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## FOIL UPDATE 14<sup>th</sup> July 2023



### Interpreter's fee may be allowed under CPR 45.29I(h)

#### IN BRIEF

*Santiago v Motor Insurers' Bureau (2023) EWCA Civ 838*

Where, in a case to which Section IIIA of the fixed costs regime in CPR Part 45 applies, a claimant reasonably requires and retains the services of an independent interpreter at trial, may the interpreter's reasonable fees be recovered as a disbursement falling within CPR 45.29I(h) ["sub-paragraph (h)"]? Although this issue is time limited and, as things stand, will not arise in proceedings issued on or after 1<sup>st</sup> October 2023 (or in the case of personal injury, new claims after that date), the issue is important both for claimants who need the services of an interpreter in order to participate fully in a trial or other hearing of a claim issued before that date, and for defendants in such cases.

A Deputy District Judge felt herself constrained by the decision of *Cham (2019)* and held that she had no discretion in the matter and that a person's lack of linguistic ability could not be regarded as "a particular feature of the dispute" within the meaning of sub-paragraph (h).

The Court of Appeal held that the issue in *Cham* was whether the fee for counsel's advice on settlement was a recoverable disbursement within the meaning of sub-paragraph (h). The Court in *Cham* was not required to rule on the recoverability of interpreter's fees and, to the extent that *Cham* appeared to exclude the possibility of an interpreter's fees being recovered as a disbursement, this court considered that it was strictly obiter.

The Court of Appeal held that that an interpretation of sub-paragraph (h) that precluded the recovery of reasonably incurred interpreter's fees in a case such as the present would not be in accordance with the overriding objective and the court was not bound by *Cham* in which counsel's fee had been disallowed

What, if anything, was the difference in terms of access to justice between counsel's fee for an opinion in a child's case and the fee of an independent interpreter? There were two distinctions, which were fine but critical. First, by the time that counsel's opinion was required, the claim would have settled or settlement would be in the offing, whether proceedings had been issued or not. If there was no opinion the claim could proceed to judgment without impediment and with the parties on an equal footing, or the settlement could be concluded (but not approved by the court) with the child having the option of adopting or repudiating it on achieving their majority. The child's access to justice was therefore secured. By contrast, without the services of the interpreter the claimant (or witness) who could not speak or understand English was precluded from having access to the court that would permit them to participate fully on an equal footing and to give their best evidence. Second, the cost of the opinion was deemed to be remunerated because it was included in Table 6B. By contrast, if the interpreter's fee was not recoverable as a disbursement, it was not remunerated at all, either actually or notionally.

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

That conclusion would not justify allowing the present appeal if the application of normal principles of interpretation precluded it or this court was bound by *Cham* to take a different view,

The court held that the application of normal principles of construction did not preclude the interpretation of sub-paragraph (h) for which the claimant contended. Far from it: the application of normal principles strongly supported that interpretation and the court would have reached this conclusion before the 2021 amendments. The effect of the 2021 amendments was to clarify and reinforce the overriding objective and, thereby, to make express the obligation of the court to interpret the provisions with which this court was concerned so as to enable a party or witness to participate fully and to give their best evidence.

In *Cham*, the first and most striking feature of the decision was that there was no mention of the overriding objective which, even then, required the court so far as possible to put the parties on an equal footing and to deal with the case fairly. Although the terms of the overriding objective had since been clarified and reinforced, it was difficult to accept that the court in *Cham* would not have referred to the overriding objective *unless* it considered that the facts of that case did not engage the principles of access to justice.

What appeared clear was that the court in *Cham* did not have to consider, and did not expressly consider, the implications of disallowing the interpreter's fee when viewed through that prism; and counsel's fee for the opinion did not raise the same issues as those that arose in this case.

These points of distinction provided the key to answering the questions (a) whether *Cham* was decided *per incuriam* and (b) whether this court bound by *Cham* to dismiss the present appeal. The court in *Cham* may have concluded that an opinion of counsel was not required in order for the child to have access to the court to resolve their claim. That was not a conclusion that was open to this court in the present case when considering the interpreter's fee.

This distinction permitted the conclusion that this court was not bound by *Cham* to adopt an interpretation of sub-paragraph (h) which was not in accordance with the overriding objective on the different facts that were in play in the present appeal. The effect of *Cham* was that a disbursement should ordinarily be held to be "reasonably incurred due to a particular feature of the dispute" within sub-paragraph (h) if it was required to enable the determination by the court of a particular issue in the case rather than because of a particular characteristic of a party or witness. However, where considerations of access to justice arose, a broader interpretation was necessary to enable the dispute to be determined by the court in accordance with the overriding objective. It followed that the independent interpreter's fee (assuming it to be reasonably incurred) was properly to be regarded as a disbursement falling within sub-paragraph (h).

**Matthew Hoe**, Director at **Taylor Rose MW** and a member of the FOIL Costs SFT comments:

*The fee for an interpreter at trial is likely to be an infrequent claim, but the judgment will surely pave the way for many claims for interpreting and translation fees at any stage in a Section IIIA claim, without real evidence of the claimant's linguistic abilities and at the wildly high fee levels we have seen before. It is not clear though that such fees would be recoverable on the same 'access to justice' basis as in Santiago, when more time can be taken, friends and family may help, or especially when a smartphone nowadays can typically translate in real time. Nevertheless, it is a shame to lose the simple certainty that Cham provided on these points.*

The full judgment may be found at: [Santiago v Motor Insurers' Bureau \[2023\] EWCA Civ 838 \(13 July 2023\) \(bailii.org\)](#)

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