Neutral Citation Number: [2015] EWFC 5

Case numbers omitted

IN THE FAMILY COURT
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of Capita Translation and Interpreting Limited

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- -

Mr Charles Howard QC (instructed by Kent County Council) for the applicant (Kent County Council)
Mr James Turner QC (instructed by Freeths LLP) for the respondent (Capita Translation and Interpreting Limited)

Hearing date: 14 November 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in open court

Sir James Munby, President of the Family Division :

1. On 7 May 2014 there were listed before me at the Royal Courts of Justice applications by a father and a mother for leave pursuant to section 47(5) of the Adoption and Children Act 2002 to oppose the making of adoption orders in relation to two of their children, J and S, boys born respectively in 2010 and 2012. The parents were Roma from the Slovak Republic. They required the assistance of interpreters in Slovak. The hearing had been listed in accordance with an order made by His Honour Judge Murdoch QC in the Canterbury County Court on 11 April 2014. So far as material for present purposes, his order provided that "HMCTS do provide 2 Slovak interpreters for the hearing on 7 May 2014."

2. I can pick up the story by referring to what I said in the judgment I subsequently handed down on 23 May 2014: *Re J and S (Children)* [2014] EWFC 4, paras 9-10:

> "9 The hearing before me on 7 May 2014 was unable to proceed. Despite the order made by Judge Murdoch, and although HMCTS had, as was subsequently conceded by it, gone through the appropriate procedures with Capita Translation and Interpreting Limited (Capita) to book two interpreters, no interpreter was present at court. I had no choice but to adjourn the hearing. How could I do otherwise? It would have been unjust, indeed inhumane, to continue with the final hearing of applications as significant as those before me – this, after all, was their final opportunity to prevent the adoption of their children – if the parents were unable to understand what was being said. Anyone tempted to suggest that an adjournment was not necessary might care to consider what our reaction would be if an English parent before a foreign court in similar circumstances was not provided with an interpreter.
>
> 10 I accordingly adjourned the hearing until 15 May 2014. I directed that HMCTS was to provide two interpreters for that hearing. I directed that Capita's Relationship Director, Sonia Facchini, file a written statement (with statement of truth) explaining the circumstances in which and the reasons why no interpreters had been provided by Capita for the hearing on 7 May 2014. I gave Capita permission to apply to vary or discharge this order. It chose not to. I reserved the costs of the hearing on 7 May 2014 to the hearing on 15 May 2014 "for consideration of, inter alia, whether Capita should pay such costs.""

3. Ms Facchini's statement was dated 14 May 2014. I shall return to it below. The matter proceeded on 15 May 2014, Capita having provided the required two interpreters. Capita was neither present nor represented. Both Mr Roger Hall, on behalf of the local authority, Kent County Council, and Mr Jeremy Hall, on behalf of the children, indicated that they sought orders that Capita pay them their costs of the abortive hearing on 7 May 2014. They had each filed written submissions, those from Kent County Council dated 14 May 2014, and those from the children's solicitors dated 15

May 2014. Plainly I could not deal with those applications without giving Capita a proper opportunity to consider the case being made against it. I accordingly adjourned the applications, directing that "The costs of the hearings on 7 and 15 May 2014 are reserved for determination by the President of the Family Division on a date to be fixed."

4. Following the hearing I made a further order, dated 23 May 2014, which, after reciting that the court was treating the written submissions I have just referred to as applications that Capita pay the costs of the hearing on 7 May 2014, provided that Kent County Council and the children's solicitors were each to send to Capita's solicitors by Friday 6 June 2014 the evidence and any further submissions or other materials relied on in support of their applications. The order further provided that Capita was to send to Kent County Council and the children's solicitors by Friday 20 June 2014 any further evidence and any submissions or other materials relied on in response to the applications. I gave all parties permission to apply for further directions. In fact no further directions were sought by anyone. In due course (see below) Kent County Council and Capita filed various documents in accordance with that order. The children's solicitors did not.

5. The applications came on for hearing before me on 14 November 2014. Kent County Council was represented by Mr Charles Howard QC, Capita by Mr James Turner QC. The children's solicitors were neither present nor represented. They had written to the court on 27 October 2014 explaining that the scope of their legal aid certificate was exhausted when final adoption orders were made and that accordingly they had no authority to attend the hearing and would not be in attendance.

6. The evidence consisted of the statement of Capita's Relationship Director, Sonia Facchini, dated 14 May 2014, to which I have already referred, and a statement of Capita's Operations Director – Interpreting, Karl Johnson, dated 27 June 2014. I also had before me the written submissions from Kent County Council dated 14 May 2014, and the written submissions from the children's solicitors dated 15 May 2014, referred to in my order of 23 May 2014, further written submissions from Kent County Council dated 5 June 2014 and from Capita dated 27 June 2014, a skeleton argument from Mr Howard dated 11 November 2014 and a position statement from Mr Turner dated 13 November 2014, supplemented by a further note from him dated 14 November 2014.

7. The facts are not in dispute. They fall into two parts.

8. I deal first with the repeated failure by Capita or its subsidiary Applied Language Solutions Limited (ALS) to provide interpreters in this particular piece of litigation.

9. The proceedings were commenced by Kent County Council in what was then the Dover Family Proceedings Court on 2 August 2012. In due course the proceedings were transferred to the Canterbury County Court before being transferred to the High Court. Kent County Council draws attention to what had happened on six occasions prior to the abortive hearing on 7 May 2014. I summarise the undisputed facts and set out the explanations provided on behalf of Capita by Mr Johnson in his statement dated 27 June 2014:

i) 6 August 2012 – Dover Family Proceedings Court: Two interpreters were booked at 4.23pm and 4.46pm on 2 August 2012. None attended at the hearing on 6 August 2012. According to Mr Johnson, ALS was unable to find interpreters in time.

ii) 9 August 2012 – Dover Family Proceedings Court: Two interpreters were booked at 9.23am for a hearing starting 37 minutes later, at 10.00am. None attended. According to Mr Johnson, and it might be thought unsurprisingly, ALS was unable to find interpreters in time.

iii) 17 August 2012 – Dover Family Proceedings Court: Two interpreters were booked at 11.50am and 11.53am on 10 August 2012. Both arrived late for the hearing on 17 August 2012. One of the interpreters was Czech, not Slovak, and was said to be able to translate Slovak only "very slowly". According to Mr Johnson, they were late because, due to an error by ALS, they had been sent to Canterbury. He says that both interpreters were on ALS's Slovak list, both had undertaken previous Slovak assignments and that neither had previously been the subject of any complaint. In the reasons they gave at the end of the hearing, the Justices expressed themselves in justifiably strong terms:

> "This is the third hearing of this case. The first hearing had to be adjourned due, in part, to the failure of ALS, the company through whom the courts now have to arrange interpreters, to provide interpreters to assist the parents.
>
> The timetabling of this matter was tight and arrangements were made for the hearing to commence at 9.30am today in order to allow more time to hear the case. Unfortunately this court has been let down again by ALS. Although two interpreters were booked they were sent to the wrong court house causing such a lengthy delay there was no time to hear the planned evidence. The only options open to the court today was to hear very limited evidence from only one or two witnesses, or hear only submissions. No party felt that either of these options was appropriate or conducive to a fair hearing for the parents, bearing in mind the issue today was one of removal of children from their parents' care.
>
> In light of this the parties have been able to negotiate a short term holding position until a contested hearing can be arranged."

iv) 21 August 2012 – Canterbury County Court: Two interpreters were booked at 9.51am and 9.52am on 20 August 2012. None attended. According to Mr Johnson, ALS was unable to find interpreters in time. The order made by Judge Murdoch QC contained recitals noting that the previous hearing on 17 August 2012 had been frustrated, that the parents' counsel had only been able to take instructions on a limited basis using an interpreter provided by the

children's solicitor, and that the parents were declining to continue the agreement made at court on 17 August 2012.

v) 18 September 2012 – Canterbury County Court: Two interpreters were booked on 22 August 2012. None attended. According to Mr Johnson, the assignments had been filled on acceptance by interpreters on 23 August 2012 and 5 September 2012 respectively, but both were later removed, the first on 30 August 2012 for being double-booked and the other on 6 September 2012 for reasons which were not recorded. ALS was unable to find replacement interpreters in time. The order made by His Honour Judge Scarratt contained a recital that the parents' right to a fair trial of the local authority's application for the removal of the children into foster care required the matter to be adjourned.

vi) 3 October 2012 – Canterbury County Court: Two interpreters were booked on 1 October 2012. Only one attended. According to Mr Johnson, ALS was able to find only one interpreter available and willing to take the assignment. The matter was again adjourned, despite the local authority's concern, as recorded in Judge Scarratt's order, that the ongoing delay in determining the applications "is increasingly unmanageable."

In the event, the hearing of the applications eventually took place before Judge Murdoch on 23-24 October 2012.

10. So far as concerns the hearing before me on 7 May 2014, two interpreters were booked on 14 April 2014. Only at 2pm on the day before the hearing, 6 May 2014, was the court informed by Capita that no interpreters were available for the hearing. This was done by an automatically generated email which included the words "We apologise for any inconvenience caused" – a banal and formulaic statement hardly reflecting the fact that a failure to provide interpreters, particular in a case such as this, causes much more than "inconvenience" to all concerned, not least to the anxious parents. The timing of the sending of this email was, I am told, in accordance with an agreed protocol. That may be, but, for reasons which will become apparent, it does not seem to me to affect Capita's liability, nor does the fact, as I was told, that court staff have access, by way of a web portal, to the current status of any booking at all times after the booking has been made.

11. I refer to what I said in my previous judgment (*Re J and S*, para 11) about Ms Facchini's statement dated 14 May 2014:

> "For immediate purposes there are three points demanding notice. The first is that, according to Ms Facchini, the contractual arrangements between Capita and the interpreters it provides do not give Capita the ability to require that any particular interpreter accepts any particular assignment, or even to honour any engagement which the interpreter has accepted. The consequence, apparently, was that in this case the two interpreters who had accepted the assignment (one on 14 and the other on 17 April 2014) later cancelled (on 5 and 1 May 2014 respectively). The second is that it is only at 2pm on the

> day before the hearing that Capita notifies the court that there is no interpreter assigned. The third is the revelation that on 7 May 2014 Capita had only 29 suitably qualified Slovak language interpreters on its books (only 13 within a 100 miles radius of the Royal Courts of Justice) whereas it was requested to provide 39 such interpreters for court hearings that day."

Ms Facchini's statement sets out in some detail the increasingly frantic but unsuccessful attempts made by Capita to find substitute interpreters for the hearing. No purpose would be served by going into the details.

12. I must now set out Capita's more general explanations for this truly lamentable state of affairs. I go first to what Ms Facchini said in her statement dated 14 May 2014:

> "Capita does not employ interpreters, all of whom remain (as they were under the old booking system in operation prior to February 2012) self-employed independent contractors, free to choose to register with Capita or not to do so, to register with any other organisation (or none) instead of or in addition to Capita, and then to accept or reject booking offers from Capita as they see fit, without explanation. This means that although interpreters are expected to honour those assignments they accept, Capita has no way of actually compelling an interpreter to accept an assignment.
>
> Interpreters often prefer to take jobs closer to their home locations, or at venues where they can cover multiple jobs in a day and so maximise their earnings. Where the number of qualified court interpreters for a given language is low, those with the requisite qualifications can be quite selective about the assignments they take on."

13. Mr Johnson in his statement dated 27 June 2014 makes much the same points:

> "Firstly, and as made clear by Ms Facchini …, [Capita] does not employ interpreters, who remain as they were prior to 2012 independent third party contractors who can – and do – accept assignments from other organisations besides [Capita], such as local government and the NHS. [Capita] has no exclusive call on their services. This is not mere fiscal or managerial sleight of hand: it is a simple reflection of how the interpreter sector works in this country, and has does so since before the ALS / [Capita] contract with the Ministry of Justice came into effect.
>
> [Capita] is paid for filling booking requests. The company therefore has a very real incentive to fill as many booking requests as possible. The running of the booking service involves significant infrastructure which has required a very significant amount of investment. This means that [Capita] has to fill booking requests to pay its staff and meet its running costs. [Capita]'s interests demand that it access the services of

> as many properly-qualified interpreters as it can, because this determines its ability to fill as many assignments as possible as, when, and where needed …
>
> Interpreters choose where in the country they wish to live, and how many days they wish to work."

He adds:

> "There is no employer / employee relationship under which [Capita] can issue instructions to an interpreter to accept an assignment if that interpreter does not choose to take it. The interpreter may choose to give an explanation as to why he or she does not wish to take the assignment (for example, that they are already engaged elsewhere, that they are ill or taking leave due to pregnancy, or that they prefer to take only a particular type of case) but can simply decline the offer without giving a reason.
>
> Capita cannot exercise any form of compulsion over an interpreter to comply with its instructions to honour an assignment that they have accepted. All [Capita] can do is to apply sanctions *after the event*, which can (depending on the circumstances) range from warnings to removal from [Capita]'s lists. In suitable cases, interpreters can be joined in proceedings as third parties and required to answer for their actions in their own right."

14. The wider context is illuminated by *Statistics on the use of language services in courts and tribunals: Statistical bulletin, 30 January 2012 to 31 December 2013*, published by the Ministry of Justice on 17 April 2014. In Q2 2012, Capita's overall 'success rate' in providing interpreters requested by courts and tribunals was 92.4%. After a dip, coinciding with Capita's reduction in the mileage rate paid to interpreters, the overall success rate had climbed again to 93.4% in Q4 2013. For civil and family cases the success rate in 2013 was lower, at 89.8%. What is striking, however, is the markedly lower success rate in relation to the provision of Slovak interpreters, only 77.7% in 2013, which was "reflected in the complaint rate which is amongst the highest of all language requests." Indeed, "Of the 10 languages with most complaints in 2013, the language with the highest complaint rate was Slovak (8.7%). The majority of Slovak complaints came from tribunals where there was a 23.6 complaint rate." In relation to the overall complaint rate, "In 2013, most complaints were in the South East (2,400) – 35.8% of all complaints reported. The South East had a relatively high complaint rate of 5.7%, well above the 4.1% UK average."[1]

[1] Mr Howard sought before me to rely, in support of his more general attack on Capita, on various materials, including the *Statistical bulletin*, which had been produced only two days before the hearing, notwithstanding the clear directions I had given on 23 May 2014. Mr Turner objected, saying that he would wish to adduce oral evidence to address any points based on these materials. In relation to the materials other than the *Statistical bulletin*, it seemed to me that Mr Turner's objections had substance, and in any event those materials, which I have ignored, were of no assistance. So far as concerns the *Statistical bulletin*, the only matters I have relied upon are the various statistics referred to above. I note that, even now, and having had the

15. I was unclear when I gave my previous judgment (see *Re J and S*, para 12) as to what the relevant contractual arrangements were.

16. As between Capita and the interpreters it employs, the relationship is that of independent contractors who, as we have seen, are not contractually obliged to accept any particular assignment, or even to honour any engagement which the interpreter has accepted. That is a matter for Capita and does not, in my judgment, affect anything I have to decide.

17. What is of crucial, indeed of decisive, importance is the agreement between, as I understand it, Capita and the Secretary of State for Justice. This is not a document which Capita has seen fit to produce, though to be fair it has not been ordered to do so. I was assured, however, and in unequivocal terms, by Mr Turner that the relevant agreement is that analysed by the Court of Appeal (Criminal Division) in *In re Applied Language Solutions Ltd* [2013] EWCA Crim 326, [2013] 1 WLR 3820 (the *ALS* case), and, moreover, that all the terms of the agreement which are relevant to anything I have to decide are sufficiently set out in the report of the *ALS* case. On the basis of that assurance, I was content to proceed without calling for production of the agreement.

18. At the outset of the hearing an issue arose as to whether Kent County Council's claim was confined to recovery of its costs of the abortive hearing on 7 May 2014 or whether, as Mr Howard sought to argue, albeit somewhat faintly,[2] I should extend the ambit of the hearing to cover the costs of the earlier hearings referred to in paragraph 9 above. Unsurprisingly, Mr Turner objected, not least because the first clear warning Capita had had of this was only a day or two before the hearing. As Mr Turner pointed out, the ambit of the hearing had been very clearly defined in my orders of 7 and 23 May 2014. I was not prepared to extend the ambit of the hearing, nor to adjourn to enable Mr Howard to put his tackle in order. If Kent County Council seeks to recover any costs in relation to any of the earlier hearings it must take such steps as it may be advised – a matter as to which I express no views whatever.

19. So far as concerns the application by the children's solicitors, it has not been pursued, though it has not been expressly abandoned. In the circumstances I shall make no order in relation to it.

20. Leaving on one side certain rhetorical flourishes which, if he will forgive me for saying, I have ignored, Mr Howard's submissions on behalf of Kent County Council are simple, clear and, in the final analysis, compelling.

21. His argument proceeds in four stages: first, and relying on the *ALS* case, he submits that Capita's failure to provide the interpreters on 7 May 2014 was a breach of its agreement with the Secretary of State; secondly, and again relying on the *ALS* case, he submits that Capita is in principle amenable to the court's jurisdiction under section 51 of the Senior Courts Act 1981 to order a non-party to pay costs; thirdly, and by reference to the decisions of the Court of Appeal (Civil Division) in *Globe Equities*

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benefit of reading this judgment in draft, Capita has not identified any error or inaccuracy in any of the figures I have referred to.

[2] Even at that stage Kent County Council had not produced, nor has it since produced, any details of its costs of the earlier hearings.

Ltd v Globe Legal Services Ltd [1999] BLR 232 and of Cobb J in *B v B (Costs: Order against non-party)* [2013] EWHC 1956 (Fam), [2013] PTSR 1579, [2013] 3 FCR 318, he identifies what he submits are the principles I must apply in deciding whether or not to make an order; finally, he submits that a proper application of those principles indicates that the order he seeks can and should be made.

22. I turn therefore to Mr Howard's sheet-anchor, the decision in the *ALS* case. The judgment of the court (Sir John Thomas P, Swift and Cranston JJ) was delivered by Sir John Thomas P, as he then was. The case arose out of the failure of ALS (now Capita) to provide a Slovak interpreter at Sheffield Crown Court. The relevance of this fact is that, in the final analysis, the question of whether Capita could and should be ordered to pay the costs in that case, turned not on section 51 of the 1981 Act but on section 19B of the Prosecution of Offences Act 1985, which provided that such an order could be made only if there had been "serious misconduct", that is (see the *ALS* case, para 12) deliberate or negligent failure.

23. Before turning to consider the terms of the agreement between Capita and the Secretary of State, Sir John Thomas P made these important observations (paras 13-15):

> "13 It is clear that the provision of an interpreter for a witness or a defendant in a criminal case is an obligation of the state which is regarded as an integral part of its obligations to provide a fair and just system of criminal justice. At common law, the position of defendants has been clear since at least 1915 …; it is now established that there is a similar position under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms …
>
> 14 If a private company takes on the discharge of an obligation of the state, it assumes the responsibility to do so in accordance with the terms it has agreed.
>
> 15 It therefore became important, in our view, to examine the role played by the company in the provision of the state's obligation to provide interpreter services, not only to determine the extent of its responsibility for providing interpreter services on behalf of the state as an essential part of the system of justice upon which the courts were bound to rely, but also to determine what its obligations were for the purpose of seeing whether there had been a deliberate or negligent failure to perform those obligations."

What was there said in relation to the criminal justice system manifestly applies with equal force, in my judgment, in relation to public law family proceedings where, as here, the state is seeking to intrude – and in the present case intrude very drastically – into the life of a family.

24. Sir John then proceeded (paras 18-24) to set out the relevant terms of the agreement. There is no need for me to go through it all. As Sir John summarised it (para 25):

> "The company is bound to provide 24 hours a day, 365 days a year an interpreter or translator of the appropriate agreed standard for each individual assignment."

It was contended (see para 26) that that this was not an absolute obligation but one under which the company was only bound to provide that service on 98% of occasions when interpreters were booked. The judgment continues (para 27), "We cannot accept this argument." Having explained why by reference to the terms of the agreement, Sir John concluded (paras 28-30):

> "28 As we have set out at para 13, the provision of an interpreter where either a witness or a defendant does not speak English (or Welsh), is essential. Without one a case cannot proceed. It seems to us inconceivable that the Ministry of Justice would have entered into a contract where the obligation … was framed in any terms other than an absolute obligation. It is simply no use to a court having an interpreter there on 98% of occasions when interpreters are required, because if an interpreter is required justice cannot be done without one and a case cannot proceed. An interpreter is required on 100% of such occasions.
>
> 29 This must have been understood and known both to the company and the Ministry of Justice and was an essential part of the factual matrix against which the agreement must be interpreted.
>
> 30 Therefore taking into account the factual matrix and "order of precedence" of the sections of the agreement and construing the agreement in a purposive manner, it is clear that interpreters would have been required on each occasion and the obligation was to provide interpreters on each such occasion, subject to force majeure … There might be some financial adjustment of the kind set out in the [agreement], but that was simply an adjustment of moneys due. It did not in any way affect the obligation to provide interpreters on each occasion."

25. Sir John set out (para 32) the relevant force majeure clause which, he said,

> "makes it clear that any non-performance resulting from a failure by an interpreter to attend is not excused unless that interpreter's failure is caused by force majeure."

There was, he continued, no suggestion that a force majeure event arose in that case, nor has any such suggestion been made, nor could it be made, in the present case.

26. Sir John expressed the court's conclusion on this part of the case as follows (para 33):

> "It therefore follows, in our view, that the company has undertaken far more than a booking facility. It is bound to provide interpreters on each occasion unless there is a force

> majeure that affects the company. A failure by an interpreter to attend does not avail the company unless that interpreter was prevented by force majeure; if there is no force majeure on which the interpreter can rely the company has failed to discharge its obligation."

27. I do not take up time considering whether or not a judge sitting at first instance in either a civil or a family court is bound by a decision of the Criminal Division of the Court of Appeal. I am prepared for present purposes to assume that I am not. So I approach the decision in the *ALS* case on its own intrinsic merits. Even on that basis I have no hesitation in following it. The court's analysis in the *ALS* case is, if I may respectfully say so, compelling and I have no hesitation in following and applying it.

28. It follows, in my judgment, that Mr Howard makes good the first stage of his argument. By failing to provide interpreters at the hearing on 7 May 2014, Capita failed to discharge its obligations under its agreement with the Secretary of State.

29. I turn to the second stage in Mr Howard's argument. Here again he makes good his submission by reference to the decision in the *ALS* case, which in my judgment is clear authority for the proposition that a failure by Capita to discharge its obligations under its agreement with the Secretary of State exposes it in principle to the making of a non-party adverse costs order. Two passages in the judgment make this clear.

30. I go first to what Sir John Thomas P said in para 35:

> "the conduct of the company was to be considered in the light of the responsibility to discharge the state's obligation to provide an interpreter in criminal proceedings; a simple failure by the interpreter to attend was a failure for which the company was responsible."

He then turned (para 36) to consider whether the failure to provide the interpreter in that case amounted to serious misconduct within the terms of section 19B of the 1985 Act, holding (para 39) that "there was no evidence that the failure was anything other than an isolated failure. There was no evidence of a number of other previous failures by the interpreter in question or failures in the company's system." He continued (para 40):

> "However, we would observe that a case of serious misconduct might arise if there was before the court considering making an order under section 19B, evidence that the non-attendance occurred in circumstances where there had been a failure to remedy a defect in the company's administrative systems which had caused non-attendance in the past. Equally the failure of a particular interpreter to attend where there was evidence that there had been similar failures in the past might constitute serious misconduct for which the company was responsible."

31. In my judgment Mr Howard makes good the second stage of his argument. Even if not bound to follow it, the judgment in the *ALS* case on this point is compelling, I respectfully agree with it, and accordingly I think I should follow and apply it.

32. Before leaving the *ALS* case, I should set out Sir John's concluding observations (para 41):

> "We have reached that conclusion in the light of the following: (i) Courts have to alter times not to suit judges but to suit advocates and witnesses in cases to ensure that trials which are in progress proceed on time … In such a case it is essential that the strict obligations under the agreement are complied with by the company. (ii) The Crown Prosecution Service and, on many occasions, those instructed on behalf of the defence are paid out of the public purse. If a case cannot proceed then this has an effect on funds available to the CPS and to the Legal Services Commission who fund much of the defence work. The CPS lawyer and the defence lawyer will have lost the time that they could otherwise have spent. The loss to the public purse is real. (iii) Having efficient systems and good and reliable interpreters is expensive. A contractor cannot be allowed to maximise its profit or reduce its loss in the context of court proceedings by not having in place the best systems and the best interpreters. It cannot transfer its costs of failing to do so to the CPS or the defence. (iv) As the company is providing an integral part of the state's obligations, then it must discharge that obligation for the reasons we have set out. (v) Taking, therefore, this wider public interest into account, a court is entitled to view successive non-attendance of an individual interpreter or successive failures in systems as amounting to serious misconduct, thus rendering the company liable for the costs thereby incurred to the CPS and the defence."

Every word of that applies, mutatis mutandis, to public law family proceedings, substituting only, for Sir John's references to the CPS, references to the relevant local authority.

33. I turn, therefore, to the third stage in Mr Howard's argument. There is no need for me to go through the earlier authorities. I can go straight to the decision of the Court of Appeal (Butler-Sloss, Morritt and Sedley LJJ) in *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232. Morritt LJ, with whom Butler-Sloss and Sedley LJJ agreed, gave the only substantive judgment. Having gone through the authorities, Morritt LJ, as he then was, summarised his conclusions as follows (para 21):

> "there appears to me to be a danger of treating the requirement that the circumstances are "exceptional" as being part of the statute to be applied. It is not. The epithet originates in the first proposition enunciated by Balcombe LJ in *Symphony Group plc v Hodgson* [[1994] QB 179], but it is based on what Lord Goff said in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, 980
>
> > "In the vast majority of cases it would no doubt be unjust to make an award of costs against a person who is not a party to

> the relevant proceedings. But, as the facts of this case show, that is not always so."

> In none of the cases to which I have referred have "exceptional circumstances" been elevated into a precondition to the exercise of the power; nor should they be. Ultimately the test is whether in all the circumstances it is just to exercise the power conferred by subsections (1) and (3) of s.51 Supreme Court Act 1981 to make a non-party pay the costs of the proceedings. Plainly in the ordinary run of cases where the party is pursuing or defending the claim for his own benefit through solicitors acting as such there is not usually any justification for making someone else pay the costs. But there will be cases where either or both these two features are absent. In such cases it will be a matter for judgment and the exercise by the judge of his discretion to decide whether the circumstances relied on are such as to make it just to order some non-party to pay the costs. Thus, as it seems to me, the exceptional case is one to be recognised by comparison with the ordinary run of cases not defined in advance by reference to any further characteristic."

He added (para 27):

> "It is not necessary … to reach any conclusion whether the conduct of the Firm was improper. That element may be essential to an exercise of the inherent jurisdiction but is not a pre-requisite to the exercise of the jurisdiction conferred by s.51(1) and (3) Supreme Court Act 1981."

34. I go next to the decision of Cobb J in *B v B (Costs: Order against non-party)* [2013] EWHC 1956 (Fam), [2013] PTSR 1579, a case where a local authority, which was *not* a party to the proceedings, had been directed by the court to produce a report in accordance with section 37 of the Children Act 1989 for use in private law family proceedings. The report, as Cobb J described it (paras 23, 24), was "of a poor standard" and "does not begin to address, in any meaningful way, the serious issues raised in the proceedings." The father sought an order for costs against the local authority.

35. Cobb J addressed himself to the issue (para 38) as to "how the court should exercise its wide discretion in family cases to make orders against non-parties, other than lawyers." Having set out the passages from Morritt LJ's judgment in the *Globe* case which I have already cited, Cobb J then referred to the judgment of Thomas J, as he then was, in *Kelly v South Manchester Health Authority* [1998] 1 WLR 244, 257, which, as he commented, provides support for the circumstances in which it may be appropriate to make a costs order against a non-party public body, in that case the Legal Aid Board, now the Legal Aid Agency:

> "In my judgment, the courts do have power in an appropriate and exceptional case to make an order in respect of costs against the board under section 51(1); the role of the board in

> litigation in which it is assisting one of the parties is a crucial one. The board's efficient performance of its statutory duties is crucial to the proper and expeditious conduct of such litigation and the courts have an essential interest in seeing that those functions are performed in such a way that litigation is effectively progressed."

36. Cobb J held (para 52) that the local authority's "failures in this case are not minor; they are extensive, and have had a profound effect on the conduct of the proceedings." The local authority, he said, had "failed fundamentally to investigate, address, or analyse the serious issues in the case raised by the father's allegations when they prepared their section 37 report". He made a costs order against the local authority.

37. Cobb J was pressed by the local authority (see para 49) with the proposition, derived from the decision of the Court of Appeal in *Northampton Health Authority v Official Solicitor* [1994] 1 FLR 162, 170, that a non-party should be ordered to pay costs only if he "is so closely connected with, or responsible for, the proceedings as to make it just to saddle him with liability for the costs." He said (paras 59-60):

> "59 I regard a local authority in a private law case in which a section 37 direction has been given as being sufficiently "closely connected" with the litigation to justify the order; by such a direction the court is expressly inviting consideration of the issuing of public law proceedings. It should be noted that when a section 37 order is made, the court also has the power, if the relevant "threshold" is established under section 38(2), to make an interim care order: see section 38(1)(b) . Although this did not happen here, this power illustrates in my judgment the extent to which the court can, if it considers it appropriate, draw a local authority directly into private law process of this kind and underlines their "close connection" with the subject matter of the proceedings.
>
> 60 My conclusion on this aspect, at para 59 above, is amply justified by reference to other situations where "non-parties" have been deemed to be "closely connected" to the litigation, including insurers (*Palmer v Estate of Kevin Palmer, decd* [2008] 4 Costs LR 513); directors (*Secretary of State for Trade and Industry v Backhouse* [2001] 1 BCLC 468 and *Goodwood Recoveries Ltd v Breen* [2006] 1 WLR 2723); liquidators and receivers (*Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 and *Dolphin Quays Developments Ltd (in administration and fixed charge receivership) v Mills* [2007] 4 All ER 503); tribunals (*Providence Capitol Trustees Ltd v Ayres* [1996] 4 All ER 760); and the Legal Aid Board (now Legal Aid Agency) (*Kelly v South Manchester Health Authority* [1998] 1 WLR 244)."

38. He also (paras 61-62) drew attention to the decision of Peter Smith J in *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043, in which it was held

that the court had power to make a costs order against a non-party expert witness. That decision, he commented, survives, indeed is fortified by, consideration of similar, immunity, issues in *Jones v Kaney* [2011] 2 AC 398. I should add, as was pointed out by Mr Howard, that the decision in *Phillips v Symes* was in fact followed by Her Honour Judge Williams in *X Local Authority v Trimega Laboratories* [2013] EWCC 6 (Fam), [2014] 2 FLR 232.

39. This brings me to the fourth and final stage in Mr Howard's argument. He identifies the following reasons why I should make the order he seeks:

i) In relation to this particular case the court has faced a consistent set of problems with Capita's service provision. The failure on 7 May 2014 was not an isolated event. Even putting on one side the hearing on 9 August 2012, where Capita was given only 37 minutes' notice of the court's requirement, there had been serious failures on no fewer than five previous occasions – the hearings on 6, 17 and 21 August 2012, 18 September 2012 and 3 October 2012. The non-attendance of the interpreters on all these occasions, he says, can in no way be explained away or excused as a singular or isolated event. Even where Capita was given several weeks notice (as in relation to the hearings on 18 September 2012 and 7 May 2014) it was still unable to comply with its obligations. This, he says, is the central reason why it is *just* to order Capita to pay the costs.

ii) There is and can be no suggestion here of force majeure.

iii) The serial failures in this particular case reflect the wider systemic problems in relation to Slovak interpreters identified by the Ministry of Justice's *Statistical bulletin*.

iv) Where there is such serial and systemic failure it is just that Capita be ordered to pay the costs.

v) All the points identified by Sir John Thomas P in the *ALS* case in the passage (para 41) I have set out in paragraph 32 above apply with equal force to public law family proceedings and, Mr Howard submits, provide powerful reasons why in the present case I should make the order sought.

40. I agree with Mr Howard. There have been serial failures by Capita in this case against a background of wider systemic problems. Applying the standard identified by Morritt LJ in the *Globe* case and Cobb J in *B v B*, and having regard to the principles of general application to be drawn from the *ALS* case, it is my judgment just in all the circumstances to make the order Mr Howard seeks. In this case, just as in *B v B*, the failures (here on the part of Capita, there on the part of the local authority) were, to adopt Cobb J's words, not minor but extensive, and, at two different stages of the litigation, they had a profound effect on the conduct of the proceedings.

41. I emphasise that I have reached this decision on the facts of this particular case. I am not to be understood as suggesting that Capita will be liable for each and every failure to provide an interpreter. The *ALS* case is clear authority against any such proposition. Nor am I to be understood as suggesting that Capita will be liable for each and every failure to provide a Slovak interpreter, lamentable though its failures to provide such

interpreters were in this particular case and, seemingly, more generally. Everything will depend upon the precise circumstances of the particular case.

42. Nor should it be assumed that a similar liability will extend to other private-sector contractors whose failures can impact adversely upon the court sitting-day, for example, the companies responsible for producing prisoners at court or the companies responsible for the maintenance of court buildings. Much may turn on the precise term of the agreements under which they operate, of which I know nothing and which may, for all I know, be very significantly and materially different from Capita's agreement with the Secretary of State.

43. There are two further points I should add.

44. Mr Howard made much play of the fact that Capita is a commercial operator, seeking, no doubt, to make a profit out of its agreement with the Secretary of State. He suggested that it therefore has a financial incentive so to organise the arrangements it has made to perform its obligations as to minimise its overheads – hence, he suggests its reliance upon independent contractors rather than employees and also, he suggests, a level of remuneration which in pursuit of profit is set too low to attract an adequate number of translators willing to act as Capita's contractors. Capita, for its part, as we have seen, emphasises the limited control it has over its contractors.

45. In my judgment, neither of these arguments, whatever their factual merits – which I am in no position to evaluate – really bears upon anything I have to decide. It is for Capita to decide what arrangements it chooses to make to enable it to perform its agreement with the Secretary of State. That is a matter for Capita, and how it decides to operate does not, in my judgment, affect anything I have to decide. Consistently with the analysis in the *ALS* case, the key question at the outset is simply whether or not Capita has fulfilled its obligations under the agreement. If it has, then that is that. If it has not then, subject only to force majeure, that is likewise that. Its pursuit of the largest profit it can make out of its agreement with the Secretary of State is of itself no basis for making Capita liable in costs for failure (if there is failure) to perform its contractual obligation. Liability is to be determined in accordance with the principles as I have set them out. Nor, on the other hand, is Capita to be exonerated from a liability in costs which would otherwise attach to it merely because of the nature of the arrangements it has put in place with its contractors. The only relevance of any of this is the point, with which I respectfully agree, made by Sir John Thomas P in para 41(iii) of the judgment in the *ALS* case, set out in paragraph 32 above.

46. The other matter is this. There was a certain amount of discussion before me as to whether Capita's obligation to provide an interpreter is dependent upon it having been given reasonable notice and, if it is, as to what amounts to reasonable notice. The point does not in fact arise for decision because on any basis Capita was given more than adequate notice of the need for interpreters at the hearing on 7 May 2014. I propose to say only this. It is clear from the analysis in the *ALS* case that Capita is required to provide interpreters not merely 24 hours a day but also at what may be very short notice. Notice will in the nature of things often be a matter of hours at most rather than days. But there may come a point at which, given the circumstances of the particular assignment, the notice given is so short as to be meaningless. Suppose, for example, that at 10.00am the court at Llangefni (on the Isle of Anglesey) were to

inform Capita that it needs an interpreter in Slovak for a hearing starting at 10.30. Would Capita be in breach of its obligations? This is a matter to be decided another day when the point arises. But without, I emphasise, deciding the point one way or the other, I have, as indicated (see paragraph 39 above), given Capita the benefit of the doubt in relation to the 37 minutes' notice it was given of the hearing on 9 August 2012.

47. Mr Turner seeks to avoid the conclusions at which Mr Howard would have me arrive. In the first place he submits that, as a matter of principle, Capita is not liable to an adverse costs order. The argument has two major limbs.

48. First, he submits that any failure by Capita to provide interpreters is a matter to be dealt with, for what he calls policy and practical reasons, as a matter of contract between Capita and the Secretary of State, and not by the court. Otherwise there is, he suggests, a risk, if not a certainty, that the court will be interfering improperly in contractual arrangements entered into by the State, without having the ability or information to take proper account of potential political, economic or commercial factors. For example, he says, a perceived failing on the part of the contractor may be a consequence of the bargain that the State has made, for good commercial reasons, and the contractor should not be exposed to greater or additional penalties than are provided for expressly under the relevant contractual arrangements. In a commercial arrangement such as this there should, he says, be no obligations over and above those which exist under the contract. Otherwise, he submits, one arm of what he calls the State justice system will be able, in effect, to supplement unilaterally the contractual arrangements that have been carefully negotiated with another arm of the State justice system and, moreover, to do that without the ability to take proper account of all relevant economic and commercial actors that exist on both sides of the contract. The appropriate way to deal with perceived problems in the operation of the agreement between Capita and the Secretary of State is, he says, by ongoing monitoring and review, including by Parliament. In support of this submission he drew attention to, and placed much reliance on, the provision in the agreement for set-off in relation to 'service credits' which was referred to in para 27 of the judgment in the *ALS* case

49. The short answer to this, in my judgment, is provided by the decision in the *ALS* case from which, despite his endeavours, Mr Turner cannot escape. Without further elaborating what I have just said, I draw attention to the fact that in para 30 of the judgment in the *ALS* case, Sir John Thomas specifically addressed the question of the financial adjustment and, as we have seen, said in terms that it was "simply an adjustment of moneys due [and] did not in any way affect the obligation to provide interpreters on each occasion." To this I should add two observations. The fundamental task on which the court was embarked in the *ALS* case was to identify what the relevant agreement meant as a matter of construction and, in the light of that, to determine whether there had been a breach of contract. That is, quintessentially a function of the court, so Mr Turner's reference to political, economic or commercial factors takes him no further than it would in any breach of contract case. Moreover, and to address head on another of Mr Turner's concerns, there is, as I have already made clear, no question of the court exercising the jurisdiction being invoked by Mr Howard unless it is first established that there has been a breach of contract by Capita.

50. Secondly, Mr Turner submits that jurisdiction to make an adverse costs order against a non-party is, on the authorities, confined to three classes of case: (a) cases where the non-party has 'maintained' the cause of one of the parties by funding that cause; (b) cases where the non-party has a direct interest in the subject or object of the litigation; and (c) cases where the non-party is a lawyer to one of the parties who has improperly, unreasonably or negligently caused costs to be wasted. Linked with this, is the submission that in any event the jurisdiction in a case such as this can be exercised only if there has been, to use the terminology of the wasted costs jurisdiction, improper, unreasonable or negligent conduct. In the course of his oral submissions, Mr Turner extended his analysis to include within the jurisdiction to make an adverse costs order cases where, as he formulated it, there is a *direct* obligation to the court *under legislation* (including subordinate legislation). Examples would include, he submitted, a local authority directed by the court to produce a section 37 report and, because of the provisions of the relevant rules of court, an expert witness.

51. Up to a point I can accept Mr Turner's taxonomy – it is accurate *so far as it goes*. But there is nothing in any of the authorities to which Mr Turner directed my attention to suggest that his taxonomy is exhaustive and, in my judgment, it plainly is not. Consider, for example, the decisions in *Kelly v South Manchester Health Authority* [1998] 1 WLR 244, which cannot sensibly be fitted into even his extended taxonomy, and in *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043, and *X Local Authority v Trimega Laboratories* [2013] EWCC 6 (Fam), [2014] 2 FLR 232, where the basis of liability is not that identified by Mr Turner. The short answer to Mr Turner's primary submission is provided by the decision in the *ALS* case, which is directly in point, and to his subsidiary submission by the decisions in the *Globe* case and in *B v B.*

52. Finally, Mr Turner submits that, even if he is wrong on everything else, the failure to provide interpreters on 7 May 2014 does not, in the particular circumstances, justify the order being sought by Mr Howard. As to that I can only repeat what I have already said and observe that, try as he might, Mr Turner was unable to gainsay any of the points set out in paragraph 39 above.

53. It follows, for the reasons I have given that it is just for Capita to be ordered to pay the costs incurred by the local authority in relation to the hearing on 7 May 2014, excluding, of course, those costs which would have had to be incurred in any event for the hearing which eventually took place on 15 May 2014. The local authority has prepared a schedule of those costs, showing, as revised, that they amount in all (inclusive of disbursements and the costs of the adoptive parents, who were being funded by the local authority) to £4,207.46, inclusive of VAT. The details have been set out in the schedule, appear to me to be reasonable and, except as to whether VAT should be included, have not been subjected to any criticism, either as to principle or quantum, by Mr Turner.

54. The local authority has succeeded in its application. Capita has failed. Mr Turner accepts that in these circumstances Capita should also pay the local authority the costs of the preparation for and the hearing before me on 14 November 2014. Those costs, detailed in the same schedule, and represented in large part by Mr Howard's fees

amount in all to £11,719.90, inclusive of VAT. Again, these costs seem reasonable and, subject only to his point in relation to VAT, are not challenged by Mr Turner.

55. It is now agreed that the sums payable to Capita should be exclusive of VAT. I propose to assess them summarily in the sums claimed. The costs payable by Capita to the local authority therefore amount to £15,927.36, inclusive of VAT, and £13,338.15 exclusive of VAT. There will accordingly be an order that Capita pay the local authority within seven days the sum of £13,338.15 in respect of the costs of the hearings on 7 May 2014 and 14 November 2014.

56. The local authority seeks in addition the sum of £1,102.50, exclusive of VAT, incurred by it since I sent the judgment to the parties in draft. These costs are the fees of Mr Howard (i) considering and advising on the draft judgment, (ii) drafting a response to Mr Turner's observations on the draft judgment, including in relation to the VAT issue, and (iii) settling submissions in response to Mr Turner's application for permission to appeal (see below). Mr Turner's response is that Capita should not be required to pay any of these fees. I agree. None of these, in my experience, is normally treated as giving rise to additional costs. This was not, I should make clear, a case where the parties were directed by the court to file lengthy post-judgment submissions. In the usual way they were invited to file *brief* submissions on any matters arising from the draft judgment, which they did. As to the fees claimed under head (i) I fail to see any basis on which the losing party should have to pay costs which, as I understand it, were incurred in giving advice on the judgment and, moreover, for work done *before* Mr Turner's observations on the judgment were to hand. In relation to items (ii) and (iii), if it is appropriate to think in such terms, and I doubt that it is, it is to be noted, as Mr Turner points out, that although the local authority 'won' on the question of permission to appeal (see below) it 'lost' on the question of whether VAT was payable. I decline to order Capita to pay any of these further costs. And, in order to avoid what might otherwise become an argument on costs without end, I make it clear that I do not propose to entertain any further argument (not that any has been forthcoming) as to what would be the further costs of the costs of the costs.

57. Mr Turner seeks permission to appeal. His primary argument, in effect a reprise of the submissions which I have rejected, is that there is a real prospect of success within the meaning of CPR 52.3(6)(a). Mr Howard begs to differ, submitting that my decision is securely founded on and an entirely proper application of the principles in the *ALS* case and the *Globe* case. I agree with Mr Howard and refuse permission on this ground. Mr Turner submits in the alternative that the case falls within CPR 52.3(6)(b). That may or may not be so, but the decision whether to grant permission on this basis is, in my judgment, properly one for the Court of Appeal and not for the judge at first instance. Accordingly, I refuse permission on this ground also.