

Supreme Court refuses permission to appeal in *Aldred v Cham* [2019]

By [Eloise Turnnidge](#)

3PB Barristers

On 19 May 2020, Lords Hodge, Briggs and Leggatt refused permission to appeal on the issue of the recoverability, in protocol claims brought by children, of counsel's advice on quantum.

Judgment of the Court of Appeal

Readers may be familiar with the judgment of the Court of Appeal [2019] EWCA Civ 1780, handed down on 25 October 2019. For those unfamiliar with that judgment, a brief summary follows below.

The claimant was 7 years old when he was injured in a road traffic accident. His claim, originally submitted within the RTA protocol (the costs of which are prescribed by Section III of Part 45), fell out of the protocol when the defendant denied liability. Although the defendant subsequently accepted liability, a claim cannot re-enter the protocol (RTA protocol, paragraph 5.11). As such, the costs of the claim were governed by Section IIIA of Part 45.

As required by PD21 (paragraph 5.2, except in "very clear cases"), the claimant sought the advice of counsel on the quantum of his claim. He then settled pursuant to counsel's advice, and the court approved that settlement, ordering that costs be assessed if not agreed. The defendant disputed the recoverability of the fee for counsel's advice. On assessment, District Judge Hale allowed the fee, noting the necessity of the advice as required by Part 21: "This is a particular situation where the rules require a particular piece of work to be done. There is no discretion about it."

Whilst Section III specifically provides for the cost of counsel's advice (r45.18(2) and Table 6/6A), Section IIIA makes no such provision. The question for the Court of Appeal was whether the claimant could recover that cost as a disbursement, in addition to the fixed costs

recoverable under Section IIIA, on account of it being “reasonably incurred due to a particular feature of the dispute” (r45.29I(2)(h)).

On appeal at Northampton County Court, His Honour Judge Owen QC agreed with District Judge Hale, finding that the cost of counsel’s advice was within the scope of r45.29I(2)(h): “If the claimant is a child, the need to obtain counsel’s advice on valuation would constitute a particular feature of the dispute.”

Subsequently, in the Court of Appeal, Lord Justice Coulson gave the leading judgment. He discussed two first instance decisions regarding translator fees, to which the court had been referred. In one, the court found that the cost of an interpreter arose out of a characteristic of the *claimant* and not out of a particular feature of the *dispute*. In the other, this personal characteristic was considered one to which the “sweep-up” clause could relate.

Coulson LJ favoured the former approach (paragraph 35): “The fact that, in a particular case, a claimant is a child, or someone who cannot speak English, or who requires an intermediary, is nothing whatever to do with the dispute itself. Age, linguistic ability and mental wellbeing are all characteristics of the claimant regardless of the dispute. They are not generated by or linked in any way to the dispute itself and cannot therefore be said to be a particular feature of the dispute.” He went on to find that the cost of counsel’s advice did not fall within the exception (i.e. r45.29I(2)(h)).

The court also considered the question of counsel’s fees for other work. Coulson LJ stated: “The straightforward answer is that, in the vast majority of cases, counsel’s fees, although properly described as a disbursement, and although doubtless reasonably incurred, would not be allowed by the court under r45.29I(1)(a). That is because the work that is the subject of the disbursement has already been allowed for in the fixed recoverable costs.” He added: “if an item of work is deemed (or can be said implicitly) to be within the fixed recoverable costs in Table 6B, then it will not be separately recoverable as a disbursement.”

Returning to counsel’s fee for advising on quantum, Coulson LJ stated: “In my view, this item of work must be deemed to be within the fixed costs in Table 6B. It is an item of work that arises in thousands of RTA claims under Section IIIA where the claimant is a child. It is a routine step that has to be taken prior to the settlement of such a claim. It must therefore be deemed to be included within Table 6B.”

The cost of counsel's advice on quantum was therefore not recoverable as a disbursement pursuant to r45.29(2)(h).

Supreme Court's Refusal

Although both PIBA and APIL sought to intervene, the Supreme Court determined that the proposed appeal did not raise a point of law of general public importance. Nevertheless, it expressed the view that it would be appropriate for the Civil Procedure Rules Committee to consider the issue.

Importance

Although obiter, the discussion regarding translation or intermediary fees is one which defendants have relied upon with success. The author has acted in a number of cases in which the Court of Appeal's comments have been applied by district judges in disallowing such costs. The effect of *Aldred* may then be to indirectly discriminate against claimants whose first language is not English, for example, as claimant firms consider the likely profit (or loss) of accepting instructions in such cases, in which there is additional irrecoverable cost.

The information and any commentary within this document are provided for information purposes only. Every reasonable effort is made to ensure the information and commentary is accurate and up to date, but no responsibility for its accuracy, or for any consequences of relying on it, is assumed by the author or 3PB. The information and commentary does not, and are not intended to, amount to legal advice.

If you seek further information, please contact the [3PB clerking team](#).

August 2020



Eloise Turnnidge

Barrister

3PB

0330 332 2633

eloise.turnnidge@3pb.co.uk

3pb.co.uk