IN THE HIGH COURT OF JUSTICE [2018] EWHC 692 (QB)

QUEEN'S BENCH DIVISION No. HQ14X01860

Royal Courts of Justice

Before:

MASTER VICTORIA McCLOUD

B E T W E E N :

(1) Ms Muna Abdule

(2) Aburahman Yusuf

(3) Miss Nusaba Yusuf

(4) Miss Ruwayda Yusuf

(Claimants 2-4 by their mother and Litigation Friend Ms Muna Abdule)

Claimants

- and -

(1) The Foreign and Commonwealth Office

(2) The Home Office

(3) The Attorney General

Defendants

Mr Ben Jaffey QC (instructed by Messrs Leigh Day, Solicitors), appeared for the Claimants.

Ms. Karen Steyn QC and Mr James Stansfeld (instructed by the Government Legal Department) appeared on behalf of the Defendants.

Ms Shaheen Rahman QC (instructed as Special Advocate) did not appear but provided written submissions.

Hearing: 15th March 2018

Draft Judgment: 22nd March 2018

Handed down: 28th March 2018

Keywords: CLOSED material procedure – national security – assault – misfeasance in public office – false imprisonment - overriding objective – service of defence – Article 6 ECHR – jurisdiction and status of Master and court – Justice and Security Act 2013 – Supreme Court of Judicature – Senior Courts - Court of Queen's Bench – Queen's Bench Division – Judicial Office holder – High Court

Authorities referred to:

Belhaj and Boudchar v FCO [2017] EWHC 1861 (QB) and [2017] AC 964.

Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34

XYZ v MOD [2017 EWHC 547

Kamoka and Ors. v Security Service and Others [2018] EWHC 517 (QB)

Smeeton v Collier (1847) 1 EX. 457

Coral Reef Ltd v Silverbond Enterprises Ltd [2016] EWHC 874 (Ch)

Paxton Jones v Chichester Harbour Conservancy [2017] EWHC 2270 (QB)

Kennedy v The National Trust for Scotland [2017] EWHC 3368 (QB)

R (on application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs [2015] EWCA Civ. 687

Statutes referred to:

Justice and Security Act 2013

Senior Courts Act 1981

Constitutional Reform Act 2005

Judicial Pensions and Retirement Act 1993

Statute 1 Vict. 1837 chapter 30 ("*An Act to Abolish Certain Offices in the Superior Courts of Common Law, and to make Provision for a more effective and uniform Establishment of Officers in those Courts*")

Master In Chancery (Abolition) Act 1852

Judge in Chambers (Despatch of Business) Act 1867

Supreme Court of Judicature Act

Judicature (Consolidation Act) 1925

J U D G M E N T

MASTER VICTORIA McCLOUD:

1. This is a claim by the Claimants arising from the UK Government's alleged involvement in the detention and mistreatment of the 1st Claimant (C1) in Puntland, Somalia in or around 2013 and the alleged effect of that involvement on the children of C1 who are claimants 2 to 4 (C2-C4). The matter before me is a hearing of an application by the Claimants for the provision of a draft CLOSED defence and an OPEN defence by the Defendants prior to an anticipated hearing under s.6 of the Justice and Security Act 2013, about which I say more later.

2. C1 says she was detained by security personnel at Bosaso Airport in Puntland, Somalia, on 11 January 2013, thereafter held at a Puntland Security Forces base, then transferred to Bosaso Central prison until 31 October 2013. She says she was tortured and suffered other mistreatment and that she was held in

inhumane and degrading conditions. In point of law the claim is founded in assault and battery, false imprisonment, and misfeasance in a public office. In the alternative C1 relies on such equivalent causes of action as may apply under Somali law or Sharia Law. Her case is that the UK State was complicit in the wrongs said to have been committed.

3. Those familiar with this type of claim in a broad sense will be aware of the decisions in Belhaj and Boudchar v FCO [2017] EWHC 1861 (QB) and of the prior Supreme Court decision in that case ([2017] AC 964). The claim before me was stayed until the Supreme Court decision in *Belhaj*.

4. I have provided this written judgment in view firstly of the lack of time at the end of the hearing and more importantly so as to do justice to the submissions of leading counsel on a novel point of jurisdiction which, if correct, could have wider implication for the conduct of cases in the High Court by Masters and likely also by deputy HCJs and s.9 judges, and could necessitate statutory amendment. The parties disagreed as to the answer to the jurisdiction point and I must direct myself properly on it since it goes to the wider decision I must make. I am grateful to both advocates who attended and to the Special Advocate.

5. This judgment therefore concerns three matters:

    i. Whether an OPEN defence and/or draft CLOSED defence should be ordered to be produced by the Defendants prior to the hearing of the Defendants' application under s.6 of the Justice and Security Act 2013 (JSA 2013); and

ii. Whether the law mandates that this case be released to a full puisne judge of the High Court for the s.6 hearing[1] because a Master has no jurisdiction and therefore there is no discretion to exercise; and

iii. If the answer to (ii) is "no" then whether to release under the discretionary powers which this court has, after proper consideration of the relevant factors.

6. The issue as to point (i) is that the Defendants oppose any direction for the provision of either or both of an OPEN defence or a draft CLOSED defence prior to determination of the s.6 application and they say that it is their intention in any case to apply after the s.6 hearing for summary judgment against the Claimant without having themselves served a defence. The Special Advocate and the Claimant both urge me to ensure that an OPEN defence and draft CLOSED defence are supplied.

7. Point (ii) was taken briefly by Ms Steyn QC and Mr Stansfeld in the skeleton lodged by Ds for the hearing but was expanded upon and clarified significantly in oral submissions, and responded to and opposed by Mr Jaffey QC for the Claimants both orally and in writing. The Special Advocate made no submissions addressing this point, I infer because it was raised in the skeleton served by D, and the Special Advocate (SA) was unable to attend to make oral submissions because of commitments in a jury trial elsewhere. If having read this judgment in draft the SA wishes to make written submissions she should please indicate to me, but I am not directing that there must be any. The Claimants' position before me was that point (ii) is incorrect and that I have a discretion to exercise judicially if I am to release this application to a full puisne judge.

[1] And query whether I must also release the decision as to the service of defence/draft defence, though that was not argued.

8. In considering this application, I remind myself that a modified version of the Overriding Objective of the Civil Procedure Rules applies to proceedings seeking a declaration under s.6 JSA 2013 and hence that in making any directions ancillary to the arrangements for a s.6 hearing, I should seek to enable the court making the substantive decision to comply with the modified Overriding Objective:

> "82.2 (1) Where any of the rules in this Part applies, the overriding objective in Part 1, and so far as possible any other rule, must be read and given effect in a way which is compatible with the duty set out in paragraph (2).
>
> (2) The court must ensure that information is not disclosed in a way which would be damaging to the interests of national security.
>
> (3) Subject to paragraph (2), the court must satisfy itself that the material available to it enables it properly to determine proceedings."

CLOSED material procedure

9. The CLOSED material procedure which is set out in Part 2 of the JSA 2013 came into being following the decision of the Supreme Court in Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34. In that case the court unanimously decided that there was no power at common law to replace public interest immunity, whereby a judge decides whether in the public interest certain material should be excluded from a hearing, with a so-called 'closed material procedure' (CMP). Whilst the court has an inherent power to regulate its own procedure, it was held that the court cannot exercise that power to regulate its own procedures in such a way that will deny parties their common law right to a fair trial. Part 2 of the JSA 2013 enacted a statutory CMP in the absence of a common law power for the court to create one of its own.

10. By s.6 of the JSA 2013 it is provided that (as far as relevant here – I have underlined some expressions which play a particular role in this judgment and in argument):

Declaration permitting closed material applications in proceedings

6 (1) The court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.

[…].

(3) The court may make such a declaration if it considers that the following two conditions are met.

(4) The first condition is that—

(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or

[…]

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

(6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the conditions or on material that the applicant would be required to disclose).

[…]

(11) In this section—

"closed material application" means an application of the kind mentioned in section 8(1)(a),

"relevant civil proceedings" means any proceedings (other than proceedings in a criminal cause or matter) before—

(a) the High Court,

[…]

"sensitive material" means material the disclosure of which would be damaging to the interests of national security.

11. S.8 of the JSA 2013 provides that rules of court 'relating to any relevant civil proceedings in relation to which there is a declaration under section 6' 'must' make various provisions, such as to enable a relevant person to apply to the court for permission not to disclose material, where the court is satisfied that disclosure would be damaging to the interests of national security, and that the court must for example in that event consider whether a summary could be provided which would not contain material damaging to the interests of security.

12. S.7 of the JSA 2013 provides among other things that where a court seized of 'relevant proceedings' has made a s.6 declaration, that declaration is kept under review (including a 'formal review' at the end of the pre-trial disclosure exercise) and that the declaration may be revoked. Rules of court 'must' make provision as to how such formal reviews must be performed, and when (there is no reference mandating rules for more informal types of review).

The issue as to service of OPEN Defence and/or CLOSED draft Defence

13. Both the Claimants and the Special Advocate urge me to direct that the Defendants must provide a draft CLOSED defence and an OPEN defence before the s.6 hearing. The Defendants say that the s.6 application should be determined before any draft or actual defence is supplied and indeed they say that they intend to seek summary judgment prior to providing a defence, following the s.6 hearing.

14. Supporting the application for defences to be provided in CLOSED draft and/or fully in OPEN, it was argued that to refuse to order service would deprive the s.6 court from seeing what, on the statements of case and draft statements of case, the issues are between the parties. Section 6(4) refers to a test which involves the scope of disclosure documents and that cannot be decided – or ought not to be decided – without information before the court as to the issues. That goes, it was said, to the core of the two issues which the s.6 court must determine as set out in s.6(4) and 6(5), including whether the sensitive material is necessary to enable the court to determine the issues before it. Further, absent those documents the Claimants and Special Advocate themselves would be impaired in their ability to consider whether the criteria are made out (which engages Art. 6 ECHR).

15. Per Leggatt J in XYZ v MOD [2017 EWHC 547 (QB), the CLOSED material procedure was described as involving a serious derogation from the fundamental principles of open justice and natural justice, and that any application for it must be scrutinised carefully by the court. The same was said in Belhaj and Boudchar v FCO [2017] EWHC 1861 by Popplewell J. Importantly on the Claimants' case Leggatt J observed that on the facts of that case *"… the defendant has not yet pleaded its case on the issue of knowledge. Until the defendant has done so, it is not possible to take an informed view about whether disclosure of sensitive material in these documents will be necessary."*

16. In *Belhaj*, *supra*., at 22 the learned judge said this:

> *"Often where a closed material procedure is invoked the defendant will be unable to plead its defence in full in an open defence and the first step after making a s.6 declaration will be service of a full closed defence defining the issues in the case with the protection of national security interests which the s.6 declaration has provided."*. An open defence had been served in *Belhaj* but not a draft closed one. The judge observed at para. 50 that service of a draft closed defence would have been possible or "*at least a document identifying whether any admissions would be made and what positive case would be run in relation to the core factual narrative. That would have enabled the Court to assess the issues without the need for the Defendants to rely on NCND or to avoid identifying their positive case in relation to the core narrative*."

17. I was also taken to Kamoka and Ors. v Security Service and Others [2018] EWHC 517 (QB) where Jay J. required service of OPEN and draft CLOSED defences before the s.6 hearing.

18. Given that at present the Defendants' case is effectively a wholesale denial of the claim, with no indication of the positive case or as to admissions of facts, it was said that without the defences sought in this application the Court could not perform the s.6 scrutiny as well as it might and the Claimants would be placed in the position of not being able to decide whether to oppose the s.6 application or present argument as to the meeting, or otherwise of the statutory criteria under s.6

19. The Special Advocate fully supported the Claimants' position and added that the question of the fair and effective administration of justice (as part of the statutory criteria) could not properly be addressed if the court did not know what the issues were and hence what significance if any was to be attached to an sensitive material in relation to those issues. That aside, there was said to be no

sensible reason why the Defendants should not serve the actual and draft statements of case sought by the application so as to enable issues to be narrowed, to further the Overriding Objective. There should be a greater obligation on a Defendant to provide those documents given the nature of the CLOSED process as being a departure from the fundamental principles of open justice and natural justice.

20. The Defendants oppose service of either a draft CLOSED or an OPEN defence. They say that do so would be 'premature, unnecessary, inappropriate and an inefficient use of time and resources'. Their position is that (at present) they neither confirm nor deny ('NCND') the pleaded facts. This is therefore on the face of it currently intended to be defended as to every particular in the Particulars of Claim (a position which the Claimants counsel considered to be probably unique in the body of case law in this field so far and which means that as at the current hearing there has been no narrowing of issues even of the most basic matters of pleaded fact).

21. They make the point that (per Popplewell J in Belhaj) at 22, the s.6 hearing is only the first stage of a process and the threshold for making a s.6 order is, in terms of the quantity of material and information to be required about issues in the case, a low one. *"It requires the court to be satisfied that a closed material procedure is justifiable by reference* ***to no more than one issue in the case and by reference to no more than some sensitive material****."*

22. With that very limited criterion in mind, the court was asked to consider the two tests required to be undertaken in a s.6 hearing namely that a party would be required to disclose sensitive material in the course of proceedings and whether it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration. The latter test would be failed if there are satisfactory alternatives to a closed material procedure. (R (on application of

Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs [2015] EWCA Civ. 687).

23. In *Belhaj*, Popplewell J made his decision without a draft CLOSED defence or CLOSED summary of the Defendants' response to the Claimants' core factual narrative. Given the example of *Kamoka* where such documents were directed, it is clearly (as Ds accepted) a matter for decision in each individual case whether they are to be required for the s.6 hearing.

24. However, it was said that per Popplewell J in *Belhaj*, the court is not to be drawn at the s.6 stage into the detailed exercise which would take place at the later s.8 stage under the JSA 2013 or in a PII application, as regards the availability of alternatives to the use of sensitive information (such as the use of gisting). Popplewell J went on to say at 24 "*At the s.6 stage, the court has to take a view on the basis of the sensitive material and in the light of its nature and content, together with its importance as compared with open material, whether the likely result of a PII exercise or the stage two evaluation would put sufficient material in open proceedings to meet the justice of the case.*"

25. In relation to the proper task to be undertaken at the s.6 hearing, the Defendants have provided a CLOSED Statement of Reasons and it was said that that was sufficient to enable the court at the s.6 hearing to discharge its functions as to both limbs of the s.6 test as well as to consider whether there are alternatives to what would otherwise be disclosure of the sensitive material. Service of a full CLOSED defence would be a waste and unnecessary given the limited scope of what the court there has to decide if it is to be satisfied of the s.6 criteria. The CLOSED Statement of Reasons can be compared with the averments in the Particulars of Claim and it will be clear what (at least one) issue is and whether (at least some) sensitive material would need to be disclosed. Further the OPEN Statement of Reasons contains confirmation that counsel has advised that the

material is relevant and that the Defendants would be required to disclose it but for the matters in s.6(4)(b).

26. The above primarily concerns the application for service of a draft CLOSED defence. In relation to the application for service of an OPEN defence, the simple point made was that in this case the Defendants cannot respond to the core factual narrative in OPEN at all. They say they are unable to plead meaningfully and would only serve a general denial of liability if they served a defence in OPEN. Such would help nobody and be a waste of resources and unnecessary. Not only that but, depending on the outcome of the s.6 hearing it might very well be that an OPEN defence would have to be amended, again making the initial service of an OPEN defence at this stage a probable waste of resources.

27. The Defendants indicated that it is in any event their intention to seek summary judgment once the s.6 process is concluded and that they will do so before service any defence. In the circumstances this was said to point to the service of a draft or actual defence at this stage as potentially a waste of time and cost if the summary judgment application were to succeed.

28. It was argued that to draft such documents is not a simple task: it requires appropriately cleared and trained professionals in cases of national security and hence for this court to place an unnecessary burden on the Defendants at a time when they are having to deal with other such cases as this with finite and ‘seriously stretched’ teams who are also having to deal with the ongoing aspects of *Belhaj*, *Kamoka* and others would be wrong, or at least something I should weigh into my decision.

29. A further problem and potential source of waste was that in practical terms the drafting of an OPEN defence is best done by producing a CLOSED one and then editing it. If the s.6 hearing proceeds and no declaration is made then in all

likelihood a PII application would ensue and the contents of any OPEN defence would then change.

Analysis and decision: service of defences

30. I accept, as I think is clear from the authorities, that it is procedurally and evidentially quite a straightforward task for an applicant under s.6 to satisfy the twin criteria of that section, inasmuch as one only has to establish the tests are met in relation to one issue for some sensitive material. It is also clear that courts have, not necessarily by choice, proceeded without draft or actual defences in these applications and that it is a matter which is to be decided case by case.

31. I also accept that an important aspect for me is to consider realistically whether the s.6 court will have the information it needs to perform its task, if what it has is (instead of a CLOSED defence) a copy of the CLOSED Statement of Reasons coupled with the sensitive material relied on. The prime necessity is that the court and parties or Special Advocate can understand and take informed decisions as to the extent to which the s.6 criteria are met. It was argued that the CLOSED Statement of Reasons is enough: it can be compared with the Particulars of Claim/core factual narrative to ensure that the court knows what at least one issue requiring disclosure of sensitive information would be. (It was not I think being suggested that the Defendants actually intend, in CLOSED to take such a minimalist stance and I had the impression the CLOSED Statement of Reasons is more comprehensive).

32. So, at the outset my view is that, yes, in principle in this case a suitable CLOSED response to the core factual narrative may well be *sufficient*. Moreover, if it is really the case that the Defendants, if serving an OPEN defence would simply deny liability on a blanket basis then it may prove a minimally useful step to serve such a defence before the s.6 hearing.

33. I understand also that the State is ‘seriously stretched’ in terms of its present specialist resources in dealing with the type of work involved in possible defences in this case, given the ongoing significant other claims in progress placing demands on those resources. I accept also that, if defences were to be produced there is a risk of a need to amend after the s.6 decision, and that if a summary judgment application is made and succeeds after the s.6 decision, the draft or actual defence would perhaps have been a waste of time.

34. Understanding all that as I do, I direct myself that insofar as Ms Steyn QC was asking me to take into account the contents of the CLOSED Statement of Reasons by way of trusting the State’s assurance to me that they are sufficient, but without me having been given access to them, I shall discount that argument. It would amount to creation of some new species of closed procedure outside the correct procedures and, in my view, impermissible in law. It is not the role of this court to proceed by trusting one side or the other especially in a case where the claim revolves around wholly disputed allegations of mistreatment by the State of a person overseas and I am in effect asked to trust that a document I have not seen, produced by the State parties, is adequate to its job.

35. Insofar as Ms Steyn QC’s submission also included the more benign point that I should accept that if the s.6 hearing proceeds they intend to ensure that any Statement of Reasons in CLOSED is sufficient, then I do accept the thrust of that from counsel and from the application for the s.6 hearing. That is not the same as being in a position to evaluate whether the CLOSED Statement of Reasons lodged but not disclosed to me is sufficient.

36. So, if I proceed on the basis that the Defendants would present a Statement of Reasons in CLOSED which would be intended to address the core factual narrative of the claim sufficiently, that feeds into consideration of whether directing a CLOSED draft Defence is a proportionate use of resources and costs.

37. It seems to me that sufficiency of material is not the only or perhaps even clearly the most important point here. The authorities more than amply establish that a CMP is a serious derogation from the fundamental principles of open justice and natural justice. It is an exceptional procedure which rightly attracts the most earnest scrutiny by judges who are proactive in ensuring that the matters before the court are dealt with in ways which ensure the fair and effective administration of justice and protect the Article 6 Rights of those affected.

38. The example of *Belhaj* is in my judgment a good example of a practical decision by the court to 'get on with it' in circumstances where for whatever reason there was no draft CLOSED defence and no CLOSED document dealing with admissions or a CLOSED positive case on the core narrative. It was clearly not an ideal or desirable state of affairs but a case of the court doing practical justice with what material it had.

39. Where the State is accused of the sort of alleged mistreatment here, and exceptionally takes the view not only that a CMP is required but that no more than a general denial of liability is appropriate in OPEN, and it lodges a CLOSED Statement of Reasons with no disclosure to the judge, in my judgment the court's duties to:

    a. ensure fair and effective administration of justice,

    b. ensure the most proportionate approach to the inevitable impacts of CMP procedures on Art. 6 rights and common law notions of natural and open justice and

    c. the further the Overriding Objective

are best met by directions that the Defendant should plead a CLOSED draft defence. That is the most accurate and effective way to address what type and nature of disclosure would be required. There is less benefit in solely opting for a Statement of Reasons in CLOSED, which would provide a more approximate way to address the Particulars of Claim, whilst positively avoiding the production of a draft defence if such is capable of being produced. Whilst I sympathise with the Defendants and their stretched resources that has to be rather lower down in my consideration, as are the possible – but by no means certain – elements of costs thrown away if defences are later amended or prove (after summary judgment) in the end not to have been needed.

40. As to the question of a CLOSED defence, I do take note of and carefully consider whether a direction for that would be sensible if it is really the case that the Defendants will make a general denial of liability. But (i) if that is the case, it is a very modest use of resources to plead it and (ii) a direction for an OPEN, even if limited, defence would require professional consideration of whether in reality some factual matters are admitted such as names, or ages or locations, or the fact of the First Claimant's imprisonment in Somalia for a period. Until that exercise is carried out, that is to say the drafting of a defence in OPEN and the taking of instructions on it, I do not feel wholly satisfied that it is realistic to think that all facts will be denied. I consider it appropriate also that I start from the position that where a claim is brought and Particulars of Claim are served then the basic presumption is that the Claimant has a right at the earliest opportunity to know what can be said in the Defence, and the Court managing the case likewise (both in OPEN and CLOSED).

41. This is therefore a case where even if alternatives to defences would suffice, sufficiency is not the height to which this court should aspire in a case of this sort. There is a positive duty to place parties as far as possible on an equal footing, secure Art. 6 rights and as far as practicable protect the principles of

open justice and natural justice. Hence my decision is to accede to the application (supported fully by the Special Advocate) and to direct service of a draft CLOSED defence and as far as can be pleaded properly, an OPEN defence.

The Jurisdiction Issue

42. Section 1 of the Senior Courts Act 1981 (SCA) provides that the Senior Courts consist of the Court of Appeal, High Court of Justice and Crown Court.

43. Section 4 provides that the High Court shall consist of the Lord Chief Justice, President of the Queen's Bench Division, President of the Family Division, Chancellor of the High Court, Senior Presiding Judge, vice-president of the Queen's Bench Division, and the puisne judges of the High Court (whose numbers are fixed by statute).

44. Section 5 provides that there shall be three divisions of the High Court, one of which is the Queen's Bench Division, which is defined as consisting of the Lord Chief Justice, President of the Queen's Bench Division, vice-president, and such of the puisne judges as '*are for the time being attached thereto'*.

45. Ms Steyn QC for the Defendants argued that Masters are not "The High Court", within s.4 of the SCA 1981. Proceedings before them cannot be within the scope of s.6(11), referring to 'proceedings before the High Court' as being 'relevant civil proceedings'. It is not an academic point but a practical one. If correct then I have no jurisdiction under that part of that Act or, very possibly, other Acts with similar stipulations.

46. There are provisions of the SCA and Civil Procedure Rules which as far as Mr Jaffey QC was concerned show that Masters do have jurisdiction irrespective of their absence as part of the High Court under s.4 of the SCA 1981.

47. Both counsel referred to s.19(3) of the SCA 1981. By that section *"Any jurisdiction of the High Court may be exercised only by a single judge of that court, except in so far as it is … by rules of court made exercisable by a master..."* (see also s.68 SCA 1981).

48. Mr Jaffey QC referred to CPR 2.4, familiar to any Master, namely *"Where these Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed – (a) in relation to proceedings in the High Court, by any … Master…"*

49. PD 2B lists the limited categories of remedy which Masters do not have power to grant. The JSA 2013 and s.6 are not mentioned among them.

50. CPR Part 82 which governs CLOSED material applications, uses the word 'the court' throughout. Therefore, according to Mr Jaffey QC, it follows from the combination of SCA s.19(3), CPR 2.4, and the absence of provision to the contrary in the PD, Act or Rules, that Masters may perform the "acts" which it is provided for 'the court' to perform. Masters therefore on Cs' case have jurisdiction.

51. On Ms Steyn's case the above certainly does not save the day. Rule 2.4 is confined to 'acts' performed by the court. That is not the same as conferring on the Master the substantive jurisdiction of the High Court under s.6 JSA 2013. (I note that the wording of rule 2.4 does not speak in terms which use the verbatim wording of s.19(3) of the SCA 1981, ie in terms of '*exercise of jurisdiction*' but instead of performance of '*acts'*.

52. Note number 2.4.1 on p.31 of the current volume 1 of the White Book, towards the end of the second paragraph on that page was cited to me by Ms Steyn as support for that distinction (I have underlined the key passage):

"… The rule is confined to circumstances in which these Rules refer to the performance of an 'act' by the court. The general principle is that Masters and district judges should have power to act. It should be noted that the rule speaks, not of 'any act' that the court may perform, but of 'any act' which 'these Rules provide for the court to perform'. Where the court performs an 'act' not provided for by the CPR (eg tries a claim[2]) the rule has no application."

53. After reserving my decision on this and the question of defences, I circulated a draft judgment which called for any further submissions to be made on the jurisdiction issue, because in the draft judgment I expressed only my provisional view and had considered statutes and legal materials wider than those referred to at the hearing. I am grateful to both leading and junior counsel for their further consideration in the light of the draft. Both sides were however content not to make further submissions in response to my analysis in the draft judgment and it accordingly remains unchanged.

Analysis and decision: jurisdiction

54. Page 34 of the White Book, also at note 2.4.1, observes that *"This formula [ie, rule 2.4] has no exact counterpart in former rules. The former provision spoke variously of the exercise by lesser judicial officers of power, authority, and jurisdiction, and their transaction of business. Further they were not always limited to the exercise of power, etc, conferred by the RSC and the CCR. In the CPR sometimes the source of the court's power to perform particular acts is found within the CPR and sometimes the power has a provenance without … It would seem that, whatever the provenance of the court's power to perform an 'act' if it is mentioned in the CPR [then] the Rules 'provide for' it …"*

[2] I doubt the statement in the note that the CPR does not refer to the act of trying a claim can be correct and I mention this further below.

55. The CPR formulation referring to ‘acts’ of the court departs from the approach taken prior to the CPR, where the framers of RSC Ord. 32 r.11 were careful to include expressly within the scope of the court rules the exercise of ‘power, authority and jurisdiction’, which is a form of words which more obviously gives effect to s.19(3) of the SCA 1981. That departure cannot be ignored when construing rule 2.4[3].

56. If the High Court can perform an act as a matter of law, but it is not an act provided for in the CPR, then in the learned editor’s opinion it does not fall within the scope of the Master’s powers. Conversely if the CPR does provide for the court to perform an act then it does not matter whether the source of the power is from within the rules or from extrinsic sources.

57. The White Book commentary observes that the trial of a claim, whilst being an ‘act’ which the court can perform, is not an act which is provided for in the Rules and therefore in the editor’s view is excluded from CPR 2.4. This, if correct, would conflict with the provisions of Practice Direction 2B which proceeds on the basis that QB Masters have full jurisdiction to try QB civil claims save for the limited exceptions listed there. But a Practice Direction is not a rule, which s.19(3) requires.

58. The jurisdiction issue appears not to have been argued before. That does not make Ms Steyn QC’s argument incorrect, even if it is a bold one. If correct, then wherever the same or similar wording appears elsewhere, the same or a similar issue could arise. Ms Steyn accepted that the arguments could also affect the position of, eg, deputy High Court Judges and s.9 Circuit Judges, though the

[3] This may be something for the Rules Committee to consider lest the discrepancy gives rise to other similar challenges in future. It would inconvenient for a court to have to address jurisdiction issues of this sort too frequently.

complex effects wider than those directly in play in this case were not explored and did not need to be explored.

(1) Is the High Court comprised (among others) of Masters of the Queen's Bench Division?

59. No. Section 4 of the SCA 1981 provides a list of those who comprise the High Court, and Masters are not on the list.

(2) Are proceedings before Masters nonetheless '*proceedings before the High Court*'?

(i) Status of Masters

60. Section 109 of the Constitutional Reform Act 2005 incorporates the office holders listed in Sch. 14 as 'Judicial Office Holders'. Other Judicial Office Holders include Puisne Judges, Circuit Judges and District Judges.

61. This is confirmed by the Judicial Pensions and Retirement Act 1993 s.1(6) which applies Sch. 1 of that Act. Salaried Masters and others such as salaried Puisne judges, Circuit Judges etc including Tribunal judges, are said to be "*Holders of qualifying judicial office*".

62. Is a "Judicial Office Holder" a 'judge'? Sch. 1 of the 1993 Act divides Judicial Office Holders into sub-headings which are "Judges", "Court Officers", "Members of Tribunals", "Other offices whose holders are appointed by the Lord Chancellor" and lastly "Other offices". This may be evidence that there is a distinction between 'judges' and all other forms of judicial office holder.

63. Yet District Judges (county courts) are not included as "judges", nor is the Judge Advocate General, nor are Employment Judges, or Judges of the Upper

Tribunal (and so on). It would create an absurdity (and probably some consternation), if it were to be the case that they are not, as they may have thought, judges after all. What they may think is of course not the point, with consternation or not, but the repercussions in legal terms which would arise from concluding that such judges are not judges after all would be so broad that it seems most unlikely that the 1993 Act intends that effect.

64. The subheading 'judges' in Sch. 1 to the 1993 Act is in my judgment no more than an indication that the office holders set out there do not require some other additional description beyond the most simple one of 'judge'. Thus, for example in the case of District Judges (county courts), they appear as 'court officers' whereas Circuit Judges appear only as 'judges'. This is indicative of the fact that District Judges in addition to sitting as judges also have the duties of court officers while Circuit Judges do not.

65. I note that rule 2.3 of the Civil Procedure Rules includes within the definition of the term 'judge', *"unless the context otherwise requires, a judge, Master or District Judge or a person authorised to act as such*", which suggests that there is no distinction to be drawn between different sorts of judicial office holder as regards the question whether they are in the general sense 'judges'.

66. QB Masters are thus judges who are also court officers. Puisne judges are simply 'judges'. Masters for historical reasons transact the 'business' of the High Court as well as performing their (historically later acquired) judicial functions. The fact that since the latter half of the 20th century Masters have been required to take the full judicial oath on assuming judicial office is perhaps also a pointer to the same conclusion.

(ii) If Masters are judges, given the wording of s.4 SCA 1981 are they 'judges of the High Court', or if not, what is their position?

67. Recall that s.19(3) SCA 1981 provides that "*Any jurisdiction of the High Court may be exercised only by a single judge of that court"* (save where rules provide otherwise).

68. Given my conclusion that the High Court does not 'comprise' Masters (because of their omission from SCA 1981 s.4) it is clear that Masters, whilst being judges, are not 'judges of that court'. If they were, then s.19(3) would be a pointless provision since there would be no requirement for a provision enabling the grant of powers to Masters to exercise the jurisdiction of judges of the High Court.

(iii) Since Masters are judges, but not 'judges of that court' (the High Court), what are they, and does that resolve the question of jurisdiction?

69. This question requires a return to the statutory foundations of the QB Masters and is a lesson in how, if we are not mindful of our legal past, we risk misunderstanding the present and misdirecting posterity.

70. The SCA 1981 is merely the most recent of many Acts which might broadly be said to be 'Judicature' Acts since the Victorian era. To understand the present statute one needs to look at how it came about, which is a story of inelegant evolution leading to the apparent anomaly of s.4, rather than a case of design. Masters evolved from solely being 'court officers' to being judges, in the years between 1838 and the present time, and the statutes governing the courts over the years reflected that in ways which differ from the simpler case of puisne judges who were readily identifiable as judges from the outset, and whose position has been constant.

71. To spoil the ending, the answer to the question "*What is a Queen's Bench Master?*" is that, today, "*She*[4] *is a judge attached to the Senior Courts, Queen's Bench Division of the High Court*".

72. I need not 'begin at the beginning', as Dickens' narrator says in one of his Christmas novels from the same era, but can usefully pick up the threads in the year 1837. By the Statute 1 Vict. 1837 chapter 30 ("*An Act to Abolish Certain Offices in the Superior Courts of Common Law, and to make Provision for a more effective and uniform Establishment of Officers in those Courts*") at s. 3 it was provided that from 1 January 1838 there were to be five 'Principal Officers' to be called "the Masters of" the common law courts namely the Plea side of the Court of Queen's Bench, the Court of Common Pleas and the Plea side of the Court of Exchequer. They were appointed to "conduct the civil business" of those courts. They were referred to in Sch. B of the Act as 'the Masters of the Superior Courts of Common Law'.

73. In 1852 the Masters in Chancery were abolished by the Master In Chancery (Abolition) Act 1852[5]. It may be that *Bleak House* did not assist. The Masters in Chancery were not simply re-named: they were replaced with clerks who lacked judicial powers[6], following the Chancery Commission of that year which determined that they should be abolished, and any judicial functions thereafter exercised by judges. The title did not re-emerge until the eve of the 20th Century[7].

---

[4] There are also male Masters.

[5] Given the abolition of Masters in Chancery in the 1850s, anything said here about QB Masters may not be relevant as regards modern Chancery Masters who later sprung into existence in a different way.

[6] See by former Master, Heward E., 'Masters in Ordinary' (1990), Pub. Rose, at p14.

[7] According to the book by Master Heward, the title of Chancery Master was given to the clerks of that Division by Order of the Lord Chancellor in 1897, speculated upon in the Harman Report of 1960 to have been related to the delightfully Victorian preference of a London Club not to elect 'clerks' to its membership.

74. The Common Law Masters fared better. By the Judge in Chambers (Despatch of Business) Act 1867, the Masters of the Common Law courts could be given powers controlled by rules of court, enabling them to transact the business which a judge in Chambers could transact, except for matters relating to the liberty of the subject. The *Regulae Generales* of Michaelmas Term 1867 set out the relevant rules, according to the White Book 1982, notes to Ord. 1 r.4. Thus, at the latest, the Common Law Masters had judicial powers by 1867. That was no mere formality: Smeeton v Collier (1847) 1 EX. 457 determined that where the legislature gave the court a power and did not state otherwise, the court could exercise that power in Chambers. Common Law Masters had taken a further step towards judicial office.

75. The courts of Common Law and Equity were merged by the Supreme Court of Judicature Act 1873, and were called the "Supreme Court of Judicature". It was divided into the High Court and Court of Appeal. The High Court was divided into Divisions, one being the "Queen's Bench Division", then due to set up its offices within the new, pristine, "Royal Courts of Justice".

76. Section 77 of that Act is the founding section for the QB Masters in the 'post fusion' era. It preserved the Common Law Masters' posts and provided that they were to be 'attached to' the Supreme Court:

> *77* ***The Queen's Remembrancer[8], and all Masters*** *... at the time of commencement of this Act attached to any Court[9] ... whose jurisdiction is hereby transferred to the High Court ...* ***shall, from and after the commencement of this Act, be attached to the Supreme Court*** *... The business to be performed in the High Court of Justice ... shall be distributed*

[8] An office now held by the Senior Master of the QBD.
[9] As was the case for the QB Masters.

among the several officers attached to the Supreme Court by this section in such manner as may be directed by Rules of Court."

77. Later reforms and expansions were consolidated in the Supreme Court of Judicature (Consolidation) Act 1925. Section 104 continued the roles of the Masters from the 1873 Act.

78. There was finally a re-consolidation into the Supreme Courts Act 1981, now the Senior Courts Act 1981. Continuity of appointment of the QB Masters was expressly preserved in each of the transitions between the 1873, 1925 and 1981 Acts. By the time of the SCA 1981 Sch 5. Masters had evolved to be called 'judicial officers' (Sch. 5 SCA 1981) and I have already set out earlier in this judgment how in the more recent Acts they are 'Judicial Office Holders' along with all other judges. That is the current state of evolution of the office of QB Master.

79. That brings us to today, to this Master, and to the now elderly Royal Courts of Justice. Save for the building itself, I suspect that much today would still be recognisable to my late predecessor Master Le Blanc and other Masters named in the Act of 1838.

80. Masters of the Queen's Bench Division are thus properly described nowadays as being "judges attached to the Senior Courts, Queen's Bench Division"[10]. This echoes the notion of 'attachment' of the puisne judges who sit in the Queen's Bench Division but does not equate Masters with those judges: see SCA 1981 s.5.

[10] In passing I observe that this does not contradict s.5 of the SCA 1981: 'attachment' and 'comprising' are not the same thing.

81. The above, I note, tallies quite well with the position indicated in Lord Justice (now Lord) Briggs' report namely the 'Civil Courts Structure Review' of July 2016 where a Master is described by him as:

"… *a Judge of the Queen's Bench Division or Chancery Division*…" (p132)

Lord Briggs observes that Masters now try increasing numbers of High Court claims. If the Master does not try a claim it is often directed that it should be tried by a deputy HCJ or s.9 Circuit Judge, especially given the vey full nature of the Masters' lists.

82. For an exposition of the role of the modern Master, the wide scope of their trial jurisdiction[11] and the relationship of equality between judgments of puisne judges and Masters at first instance, see the decision of Chief Master Marsh in Coral Reef Ltd v Silverbond Enterprises Ltd [2016] EWHC 874 (Ch). *Coral Reef* was applied by me in Paxton Jones v Chichester Harbour Conservancy [2017] EWHC 2270 (QB) (and has been applied in other cases). See also Kennedy *v* The National Trust for Scotland [2017] EWHC 3368 (QB) per Sir David Eady.

(iv) Status of proceedings before Masters, given the above.

83. If a judge attached to the Senior Courts Queen's Bench Division of the High Court has proceedings before her, then those are in my judgment '*before the High Court'*.

84. If they were not, then one would pose the question '*before which court are the proceedings, if not the High Court?*', which admits of no other readily available

[11] Per Master Marsh at [34] in *Coral Reef "... the then restrictions on the jurisdiction of masters, ... have since been almost wholly removed, and masters can now hear and try more or less the same cases as the High Court judges".*

answer in the case of a Master (there is surely no other relevant court to which she belongs or is attached) and none was suggested to me in argument.

85. The answer to the question whether the instant case amounts to 'proceedings before the High Court' is therefore "yes".

(2) Given that the instant proceedings are 'proceedings before the High Court', does the Master have the power, in principle, to exercise jurisdiction under s.6 of the JSA 2013?

86. This turns on whether the JSA s.6 procedure is provided for by way of 'acts' of 'the court' under the Rules, especially rule 2.4 and Part 82. Ever since the 1867 Act, the judicial powers of Masters have derived from court rules and that remains the case.

87. In my judgment CPR Part 82 provides that it is indeed 'the court' which performs 'acts' including hearing the substantive s.6 application rather than merely preparatory matters. See CPR rr. 82.6 and 82.8 for example which provide either expressly or by necessary implication that under Part 82 the acts to be done by the court include disposal of the substantive application and not merely preliminary or procedural steps.

88. Consider the wording of CPR 82.6:

> **82.6** (1) **If the court considers it necessary for any party and that party's legal representative to be excluded from any hearing** or part of a hearing in order to secure that information is not disclosed where disclosure would be damaging to the interests of national security, it must—
>
> (a) direct accordingly; and
>
> **(b) conduct the hearing**

89. It seems to me obvious that in construing the rules it would be irrational to take the view that *if the court does not consider the exclusion of a party from the hearing to be necessary*, so that 82.6 did not apply, then the CPR should be said to lack provision for the hearing to take place at all[12]. It is a necessary implication that by providing for the court to take the acts which it does in 82.6, it is providing for the hearing of the substantive application.

90. This does not appear to be a case of the sort envisaged by the editors of the White Book where acts of the court which it is open to the court to take are not provided for in the CPR.

(3) Given that this is a matter of discretion, will the court exercise it in this case and release to a puisne judge?

91. This is a plain case for a release once the appropriate directions for preparation for the s.6 hearing have been dealt with.

92. It is difficult to envisage circumstances in which a Master, even given that she has jurisdiction in principle, would hear a s.6 declaration application given the lack of CLOSED facilities available to Masters and given in general the public interest in ensuring that CLOSED hearings are heard by the most appropriately experienced judicial office holders in the context of secure courts and vetted staff, in the interests of the protection of national security. The Claimants were

[12] This supplies an answer to what might otherwise call into question Masters' trial jurisdiction: the CPR provide an entire framework for the act of trying a case, even for example specifying that the court may act in the absence of a party at trial (CPR 39.3) and it is a necessary inference that it is not intended that the court *loses* the power to proceed to trial in the presence of that party, despite such power not being expressly stated in the rules. I am of the view that, if the learned editor of the note at 2.4.1 of the White Book intended to convey the meaning that the hearing of a trial is not an act provided for the rules as being done by the court, then he or she is incorrect.

neutral on the point but the Defendants urged me, if this was held to be a discretionary matter, to release. It is also appropriate that I take into account the expressed views of parties as well as all the other circumstances.

93. Absent the facilities and staff to ensure the necessary degree of security, for the other reasons given above, and so as to further the Overriding Objective in the form in which it applies to Part 82, it is clear that these proceedings should be released for hearing only before a full puisne judge of the High Court in the CLOSED court, that is to say before a judge in listing category A sitting in that court.

94. It does not seem proportionate or necessary for me to release the question of the service of a defence or draft defence, and I was not urged to do so, and hence I have dealt with that matter.

MASTER VICTORIA MCCLOUD

Senior Courts, Queen's Bench Division.

28 March 2018