[2023] EWHC 1730 (KB)
IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER
(Her Honour Judge Evans)

No. H43YY904 and
Appeal Ref: M22Q682

Transcript of judgment amended on 25 September 2023 pursuant to CPR Pt.40.12(1) by Mr Justice Freedman

Manchester Civil Justice Centre (Civil and Family Courts)
1 Bridge Street West
Manchester
M60 9DJ

Friday, 9 June 2023

Before:

MR JUSTICE FREEDMAN

~~**(In Private)**~~

B E T W E E N :

RAJA SAEED AFZAL — Appellant/Claimant

- and -

UK INSURANCE LTD — Respondent/Defendant

MR F SIDDIQUE (instructed by Ten Legal Associates Ltd) appeared on behalf of the Appellant/Claimant.

MR A LAWSON (instructed by Clyde & Co) appeared on behalf of the Respondent/Defendant.

J U D G M E N T

MR JUSTICE FREEDMAN:

Introduction

1 This is an appeal against an order made in the Manchester County Court by HHJ Evans ("the Judge") dated 14 October 2022. The claimant appeals against an order whereby the Judge refused to give permission to the appellant to adduce his evidence at trial on the basis that the appellant's "own language" was not English and therefore a breach of CPR 32, PD 18.1. The result was that the claimant was unable to prove his case. This was a personal injuries case in which liability was admitted, but where causation and quantum were disputed and the claim was for a sum not exceeding £20,000.

2 The matter was allocated to the fast track and the trial of the matter was due to be heard on 14 October 2022.

3 The claimant's appeal is on the basis that it is submitted that the Judge misconstrued CPR 32, PD 18.1, both in insisting in finding that the evidence as a matter of fact and/or law that the witness evidence had to be in Urdu and that the Judge should have permitted the claimant in any event to rely upon his written statement.

4 The defendant's response was that the claimant conceded that there had been a clear and obvious breach of the CPR before the Judge. The defendant submitted that the claimant should not be able to withdraw that concession.

5 On the basis of that concession the Judge had a discretion in the way in which she then acted and she was entitled, on the basis of that exercise of discretion, to refuse permission to the claimant to adduce his witness statement and to refuse an application that was made for an adjournment in order to provide another witness statement.

Background

6 This can be stated shortly. A road traffic accident occurred on 5 December 2018. Proceedings were issued by the claimant on 26 November 2021 and the breach of the primary duty was admitted by the defendant in the defence. As indicated above, causation and quantum were disputed and the matter was due to be tried on 14 October 2022. The claimant's witness statement, which was in English, is dated 31 March 2022. There had been no issue prior to the hearing of 14 October 2022 about the fact that the witness statement was in English. At court, it was intimated by the defendant through Mr Lawson, who appeared, that in the course of his cross-examination he may be asking questions of the claimant in that regard.

7 There is a transcript of the proceedings. Mr Boxall, who was then counsel for the claimant said that, no, he was not aware of any preliminary issues either of himself or of Mr Lawson for the defendant. The Judge then said that she had a preliminary issue. The transcript reads as follows:

"JUDGE:	I have a preliminary issue, Mr Boxall: what is your client's own language?
MR BOXALL:	He speaks both English and Urdu, I believe.
JUDGE:	That was not the question. What is your client's own language?
MR BOXALL:	Can I take some instructions, ma'am? (After a pause) It is Urdu, your Honour.

JUDGE: What language is his witness statement in?
MR BOXALL: English.
JUDGE: You know what the provisions say in the Practice Direction to Part 32, I imagine. I am considering whether to refuse you permission to rely upon the witness statement, given that it has not been drafted in the witness's own language and that the statement of truth is not in his own language. Do you want to take some instructions before you make some submissions about that?"

There was then a short adjournment of 31 minutes in order for Mr Boxall to be able to take instructions. Having taken instructions the following interchange then took place:

"MR BOXALL: Your Honour, thank you for the considerable time you have afforded. I say at the outset I accept there has been an obvious breach in the civil procedure rules. I have taken instructions on why the witness statement was not drafted in Urdu. I do not have what I would consider to be an adequate reason to put forward to the court.
JUDGE: No.
MR BOXALL: What I will say, having taken instructions, is that those instructing me have advised - have advised at all times - the instructions they have received from the claimant, both in numerous in person conferences and over the telephone, has been conducted in English. Notwithstanding that those instructing also speak Urdu, they have not have to resort to using that in their-- when they have been taking instructions; so, I accept there is a clear and obvious breach. In terms of the way forward I would ask the court for permission to rely upon the statement in any event."

8 The Judge then mentioned that counsel did not have to seek that permission. The question was whether under para.25.1 of PD 32 the court should refuse permission to rely upon the witness statement. It was therefore for the Judge to consider whether to refuse permission rather than for the claimant to seek permission.

9 Mr Boxall then sought to persuade the court that by reference, perhaps by way of analogy, to the principles set out in the third limb in the case of *Denton & Ors v. TH White Ltd & Ors* [2014] EWCA Civ. 906, whether it was just in all the circumstances for permission to be given. He then said the following:

"In the circumstances of this particular case, we have a claimant who has at all times provided instructions in a satisfactory manner in English to those instructing me. I have also been personally advised

> by the claimant himself that he is able to read and understand the contents of his witness statement."

10 It was then submitted that in circumstances where the breach of duty had been admitted and causation of quantum remained an issue, and that there was clear and obvious contemporaneous evidence of an injury, it would be unjust not to be permitted to rely upon the witness statement.

11 Mr Lawson for the defendant stated that he had raised concerns with Mr Boxall as to the ability of his client to understand English because of the reference in Dr Ballin's statement to the wife of the claimant accompanying him: "she was there to translate a few things"

12 Mr Lawson said that in the light of the concession that had been given of an obvious breach, he was going to wait until that part of the cross-examination to see how the questions were understood and as to causation and history of his symptomatology. He said that there was a problem that it was not known whether the claimant understood it clearly in his Urdu language and there was no one to translate from Urdu.

13 He submitted to the court that there would be a problem about allowing an adjournment and it was not appropriate for the court to allow this matter to go off. Further he submitted that, "None of us can be sure he understands what is in the statement in his own language."

14 In response, Mr Boxall asked for an adjournment in order to regularise the position. He said that the form that that may take is for the witness statement to be translated into Urdu. He said that this was the first day of actual court time that had been used on the case and that it should be adjourned. He submitted that it would be a windfall for the defendant where a breach is admitted for there, in effect, to be a default judgment arising out of the evidence not being admitted. He submitted that any prejudice to the defendant would be entirely in costs.

15 The Judge then gave a judgment. She recorded in para.2 the following:

> "The claimant's own language is Urdu. I am told that he speaks, reads and understands English but nonetheless his own language is Urdu. Indeed it appeared that his wife attended with him for at least one of his medical appointments, he said to help him with some of the terminology that he might not otherwise have understood. His witness statement is drafted in English."

16 The Judge then drew attention to Practice Direction 32 at para.81 and the requirement that a witness statement, "must in any event be drafted in their (the witness's) own language". She said that it was also provided at para.20.1 that the statement of truth must be in the witness's own language. This one, she said, is not. The Judge, then at para.4 said that what should happen in a case like this is that the statement should be drafted in Urdu and approved and signed by the claimant in Urdu and then, and only then, translated into English. That had not happened. Instead Mr Boxall's instructions were that the solicitors had conducted their dealings with the claimant in English.

17 The Judge then said the following at para.7:

> "7. The Practice Direction to Part 32 has been in this form since early 2020. Before that the courts were often faced with confusion as to

> what was the appropriate course of action for a solicitor who was instructed by a client who did not have English as his own language. Some of them drafted statements in the witness's own language. Some of them, and sometimes the courts, entered into consideration of the extent to which a witness was able to understand and to be able to communicate adequately in English. Putting an end to all of that, in early 2020 the rules were changed to make absolutely clear that what must happen in a case where a witness does have English as their own language. The rules do not provide that the witness statement should be drafted in the witness's own language if he is not capable of understanding English adequately; or that it may be drafted in English if the witness has been conversing with the solicitors in English. The rules provide that the statement must be drafted in the witness's own language and the statement of truth must be in the witness's own language.
>
> 8. The reason for that is firstly this. One of the fundamental principles of civil litigation is that parties are entitled to know before they come to trial what it is that a witness is going to say and are entitled to assume that that which the witness says in his statement is expressed in a manner which he will choose to express himself with all the vocabulary and nuance and everything else available to him; and a witness statement that is drafted in a language which is not the witness's own language invariably will not convey the witness's evidence in the same manner that it would if it were drafted in his own language."

18 In the next paragraph the Judge gave a second reason, which was that where a witness has made a false witness statement, it is not in the interests of justice if a witness can say that he did not really understand the nature of the paragraph because it was not in his own language. The Judge said that the provision had been in force for almost three years and there is experience that the provision is frequently ignored; yet the provision is of fundamental importance.

19 She said at para.11:

> "And so, whilst, if I refuse permission to the claimant to rely upon this statement, it may have the result ultimately of his not being able to pursue his claim against the defendant, that it prejudices him, in my judgment, is outweighed by the importance of securing compliance with this particular Practice Direction for all the reasons I have already set out."

20 At para.12 she referred to Mr Boxall's suggestion that there could be an adjournment for the statement to be translated into Urdu. The Judge said there were problems about that. First, it did not rectify the breach to translate the statement into Urdu because the instruction should have been taken in Urdu, and the statement in Urdu will not necessarily then correlate with the instructions because of differences in translation.

21 The second problem was stated at para.14 in the following terms:

> "The second problem is that if I were to adjourn the claim that would result in another day of court time being given to this case, at a time when court resources are particularly stretched, and would result in the addition of costs to both sides of the case being adjourned and an order that the claimant or his solicitors pay the defendant's costs would deal with that point for the defendant, but would not deal with the general need for costs to be kept generally proportionate and at an appropriate level, and not wasted."

The Law

22 At this stage I shall make reference to the relevant legal provisions. Some of the major points were summarised in the judgment of *Correia v. Williams* [2022] EWHC 2824 (KB), a decision of Garnham J, who set out the rules and guidance at paras.17 to 23 of his judgment. He said the following:

> "17. It was common ground before me that in accordance with CPR rule 52.21(1) this appeal was not a rehearing of the matters before the Judge, but was a review.
>
> 18. CPR Part 22 and Practice Direction (PD) 22 deals with statements of truth -
>
> R.22.1(1): The following documents must be verified by a statement of truth ... (c) a witness statement.
> R.22.3: If the maker of a witness statement fails to verify the witness statement by a statement of truth the court may direct that it shall not be admissible as evidence.
> PD 22, 2.4. The statement of truth verifying a witness statement must be in the witness's own language.
>
> 19. CPR Part 32 deals with witness statements -
>
> R.32.4(1): A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.
> R.32.8: A witness statement must comply with the requirements set out in Practice Direction 32.
>
> 20. The Practice Direction to part 32 ("PD32") sets out the requirements for the preparation of witness statements:
>
> PD32: 18.1. The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language.
> PD32: 19.1. A witness statement should – (8) be drafted in the witness's own language
> PD32: 20.1. A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence it must include a statement by the intended witness in their own language that they believe the facts in it are true.

PD32: 23.2. Where a witness statement is in a foreign language -

(a) The party wishing to rely on it must –

(i) have it translated; and

(ii) file the foreign language witness statement with the court; [...]

PD32: 25.1. Where:

(1) an affidavit,

(2) a witness statement, or

(3) an exhibit to either an affidavit or a witness statement,

does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation.

PD32: 25.2 Permission to file a defective affidavit or witness statement or to use a defective exhibit may be obtained from a Judge in the court where the case is proceeding.

21. While not immediately applicable in these County Court proceedings it is of interest to note what the Kings Bench Division and the Chancery Division guides say on the topic of witness statements from witnesses who are not fluent in English."

23 At para.22 the Judge referred to the Queen's Bench Guide [2016] at para.10.61. This has, almost word for word, been replaced by the King's Bench Guide [2022] at para.10.62, which provides:

> "If a witness is not sufficiently fluent in English to give their evidence in English, the witness statement should be in the witness's own language and a translation provided."

24 At para.23 Garnham J referred to the then Chancery Guide at 19.13. This states:

> "If a witness is not sufficiently fluent in English to give his or her evidence in English, the witness statement should be in the witness's own language and a translation provided. If the witness is not fluent in English but can make himself or herself understood in broken English and can understand written English, the statement need not be in his or her own words provided that these matters are indicated in the statement itself. It must however be written so as to express as accurately as possible the substance of his or her evidence."

25 Although it does not appear in *Correia* the Business and Property Courts Guide came into force in April 2021, one year after the amendment to PD 32. This is in different terms from para.19.13 of the Chancery Guide and bears examination. It states as follows at para.3.3:

> "A trial witness statement must comply with paras.18.1 and 18.2 of Practice Direction 32, and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-

> examination) if required, and is not limited to a witness's first or native language.
>
> (Paragraph 18.1 of Practice Direction 32 requires a trial witness statement to be in the witness's own words, if practicable, and to be drafted in the witness's own language and in the first person; paras.18.1(1) to (5) and 18.2 set out further requirements; para.23 of Practice Direction 32 provides that a party who relies on a witness statement in a foreign language must also file a translation.)"

26 The courts have emphasised over the years that it is important that if the witness does not speak English then the witness statement will be in that person's own language, which must then be translated and the translation filed and verified in accordance with para.23 of PD 32: see *Re Phoneer* [2002] 2 BCLC 241 per HHJ Kaye KC.

27 The case of *Correia* was an appeal from HHJ Gerald who had found that the English witness statement was inadmissible due to the fact that the claimant in that case was a Portuguese speaker, who was not particularly proficient in English, but had filed and served an English written statement, translated by his solicitor, and who required and intended to give evidence by an interpreter at trial.

28 Garnham J, who dismissed the appeal, found that a claimant who was not fluent in English had to comply with the provisions of PD 32, and in particular the requirement that the statement must be in the claimant's own language. At para.41 he stated:

> "If the witness statement is not in his or her own language, there can be no confidence that it is their own evidence rather than the evidence of the drafter."

29 The court was also taken to a case called *Bahia v. Sidhu* [2022] EWHC 875 (Ch). In that case Mr Bahia was a mixed language individual, speaking a mixture of Punjabi and English. He had said in his second statement that English was not his first language but he had an understanding of it. His usual way of communicating was by speaking a mixture of Punjabi and English; the meaning of certain words and phrases used in the case had been explained to him by his solicitors in English and the discussions had been mostly in English. In that case the issues that were decided in relation to what to do about Mr Bahia's evidence occurred only after three days of cross-examination and there were issues in relation to the weight, if any, to be given to his evidence.

30 At para.35 Joanna Smith J said:

> "Having regard to the submissions from both parties, I accept that in the particular circumstances of this case there has been no serious breach of the relevant Practice Directions. Mr Bahia's solicitors were faced with a difficult decision over the language to use in the preparation of his statements and, on balance, their decision to prepare them in English is not open to criticism. Mr Bahia's statements clearly set out how they were prepared and, notwithstanding Mr Clarke's suggestions to the contrary, there is no evidence that any pressure was put on Mr Bahia to say anything in particular about his evidence and no evidence that he was 'led' during the preparation of his statements.

I am inclined to agree with Mr Temmink that the relevant Practice Directions could perhaps be rather clearer as to the approach to be adopted in a situation of this sort."

31 The court will now consider the following matters:

1. Whether the Judge erred in her understanding of the relevant Practice Direction, in particular para.18.1.
2. Whether the defendant is unable to complain about the understanding of the Judge because of a concession of counsel that the defendant's own language was Urdu.
3. Whether the Judge erred in refusing to give permission pursuant to CPR 32 PD, para.25.1, to adduce the evidence in English. Related to that there is a preliminary question as to whether this is a point which has been adequately taken by the claimant and whether or not the claimant is still able to take that point.
4. Whether the Judge erred in refusing to grant an adjournment.

32 The court will also consider the fourth ground about points of public policy or natural justice, but this will be absorbed within the discussion of the other grounds. The court will also consider the matters raised in the respondent's notice.

The construction of CPR 32, PD 18.1

33 From the summary of the hearing the Judge appears to have understood the meaning of the expression "own language" in CPR 32, PD 18.1, as giving rise to a view that each person has their "own language". Further it appears that her understanding is that the language would be the original language of the person, or the mother tongue or native language i.e. the language in which they are most fluent.

34 That is apparent for the following reasons:

1. When Mr Boxall said to the Judge that the claimant spoke both English and Urdu, the Judge then said that that was not the question but asked "What is your client's own language?"
2. In context that appears to have been understood by Mr Boxall as being a reference to the mother tongue, or the native language, of the person and so he answered, having taken instructions, that it was Urdu.
3. In the course of the judgment at para.7, the witness's own language would remain their own language even if the witness was capable of understanding English adequately, and even if the witness had been conversing with his solicitors in English.

35 The court has to do its best objectively to understand these interchanges. It is possible that the Judge had in mind something else, but the natural meaning of the court not being willing to proceed with the matter on the basis in English was that notwithstanding the fact that the court was told that the claimant spoke, read and understood English, he still had his own language of Urdu, which in context appears to be a reference to his first language.

36 If the Judge had considered the question with which language did the claimant have a proficiency, then the Judge might have accepted that it was sufficient for the statement to be in English, bearing in mind the information that was provided to the court.

37 In my judgment, assistance is derived from the references to the guides, and especially to the extract from the Business and Property Guide because this postdates in time the provisions of CPR 32, PD 18.1. It is significant in my judgment that the authors of the guide referred to the witness statement having to comply with paras.18.1 and 18.2 of Practice Direction 32. They could not have been taken then to have been intending to give a new meaning to paras.18.1 and 18.2, but rather to have spelled out what the meaning and effect of 18.1 and 18.2 were.

38 The reference to "for that purpose the witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination if required) and is not limited to a witness's first or native language" are in my judgment words of clarification rather than gloss. Perhaps it had occurred to them that there was a need for an explanation to be set out, but in my judgment this points significantly to the correct understanding of the meaning and effect of paras.18.1 and 18.2.

39 It does seem unlikely that it was intended that a separate regime would apply in relation to the Business and Property Courts as opposed to that which would apply in other courts that were not governed by that guide.

40 This construction accords with the purpose of the relevant Practice Direction. The background to it was the concern about what would happen to witnesses who were not proficient with the English language; the problems of vocabulary and nuance that were described by the Judge at paras.8 and 9 of her judgment. That does not mean that it was intended that those who were bilingual, or those who were sufficiently fluent in English to give oral evidence including under cross-examination, should not be able to give their evidence in English.

41 Attention has been drawn to the practical problems that would arise if the Practice Direction had a meaning, the effect of which would be that where somebody's native language was a foreign language but they were sufficiently fluent in English to give evidence in English, that they would then have to prepare statements in that foreign language.

42 My attention was particularly drawn to the fact that there may be millions of people in England and Wales who are sufficiently fluent in English but have a different mother tongue or first language. There may be repercussions for access to justice, and indeed other considerations, in the event that they were required, notwithstanding their sufficiency in English, to provide a witness statement in their mother tongue.

43 All of these points simply give further force to my judgment that the intention of the provision at PD 32, para.18.1 does have the meaning referred to in the Business and Property Courts Guide; that a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence including under cross-examination if required.

44 It therefore follows that in my judgment the Judge was wrong to reach a conclusion that the language of the witness statement had to be the first language of the claimant, and that it was highly relevant that the claimant read, understood, conversed and gave instructions in English. If there were doubts about the proficiency of the claimant as to whether the

claimant was sufficiently fluent, then that could have been tested with a view to considering whether the evidence should be excluded. There was no such exercise before the court.

45 In fact the evidence in the trial bundle was not limited to the evidence of what happened before Dr Ballin and the reference to the wife of the claimant helping with translation. There was also the following.

46 The claimant had positively dealt with an assertion that he needed an interpreter in a witness statement, which he prepared for in his witness statement, dated 21 May 2022. He said at para.51, the following:

> "In response to para.12.11 of the defendant's defence I confirm I do not require a translator. When I had my medical examination with Dr Ballin on 16 January 2022 my wife sat with me during the examination. She may have translated a little for me with regards to terminology I may not have understood."

47 After that medical examination the claimant attended upon Mr Dosani and Dr Tyler, apparently unaccompanied, with the latter noting that the claimant "... was able to express himself fluently". The claimant further attended a number of physiotherapy sessions which he attended alone but no issue of language was ever raised. Aside from a single comment in Dr Ballin's report there was no other reason to question the claimant's ability to give evidence in English.

48 The defendant, through Mr Lawson, does not support a construction that the reference to "own language" should be construed as referring only to a native language or to a mother tongue. The defendant recognises that a person may have more than one language; in particular they may be bilingual or have even more than two languages. The defendant submits that what has to happen is that there has to be an election at the point when the statement is made.

49 The defendant submits that what happened here was that the defendant chose to make a concession. The concession was that if it was an election the defendant said that his own language was Urdu. Given that that information had been provided on behalf of the defendant to the Judge, there is no reason to criticise the decision of the Judge to go along on the basis that there was a concession that the claimant's own language was not English. That then leads to a consideration which is the defendant's answer to this part of the case; namely whether the concession is binding on the claimant or whether the claimant should be able to withdraw the concession.

<u>The alleged concession, the effect of the concession and whether the claimant was able to withdraw the concession</u>

50 Mr Lawson submits that the claimant is bound by the concession. It does not matter for this purpose that the claimant may have been showing a mistaken understanding of the law of the court. The claimant had the opportunity to take the position that English was his language, or that he had two languages and he could elect which of the two languages to use. He did not do so. It was therefore said that the claimant set in train which followed, which was that the Judge would then act on that in forming the view that they had in accepting the admission that there had been a breach of the rules, and then engaging in the two stages which followed thereafter.

51 The first stage was the Judge's consideration of whether there should be permission under CPR 32, PD 25 for the claimant still to be able to use the statement in English. There was also set in train the second stage, in the event that permission was not granted, as to whether there should be an adjournment to enable another statement to be provided if necessary in Urdu.

52 The case of the defendant is that the Judge at that stage was exercising a discretion in respect of both of those matters, and was actually acting within the wide ambit that the court has in exercising discretion in relation to case management matters. It was submitted that an appellate court ought to be wary about interfering with the legitimate exercise of a discretion and indeed had no basis for so doing on the facts of this case.

53 Mr Lawson also submitted that the claimant failed to engage with the impact of the concession in his skeleton argument. Further, there was no evidence that was provided as to what prompted the concession. The court should not speculate as to what gave rise to the concession.

54 The court put to Mr Lawson that it may be that there is an important question to be considered in this case as to the meaning of CPR, PD 18 in relation to the meaning of the words "own language". It may be that that is important not just for this case but for other users and the court asked whether that would be relevant to the question as to what to do about the concession. Mr Lawson answered that that might well be the case but that that would be a matter for the benefit of other court users. As regards the claimant who has made the concession, there was no reason to allow the claimant to withdraw the concession.

55 The parties drew my attention to the relevant law in this regard in the skeleton argument of the defendant at para.6. Mr Lawson drew the court's attention to the case of *Jones v. MBNA International Bank* [2000] EWCA Civ. 514 at [38] per Peter Gibson LJ, who said the following:

> "It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial Judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

56 The claimant drew the attention of the court to the recent decision of *Hudson v. Hathway* [2022] EWCA Civ 1648 in which there was reference to the principles set out in *Singh v. Dass* [2019] EWCA Civ. 360 about the power to entertain a new point on appeal, and to *Notting Hill Finance Ltd v. Sheikh* [2019] EWCA Civ. 1337 amplifying those criteria.

57 Those criteria were first that the appellate court would be cautious about allowing a new point that was not raised before; second, that the new point would not generally be permitted

if it would necessitate new evidence and had it been run below it would have resulted in the trial being conducted differently; thirdly, even where the point was a pure point of law it would only be allowed if the other party had adequate time to deal with the point, if the other party had not acted to its detriment on the face of the earlier omission and the other party can be adequately protected in costs.

58 In *Notting Hill Finance* it was stated that there was no general rule that a case needed to be exceptional before a new case was taken. The court would always be cautious whether it was just in all the circumstances. One had to look at the nature of the new point and the prejudice caused by it. Those points apply to the fact that the caution applies particularly to a concession and having regard to the fact that the concession was, by definition, made by the party itself.

59 I have come to the conclusion in the circumstances of this case that insofar as a concession was made, that the claimant should be able to withdraw the points for the following reasons.

60 First, the claimant was considering a preliminary matter raised by the court of its own motion on 14 October 2022. There was therefore little time to consider the point. Mr Lawson submitted that there was sufficient time because the court gave a time in order for the point to be considered. There were 30 minutes taken and more time could have been asked for if necessary.

61 In my judgment there was still very little time to grapple with this point. It would have been necessary not only to consider the law but to consider the impact of matters as they arose. There has been very careful consideration of this point of law by both counsel since then and by this court. It was simply unrealistic to expect that the claimant would have been able, within the limited time available, to undertake the relevant search and form the relevant judgment.

62 The judgment that was formed by the claimant appears in the circumstances to seek to put the eggs in the basket of getting permission. Permission was a very closely allied way of dealing with any particular problem. It was to the effect that given the proficiency of the claimant with English the court should allow the claimant to use the witness statement. The fact that in order to get to that route the claimant said that the language was Urdu was in order to extricate his client from the problem that was troubling the Judge.

63 There has been an important point of principle for the court to consider in relation to the meaning and effect of CPR 31, PD 18. It has been important for this and for other court cases to consider it on the correct basis. It does seem to me that in the event, having reached the conclusion that the concession was not properly made nor was the view properly entertained, that it would be very harsh on the claimant to form a view that he was unable to withdraw the concession in those circumstances.

64 I am satisfied that there is no prejudice to the defendant in allowing this to take place, other than the fact that the trial would have to be fixed again. If it were necessary to have a consequence in costs then that could be so addressed, but that point will only arise in the course of my consideration in relation to costs.

65 For all these reasons I am satisfied that the various tests in *Singh v. Dass* and *Notting Hill Finance v. Sheikh*, and in the decision of Peter Gibson LJ, are all satisfied. Bearing in mind

that whilst exercising caution it is right - and having regard to the absence of prejudice to the defendant - to allow the claimant to withdraw the concession.

66 Therefore, in view of the above, I have come to the conclusion that the appeal should be allowed on the ground that the wrong test was applied and that therefore the claimant ought to have been either able to adduce the evidence as a right, or the court ought have tested with the claimant in some way if there were still any underlying concerns. I have therefore come to the conclusion that, on the information before the court, the court ought not to have taken the view that there had been a breach of CPR 32, PD 18.

67 In case I were wrong in relation to that, the next question which arises is in relation to the question of permission under CPR 32, PD 25.

Permission to rely upon the statement in English: Preliminary points of procedure

68 The defendant says that this was not a separate ground of appeal and that it was touched on only cursorily in the grounds of appeal, and further it was touched on only cursorily at para.37 of the skeleton of the claimant. In any event it is up to the claimant to set out its position in the grounds of appeal and the defendant does not have to try to examine the skeleton argument to see if it goes beyond the grounds of appeal. The defendant also says that the real reason why the claimant is now emphasising this is because it was mentioned by the court at the outset of the hearing.

69 In my judgment the question of permission and the question of construction in respect of CPR 32, PD 18 are intimately connected. That was apparent from the way in which the hearing went before the Judge, where the Judge was dealing with what was the own language and the issue of permission in close proximity the one to the other.

70 In my judgment it is also reflected in the grounds of appeal at para.11 which rules as follows:

> "At trial, the claimant was not permitted to actually give evidence and there were no grounds before the court, other than his first language being Urdu, upon which the court should make a determination that it was inappropriate for the claimant to have given his evidence in English."

71 The Judge then went on in para.12 to refer to the construction of PD 18.1 but added in the last paragraph:

> "In directing herself, it is submitted that the final effect/exercise of discretion was perverse, i.e. that no reasonable Judge, properly directing him or herself on the law, could have made such a finding."

72 Although the matter could have been set out with greater clarity in context and as amplified at para.37 of the skeleton argument, in my judgment there was enough here to indicate that this point about permission is available to the claimant on the appeal. In case I was wrong in relation to this I invited the claimant to provide a draft further ground in relation to appealing against the refusal of permission by the Judge under CPR 32, CPR 50, PD 25. That has now been done in Ground 1A in paras.13 and 14.

73 In my judgment, given the closely intertwined nature of permission and the question of construction it is appropriate to give permission to the appellant, despite the arguments to the contrary of the defendant.

Should permission have been granted?

74 For this purpose the assumption must be that either the Judge was wrong in relation to the construction of CPR 32, PD 18, or that the claimant is not entitled because of its concession to take the point to the contrary.

The claimant's arguments

75 The claimant submits that there was sufficient information that the statement in English was in the own words of the claimant and that he had at all times given instructions, both on the telephone and at meetings, to his solicitors, that the communications had been in English and not in Urdu, that he read and understood English. It was submitted on behalf of the claimant that even if there had been a breach of CPR 32, PD 18.1, the spirit of the rule was not infringed because the claimant was putting forward his own story in a language that he understood.

The defendant's arguments

76 The defendant's arguments were to the effect that the court was exercising a discretion and that the usual strictures of appellate courts against limited intervention in relation to exercises of discretion, and in relation to case management decisions, applied.

77 Reference was made to *Tanfern Ltd v. Cameron-MacDonald* [2001] WLR 1311, CA para.32, in which Brooke LJ quoted Lord Fraser who said:

> "... the appellate court should only interfere when they consider that the Judge at first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

They also referred to Lord Woolf MR in *AEI Rediffusion Music Ltd v. Phonographic Performance Ltd* [1999] 1 WLR 1507 CA 1523:

> "Before the court can interfere it must be shown that the Judge has either erred in principle in his approach, or has left out of account, or has taken into account some feature that he should, or should not have considered, or that his decision is wholly wrong because the court is forced to the conclusion that the has not balanced the various factors fairly in the scale."

78 The defendant submitted that the Judge was entitled to refuse permission. It had not been fully addressed how the claimant was proficient in English and it was very important that the court should have complete knowledge that it could rely upon the understanding of the witness, and, therefore, the appellate court should not interfere with the exercise of the discretion of the first instance court.

79 The court had considered the matters in relation to permission in the opening paragraphs in the course of the judgment at paras.1 to 11.

Discussion

80 In my judgment the court ~~ought to have,~~ on the facts of this case, acted outside the generous ambit of its discretion in refusing to give permission. The following facts are to be noted. The Judge could not make any findings that the information provided to the court was untrue in relation to the ability of the claimant to give instructions in English, and the fact that he did give instructions and the fact that he read and understood English and his witness statement. Although it is apparent that the Judge had some doubt, to the extent that she referred to it in the second paragraph of the judgment, to the meeting with Dr Ballin, these matters were not amplified and there was no attempt to test whether the information provided to the court was or was not correct. Indeed as noted from the other evidence before the court there was ample evidence about the proficiency of the claimant in English.

81 In my judgment the court erred because it took as a corollary of its understanding of the law and the concession that the court ought not to permit the admission of the statement in these circumstances. It followed that the Judge's view was that even if a person was almost bilingual, they were required to have the statement in their own language. It follows from the part of para.7 of the judgment that it did not matter that a witness was capable of understanding English adequately.

82 In my judgment in the event that para.18.1 had that meaning, the Judge ought to have taken the view that in these circumstances the Judge ought to have an open mind in respect of the question of permission. Instead the Judge took the view that the wording of the rules and the importance of securing an important compliance with a particular Practice Direction was more important than the question of permission in the individual circumstances.

83 Having done that, in my judgment the Judge failed to give adequate attention to the ability of the claimant to communicate in English and his proficiency in English. The court also failed to give any or any adequate attention to the consequences of this and how there were very serious consequences for this particular claimant in losing his ability to be able to prosecute his claim.

84 In these circumstances the Judge ought to have taken the view that rather than there being an almost inflexible rule that the importance of securing compliance with the Practice Direction was greater than anything else, the Judge ought to have been amenable to an analysis of the circumstances of the case.

85 In my judgment, the Judge did have a discretion but the Judge exercised the discretion in a flawed way because of the approach that she took. In so doing the Judge either did not exercise a discretion or, if she did, she exercised it on a wrong basis. The court therefore in these circumstances is able to exercise its discretion afresh and, if the construction of the rule put forward by the Judge was correct, is prepared to admit the evidence of the claimant.

86 Accordingly, the court finds that on this alternative ground of appeal that the Judge ought to have granted permission to adduce this evidence.

Other grounds

87 It therefore remains to consider the other matters, which are Ground 3 in relation to the adjournment, Ground 4 in relation to public policy and the respondent's notice. I can state all of these briefly.

88 As regards the application for the adjournment that does not arise in the circumstances that I have found, because the Judge ought to, on either of the bases that I have referred to, have allowed the case to proceed. If I had to decide anything about the adjournment I would have decided that the Judge erred in the exercise of her discretion in not allowing an adjournment. I would give some more extended reasons in relation to that if required, but having regard to the substance in the way in which I have decided the matters that seems to be unnecessary.

89 In relation to the fourth ground of appeal about public policy, that is entirely subsumed in relation to the matters that I have dealt with. It does not seem to me to be an independent ground of appeal. Rather it was put in in connection with the successful application for permission to appeal on the basis that there were compelling reasons for the appeal to be heard, and once permission had been granted Ground 4 was simply subsumed within the other grounds.

Respondent's notice

90 The respondent's notice contains three grounds. The first is that there was no need for the court to make a finding of fact about the claimant's ability to speak or understand English, or determine what his own language was for the purpose of the rules or Practice Direction because of the concession about Urdu being his own language.

91 The answer to that is first of all that the court has, for the reasons given, allowed the claimant to withdraw the concession. In any event even if the claimant had not been allowed to withdraw that, the court was able to make a finding of fact about the claimant's ability to speak or understand English based on the evidence that was before the court. Further, it was entitled to do so in relation to the permission matter irrespective of how it arose following the concession.

92 As regards Ground 2, it was submitted that the claimant did not then submit to the Judge that the bilingual competence was such that he was able to proceed and understand all aspects of the tribunal hearing, including cross-examination, or that English was his own language.

93 In my judgment that was sufficiently done both by the fact that he had given evidence to explain that in his witness statement. It was further done by information provided by counsel on his behalf. Further, the other medical reports did not indicate any difficulty that the claimant had in relation to English.

94 The claimant is not intending to provide a second witness statement in Urdu in the light of this judgment. That is because of the clear instructions given to the court by the claimant and as set out in his second witness statement. There is no reason to believe that the position will appear to be any different at trial. If it were different, If the contrary turned out to be the case, then as Mr Lawson stated rightly, there might be an abuse of process problem for the claimant and other possible repercussions. As I have indicated there is no reason on the papers before me that indicates that that is a likely possibility.

95 The third and final ground in the respondent's notice was that the claimant or appellant was seeking to take points which were not argued before the lower court. That was not expanded upon, but to the extent that it has been identified in oral argument, I have dealt with it.

96 For all of those reasons the appeal will be allowed. There will be directions about the new trial.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.