IN THE BIRKENHEAD COUNTY COURT

Case No: BI1B1440

Date: 28th June 2016

Before :

District Judge Peake

Between :

RYAN McSHANE — **Claimant**

and –

KATHERINE LINCOLN — **Defendant**

Counsel for the Claimant Mr McGee
Counsel for the Defendant Mr Paul

JUDGMENT

District Judge Peake :

1. This is a case which came before me on 18th April 2016 for a Stage 3 Hearing to assess damages pursuant to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents [The MOJ Portal]. At that hearing the Claimant was represented by Mr Sisto, a Solicitor's Agent. Issue was taken by the Defendants Counsel Miss Walters as to whether he had Rights of Audience in such a hearing and as there was insufficient time for the issues to be argued fully the case has been listed for substantive argument today.

2. I have the benefit of skeleton arguments from both parties which I have considered, and heard detailed submissions from them today. Counsel for the Defendant has also provided me with a bundle of documents containing the relevant statutory provisions and authorities.

3. **The Legal Framework**

Court advocacy is regulated by the **Legal Services Act 2007**. **[LSA 2007]**

Section 12(1) of the LSA 2007 designates certain activities as "reserved legal activities", including:

(a) the exercise of a right of audience;
(b) the conduct of litigation; ...

"Right of Audience" is defined in the **LSA 2007, Sch. 2 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.
(2) But a "right of audience" does not include a right to appear before or address court, or to call or examine witnesses, in relation to any particular court or in relation to particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to exercise that right.

Section 13(2) of the LSA 2007 provides that a person is entitled to carry on a reserved legal activity where:
(a) The person is an authorised person in relation to the relevant activity; or
(b) The person is an exempt person in relation to that activity.

It was accepted by both parties that the solicitor's agent was not by virtue of his own qualifications authorised to exercise rights of audience, and it was not suggested on behalf of the Claimant that the court should exercise its discretion on a case by case basis (pursuant to the **LSA 2007, Sch. 3 Para. 1(2)**).

It is the Claimant's case that the solicitor's agent is an exempt person in relation to the reserved activity. **LSA 2007 Sch. 3** provides a list of circumstances where a person will be exempt. Most of these are not relevant to the issue in hand.

Schedule 3 Para. 1(2) provides that an unauthorised person may be exempt if he *"has a right of audience granted by that court in relation to those proceedings"*. This involves the court exercising discretion on a case by case basis and, it is accepted by both parties that

this is unlikely to be relevant in determining the issue of general principle as to whether solicitor's agents have rights of audience in Stage 3 Hearings.

The exemption that is relevant to a solicitor's agent is that which is set out in **LSA 2007, Sch. 3 Para. 1(7):**

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 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, or

(ii) In the family court by a judge . . .

LSA 2007 Sch. 3 Para. 8 states:

This sub –paragraph applies to –
(a) Any authorised person in relation to an activity which constitutes the conduct of litigation;
(b) Any person who by virtue of section 193 is not required to be entitled to carry on such an activity

The importance of determining this issue is that if the solicitor's agent is not exempt, then he may be committing a criminal offence pursuant to **LSA 2007, section 14:**

(1) It is an offence for a person to carry on an activity ("the relevant activity") which is a reserved legal activity unless that person is entitled to carry on the relevant activity.

(2) In proceedings for an offence under subsection (1), it is a defence for the accused to show that the accused did not know, and could not reasonably have been expected to know, that the offence was being committed.

The Defendant disputes that a solicitor's agent satisfies the relevant criteria to be an exempt person as set out in **Sch. 3 Para. 1(7)**, and the questions for me to decide today are therefore:-

(1) Is the hearing in chambers?
(2) Is the advocate assisting in the conduct of litigation?
(3) Is the advocate assisting under instructions given by and under the supervision of an authorised person as defined in sub-paragraph (8)?

These three criteria are conjunctive, and it is not in dispute that if the answer to any of these questions is no, then the solicitor's agent does not have a right of audience at a Stage 3 Hearing.

It is necessary to consider all three criteria in turn.

4. Is the hearing in chambers?

The term "chambers" is used frequently in the old Rules of the Supreme Court. RSC Order 32 deals with "Applications and Proceedings in Chambers". Counsel for the Defendant referred me to the editorial commentary in the 1999 edition of the White Book:

[32/6/1] . . . The term "chambers" is not defined by the RSC but is used in contrast to the term "Court" (see rr. 13 and 20). In fact applications and proceedings in Chambers are conducted before a Court sitting in private, more often before a Master but occasionally before a Judge, and only the parties and their representatives are entitled to be present. The true distinction is between the Court sitting in Chambers, i.e. in private, and the Court sitting in open Court, i.e. in public, although in the latter case the Court may in a proper case exclude the public, so as to sit in camera.

These comments are consistent with the Court of Appeal judgment in R v Bow County Court [1999] 1 WLR at p. 1813, where it was expressly stated that the expression "in chambers" meant "in private". The CPR refers to hearings being in private or in public. The term "chambers" is not used.

CPR 39.2 states:
(1) The general rule is that a hearing is to be in public.
(2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.

The general rule laid down by 39.2(1) ensures that the CPR complies with the provisions of the Human Rights Act 1998 Sch. 1, where Article 6 states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

CPR 39.2 (3) provides that in certain circumstances a hearing may be heard in private. None of the circumstances listed in 39.2(3) arise in the case of Stage 3 Hearings.

PD 39A provides further detailed guidance with regard to public hearings. In addition, it states at paragraph 1.14:

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.

This paragraph does not assist in considering the question of rights of audience in Stage 3 Hearings, since such hearings are a new creation and did not exist under the rules previously in force.

Roger Mallalieu prepared the Claimant's submission and skeleton argument. He contends in para 68 that the correct approach to whether a hearing is in public or private, in order to give effect to statutory and procedural provisions, must be to seek to identify whether the hearing in question falls within a 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. I agree entirely. Where I disagree is his further submission (Paras 21 and 73-79) that a disposal hearing would have been chambers work.

Both Counsel today agree that prior to 1999, the equivalent hearing was an Assessment of Damages Hearing, which was held in open court with the judge and advocates robed, and oral evidence given on oath. This was clearly a public hearing.

Following the introduction of the CPR, it is now possible for such hearings to be heard as disposal hearings, where assessment and the judgment are based upon the case papers and oral submissions from advocates, without the presence of the Claimant. However, this is still a final contested hearing, and is therefore still a 'trial' as defined by **CPR 45.29C(4)(c)** *"a reference to 'trial' is a reference to the final contested hearing"*. It follows that this must still be a public hearing, which preserves the Claimants' Article 6 rights.

Stage 3 Hearings were a further development created by the MOJ Portal scheme and removed the need for written evidence from the Claimant in statement form unless necessary to value special damages. However, the purpose of these hearings is still for the court to finally determine the claim by way of a final contested hearing, by consideration of the case papers and submissions from advocates. It bears little difference to a disposal hearing and there is no justification for such a hearing to be in private.

It is my view therefore that in accordance with the general rule in **CPR 39.2** that Stage 3 Hearings will be public hearings, and do not take place in "chambers" as the term is understood under the previous rules.

That should be sufficient to dispose of this application. However, if I am wrong on this point, it is necessary to consider the other two limbs of the test:

5. Is the advocate "assisting in the conduct of litigation"

I am satisfied that from reading **LSA 2007 s. 12** that "conduct of litigation" and "exercise of a right of audience" are distinct and separate reserved legal activities. The fact that an advocate is purporting to exercise a right of audience does not necessarily make it one and the same thing as assisting in the conduct of litigation. This is supported by the fact

that **Schedule 3 Para 1(2)** gives the court the power to grant a right of audience on a case by case basis. There is no such power in relation to the conduct of litigation.

LSA 2007 Sch. 2 Para. 4 provides:
(1) The "conduct of litigation" means–
(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).

(2) But the "conduct of litigation" does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.

Counsel for the Defendant referred me to the similarity to the previous provisions contained within section 119 of the Courts and Legal Services Act 1990, which was the subject of judicial consideration in the case of **Agassi v Robinson [2006] 1 WLR 2126.** The relevant passage states:

[54] . . . 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.

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.

I have been referred by Mr McGee from Mr Mallalieu's skeleton argument to a number of cases involving costs draftsmen. However Counsel for the Defendant points out that these are not strictly on the point, and in my view can be distinguished because they clearly fall within the exemption granted by
LSA 2007 Sch. 2 Para. 4:
(2) But the "conduct of litigation" does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.

Any cases referred to can be distinguished on the basis that they refer to that particular set of circumstances only, and in any event, issues concerning what was taxation of solicitors costs were dealt with in chambers pre-1999.

I am not satisfied therefore that applying this definition, a solicitor's agent's work includes assisting in the conduct of litigation (as required under Sch. 3 Para. 7(a)). This may be distinguished 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.

Historically solicitors would instruct other solicitors' firms to appear on their behalf in other parts of the country. This was described as 'agency work' and largely involved attending on housing matters, particularly mortgage possession claims which under the CPR are heard in private. However it also included appearing on interlocutory hearings as they were known, as these were heard in chambers. For open court work solicitors or counsel were instructed.

With the introduction of the CPR the demarcation between what is or is not a public hearing has become blurred and thus who may appear at such hearings unclear. There is currently some disquiet amongst those who have expended very considerably to achieve the necessary qualifications to exercise a right of audience that this is being exercised regularly in breach of the regulations.

The case of a solicitor's agent is markedly different to that of the historical instruction of an agent. The concept of a 'solicitors agent' is a relatively new development, and many thus employed are persons who have legal qualifications but for some reason or other cannot obtain a professional qualification or employment as a solicitor or barrister. They will normally act as a freelance self employed advocate and have no previous involvement in the case until instructed to attend the hearing.

Taking all the above into account in my judgement therefore the work of a solicitor's agent does not include assisting with the conduct of litigation.

6. Is the solicitor's agent supervised by an authorised litigator

Supervision must be distinguished from mere instruction. It involves 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. There is no such relationship in existence as between a solicitor's agent and his agency or the solicitor who has instructed the agency.

Also, LSA 2007 Sch 3 Para 1(7)(b) requires that the supervision must be provided by the individual who is giving instructions. Therefore any supervision by the manager of the agency would not suffice since he/she is not the same individual as the solicitor who is providing the instructions.

I was referred to the case of **Kynaston v Carroll [2011] EWHC 2179 (QB)** which involved consideration of Sch. 3 Para. 1(7). In this case Burnett J held that a right of audience had been correctly granted to an unqualified individual who was an employee of an authorised costs lawyer. There was no doubt in that case that the individual was working under the direction and control of his employer, who had conduct of the litigation. The position of the 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.

There are important reasons for this provision, which provides protection to the public in the event of negligence or misconduct, as solicitors and barristers are required by law to have professional indemnity insurance, and are subject to regulation and possible disciplinary sanction by their professional bodies. There was no evidence submitted by the Claimant that Mr Sisto carried any professional indemnity insurance or was subject to regulation of any kind, and Mr McGee who appeared for the Claimant could not provide me with any further confirmation in respect of this.

CONCLUSION

For the reasons set out above I have concluded therefore that a solicitors agent as an advocate does not satisfy any of the three tests set out on LSA 2007 Sch 3 Para 1(7) and does not have a right of audience in a Stage 3 Hearing because (a) the hearing is not in chambers (i.e. not in private); (b)by exercising a right of audience the solicitor's agent is not assisting with conduct of the litigation and (c) the solicitor's agent is not being supervised by an authorised person.

Michael Peake
District Judge
Birkenhead Civil and Family Court.
27.7.2016