



## Chambers of Timothy Raggatt QC

4 King's Bench Walk, 2nd Floor, Temple, London EC4Y 7DL

[www.4kbw.co.uk](http://www.4kbw.co.uk)



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Civil Law Update

**MAY 2008**

Welcome to the May 2008 edition of the 4KBW Civil Newsletter. In this edition, Jerome Silva revisits the issue of mitigation of loss and the burden of proof, clarifying an often misunderstood area of law. David Sawtell examines recent case law in the field of employment law where the Court of Appeal has reiterated the need to clarify the contractual relationship between the parties when bringing a claim. Jo Durber, a pupil at Chambers, writes about the recoverability of counsel's fees for attending infant approval hearings.

We hope that you find this newsletter informative and useful. Please feel free to forward it on to your colleagues. If you wish to be added to our mailing list, please email [clerks@4kbw.co.uk](mailto:clerks@4kbw.co.uk).

### Contents

Pg 2 - Practice Profile: Alison Griffiths

Pg 3 - Article: Mitigation of Loss Revisited (Jerome Silva)

Pg 5 - Article: Agency Workers and Employment Law (David Sawtell)

Pg 9 - Article: Counsel's fee for attendance at infant settlement hearings  
(Jo Durber)



## Chambers of Timothy Raggatt QC

4 King's Bench Walk, 2nd Floor, Temple, London EC4Y 7DL

[www.4kbw.co.uk](http://www.4kbw.co.uk)



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

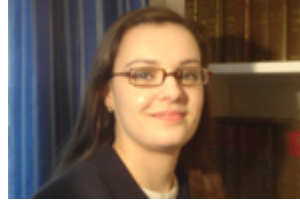
\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moiria Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Member Profile



### ALISON GRIFFITHS Called 2001

I read Law at the University of Leicester. During which, for three years, I was employed as an outdoor clerk at Geffens Solicitors (solicitor for the Birmingham Six). I also worked as Principal Legal Researcher for Prof. Parry on her book 'Transaction Avoidance in Insolvency proceedings'.

I studied the BVC at the Inns of Court School of Law and was also employed by 4 Essex Court (now Quadrant Chambers), Gough Square Chambers, Mr. Stephen Hickman QC and at the Houses of Parliament as a Researcher.

A member of the Inner Temple, I was the Yarborough Anderson Benefactor Scholar and received a Duke of Edinburgh scholarship.

I completed pupillage at Lamb Building, receiving instructions from the Office of the Treasury Solicitor.

After joining 4KBW in 2002 I practised in the criminal and immigration jurisdictions, as well as accepting civil instructions. For several years now, I have had an exclusively civil practice. Instructions include PI, contract, commercial, insolvency and landlord and tenant. I appear in fast-track and multi-track trials in the County Court and High Court (Queen's Bench Division and Chancery Division) litigation; together with advisory and drafting work. I have experience of all levels of PI, low velocity impact claims, credit hire and insolvency proceedings.

I am currently reading an LLM in Commercial Law at the University of London, with a special interest in Corporate Law. I am regularly involved in Practitioner Sessions at the College of Law BVC.

### Publications & Cases Reported

- *Personal insolvency as a restriction on involvement in company management*, The Insolvency Lawyer 5 [1999] 199.
- Several reported PI quantum cases in *Current Law*, most recently *Farrugia v Excalibur*, *Corneby v Harris* and *Puplett v Reagan*



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Mitigation of Loss Revisited

I hope this pithy and discreet article serves as a reminder of the easily forgotten fundamentals in relation to the recurring doctrine of mitigation of loss.

It is not uncommon to hear either defence solicitors in correspondence or counsel at disposal hearings use the well worn phrase: "the claimant has a duty to mitigate his loss." It is worth reminding oneself of Sir John Donaldson's judgment in *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605, 608, where he said:

"a plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty."

The onus of proof on the issue of mitigation is on the defendant; trite law, but a principle that is in my experience often subverted by judges who are keen to seemingly put a claimant to proof that they have so mitigated. Not only does a defendant have to prove that a claimant has acted unreasonably, they must produce evidence in support of such a contention.

### Mitigation of loss and surgery:

This is an area where the issue of a claimant's failure to mitigate, i.e. failure to undergo a surgical procedure that may curtail pain suffering and loss of amenity and even allow a claimant to resume work, can have a drastic impact on damages recoverable. In the case of *Geest plc v Lansiquot* [2002] 1 WLR 3111 the Privy Council set out the effect that a claimant's decision not to undergo surgery could have on damages. Shortly put, the case involved a claimant with a chronic back injury. Her treating doctors had eventually considered that a surgical operation on her back was the only method of relieving her pain and disability, and had advised her that such surgery was successful in most cases, although it could not guarantee a cure, but no advice had been given as to the risk that an operation might worsen her condition, or what the worst outcome of an operation might be.

The claimant did not undergo surgery and at trial, the defendants tried to contend that she had failed to mitigate her loss. Despite there being no suggestion that surgery could be risky or that the claimant had anything to lose by undergoing an operation, the Privy Council held that the claimant had not failed to mitigate her loss. The court were clear that where a claimant had refused medical treatment the burden lay on the defendant to prove that the refusal was unreasonable and thus constituted a failure by the claimant to mitigate the damage sustained.

In discharging such a burden and proving that such a decision was unreasonable, the defendants had to put evidence before the court. This should be in the form of expert evidence which sets out that an operation would in all probability be effective, that it stands a good chance of success and carries with it negligible risk.



Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

Principal Clerk

Lee Cook

Mitigation of Loss Revisited - Continued

Even when such opinion is placed before the court, a claimant may still refuse to undergo surgery and not be found to have failed to mitigate if he has been given his own medical advice which respects his decision not have surgery.

In *Richardson v Redpath, Brown & Company Limited* [1944] AC 62 the House of Lords held that if a "reputable medical man, a specialist, advises against the operation, (the claimant) cannot be held unreasonable in taking that advice." This is the case even if such advice is subsequently shown to be erroneous, as the test is whether the claimant who refuses to be operated upon is acting reasonably in view of the advice he has received, rather than whether that advice is itself correct. In practical terms then, a defendant's suggestion that a claimant has failed to mitigate by refusing to undergo surgery can be frustrated by evidence that the claimant has received medical advice that endorses his decision not to undergo surgery.

**Defendant must plead failure to mitigate**

*Geest* also amplified another overlooked principle: it is the clear duty of the defendant to plead in its defence that the claimant has failed to mitigate his damage and to give appropriate particulars sufficient to alert the claimant to the nature of the defendant's case. The Privy Council also went on to state:

"It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the claimant long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter."

It would seem then that it is not acceptable for a defendant to raise the issue of failure to mitigate during their closing speech or even during cross examination if they have not put the claimant on written notice and subsequently supported the same with evidence.

**JEROME SILVA**



Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

Principal Clerk

Lee Cook

## Agency Workers and Employment Law: Recent Developments

Both the Court of Appeal and the Employment Appeal Tribunal have handed down recent cases on the importance of the contract of employment when bringing claims to the Employment Tribunal. Even when claiming under the discrimination jurisdictions of the ET, it is necessary to ensure that the relationship between the parties was such that a claim can be brought. This applies not only to the so-called 'triangular' relationships, where there is no direct contract between the worker and the business making use of his or her services, but also to situations where it is not immediately apparent that there was an intention to create legal relations.

### James v London Borough of Greenwich [2008] EWCA Civ 35

On its face, this case does not create any new principle of law. However, by powerfully re-stating the necessity principle when trying to 'find' contracts between the worker and the end user of that work, the Court of Appeal has closed down a claim for unfair dismissal as a remedy for many potential claimants who work through agencies.

Merana James was an agency worker with a well-known employment agency. The agency found her a position as a housing support worker with the Council. While she was undertaking work for the Council, she was subjected to a degree of control consistent with a contract of employment, even wearing a staff badge bearing the Greenwich Council logo. However, according to the terms of her contract with her agency, she was contracted under a 'contract of services' with the agency and the agreement did not give rise to a contract of employment either between them or between the worker and the client. After several years the Council replaced her with another worker supplied by the agency.

The claimant brought a claim for unfair dismissal. The issue was whether the claimant was employed by the respondent under a contract of employment. It is legally possible for workers to have one kind of contract with an employment agency and another kind of contract with the end user to whom he renders services. The Court of Appeal stated (at paragraph 6) that in the absence of an express contract of employment the ET is faced with the question whether it is necessary to imply a contract of employment between the claimant and respondent.

After reviewing the authorities, the Court of Appeal concluded that the question whether an 'agency worker' is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. The House of Lords decision in *Carmichael v National Power* [1999] ICR 1226, which stated that for a contract of service to exist (as opposed to a contract for services), mutuality of obligation must be found, was not helpful as it dealt with 'casual' workers directly engaged by the end user where no employment agency was involved.



**Members of Chambers**

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

**Principal Clerk**

Lee Cook

## Agency Workers and Employment Law: Recent Developments - Continued

The correct legal test was laid down by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213 at 224, as whether it was necessary to imply a contract in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one other in circumstances in which one would expect that business reality and those enforceable obligations to exist. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract.

In the agency worker cases, the Court of Appeal agreed with the EAT (at paragraph 30) that the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work; that can be explained by the genuine express contracts between the worker and the agency, and the agency and the end user, so that an implied contract cannot be justified as necessary. Further, in order to defeat an ET's finding, it would be necessary to appeal on the grounds of perversity.

### M&P Steelcraft v Ellis (UKEAT 0536/07)

In this case there was a tripartite arrangement between a prisoner, the prison and the employer. The prisoner was given a job placement by the employer under a resettlement scheme designed to facilitate the rehabilitation of prisoners. The relationship between the prison, the employer and the prisoner in this scheme was regulated by a Memorandum of Understanding. This Memorandum contained an express provision purporting to prevent the arrangement from giving rise to any legal consequences. On his release from prison, the prisoner continued to work for the employer, but was subsequently dismissed. The issue was whether he was an employee of the employer while he was a serving prisoner for the purposes of calculating the period of his continuous employment.

There was no inherent barrier between a prisoner and the employer choosing to enter into a contract of employment. However, the mere fact that the claimant entered into an engagement on the same terms as other employees was not sufficient to infer a contract because that fact was equally consistent with the parties giving effect to the Memorandum; it was therefore not necessary to imply a contract. The agreement takes on a different character when seen in the context of the tripartite arrangement. It was not legitimate to separate out and focus on the features that identify the relationship between the claimant and the employer and to treat the features of the relationships between those two parties and the prison as essentially incidental. The dominant purpose of the tripartite agreement was the rehabilitation objective. It is necessary to consider the relationships in the round to determine its true objective rather than focus on the terms of engagement between the employer and the prisoner, which taken in isolation would have been consistent with a contract of service.



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Agency Workers and Employment Law: Recent Developments - Continued

As a matter of pure construction, the express provision preventing the arrangement from giving rise to legal consequences did effectively establish that there was no intention to create legal relations. The EAT then dealt with the issue as to whether, if there had been a contract of employment, it would fall foul of section 203 of the Employment Relations Act 1996, which prevents parties from contracting out of their statutory obligations. If there had been a contract of employment, the clause would have had the effect of limiting or excluding the protected statutory rights. In order to establish that a clause infringes section 203, as well as showing that but for the clause the statutory rights would be limited, it is necessary to show that the only purpose of the clause is to alter, or seek to alter, what would, absent the clause, be the legal effect of the contractual arrangements. In the present case, had the claimant otherwise been able to take advantage of statutory rights, section 203 would be infringed.

However, given that the dominant purpose of the tripartite arrangement was rehabilitation, and that the provision of personal service to the employer was essentially secondary, there was no employment contract while the claimant remained a prisoner. It therefore followed that section 203 would not bite as he was neither a worker nor an employee under the 1996 Act. Following on from this, there was no reason why the clause preventing the creation of legal relations should not be given effect.

### Vidal-Hall v Ministry of Justice (UKEAT 0462/07)

Section 9 (Contract Workers) of the Sex Discrimination Act 1976, subsection 1, states that "this section applies to any work at an establishment in Great Britain, for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal". The present case again raised the issue of the triangular relationship between an employer, an end user and an employee in the unusual context of a charity providing services to a prison. The claimant sought to bring a claim under the SDA, but as she had not been an employee she attempted to proceed under s9. For the purposes of s9, the claimant had to show that there was a contract between the prison and charity. The claimant had brought no claim against the charity.

The claimant was the employee of the charity. There was an agreement between the prison (run by the Ministry of Justice) and the charity, which provided services to the prison for the advancement of the education and rehabilitation of the prisoners, which consequently could discharge its duties to its prisoners through its services. The opening words of the prison's agreement with the charity contained a clause stating that it was not intended to be a legally binding document, but that each party would use its best endeavours to implement their particular responsibilities.



## Chambers of Timothy Raggatt QC

4 King's Bench Walk, 2nd Floor, Temple, London EC4Y 7DL

[www.4kbw.co.uk](http://www.4kbw.co.uk)



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Dennis  
Moirra Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Agency Workers and Employment Law: Recent Developments - Continued

The EAT followed the approach of the two cases set out above, namely that the contractual principle should be followed and that the ET's decision is not normally susceptible to appeal. The intention of the prison and the charity was to keep their relationship non-contractual. The clause could not be severed. Furthermore, it was not necessary to imply a contract and the relationship between the claimant and the prison was in no sense one of employment. Therefore, the s9 claim failed.

### Conclusion

These three cases demonstrate the importance of applying standard common law principles to contractual issues in the ET. Both the EAT and the Court of Appeal have refused to go behind the wording of employment legislation in order to afford extra protection to agency workers. This has implications not only in unfair dismissal claims, but also means that those bringing claims under the discrimination jurisdictions should very carefully consider the claimant's contractual relationship with the end-user before choosing the identity of the respondent or respondents.

### DAVID SAWTELL



Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

Principal Clerk

Lee Cook

## Counsel's fee for attendance at infant settlement hearings

It is becoming fashionable for defendants to argue that counsel's fee for attendance at an infant approval hearing is not a recoverable disbursement under CPR 45.10, requiring courts to hear submissions regarding costs at the hearing itself.

Two informally reported cases show courts reaching completely contrary conclusions. Seemingly, the aim of the fixed costs regime (to ensure costs are predictable, consistent and not the subject of litigation in their own right) is being defeated.

The question needs to be unequivocally answered soon and, to avoid limiting access to justice for vulnerable litigants, it should be answered in favour of the Claimant.

### Singh v Global Solutions (Post Mag. 2008, Mar 6, 28)

At the Part 8, infant approval hearing, the defendant asked the court to consider whether counsel's fee for attending was a recoverable disbursement under CPR 45.10, arguing the claimant's solicitor could have represented him at the hearing. The costs of instructing counsel to do so were not 'necessary'.

The court found for the defendant and noted that the costs incurred by a solicitor attending to represent the claimant would be accounted for in the amount of fixed recoverable costs. The disbursement for instructing counsel was not necessary and therefore not recoverable.

The reporter quotes Martin Saunders of Allianz Insurance:

*"This case has seen a reminder delivered to those who make excessive demands that the courts will exercise their powers and disallow payments where the rules permit."*

### G (A Child) v Chhaganlal (Current Law September 6, 2006)

At the Part 8, infant approval hearing the claimant sought fixed solicitors costs and disbursements, to include counsel's fee for attendance. The defendant argued such a fee was not recoverable, there were no exceptional circumstances that required attendance by counsel and solicitors should have attended instead, costs being covered by their fixed costs allowance. The claimant countered that 45.10(2)(c) specifically allowed disbursements which were necessarily incurred by reason of the claimant being a child, including fees for instructing counsel. In addition, the claimant argued she was entitled to recover, under 45.10(2)(d), "any other disbursement that has arisen due to a particular feature of the dispute", the feature being the vulnerability of the claimant, who should not be expected to attend court without suitable representation. Attendance by counsel for this purpose, should be recoverable under (d) if not included in (c)(i).



Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

Principal Clerk

Lee Cook

## Counsel's fee for attendance at infant settlement hearings - Continued

The court found for the claimant: no settlement could be reached without court approval and such approval could only be obtained via Part 8 proceedings. The claimant is required to attend and it is right and proper that he should have representation. The court felt it 'entirely wrong' that a solicitor should have to attend a hearing and not be paid for it, as such attendance is mandatory it cannot be said to be a cost-building exercise. Though it was a misfortune for a defendant that, had the claimant been an adult without disability, he would not have to pay attendance costs, the principle remained that a child claimant must be advised and must come to court to enable settlement to be approved, and the defendant must pay for this.

The main thrust of the defence argument in such cases is twofold. First, relying on *Singh*, that the fixed costs allowance at 45.9 includes the expense of solicitor attendance at hearings. Second, in the absence of exceptional circumstances or complexity, it is not necessary to incur further fees by sending counsel to the hearing instead, as argued in *Chhaganlal*.

### Is Attendance an Extra Expense? - The Intention of Part 45 Section II

The Civil Procedure (Amendment No 4) Rules 2004, amended Section II of Part 45 to apply to proceedings for approval of a settlement involving a child or patient under Rule 21.10, which itself was amended to prohibit the court from ordering detailed assessment of costs in any approval case which fits the remit of Part 45 (II). Section II provides a calculation for a fixed sum which may be claimed in respect of solicitors fees and a list of recoverable disbursements. 45.10.(2)(c) provides that disbursements are recoverable:

*(c) where they are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21 -*

*(i) fees payable for instructing counsel; or*

*(ii) court fees payable on an application to the court;*

The aim of the fixed costs regime is to prevent those claims where settlement is otherwise achieved coming before the court because the lawyers cannot agree on costs. Having laid down what the court must award, the Rules render an application unnecessary. Consequently, it would not be reasonable to incur the expense of a hearing, unless there is some unusual feature of the dispute that would make it likely an exception would be made, or a party was required by law to attend court.



### Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycougou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

### Principal Clerk

Lee Cook

## Counsel's fee for attendance at infant settlement hearings - Continued

Section 45.10(2)(c) & (d) recognise there will be cases which don't fit the usual pattern. 45.10(2)(c) specifically refers to cases requiring approval and (d) covers any other unusual elements of a case that would justify other disbursements. These cases involve expense by parties over and above that of others - the Rules' allowance for extra disbursements accepts it is reasonable for costs to be higher.

The calculation in CPR 45.9 is intended to produce a figure that will fairly compensate solicitors for the work involved in bringing a claim to the point of settlement. This would include assessment and valuation of the claim, attendances on client, inter-party correspondence, etc. When an adult settles, there should be no need for court attendance, therefore inclusion of court-related costs in the 45.9 calculation would unfairly overcompensate solicitors acting for adults. Clearly, if a solicitor is required to attend court with no additional payment, he would be attending for free and, as noted in Chhaganlal, it would be wrong to expect this.

### What about Counsel? - The Meaning of 'Necessarily'

The phrasing of 45.10(2)(c) is not "Where one or more claimants is a child or protected party *AND it is necessary to incur such costs...*" but "*necessarily incurred by reason of...*". The thinking behind this seems clear - in CPR 21.10 claims it will be necessary to incur fees for instructing counsel, and it will be necessary to pay fees to the court (a disbursement defendants do not tend to dispute).

The rules did not envisage any debate on this point. Instructions given by the Practice Direction to CPR 45 state if the claimant claims a disbursement under 45.10(2)(d), he must, on the claim form, give details of the particular feature and "*why he considers the disbursement to be necessary.*" There is no requirement to justify the necessity of disbursements under (c), necessity is assumed.

Defendants might argue the reference to counsel is restricted to the provision of an advice as required by 6.3 of the Practice Direction to CPR 21. The rules are intended to be restrictive - if this was the intention, surely it would have been drafted as such. Without any indication to the contrary, paying counsel to attend court must logically fall within the meaning of: "fees for instructing counsel".

Why is instructing counsel to attend justified?

**Independence** - The *raison d'être* of CPR 21.10 (and its predecessor RSC r.11) is that infants and patients are vulnerable and extra care is needed to ensure they are not taken advantage of. The task of approving a settlement is not left solely to the claimant's solicitor and litigation friend because it is acknowledged that either may have an interest in seeing the claim disposed of in a certain way. At court, it is appropriate that the claimant is advised and represented by an independent party with no interest.



Members of Chambers

Timothy Raggatt QC  
Roger Thomas QC  
Alan Conrad QC

\*\*\*\*

Basil Hillman  
Robert Spencer Bernard  
Christopher Cousins  
John Denniss  
Moira Pooley  
Kate Mallison  
Barnaby Evans  
Michael Harrison  
John Riley  
Reginald Arkhurst  
Andrew Granville Stafford  
Claire Jacobs  
Paul Wakerley  
Kate Mather  
Michael Skelley  
Kim Preston  
Jillian Hurworth  
Iain Burnett  
Brendan Davis  
Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

Principal Clerk

Lee Cook

## Counsel's fee for attendance at infant settlement hearings - Continued

**Updated Opinion** - The condition of the claimant may have changed, or may not have improved in accordance with the prognosis in the medical report rendering the written advice on quantum unhelpful. When there is a change in circumstances, counsel will be able to provide the court with an independent verbal view as to the current value of the claim. The court may then decide whether to approve the proposed settlement.

**Cost Effective** - Waiting time and travel time are often significant especially if the solicitor instructed by the claimant's insurer is local to the claimant's home court. Counsel attending on an agreed fee which includes travel and waiting time will be less expensive than a solicitor attending on an hourly rate.

### **Access to Justice**

Far from being an "excessive demand", recovery of attendance costs is an economic necessity. Should defendant solicitors succeed here, solicitors will have to attend hearings on an effectively pro bono basis and lose hours of chargeable working time. The result will be that firms stop taking these cases on as they could not cover their costs.

The alternative is equally worrying: that claims cease to be approved by the court at all. Instead, increased use of 'Parental Indemnities', where parents agree to indemnify the insurer against any future costs incurred as a result of their child revisiting the claim, making themselves liable where they are faultless.

Neither can be the intention of the CPR, and neither are in compliance with the overriding objective. Uncertainty may prove just as damaging as a definite rejection of counsels' attendance fees - a conclusive judgment is needed now.

**JO DURBER**