Case No: F4QZ598C

IN THE COUNTY COURT AT CENTRAL LONDON

Sitting at the Mayor's and City of London Court
Basinghall Street
London EC2V 5AR

Date: 3 May 2022

Before :

HHJ BACKHOUSE

- -

Between :

MR SCOTT HALBORG	**Appellant/ Claimant**
- and -	
(1) APPLE (UK) LIMITED **(2) O2 HOLDINGS LIMITED**	**Respondents/ Defendants**

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Mr Timson (instructed by **Deals and Disputes Solicitors LLP**) for the **Appellant**
Mr Jacob (instructed by **SCS Law**) for the **First Respondent**

Hearing dates: 16 March 2022

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Approved Judgment

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

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HHJ BACKHOUSE

HHJ Backhouse :

1. Mr Halborg appeals against a decision by Deputy District Judge Balchin ("the DDJ") that the First Defendant's advocate, Mr Erridge, was entitled to exercise a right of audience at a hearing on 05.02.2020 as an exempt person under sub-paragraph 1(7) of Schedule 3 to the Legal Services Act 2007 ("LSA 2007"). DDJ Balchin gave permission to appeal in relation to that decision and the appeal hearing before me on 16.3.22 concerned only Grounds 1 – 4 of the Claimant's Amended Grounds of Appeal dated 19.8.20.

2. The Second Defendant did not attend the hearing before the DDJ and has played no part in this appeal.

3. The underlying claim is in relation to a mobile phone which Mr Halborg purchased from the Second Defendant and which he alleges was defective. The claim, which is limited to £5000, was issued through Money Claims Online on 28.1.19 and the Claimant relied on short-form Particulars of Claim on the Claim Form.

4. Mr Halborg is a solicitor who is a director of Deals and Disputes Solicitors LLP and that firm acts for him in these proceedings. He attended the hearing before DDJ Balchin as solicitor advocate. Mr Erridge, a solicitor's agent instructed by LPC Law Limited, appeared for the First Defendant.

5. The hearing before the DDJ was listed to determine the First Defendant's application dated 2.2.19 to strike out the claim pursuant to CPR3.4(2)(a) and/or (c) for failing to disclose reasonable grounds for bringing it and/or for failing to comply with CPR16.4 and PD16. At the outset of the hearing, Mr Halborg objected to Mr Erridge representing the First Defendant, contending that he had no rights of audience. The DDJ dealt with that preliminary issue and decided that Mr Erridge did have a right of audience. I have considered the transcripts of the hearing and of the DDJ's various judgments and will come back to those later in this judgment.

6. After dealing with various other matters raised by Mr Halborg, the DDJ heard the substantive application and dismissed it. He allocated the claim to the small claims track and directed the Claimant to file and serve 'fully particularised particulars of claim setting out his case clearly and succinctly against the first and second Defendants' which was done on 2.3.20. In accordance with the DDJ's order, the First Defendant filed and served its defence on 25.3.20. The DDJ ordered the First Defendant to pay the Claimant's costs of the strike out application in the sum of £3000 and directed that 'any further question of costs of 20 November 2019 are recorded to be achieved [*sic*] at the conclusion of the case'.

7. After various delays, the small claims hearing is listed on 30.5.22.

History of this appeal

8. The appeal has had a somewhat protracted and convoluted history. What follows is a summary of the relevant events. Following the hearing before DDJ Balchin, the Claimant lodged an Appellant's Notice on 26.2.20 and the First Defendant lodged an Appellant's Notice on 27.2.20. Pursuant to an order by HHJ Lochrane on 26.3.20, both parties produced Amended Grounds of Appeal. In addition to Grounds 1-4 relating to

the decision that Mr Erridge had a right of audience, Mr Halborg sought permission to appeal on three further grounds. Two were in relation to the DDJ's refusal to give his reasons for that decision in writing, thereby requiring a party to obtain a transcript; the third was in relation to the DDJ's refusal to limit the First Defendant's costs if it succeeded on an appeal.

9. The First Defendant's amended Grounds of Appeal contained seven grounds, five of which related to the decision to dismiss the strike out application and two relating to the award of costs to the Claimant and the order in relation to the costs of the hearing on 20.11.19.

10. The appeals came before me on 5.11.20 for a 'rolled up' hearing of both appeals. I was only able to deal with the applications for permission to appeal. I refused permission to appeal in relation to the Claimant's additional grounds and in relation to the First Defendant's appeal against the dismissal of its application. I granted the First Defendant permission to appeal in relation to the two costs orders. I also dismissed the Claimant's application under CPR 52.19 for a costs capping order.

11. At the next hearing on 8.4.21, the Claimant was represented by Counsel who made an application for the appeal to be transferred to the Court of Appeal pursuant to CPR 52.23(1). I acceded to this application on the basis that whilst the appeal is academic, it nevertheless raises an important point of principle or practice in relation to the interpretation of sub-paragraph 1(7) of Schedule 3 of the 2007 Act. I allowed the First Defendant's appeal in relation to the costs orders.

12. On 24.06.2021, Andrews LJ ordered that the appeal be remitted back to this court pursuant to CPR 52.23. On 07.07.21, she reconsidered her decision at the Claimant's request and maintained it. Essentially, her reasons were that the appeal was academic, the Court of Appeal will only entertain academic appeals if certain criteria are satisfied, those criteria were not satisfied in this case, and she did not think there was any basis to exercise the Court of Appeal's residual discretion to entertain the appeal.

13. On 16.11.2021, I granted the First Defendant permission to rely on fresh evidence in the appeal. I have a witness statement dated 7.6.21 from Mr Peter Blackmore, a solicitor employed by LPC Law Limited as Head of Advocacy.

14. This appeal has no bearing on the substantive claim and is academic. Nonetheless, the parties agree that the issue in dispute in this appeal is of significant importance. As DDJ Balchin said in his judgment in relation to the rights of audience decision:

> *"I am acutely aware that LPC agents, advocates, are plying their trade up and down the land in every court in the country, certainly the ones I have and do sit in, sometimes in small claims cases, sometimes in interim applications*
>
> *Mr Halborg wishes to challenge the principle by which agents like Mr Erridge attend these kind of hearings in courts up and down the land. There are higher courts to which he can turn who will have the time to provide and frankly the authority to provide definitive advice".*

15. His reasons for granting permission to appeal were as follows:

"This is a controversial area. Mr Halborg is entirely right in what he told me about the origins of solicitor's agents attending, for instance, hearings in London at the behest of a solicitor's firm in the countryside, for example.

In my judgment the higher courts perhaps need to set out clear, definitive guidance that goes beyond that set out by the learned district judge in McShane v Lincoln, because I am acutely aware Mr Halborg does, to some extent, have force in his argument that because LPC are doing this, it does open up opportunities to perhaps unqualified and unregulated advocates under different brands to appear in these courts".

16. It is common ground between the parties that there is no higher authority on this issue. I have been referred to three first-instance, unreported decisions by DJ Peake in *McShane v Lincoln* on 28.6.16, DDJ Hampson in *Ellis v Larson* on 20.9.16 and DDJ Leach in *National Westminster Bank v Smith* on 27.2.19. In all three cases, it was held that the solicitor's agent who attended on behalf of one of the parties did not have a right of audience. I will come back to the reasons given later in this judgment.

17. The notes at 13-10 of Volume II of the 2022 White Book in the section 'Person assisting in the conduct of litigation or engaged in legal employment' state 'there has yet to be authoritative general guidance on the application of Sch.3 para. 1(7)'.

18. Mr Timson has drawn my attention to a document produced by the Bar Council in November 2015 and reviewed in January 2020 entitled 'Acting as a Solicitor's Agent' which sets out the Bar Council's concerns, including specifically that unregistered barristers might be opening themselves up to potential criminal liability.

19. The document suggests at para.18 that there is *"serious uncertainty surrounding the expression "in chambers" which remains unresolved by recent court decisions and has been exacerbated by the changes made to CPR Part 39 in April 2019".* The document also suggests at para. 10 that "*If the definition of "conduct of litigation" in the LSA 2007 were to be interpreted narrowly, along similar lines to the Court of Appeal's interpretation of the expression "right to conduct litigation" in the 1990 Act, it is doubtful whether the work of a solicitor's agent, who essentially provides advocacy services rather than assisting with the formal steps in proceedings, could be said to include assisting with the conduct of litigation".*

20. It is important to note that the Bar Council document stresses that it is not guidance for the purposes of the BSB Handbook I6.4, nor legal advice. The document highlights the Bar Council's concerns over potential criminal consequences for unqualified advocates. However, the only instance of any measures taken against unqualified advocates of which Counsel were aware was an unsuccessful prosecution of an unqualified barrister by the Bar Standards Board a few years ago.

21. Mr Jacob also stresses the importance of the decision in this appeal in his skeleton argument:

"*The appeal could have far-reaching consequences. The right of audience granted by LSA 2007, Sch. 3, sub-para. 1(7), is widely used by advocates appearing in court hearings throughout England and Wales, signing in as "solicitor's agent". C has argued, among other matters, that the effect of the omission of para. 1.14 of Practice Direction 39A following the 104th update to the CPR was that the right of audience*

ceased to exist. If that were so, hundreds of advocates (including trainee solicitors, costs draftsmen and advocates such as Mr Erridge) attending thousands of hearings each year would be purporting to exercise a right of audience that is not available to them".

22. Both Counsel submitted that guidance on the issues which arise in this appeal from a Circuit Judge would assist District Judges and Deputy District Judges when faced with rights of audience challenges. It seems to me that it is not for a County Court judge to seek to give such guidance. However, both parties have made detailed submissions on a number of issues which I will deal with in this judgment.

The law

23. The legal framework which applies to this appeal is not in dispute. Rights of audience are now governed exclusively by LSA 2007. The exercise of a right of audience and the conduct of litigation are "reserved legal activities" (s12(1)(a)). A person is entitled to carry out a reserved legal activity where they are an "authorised person" (s13(2)(a)) or an "exempt person" in relation to that activity s13(2)(b). Section 19 provides that to be an exempt person, an individual must satisfy one of the conditions in Sch. 3 to the Act.

24. The relevant condition relied on by Mr Erridge in this case (and the only one which could apply) is in Sch. 3 sub-para. 1(7), which states:

"*The person is exempt if—*

(a) the person is an individual whose work includes assisting in the conduct of litigation,

(b) the person is assisting in the conduct of litigation—

(i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies, and

(ii) under the supervision of that individual, and

(c) the proceedings are not reserved family proceedings and are being heard in chambers—

(i) in the High Court or county court……

25. An individual to whom sub-paragraph (8) applies is *"… any authorised person in relation to an activity which constitutes the conduct of litigation…"*.

26. It is common ground that in order to be exempt, a person must fulfil all three conditions in sub-para.1(7).

27. Section 18(1) defines an "authorised person" as a person who is authorised to: "*(a) carry on the relevant activity by a relevant approved regulator in relation to the relevant activity……, or*

(b) a licensable body….."

28. The Law Society and the Bar Council are such an approved regulator (Sch. 4 sub-para. 1(1)).

29. It is a criminal offence for a person to carry on a reserved legal activity unless that person is entitled to carry on the relevant activity (s14(1)). A person who is guilty of an offence under s.14 by reason of an act done in the purported exercise of a right of audience, or a right to conduct litigation, in relation to any proceedings or contemplated proceedings is also guilty of contempt of the court concerned and may be punished accordingly (s.14(4)).

30. By Sch. 2 sub-para. 3(1) *"a "right of audience" means the right to appear before and address a court, including the right to call and examine witnesses".*

31. Sch. 2 sub-para. 4(1) defines "the conduct of litigation" as meaning:

"(a) the issuing of proceedings before any court in England and Wales,

(b) the commencement, prosecution and defence of such proceedings, and

(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)."

32. LSA 2007 contains no definition of "*assisting in* the conduct of litigation".

33. It is also necessary to look at the Courts and Legal Services Act 1990 ("CLSA 1990") which governed the position before LSA 2007 came into force. The relevant right of audience was provided by s27(2)(e) CLSA 1990 which stated (where relevant):

"(2) A person shall have a right of audience before a court in relation to any proceedings only in the following cases— ...

(e) where—

(i) he is employed (whether wholly or in part), or is otherwise engaged, to assist in the conduct of litigation and is doing so under instructions given (either generally or in relation to the proceedings) by a qualified litigator; and

(ii) the proceedings are being heard in chambers in the High court or a county court and are not reserved family proceedings"

34. Rights of audience were defined in the same terms in CLSA 1990 as in LSA 2007. However, there was a difference in the definition of the "right to conduct litigation" in s119 CLSA 1990 which provided:

"the right—

(a) to issue proceedings before any court; and

(b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)"

35. It will be apparent that LSA 2007 changed significantly the definition of 'the conduct of litigation' by adding in 'the commencement, prosecution and defence of such proceedings'. It also inserted an express requirement for supervision into the exemption provisions.

Historical background

36. Although DDJ Balchin referred in his judgment to solicitors acting as agent for other solicitors, the parties agree that this appeal does not concern such an arrangement; the solicitor instructed as agent would have a right of audience as an authorised person.

37. This appeal concerns whether Mr Erridge, being an unqualified and unauthorised person, comes within the definition in Sch.3 para. 1(7) as an exempt person. In the hearing before DDJ Balchin he was described as a 'solicitor's agent'. The notes to the 2022 White Book at 13-10 suggest that 'this is a misleading term because it implies an authority which does not exist. "Solicitor's agent" is not a term used in the 2007 Act'. Nonetheless, it is a term which has been and continues to be commonly used to describe those in Mr Erridge's position.

38. The notes in 13-10 touch on the legislative purpose of the statutory provisions: *"Before the Courts and legal Services Act 1990 came into effect, solicitors' general rights of audience in the High Court and county courts when sitting in chambers, extended to their responsible representatives; particularly to solicitors' clerks and legal executives, and to persons providing clerk's services and who were not employed but acted under instructions. There was no such right in open court although, in the exercise of discretion, a judge could grant this. These statutory provisions were designed to preserve their position and must be seen against that background."*

39. *Re HS (Chambers Proceedings: Rights of Audience)* [1998] 1 FLR 868 was one of a number of cases to which I was referred which involved Dr Pelling and his desire to participate in court proceedings in various capacities. In *HS*, Dr Pelling wished to exercise a right of audience in a family case as a 'managing clerk'. I shall come back to the ratio of the decision in due course, but at page 875 Lord Bingham, the Lord Chief Justice observed:

"It appears to me that the plain object of s27(e) [CLSA 1990] is to preserve the traditional rights of solicitors' managing clerks to conduct proceedings in chambers on behalf of the solicitors who employ them. Such managing clerks are traditionally men and women of great experience, often members of the Institute of Legal Executives. They can be relied on to observe the same principles of detachment, objectivity and professional duty as a qualified solicitor or barrister. The situation disclosed in this case seems to me to be a far cry from that".

40. In the same vein, Mr Jacob referred to the Law Society's Guide to the Professional Conduct of Solicitors 1999, Annex 21G of which contains 'Guidance – solicitors' clerks – rights of audience – solicitors' supervision responsibilities'. This states:

"Solicitors' clerks have a common law right of audience in chambers in the High Court and by long custom and usage they are heard in chambers in the county court. The Courts and Legal Services Act 1990 gives statutory recognition to the position. Section

27(2)(e) gives a person a right of audience in chambers in the High Court and or a county court where:

[section quoted]

This provision makes it clear that a person instructed by a solicitor to appear in chambers may be either an employee of the solicitor or an independent contractor.

*The Standards and Guidance Committee issued guidance that under **3.07** (p72) of the Guide a solicitor is responsible for exercising supervision over both admitted and unadmitted staff. The duty to supervise extends to independent contractors as much as to employees…..*

Accordingly, as a matter of professional conduct, when instructing an unadmitted person (whether an employee or an independent contractor) to appear in chambers in the High Court or the county court, a solicitor should:

- *Be satisfied that the person is responsible and competent to carry out the instructions;*
- *Give the person sufficiently full and clear instructions to enable him or her to carry out those instructions properly;*
- *Afford appropriate supervision."*

41. Mr Jacob stressed that even before LSA 2007 made a specific reference to supervision, it was always a professional obligation to provide appropriate supervision.

42. It also appears to be the case, as set out in the Law Society guidance and the notes to the White Book, that even before the 1990 Act rights of audience in chambers extended to independent contractors instructed by solicitors, as well as to those employed by solicitors.

The hearing before DDJ Balchin

43. Mr Halborg took the point about Mr Erridge's right of audience at the beginning of the hearing. Of course, it is often only at court that the identity of the other party's representative is known. DDJ Balchin invited submissions on the point from the parties. Mr Erridge set out the legal framework and why he contended that he fell within the exemption in an admirably clear and succinct fashion.

44. Mr Erridge told the court that he is self-employed and works pursuant to a contract with LPC Law Ltd ("LPC"), the solicitors on record as acting for the First Defendant under the trading style SCS Law. He has passed the Bar Professional Training Course but is not entitled to practice as a barrister. By 05.02.2020, he had been appearing as an advocate in hearings in the County Court instructed by LPC for two years. He was instructed by and under the supervision of Peter Blackmore of LPC. He contended that he was assisting in the conduct of litigation within the meaning in Sch. 3 of the 2007 Act. He further submitted that 'in chambers' should be construed as meaning the type of hearing which, before the advent of the CPR, would have been heard in chambers and that a strike out application fell within that type of hearing.

45. Mr Halborg made a number of points in reply, some of which Mr Timson has made in this appeal and others which are not pursued today. He submitted that 'in chambers' meant 'in private' and that the hearing before DDJ Balchin was not in private; that Mr Erridge was not 'authorised'/ employed by SCS (the firm on record for Apple); that Mr Erridge was not supervised by a solicitor.

46. The DDJ gave a short *ex tempore* judgment in which he identified that the issue was whether Mr Erridge was exempt under the 2007 Act. He considered that there is now no such thing as 'chambers appointments' under the rules and that all hearings are 'now governed by the open court requirement'. He held that he was sitting in a courtroom. He said that the application to strike out was the kind of application which would have taken place in chambers previously. He then went on to say:

"7. I do not have time to look into the full qualifications to be here of Mr Erridge. I am not going to be looking at discretion, but I am satisfied on the basis of what I have been told that Mr Erridge is under the supervision of a solicitor. He says he is properly here and on the basis of the information I have heard, I am not going to dispute that.

8. Mr Halborg wishes to challenge the principle by which agents like Mr Erridge attend these kinds of hearings in courts up and down the land. There are higher courts to which he can turn who will have the time to provide and frankly the authority to provide definitive advice."

47. In his submissions Mr Timson criticised the DDJ's handling of the rights of audience issue, although this is not a ground of appeal. He says that Mr Erridge impermissibly gave evidence and that the DDJ should have adjourned the hearing so that proper evidence could be adduced, given the seriousness of the matter and the potential for Mr Erridge to have been committing a criminal offence. Both Counsel invited me to give some guidance on the approach which District Judges should take when this point is taken and/or as to how much evidence a LPC agent should be in a position to supply if it is taken.

48. I note that in *McShane* and *Ellis*, both judges adjourned the substantive hearing to hear submissions on the rights of audience issue. In both those cases, the central issue was whether an RTA Stage 3 hearing was akin to the type of hearing which would have been heard in chambers. Both judges decided that it was not, being akin to an assessment of damages hearing which previously would have been in open court, with advocates and the judge robed and with live witnesses.

49. In this case, I consider that DDJ Balchin cannot be criticised for dealing with the issue summarily. The Claimant did not object to him doing so at the hearing or ask for an adjournment. This is a low value claim which has subsequently been allocated to the small claims track. The DDJ was entitled to accept what he was told by Mr Erridge. Other cases may raise more difficult issues but, in my judgment, it would have been disproportionate to adjourn this hearing for formal evidence. The issue of who is entitled to exercise a right of audience before a court is clearly a serious one but it seems to me undesirable if challenges to rights of audience were to develop into a form of satellite litigation, taking up valuable court time and incurring costs which would often be out of proportion to the issues at stake in the claim.

50. LPC may wish to consider furnishing their agents with a witness statement along the lines of that produced by Mr Blackmore for this appeal, in order to assist any judge faced with this type of objection.

Mr Blackmore's witness statement

51. The statement extends over 12 pages and contains a great deal of information as to LPC's working practices generally and matters relating to Mr Erridge. I will come to certain aspects of the evidence more fully later in this judgment, but in summary, Mr Blackmore's statement tells the court the following:

a. LPC is a firm of solicitors specialising in civil litigation which has been in business (under various names) for 25 years and is a market leader for agency services. LPC Law's business is principally acting as agents for other firms of solicitors; SCS Law offers traditional solicitors' services to lay clients. LPC Law offers training contracts and pupillages.

b. LPC Law instructs advocates, both qualified and unqualified, to attend court hearings, depending on the nature of the hearing.

c. Mr Erridge has had a contract for services with LPC since 20.3.18 and at the time of the statement, had undertaken 1500 Jobs (instructions) for the company. Most instructions require him to exercise a right of audience but there are other ways in which he assists in the conduct of litigation (para. 7).

d. Mr Blackmore was Mr Erridge's supervising solicitor for the hearing on 5.2.20. Mr Blackmore is aware of his professional duties to ensure that those he instructs are properly supervised. He ensures that any individual instructed by LPC is competent to perform the job and has performed the job competently.

e. A team of five Advocacy Managers assists Mr Blackmore with 'routine management tasks and auditing and training advocates under my supervision'.

f. To ensure that individuals are competent, they must have an appropriate post-graduate qualification e.g. Legal Practice Course or one of the Bar courses; must have passed the LPC assessment and vetting procedures; have provided appropriate references; and completed the LPC induction programme. Mr Erridge satisfied all those criteria.

g. LPC has an Instruction Management System (IMS) which stores details of each Job and allocates them to an appropriate individual. The scope of instructions to a new-joiner is very restricted and is relaxed over time if he or she is judged competent to take on more complex instructions. However, all instructions to non-qualified advocates are of matters which Mr Blackmore considers routine.

h. Detailed instructions and guidance are provided to an advocate for each Job.

i. LPC provides regular legal updates to its advocates through an online portal, together with extensive guidance materials. Advocates are required to attend an annual seminar with Mr Blackmore and others.

j. Mr Blackmore is available throughout the day to provide guidance and further instructions to advocates he supervises. Routine queries or questions may be dealt with by an Advocacy Manager but anything outside clear parameters is referred to him.

k. As with all newly-instructed advocates, Mr Erridge was observed at court on two occasions and spot-tested on a further occasion.

l. All advocates are required to provide a detailed report of each hearing they attend to LPC. All reports by newly-instructed advocates are reviewed. If the reports consistently meet the required standard, they are only reviewed if an order has not been granted in accordance with Mr Blackmore's instructions, even if only a partial costs order was made. Either Mr Blackmore or an Advocacy Manager reviews the report. The Advocacy Managers must report to Mr Blackmore if the advocate has made an error or failed to discharge their duties.

m. LPC has a complaints procedure for clients.

52. Mr Timson makes a number of criticisms of this statement, which he characterises as vague, insufficient and self-serving. I shall come to his submissions in respect of particular parts of the evidence in due course. It is true that the Claimant has not had the opportunity to cross-examine Mr Blackmore and I bear in mind that Mr Blackmore is defending the working practices of the company by which he is employed. Nonetheless, his statement is very detailed and it comes from a solicitor which, in my judgment, means that I should give it weight.

Grounds of Appeal

53. Grounds 1, 2 and 3 challenge the DDJ's decision on each limb of sub-paragraph 1(7) as wrong and/or unjust. The grounds are not formulated very clearly and appear to overlap to a considerable extent, but it is apparent that the Claimant contends that Mr Erridge failed to fulfil any of the three limbs. The First Defendant's position is that he fulfilled all three.

54. Ground 4 can be disposed of swiftly. It suggests that if the DDJ granted Mr Erridge a right of audience on a discretionary basis, he was wrong to do so. It is clear from what the DDJ said during the hearing and from the part of his judgment which I have quoted that he did not exercise his discretion to grant Mr Erridge a right of audience and so that ground fails.

Assisting in the conduct of litigation

55. The parties agree that exercising a right of audience and conducting litigation are distinct types of reserved legal activity. The Claimant's case is that advocacy cannot be considered as conducting litigation, nor as assisting with the conduct of litigation. The First Defendant's primary case is that assisting in the conduct of litigation includes advocacy, giving the words of Sch.2 para. 4 their plain and natural meaning. Alternatively, the other tasks which Mr Erridge undertakes for LPC amounts to assisting in the conduct of litigation, which the Claimant does not accept.

56. Both Counsel referred to the Court of Appeal decision in *Agassi v Robinson (Inspector of Taxes) (No.2)* EWCA Civ 1507 in which the court had to consider whether tax advisers instructed by the claimant were entitled to conduct litigation, such that he could recover their fees. The court was dealing with the definition of the conduct of litigation in s119 of CLSA 1990.

57. Dyson LJ gave the judgment of the court. At paras. 54- 56 he said as follows:

54 "But the language of section 119 must be interpreted in accordance with the usual rules for statutory interpretation. These include that the starting point is that words should be given their plain and natural meaning. It is also important to bear in mind the penal nature of section 70. If a person purports to exercise the right to conduct litigation when he is not entitled to do so, he commits an offence. This is not directed at the person who pretends that he is entitled to exercise the right to conduct litigation: that is the subject of the separate offence created by section 70(3). Section 70(1) is directed at the person who, whatever his state of mind, actually issues proceedings or performs any ancillary functions in relation to proceedings when he is not in fact entitled to do so.

55. If Parliament had intended to introduce a broad definition of the right to conduct litigation, it could have defined it as the right "to issue and conduct proceedings before the court". That would have been all-embracing and the second limb of the definition that was adopted would have been unnecessary. Instead, Parliament decided to limit the first limb of the definition to the initial formal step in proceedings, namely their issue. It then added a second limb, which, if its meaning is ambiguous or otherwise unclear, should be construed narrowly.

56. The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation". It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense "an integral part of the conduct of litigation", that does not make it an "ancillary function" for the purposes of section 28."

58. As noted above, Sch.2 para.4 of LSA 2007 has introduced a new limb to the definition of the conduct of litigation, namely '(b) the commencement, prosecution and defence of such proceedings'. Mr Timson urged me to adopt the approach in *Agassi* to these words and to construe them narrowly. He submitted that (b) is merely a clarification of (a). He suggested that 'prosecution' means taking steps to further the litigation such as making applications and drafting witness statements. 'Defence' means putting in a defence and taking similar steps to further the defence.

59. Mr Jacob submitted that (b) is not mere clarification but a dramatic broadening of the definition and that by enacting Sch. 2 para. 4 of LSA 2007 as it did, Parliament has come close to Dyson LJ's 'all-embracing' definition.

60. Mr Jacob submitted that assisting in the conduct of litigation is a separate concept to conducting litigation. Assisting can be carried out without authorisation or exemption under LSA 2007. It is assistance provided by unauthorised persons at the instruction of and for the benefit of an authorised person. He also stressed the present progressive tense which is used in sub-para. (b) of 1(7): '*is assisting in the conduct of litigation*'. He suggested that this must mean that the advocacy itself is the assistance; if it were not so, then the requirement for supervision would not extend to the advocacy which cannot be what Parliament intended.

61. Turning to the first instance decisions, as I have already said, the ratio of both *McShane* and *Ellis* was the chambers point in relation to Stage 3 hearings, with the other limbs of 1(7) considered for completeness. DJ Peake in *McShane* quoted the same passages from *Agassi* as set out above and stated "I am satisfied that the same principles should apply when considering LSA 2007 Sch. 2 para.4. The meaning of 'conduct of litigation' should be construed narrowly and should not be enlarged or extended to anything more than the formal steps identified within the text." However, he did not expressly address the addition of sub-para. (b), describing Sch.2 para.4 as 'similar' to s119, nor did he explain how 'prosecution' and 'defence' are simply 'formal steps'.

62. DJ Peake held that exercising a right of audience "does not necessarily make it one and the same thing as assisting in the conduct of litigation". He distinguished the work of a solicitor's agent from "the work of a solicitor's clerk or legal executive employed by the solicitor who assists with the preparation of the case before attending a hearing who is clearly assisting in the conduct of litigation". As noted above, the LSA 2007 does not require an advocate to be employed by the solicitor instructing him or her and nor, historically, were rights of audience confined to employed persons.

63. DJ Peake considered that his view was supported by the court's power in Sch. 3 para. 1(2) to grant a discretionary right of audience, whereas there was no such power in relation to the conduct of litigation. DDJ Hampson in *Ellis* was also of the view that representation at a hearing is not 'assisting in the conduct of litigation' and cited the same apparent difference in the court's powers in support of that view. Counsel in this appeal agree that both judges were wrong in this assertion, as the court has power to grant a right to conduct litigation under Sch. 3 para. 2(2)(b).

64. In coming to his decision that advocacy was not 'assisting in the conduct of litigation', DDJ Hampson held that the court should apply a narrow test (presumably by reference to the decision in *Agassi*). He considered that the authorities relating to costs draftsmen (referred to below) were not on point and went on to say "There is no connection for this advocate with the work undertaken in progressing that litigation to hearing and, in my view, the purpose of the legislation was to protect parties in respect of those who might simply present matters and represent parties at a hearing".

65. Mr Timson relies heavily on guidance produced by the Bar Standards Board in October 2019 entitled 'Conducting Litigation'. This sets out the BSB's views as to the activities that amount to the 'conduct of litigation', how barristers can become authorised to conduct litigation and how to determine whether a barrister is authorised to conduct

litigation. This, of course, is in the context that barristers do not have the right to conduct litigation unless authorised to do so by the BSB. The guidance sets out lists of activities which the BSB considers amount to conducting and not conducting litigation. The lists, as might be expected, are confined to activities which barristers may be instructed to undertake, rather than all activities which might constitute conducting litigation. Activities which the BSB considers do not amount to conducting litigation include correspondence on behalf of clients, lodging documents for hearings if secondary to the role as advocate, skeleton arguments, preparing draft orders and, perhaps surprisingly, instructing expert witnesses (but not serving their report).

66. Mr Timson contrasted that list with the list in Mr Blackmore's witness statement at para. 7 of ways in which he says that Mr Erridge has assisted in the conduct of litigation apart from advocacy:

"i) Conducting conferences with clients, other legal representatives and litigants in person, with a view to narrowing points of dispute, or reaching a settlement.

ii) Lodging a bundle at Court for an appeal;

iii) Filing documents with the Court;

iv) Drafting written submissions;

v) Drafting orders and completing documents for the Court and/or me and my

client; and

vi) Observing hearings in a clerking capacity."

67. Mr Timson submitted that, bearing in mind the BSB guidelines, only (iii) could be considered to be conducting litigation. The others are all ancillary to acting as an advocate or in the case of (vi) 'anyone could do it'.

68. As Mr Jacob submitted, (iv) drafting written submissions is not confined to skeleton arguments but can encompass submissions for a paper disposal. It seems to me that (ii) lodging an appeal bundle is conducting litigation, as is (vi) clerking hearings.

69. I am not persuaded that the BSB guidance is determinative of the issue I have to decide. Its purpose is to explain its approach to how a barrister can be authorised to conduct litigation and to attempt to draw a line between the two types of reserved legal activity as they apply to barristers. It is not concerned with unauthorised people or what 'assisting in the conduct of litigation' means.

70. In contrast to that guidance, Mr Jacob drew my attention to rC3 of the BSB Handbook which states:

"You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply ***whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role*** *[emphasis added]…*".

71. This passage appears to suggest that acting as an advocate constitutes involvement in the conduct of litigation. There is nothing to suggest that it is confined to barristers with specific authorisation to conduct litigation.

72. I consider that there is some force in Mr Timson's complaint that Mr Blackmore's statement gives very little detail as to the non-advocacy instructions which have been given to Mr Erridge and in particular, the number given, when they were given and what exactly they entailed. However, he accepted, rightly in my judgment, that it was not necessary for Mr Blackmore to detail all 1500 jobs which Mr Erridge has undertaken for LPC. Mr Timson suggested that the lack of detail as to when these instructions were given makes it difficult for the court to assess whether the assistance was ongoing as at the hearing before the DDJ. If Mr Timson is correct that assisting in the conduct must mean more than mere advocacy, I accept there must be some temporal connection between non-advocacy assistance and exercising rights of audience, although it is difficult to say where the limits of that connection might be. Would some non-advocacy assistance some months or years ago be sufficient? (In this context, it is important to remember that Sch.3 sub-para.1(7)(b)(ii) only requires the assistance to be given generally, not in relation to the particular proceedings).

73. Mr Timson also made the point that according to Mr Blackmore, Mr Erridge was initially supervised by Mr Le Bas, with supervision transferring to Mr Blackmore on 23.7.19. The statement does not say in terms whether any of the non-advocacy jobs were given by Mr Blackmore. Mr Timson submits that if the instructions all came from Mr Le Bas, then Mr Erridge could not fulfil the requirement to be instructed and supervised by the same person at the hearing on 5.2.20.

74. As Mr Jacob rightly said, these points are only of relevance if I am not satisfied that advocacy per se amounts to assisting in the conduct of litigation. He points to the words 'our instructions' in para. 7 of Mr Blackmore's statement as suggesting that the instructions both for advocacy and non-advocacy Jobs came from both Mr Le Bas and Mr Blackmore and I accept that interpretation.

75. In support of the First Defendant's case, Mr Jacob referred to a number of authorities:

(1) In *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352, the issue was whether the work of independent costs consultants engaged to deal with the detailed assessment process was solicitors' work for the purposes of a success fee under a CFA. At para. 36, Hallett LJ concluded that the independent costs consultants required rights of audience under CLSA 1990, s. 27(2)(e) and instructions by a qualified litigator. "They were, therefore, deemed to be temporary employees of Rowley Ashworth and, as such, assisted Rowley Ashworth in the conduct of litigation".

(2) In *Bamrah v Gempride Ltd* [2018] EWCA Civ 1367, the court held that a solicitor remained responsible for the acts and omissions of costs draftsmen instructed by them. Hickinbottom LJ referred to the decision in *Crane* and said "*That case was determined under the Courts and Legal Services Act 1990, but the same principles apply under the 2007 Act*" (para.99).

(3) In *Ellis v Ministry of Justice* [2018] EWCA Civ 2686, the Court of Appeal was dealing with an appeal against a suspended committal order imposed for breaches

of an injunction restraining Mr Ellis "from issuing claims on behalf of others or from assisting others to bring claims in contravention of the LSA 2007". The first instance judge found a number of breaches of the order, including two occasions on which Mr Ellis gave assistance to other people at court hearings in one case "instructing (the litigant) what to say to the tribunal" and in the other "driving what happened at the hearing". She found that those activities constituted the conduct of litigation within LSA 2007, Sch. 2, para 4. Moylan LJ concluded at para. 44:

"Two of the breaches involved Mr Ellis giving assistance to other people at court hearings as referred to earlier in this judgment. Again, I consider that the judge was right to decide that those activities involved the prosecution of proceedings and/or the performance of an ancillary function."

Mr Jacob submits that if that is so, acting as an advocate must at least *assist* in the conduct of litigation.

(4) In *Campbell v Campbell* [2016] EWHC 2237 (Ch), Chief Master Marsh, at paras 31-32, held that CPR 46.5(3)(b), which enables a litigant in person to recover as costs "payments reasonably made … for legal services relating to the conduct of the proceedings", permitted recovery of "the cost of assistance in the course of the litigant in person conducting the claim", whether such assistance took the form of advocacy or other assistance.

76. Mr Timson submitted that these authorities related to very different situations to that with which the DDJ was concerned. That is true but it appears that in those cases the senior courts have been prepared to take a broad view of what amounts to 'assisting in the conduct of litigation'.

77. I do not find either the judgment in *McShane* or *Ellis* persuasive in relation to the question of what constitutes 'assisting in the conduct of litigation'. Both judges seem to have accepted that a narrow test must be applied, without considering the wording of LSA 2007 and how it differs from CLSA 1990. Nor do I derive any assistance from the Bar Council's document 'Acting as a solicitor's agent' which I referred to at the beginning of this judgment. It expressly says that it does not constitute guidance or legal advice, it is hedged about with caveats and chiefly sets out the Bar Council's concerns.

78. I return to the case of *HS* referred to in paragraph 39 of this judgment. Dr Pelling was engaged by a qualified solicitor to provide advocacy services on an ad hoc basis. He had no legal qualifications and the court doubted that he was acting under the instructions of that solicitor in the ordinary sense. Both judges expressed considerable reluctance in allowing the appeal but felt compelled to do so for the reasons given by Lord Bingham:

"*If the matter were one of discretion, I would not for my part exercise it in favour of Dr Pelling. It is, however, right in my judgment that s 27(2)(e) calls for no exercise of discretion by the court, and I find it impossible to say that Dr Pelling falls outside the very broadly expressed language of that subsection. I accordingly conclude, albeit with considerable reluctance, that the court has no alternative but to allow the appeal……"*
It is of note that the Court of Appeal seem to have accepted without comment that advocacy amounted to 'assisting in the conduct of litigation'.

79. Sch. 3 para.1(7) LSA 2007 contains the same broadly expressed language. I can see no material difference between the wording in LSA 2007, namely 'an individual whose work includes assisting in the conduct of litigation' and that in CLSA 1990, namely 'he is employed (whether wholly or in part), or is otherwise engaged, to assist in the conduct of litigation'.

80. Since *Agassi* was decided, Parliament has enacted LSA 2007 with a considerably expanded definition of 'conduct of litigation' to include the 'prosecution and defence' of proceedings. In my judgment, it is necessary to give the words of Sch.3 sub-para.1(7) 'their plain and natural meaning' as Dyson LJ held in paragraph 54 of *Agassi*. The Court of Appeal was concerned in that case with the meaning of the word 'ancillary' which it considered was ambiguous. It is not suggested in this case that the words 'assisting', or 'prosecution' or 'defence' are ambiguous. 'Assisting' is an ordinary English word. The Oxford English Dictionary's definition of 'prosecution' means the institution and conduct of legal proceedings in pursuit of a claim or more generally, the following up, continuation, or pursuit of any action, scheme, or purpose with a view to its accomplishment or completion. 'Defence' in general means the action of defending against or resisting attack or warding off or preventing injury or harm; in a legal sense it is the denial of guilt or liability by the accused party in legal proceedings.

81. In my judgment, the words 'assisting in the conduct of litigation' are sufficiently broad to include advocacy as are the terms 'prosecution' and 'defence'. There is no basis for construing those terms narrowly as suggested by Mr Timson (if, indeed, his examples are restrictive, rather than merely illustrative).

82. For those reasons, I am satisfied that in the hearing before the DDJ, Mr Erridge was assisting in the defence of this claim by his advocacy in support of the strike out application and therefore came within the broad language of 'assisting in the conduct of litigation'.

83. If I am wrong in that conclusion, I am satisfied on the evidence from Mr Blackmore that Mr Erridge's non-advocacy work means that he was 'assisting in the conduct of litigation'.

Supervision

84. Sch.3 sub-para.1(7)(b) requires that the person seeking an exemption must be under instructions given by a person authorised to conduct litigation and under the supervision of that individual.

85. It is not in dispute that Mr Erridge was acting under the instructions of Mr Blackmore. Mr Blackmore's statement says that instructions to an advocate to perform a Job are contained in a letter of instruction from both him and Mr Len Crowder, Director of LPC Law who is also a solicitor.

86. The dispute between the parties is whether LPC's system of supervision amounts to proper supervision at all. Alternatively, Mr Timson submits that Mr Blackmore's evidence contains insufficient evidence of supervision of Mr Erridge.

87. Mr Timson referred to the decision by Employment Judge Crosfill in *Agada v LPC Law Limited* 3201983/2019 dated 19.3.21. The Employment Tribunal decided as a

preliminary issue that Ms Agada (a former LPC advocate) was a worker for the purposes of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998 and in employment for the purposes of s82 Equality Act 2010. As part of his evidence to the Tribunal, Mr Crowder said that LPC works with about 260 advocates. The Claimant's primary submission is that Mr Blackmore cannot possibly supervise all the advocates who work for LPC. I bear in mind that this was evidence given in other proceedings, but I am prepared to assume for the purposes of this judgment that LPC may work with about that number of advocates at any one time.

88. Mr Timson describes LPC's system as a pyramid whereby Mr Blackmore supervises individuals who supervise individuals who supervise the advocates. I think this is something of an exaggeration, in that Mr Blackmore appears to delegate much of the supervision to the Advocacy Managers who check the instructions before they are given, deal with routine queries and questions from the advocates and review the advocates' reports of Jobs. Mr Blackmore makes sure that he or Mr Crowder are available to answer any queries which the Advocacy Managers are not authorised to deal with. Further, he reviews some of the advocates' reports and requires the Advocacy Managers to report to him any Job where they believe that the advocate made an error or failed to discharge his or her duties.

89. Mr Timson submitted that the supervision that is required is akin to the relationship between a trainee solicitor and his or her principal or a pupil and his or her pupilmaster. Supervision requires working together, regular oversight and checking of the trainee's/ pupil's work, feedback and an element of nurturing. In *McShane*, when considering the supervision aspect of the exemption, DJ Peake noted that supervision involved *"close involvement such as is involved in the case of a legal executive or paralegal who has conduct of a case under the supervision of a principal solicitor"*.

90. In *McShane*, DJ Peake referred to the judgment of Burnett J (as he then was) in *Kynaston v Carroll* [2012] 1 Costs LO 5 in which he found that a junior member of staff in a firm was amply covered by sch. 3 to the LSA 2007 at a costs hearing. DJ Peake noted that the individual in *Kynaston* "*was working under the direction and control of his employer who had conduct of the litigation. The position of a solicitor's agent is wholly different in that the Agency from whom he derives the instructions are not charged with the conduct of the litigation. They are merely instructed to provide an advocate for a hearing in court by those who do have such conduct. There can be no element of supervision in such instruction."*

91. I note that *Kynaston* was a decision on an application for permission to appeal and therefore should not be cited as an authority unless it purports to establish a new principle or to extend the present law (Practice Direction (Citation of Authorities) [2001] 1 WLR 1001), neither of which appear to be the case. It also appears that DJ Peake did not have similar evidence as to the supervision of the advocate (not instructed by LPC) as LPC have provided to me. Further, in this case, unlike *McShane*, SCS Law are on the record for the First Defendant.

92. In *Ellis,* DDJ Hampson held that he had no evidence as to whether the advocate was supervised. DDJ Leach did not deal with the issue of supervision in *Smith*.

93. Mr Jacob submitted that, as under the 1999 Guide to Professional Conduct, the current Code of Conduct for solicitors issued by the SRA makes the provision of adequate

supervision a question of professional conduct. Paragraphs 3.5 and 3.6 of the Code read as follows:

3.5 "Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for clients

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date."

94. Mr Jacob also relied on the decision of the Court of Appeal in *Hollins v Russell* [2003] EWCA Civ 718. This appeal concerned the question of whether conditional fee agreements were enforceable. The instructed solicitors had delegated the duty to provide certain information required by the applicable regulations to The Accident Group which in turn had sub-delegated it to unqualified persons. The court held that, provided the solicitors complied with their professional duty to maintain adequate supervision over those carrying out the work, such delegation was permissible. The Court noted at paras. 183-184 that solicitors were responsible for exercising proper supervision over both admitted and unadmitted staff under the 1999 Guide to Professional Conduct. At para. 185, the Court of Appeal cited, with apparent approval, the following observations in the Law Society's written submissions:

"3. It is the Law Society's view that it is open to solicitors to delegate a wide range of tasks to unqualified persons, whether those persons are employees or independent contractors. This is provided, of course, that the person to whom the task is delegated is competent and responsible and provided that the performance of the individual is adequately supervised.

4. It is the Society's view that the decision as to whether an individual is competent must be made by the solicitor concerned based on the nature of the task to be delegated and the qualities of the delegate. Further, the level of supervision required would be for the practitioner to decide in these circumstances.

5. It is also the Society's view that the individual's competence must be assessed in the context of the work which that individual is expected to do…..

13. ….The Society would be concerned if, by any part of its judgment, the court were to restrict a solicitor's ability to delegate tasks. Provided the rules of professional conduct are complied with, this ability to delegate is essential to the efficient and profitable running of virtually every solicitor's practice. It is also essential to ensuring that the cost to the public of legal services is not unnecessarily increased."

95. At para. 195 the court observed *"Parliament wishes to foster new ways of rendering litigation services…."*. After referring to the need for the duty under the applicable regulation to be appropriately delegated and supervised, it went on *"We would not wish to be prescriptive about the form which that supervision should take, provided that an appropriate system has been set up"*.

96. *Hollins* concerned the delegation of a solicitor's duty to explain to lay clients certain costs and funding issues, rather than advocacy. Nonetheless, the Court of Appeal's judgment suggests that it is for solicitors to decide both the system for supervision and the level of supervision required in any particular circumstance.

97. Whilst the manner and type of supervision which Mr Timson describes may have been the traditional model for trainee solicitors and pupils, it is perhaps unlikely to be the system adopted, for example, by large law firms with significant numbers of paralegals to supervise. Even in the traditional model, experienced managing clerks and legal executives would not require the same level of supervision as a new trainee solicitor.

98. In my judgment, Mr Timson's description of supervision includes elements which more properly fall within the definition of training. Since the requirement under LSA 2007 is 'supervision', it is necessary to distinguish that from training. The Oxford English Dictionary's definition of 'supervision' is 'the action or function of overseeing, directing or taking charge of a person, organisation, activity etc'.

99. LPC operates a system which does, in my judgment, allow it to oversee and direct its advocates and is adequate to ensure that, as Mr Blackmore says, the advocates are competent to perform the job and do perform the jobs competently. It provides significant levels of training, both initially and on an ongoing basis. Advocates are observed at court initially; their performance is then monitored through their reports to LPC. The tasks given to them increase in complexity as their experience increases. I am not persuaded that Mr Blackmore needs to personally supervise every activity undertaken by every advocate, provided that LPC has a system in place so that any matter which does require his personal attention and input can be dealt with by him. It is likely that on any given day, only a small fraction of the advocates at court will need to talk to him, which in my judgment meets Mr Timson's objections.

100. For completeness, I note that in *Agada,* Employment Judge Crosfill concluded that *"the Claimant was supervised in the manner envisaged by the legislation [LSA2007]"* (para. 51) and *"I find, to its credit, that the Respondent did supervise its advocates to the extent required by law, if not more"* (para.103). He also found at para. 49 that the Claimant's work was limited to advocacy at hearings and that she was not *responsible* for conducting ongoing litigation [emphasis added]. The ET judge's findings were, of course, in the context of the very different questions he had to determine.

101. Returning to DDJ Balchin's conduct of the hearing, he accepted what Mr Erridge told him about his supervision arrangements and I consider he was right to do so. In addition to the general undesirability of satellite litigation, to which I have already referred, it seems to me that it is not the court's role to enquire into the adequacy of supervision provided by solicitors to any particular person who appears as an advocate; that is a regulatory function.

102. Looking at the evidence overall, I am satisfied that when Mr Erridge appeared before DDJ Balchin, he was both instructed and supervised by Mr Blackmore.

The meaning of 'in chambers'

103. This is perhaps the most difficult of the three limbs of Sch.3 sub-para.1(7). All three judges in *McShane, Ellis* and *Smith* concentrated primarily on how the court should

interpret and apply those words. DDJ Leach dealt solely with that issue. DJ Peake held that the correct approach *"must be to seek to identify whether the hearing in question falls within the broad category of the type of hearing that under the pre-1999 rules would have been expected to be heard in chambers rather than in open court"*. DDJ Hampson took the same approach. Both judges noted that chambers hearings were in private. DDJ Leach decided the issue solely on the basis that the application before him for summary judgment was not listed in PD39A as those which were to be held in private.

104. It is common ground that the County Court Rules 1981 ("CCR") made provision for hearings to take place "in chambers" or "in open court" and prescribed which hearings should be in chambers. One example was Ord.13 r1 concerning applications and orders in the course of proceedings. Similarly in the High Court, s67 of the Senior Courts Act 1981 provided that "Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers." The Supreme Court Rules 1965 ("RSC") used the term 'in chambers' but the term was not defined in either the CCR or the RSC.

105. The expression 'in chambers' was not replicated in the Civil Procedure Rules 1998 ("CPR"), which provided that hearings were to be held 'in court' or 'in the judge's room'; the latter term was used, for example, in paras. 1.9 and 1.10 of the original PD39. The CPR did not prescribe which hearings were to be in court or in the judge's room. Instead, as originally enacted, CPR39.2(1) provided "that the general rule is that a hearing is to be in public" and CPR39.2(3) set out a list of circumstances in which a hearing could be heard in private. Para. 1.5 of PD39 set out a list of hearings which were to be listed as hearings in private 'in the first instance'. Para.1.6 stated that hearings involving children and patients, such as for the approval of settlements, may be in private and para. 1.7 drew attention to PD27 para.5.1 which provided that a judge could decide to hold a small claim hearing in private.

106. PD 39 para. 1.14 stated:

"References to hearings being in public or private or in a judge's room contained in the Civil Procedure Rules (including the Rules of the Supreme Court and the County Court Rules scheduled to Part 50) and the practice directions which supplement them do not restrict any existing rights of audience or confer any new rights of audience in respect of applications or proceedings which under the rules previously in force would have been heard in court or in chambers respectively."

107. Despite the fact that 'in chambers' was no longer used in the court rules, those words were used in Sch.3 sub-para.1(7) when LSA 2007 was enacted, as they had been used in CLSA 1990. There is no definition of 'in chambers' in either Act.

108. Amendments were subsequently made to PD39 which became PD39A but without any significant change for the purpose of this issue, until PD39A was omitted entirely from the CPR with effect from 6.4.19 by virtue of the 104th Practice Direction Update. CPR39.2 was also amended on the same date, the effect of which is to emphasise the principle of open justice and to limit the circumstances in which hearings will take place in private.

109. Mr Timson suggested there are three possible interpretations of 'in chambers':

a. It depends on the actual room in which the judge is sitting.

b. It refers to hearings in private, as opposed to in public.

c. The types of cases which used to be heard in chambers.

110. However, the Claimant's primary submission is that the fact that the majority of cases are now heard in public, together with the omission of para.1.14 of PD39A, mean that the rights of audience exemption has been largely removed and is now confined to those hearings where a statute or court rule refers to a hearing in chambers. Examples given include a without notice application for a restraint order under s42(i)(b) of the Proceeds of Crime Act 2002, an application to the High Court under Sch.1 of the Solicitors Act 1974 and applications under rule 43 of the PPP Administration Order Rules 2007 and rule 99 of the Energy Administration Rules 2005. The 2022 Commercial Court Guide at F2.5 provides that a without notice application may be made to the Queen's Bench Judge in Chambers.

111. Mr Jacob's case is that the correct interpretation is (c). In support of that proposition, he has referred me to extensive authority which I set out below.

112. Mr Timson submitted that to adopt interpretation (a) would be absurd, although his skeleton argument suggests that the appeal should succeed because the DDJ said that he was sitting in open court. In fact, the DDJ said that the room he was in was a courtroom and noted the difference between that and a judge's chambers "traditionally inhabited by district judges and, prior to that, registrars".

113. I agree with Mr Timson that a right of audience cannot depend on the physical setting in which the judge happens to be sitting. Both in the past and currently, the accommodation provided for use by district judges varies markedly. Some district judges, as in Central London County Court where DDJ Balchin was sitting, have their own room, and a courtroom in which they hear all types of hearings and trials. Others only have one room in which they deal with all their hearings. Others hear cases in both their own room and in a courtroom; whether a hearing is dealt with in one room or the other often depends on the practicalities, particularly when the judge is dealing with a mixed list. With the expansion of the jurisdiction of the district bench and with greater emphasis on judicial security, even judge's rooms now often look more like a courtroom, with some sort of partition between the judge and the parties and with the parties sitting at tables facing the judge and there is often a witness box.

114. CCR Ord 13 r1(4) provided that "unless allowed or authorised to be made otherwise, every application shall be heard in chambers". The notes to the 1998 Green Book under "Hearings in chambers" reads: "Paragraph (4) requires all applications to be made in chambers unless allowed or authorised to be made otherwise. This exception would, for example, enable the judge or district judge to allow the application to be taken in court, if more convenient, before, during or after a normal sitting, although even so the application might be taken in court treated as chambers". This is a good illustration of the flexible use of the available physical accommodation which judges have always adopted.

115. Turning to interpretation (b), I agree with Mr Jacob that it is necessary to differentiate between a private chambers hearing and a private hearing under the CPR. Under the CPR, private hearings are those from which the public is excluded. Under the CCR, the equivalent term was 'in camera'.

116. In *Hodgson v Imperial Tobacco Ltd (No. 1)* [1998] 1 WLR 1056, a case decided just before the advent of the CPR, the court was concerned with the issue of whether hearings in chambers were confidential for the purposes of commenting to the media. Lord Woolf MR, at 1070E-F said this:

> *"A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised in Scott v. Scott [1913] A.C. 417 or the court sits in chambers and the case falls in the categories specified in section 12(1) of the Act of 1960 (which include issues involving children, national security, secret processes and the like). Section 12(1) also refers to the court having prohibited publication. Such proceedings are appropriately described as secret; proceedings in chambers otherwise are not appropriately so described.*
> *Proceedings in chambers however are always correctly described as being conducted in private. The word "chambers" is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend.*
> *Hearings in private in chambers already make an important contribution to the administration of justice. They allow issues to be determined informally and expeditiously. They allow less strict rules as to representation to apply. They allow matters to be discussed which the parties might not wish to discuss in open court. They encourage openness. They are less intimidating to litigants which is particularly important in the case of the small claims jurisdiction. With the movement which is now taking place in relation to case management chambers hearings are likely in the future to make a greater contribution to the administration of justice than they do already."*

117. At 1071C-F he gave the following guidance as to the need to facilitate public access to chambers hearings:

> *"However it remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings. The fact that the public do not have the same right to attend hearings in chambers as those in open court and there can be in addition practical difficulties in arranging physical access does not mean that such access as is practical should not be granted. Depending on the nature of the request reasonable arrangements will normally be able to be made by a judge (of course we use this term to include masters) to ensure that the fact that the hearing takes place in chambers does not materially interfere with the right*

of the public, including the media, to know and observe what happens in chambers. Sometimes the solution may be to allow one representative of the press to attend. Another solution may be to give judgment in open court so that the judge is not only able to announce the order which he is making, but is also able to give an account of the proceedings in chambers. The decision as to what to do in any particular situation to provide information for the public will be for the discretion of the judge conducting the hearing. As long as he bears in mind the importance of the principle that justice should be administered in a manner which is as open as is practical in the particular circumstances, higher courts will not interfere with the judge's decision unless there is good reason for doing so."

118. As noted earlier, CPR39.2(1) emphasised the general rule that hearings were to be in public, whilst in 39.2(2) stating that "the requirement for a hearing in public does not require the court to make special arrangements for accommodating members of the public". The rule then set out when hearings would usually be in private, i.e. without public access, subject always to the judge's discretion.

119. *R v Bow County Court ex parte Pelling* 1 WLR 1807 concerned Dr Pelling's appeal against the dismissal of his application for judicial review of the decision of a Circuit Judge sitting at Bow County Court to refuse to allow Dr Pelling to act as a McKenzie friend for a litigant in person in a family case. The Divisional Court held that Dr Pelling had no right to act as a McKenzie friend. As a member of the public, he had no right to be present in chambers proceedings which were private. The Court of Appeal allowed Dr Pelling's appeal. Lord Woolf M.R. gave the judgment of the court. At 1825H he said:

"Part 39 and the practice direction supplementing Part 39 (Practice Direction Miscellaneous Provisions Relating to Hearings) identify three different categories of hearing. First of all there are hearings in open court. Secondly, there are hearings in the judge's room or chambers to which the public have access. Thirdly there are hearings in court or in the judge's room or chambers which are in private."

120. Dr Pelling brought another judicial review against the Bow County Court in *R v Bow County Court, ex parte Pelling (No 2)*, 19.10.2000, CA. His complaint was that he had wanted to observe a small claims hearing being heard in the chambers of a district judge with access only through a locked door with the assistance of a member of the court staff. Dr Pelling alleged that such a hearing was not in public. Buxton LJ held at paragraph 52:

"It is therefore clear that the arrangements in the Bow County Court were not fully before the Court of Appeal when it granted permission on this point. There is indeed a locked door, but an explanation was given both of the reason for that and of steps taken to admit the public to enter through that door. The case in my judgement is not like the case of the locked door in the case relied on by Dr Pelling, Storer v British Gas [2000] 2 All ER 440, [2000] 1 WLR 1237, where there was not only a locked door, but a sign saying "Private. No admittance", serving as a positive deterrent to attending the hearings. The question for us is whether the arrangements as a whole sufficiently inhibited members of the public from attending court as to make the hearing one in private, rather than in public. I am quite clear on the facts as they now appear that it

did not do so, and the hearings to which this ground relates did not take place other than in public."

121. In *City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 the court had to decide whether a party could publish the judgment given following an arbitration held in private. At para. 11 Mance LJ said that "*some consideration is also necessary of the concepts deployed under previous procedural regimes such as "in chambers" and "in camera". Even the use of modern equivalents such as "private" and "secret" has given rise to some apparent inconsistencies.*" The court considered Jacob J's judgment in *Forbes v Smith* [1998] 1 All ER 973 in which he "*concluded that whether or not the courts sat in chambers or in open court was generally a matter of administrative convenience*".

122. Mance LJ then quoted the passage from Lord Woolf's judgment in *Hodgson* set out above and in para.19 concluded that Lord Woolf was using the terms 'private' and 'secret' "*to reflect the distinction expressed in the traditional terms "in chambers" and in camera". However, the CPR discards these terms and in my view uses the word "private" in a sense corresponding with Lord Woolf's MR's description "secret"."*

123. After setting out the terms of CPR39.2 and PD39, the court concluded at para.22 that 'private' as used in the rule and practice direction means 'secret' as used by Lord Woolf in *Hodgson*. "*In other words it may be equated with the old "in camera" procedure, rather than the old "in chambers" procedure"*.

124. Para.1.14 of PD39 referred to hearings in public, private and in a judge's room. Paras.1.9 and 1.10 of PD39 made it clear that a hearing in a judge's room would not be accessible to the public if there was a sign on the door indicating the proceedings were private; where there was no such sign, members of the public would be admitted 'where practicable', echoing Lord Woolf's guidance in *Hodgson*. Further evidence that the concept of 'chambers hearings' is not coterminous with whether the hearing is in private under the CPR can be found in the list of usually private hearings that were contained in para. 1.5 of PD39 which in summary were:

(1) Mortgage possession

(2) Rent arrears possession

(3) Application to suspend warrant of execution or possession

(4) Redetermination of rate of payment or application to pay by instalments

(5) Applications for various forms of enforcement orders

(6) Oral examination

(7) Determination of costs liability of legally aided party

(8) Application for security for costs

(9) Proceedings under the Consumer Credit Act 1974, Inheritance Act 1975 or the Protection from Harassment Act 1997

(10) Application by trustee for directions relating to bringing/ defending proceedings

(11) Certain applications under the Variation of Trusts Act 1958

125. I have not heard argument as to which types of cases were traditionally dealt with in chambers. The parties seemed to be in agreement that hearings of the type (1) and (3) to (6) in the list were heard in chambers. I believe (but without deciding this) that, with the exception of certain Consumer Credit Act cases, those numbered (7) to (11) would not have been. If the Claimant's argument were correct and the issue is whether the hearing is in private under the CPR, unqualified advocates would have been able to appear in the latter category of case under the CPR until 6.4.19, which did not occur. Furthermore, small claims hearings and child settlement approval hearings were chambers hearings which under the original version of PD39 could be in private but in practice were often in public.

126. In summary, I am satisfied that under the CCR, hearings in chambers were 'private', but the public could generally have access to them, unless they were in secret. Under the CPR, a hearing in a judge's room may be in public or in private, namely secret. I therefore do not agree that the CPR distinction between hearings in public and in private is the test for what is 'in chambers'. Insofar as the three judges in *McShane* et al based their decisions on that distinction, I consider that they were wrong. I should also say that DJ Peake relied on dicta in *R v Bow CC ex p Pelling* but it appears that he was wrongly referred to the Divisional Court's judgment, rather than the Court of Appeal's decision.

127. Since I am satisfied that the existence of rights of audience does not depend on whether a hearing is in private in the CPR sense, the fact that most hearings are now in public makes no difference, in my judgment, to the question I have to decide.

128. I now turn to the question of the effect, if any, of the omission from the rules of para.1.14 in PD39A. The Claimant's contention is that this omission, either by design or inadvertently, removes the exemption in Sch.3 sub-para.1(7). Mr Timson rightly points out that there is now no reference to 'chambers' in the CPR and that the CPRC has not decided to retain any reference to the previous rules in relation to hearings in chambers.

129. I have no evidence as to the CPRC's reasons for omitting 1.14 along with the rest of PD39A. I do note that the paragraph merely provided clarification firstly, that the existing rights of audience pre-CPR were not restricted by the new rules and secondly, that they were not enlarged. It may be that the CPRC felt that such clarification was no longer necessary after 20 years.

130. Be that as it may, I am satisfied that merely doing away with words in a Practice Direction cannot have the effect of removing a right of audience enshrined in legislation. In *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 Lord Sumption said at para. 12:

"unlike the Civil Procedure Rules, which are made under statutory powers, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. As to those matters, it is binding

on judges sitting in the jurisdiction with which it is concerned: Bovale Ltd v Secretary of State for Communities and Local Government [2009] 1 WLR 2274. ***But it has no statutory force, and cannot alter the general law."*** [emphasis added]

131. In my judgment, the authorities and parts of the original PD39 which I have referred to above demonstrate that the concept of 'in chambers' survived the advent of the CPR. (Indeed, there is a heading 'Chambers hearings' in the index to the current White Book). Further, the continuing existence of the right of audience under both CLSA 1990 and LSA 2007 were recognised in *Crane*, *Kynaston* and *Bramah*, all decided post-CPR. Certain statutes, rules etc (as referred to in para. 110 of this judgment) still refer to 'in chambers'. It seems to me highly unlikely, as Mr Timson suggests, that unqualified advocates might have rights of audience in such cases in the High Court but have no such rights in the County Court.

132. Lord Woolf described the advantages of hearings in chambers in the passage quoted earlier from *Hodgson*. The evidence in this case and my own experience suggest that judges have continued to hold chambers-style hearings in appropriate cases since the CPR came into force. The benefits of less formality, greater speed, less strict rules as to representation and a less intimidating setting mean that they continue to contribute to the administration of justice, as Lord Woolf envisaged. The fact that such hearings are now mostly fully public does not alter the essential character.

133. I conclude that the correct interpretation of 'in chambers' is (c), namely whether the hearing in question is broadly of the type of hearing which would have been heard in chambers under the CCR. Mr Timson's objections to this interpretation are that it is impractical, as new judges will not know about the practice under the CCR and that it does not cover new types of hearings. Mr Jacob points out that online resources enable practitioners and judges to research the question if necessary. Further, it appears that judges have used this interpretation for the last 20 years, as can be seen from the judgment of DDJ Balchin in this case and in the judgments in *McShane* et al, so there is a body of practice.

134. In terms of new types of hearing, neither DJ Peake nor DDJ Hampson had any difficulty in deciding that Stage 3 hearings were akin to assessment of damages hearings and therefore would not have been in chambers.

135. In this case, under CCR Ord.13 r1(4), all applications would have been heard in chambers unless ordered otherwise and Ord.13 r5 dealing with applications to strike out did not alter the basic position. As DDJ Balchin held, the First Defendant's application to strike out the claim would have been heard in chambers and so Mr Erridge had a right of audience. Mr Timson suggests it would be an absurd position if all applications were deemed to be in chambers and cites the example of an application in the High Court under s212 Insolvency Act 1986 or an application for committal under CPR81. The short answer is Ord.13 r1(4) related to the County Court only and was always subject to contrary order. A committal application is a clear example of where the practice was for the hearing to be in open court and indeed, CPR81.8 specifically provides that the hearing will usually be in public and the judge and advocates will be robed, whether the hearing is in public or private.

Conclusion

136. The judgments of DDJ Balchin and of DJ Peake convey a sense of disquiet about the practice of solicitor's agents appearing as advocates. I am aware that some, perhaps many, practitioners and judges share that unease. The 2007 Act and its predecessor were designed to tightly circumscribe rights of audience. The prevalence of solicitor's agents appearing in the County Courts might be said to be taking work from qualified solicitors and barristers who have worked hard to obtain those qualifications.

137. However, I am satisfied from Mr Blackmore's evidence that, at least in relation to LPC, the people they instruct are not just 'yanked off the street' as Mr Halborg pejoratively suggested to the DDJ. As for Mr Halborg's concerns that unqualified advocates are not subject to a regulatory body's disciplinary processes, that is true but there is considerable force in Mr Jacob's submissions as to the various methods which exist for dealing with any misconduct by a solicitor's agent and/or for protecting lay clients. These are set out in paras. 61 and 62 of his skeleton argument:

"61. Mr Erridge may not have been subject to a regulatory body. Nevertheless, were he guilty of misconduct while exercising a right of audience, various methods of dealing with this exist. First, the court retains the power to refuse to hear him: LSA 2007, s. 192 (previously in CLSA 1990, s. 27(4)). Secondly, if his conduct were such that it would be undesirable for him to continue to exercise a right of audience, the Law Society or the Solicitors Disciplinary Tribunal could make an order under the Solicitors Act 1974, s. 43, that he should not be employed or remunerated by a solicitor or recognised body without the Law Society's permission. Thirdly, if Mr Blackmore provided him with insufficient instructions and/or supervision, or failed to ensure he was sufficiently competent, Mr Blackmore could be subject to disciplinary action by the SRA. Fourthly, for the purposes of the court's supervisory jurisdiction, solicitors do not abdicate their professional responsibility when they delegate or subcontract work that they are retained to do; they remain responsible for such conduct, particularly if the work is delegated to an unauthorised person: Bamrah at paras 25; 97; 103. Fifthly, LPC would remain liable to their client for any negligence on Mr Erridge's part in acting as its advocate: Crane at paras 12 and 36.

62. LPC, as a firm of solicitors, is required to have professional indemnity insurance cover for all advocates whom it instructs, including Mr Erridge, pursuant to the SRA Indemnity Insurance Rules."

138. Further, as Mr Blackmore sets out in his witness statement, a dissatisfied client has recourse to LPC's complaints process and ultimately, to the Legal Ombudsman, as occurred in relation to a complaint about Mr Erridge's conduct in one case.

139. As the Court of Appeal held in *Hollins*, the instructing solicitor remains liable for any failure to comply with his/her professional obligations. In *Bamrah*, Hickinbottom LJ stressed that solicitors remain liable for the acts of unauthorised agents instructed by them. The fact that the advocates used by LPC are not themselves subject to disciplinary action or have their own indemnity insurance must be seen against those responsibilities.

140. Mr Timson acknowledged that working for LPC and similar firms can provide valuable experience for those seeking a training contract or pupillage. Indeed, I was told that

both Mr Timson and Mr Jacob had themselves worked for LPC before qualifying. However, Mr Timson went on to suggest that without the activities of LPC and others, there would be more work available for solicitors and barristers which might lead to more training contracts and pupillages being available.

141. I have no evidence as to what the effect would be of removing solicitor's agents from most County Court work but the working model of LPC could be said to be in line with the diversification of the provision of legal services in recent years and may provide a lower cost source of advocacy in less complex County Court cases. At para. 217 of *Hollins*, the Court of Appeal said *"Part II of the 1990 Act [CLSA 1990] is concerned with the search for new or better ways for providing litigation services"*.

142. For all the reasons given, I am satisfied that Mr Erridge fulfilled all three limbs of Sch.3 sub-para.1(7) LSA 2007 and was entitled to exercise a right of audience before DDJ Balchin. Accordingly, the appeal fails.

143. I consider that judges in the County Court would benefit from more authoritative guidance from the senior courts on the question with which I have been concerned in this appeal.