down, depending upon which side of the fence that you're on. I really admire the skills of mediators when I see them in action.

JMKC:

Does your mixed approach suggest that you wouldn't be in favour of compulsory ADR?

AE:

What does that mean? You must agree something?

I know it's not that, but I remember once somebody a strange Costs Judge or Costs Officer barking at people and ordering them out of the room to go and agree something. What does that mean? Compulsory ADR seems to me to be driven from the wrong motive which is just to save public money and court costs and the costs of the administration of justice, as opposed to recognising that it should always be on the palette. The incentive should be that it's a good way to resolve disputes, not because the rules say you've got to go through the motions of doing it.

JMKC:

If it's hopeless, it's an extra cost.

AE:

Absolutely. While I admit I have no experience because we don't these days seem to do any family work, it would be academically interesting to talk to family practitioners where there's compulsory mediation in family law and to see whether they think that has been a good thing or not.

JMKC:

I've got a proposal for compulsory mediation for allocation to a difficulty level in the new intermediate track, how about that?!

AE:

I think you'd have to have a budget for it as well.

APKC:

That's a great idea!

JMKC:

On that ridiculous note, thank you very much both of you for what has been a really interesting discussion. I hope that those who are watching share that view and will be tuning in for the next costs chat between friends. Thanks very much indeed.

AE:

Thank you very much, thank you Andrew.

APKC:

Thank you, Jeremy, thank you Andy.

[ENDS]

Practico Limited
020 7442 3600
mail@practico.co.uk

9 Perseverance Works | Kingsland Road | London | E2 8DD