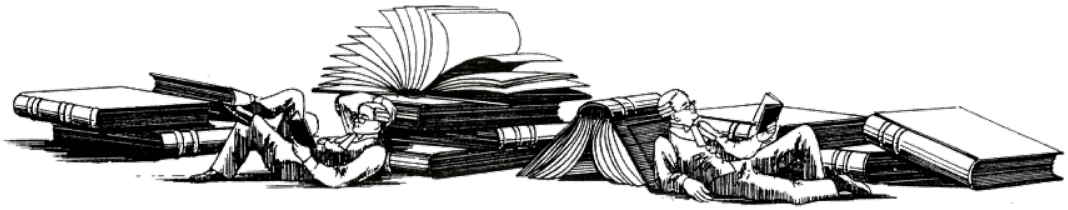

NOTES ON THE STYLE OF THE LAW

Top Ten Judicial Smackdowns of 2022

by

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lists criticism judicial style understatement fun silliness levity

Contents

THE CIVIL YEAR comes to a conclusion soon, and by custom, imminent calendrical change is cause for imitating our ancient forebears' favourite literary hobby: making lists.[1] In that spirit, I present (after a reader request) this publication's first ever listed-article, an account of the top[2] 'judicial smackdowns' of 2022. Much like the best restaurant or book reviews are the incisively critical ones, sometimes the most striking and effective judicial style occurs when the Bench takes on parties with forthright rejection (*ie*, a 'smackdown'). Without further ado, let the listing (in no particular order) commence!

1 See the Catalogue of Ships in *The Illiad* for instance.

2 Read: a random collection of

§ 1 *Lord Briggs of Westbourne*

In *First Caribbean International Bank Ltd v Interested Creditors*,[3] the appellant creditors sought to argue for the priority of the receiver on a number of grounds:

> [**12**] In their Grounds of Appeal the Interested Creditors focus mainly upon their claim based upon the alleged priority of Mr Jordan's expenses. That also occupied almost all Mr Foster's time in his oral submissions. The Board will do likewise.
>
> [**13**] The 'expenses' claim may be summarised as follows:
>
> (i) Mr Jordan incurred a personal liability to each of the Interested Creditors under the Consent Orders, having actively negotiated each of them on behalf of SV under his management powers as receiver.
>
> (ii) Acting in that capacity, he enjoyed a right of indemnity against SV and its assets in respect of the personal liability which he incurred.
>
> (iii) The incurring of that personal liability was a 'privileged expense' not requiring registration and ranking in priority to the claims of any secured creditors in the liquidation of SV, pursuant to articles 1903 and 1969 of the Civil Code of St Lucia.
>
> (iv) The Interested Creditors, as the persons to whom that liability of Mr Jordan was owed, were entitled to be subrogated to his priority claim against the assets of SV in liquidation.
>
> [**14**] In the Board's opinion, every step in that ingenious argument, except perhaps the last, is wrong.

What a smackdown! The brutality of this particular smack comes from the elaborate setup. His Lordship knows that, like in comedy, timing is everything in a judicial takedown. By carefully and slowly listing each and every item as if setting out a logical argument, the anticipation is built. Then, the slap of the 'ingenious' label emerges: the ultimate sign of judicial disapproval. Finally, the kill: saying not only that the argument was wrong, but that every single step along the way was wrong in isolation. Absolutely brutal!

§ 2 *Cockerill J*

An epic Georgian[4] family saga lies at the root of *Recovery Partners GP Ltd v Rukhadze*,[5] but our focus is on how Cockerill J smacked down arguments advanced by Mr Stephen Cogley KC regarding the relationship between interconnected events and the knowledge of the parties (or lack thereof).

3 [2022] UKPC 7, Luc

4 As in: the independent state whose capital is Tbilisi.

5 [2022] EWHC 690, Comm

> [**393**] The ingenious attempts by Mr Cogley to take the acts of preparation away from any chance of a deal with SCPI therefore involve a very partial and incomplete view of the facts.

This is a multi-layered smackdown, each layer more smack-full than the last. First, the old 'ingenious' tag, which must hurt: judicial understatement means any good smackdown has to start with doublespeak 'praise' for the advocate, much like a sumo wrestler will bow before utterly smacking down his opponent. Then, 'attempts'—the judicial equivalent of saying 'nice try'. The last bit is the truly brutal part though. First, Cockerill J smacks down a member of a profession with a commitment to impartiality as being *very* partial, and then, Her Ladyship says that a silk paid to master the facts had only an incomplete view of them. That is some judicial smacking!

§ 3 HHJ Stephen Davies

In *Smith v Gregory*,[6] Mr Ian Tucker argued on behalf of hte appellants in an appeal from the County Court. Presiding, HHJ Stephen Davies came to Manchester High Court Appeal Centre ready to smack down:

> [**49**] In oral submissions Mr Tucker ingeniously sought to extend the argument by contending that the common intention was that the Smiths should have the right to exercise the option to treat the loan agreement as being between the Gregorys and the company, however this fails for the same reasoning, namely that any such intention was not apparent from the email exchanges.

This is a good example of a judo style smackdown, using the other fighter's energy against them. Here, Mr Tucker brought an elaborate submission, made with great effort, and then, barely having to move, HHJ Stephen Davies trips him over by pulling on a single thread: there's no evidence. All the argument as law falls away without any effort, because the elaborate rights can't arise when it all fails at that hurdle. This is a brilliant example of how even a gentle sentence can be a vicious smackdown!

§ 4 HHJ Hodge KC

When it comes to trying to avoid a smackdown, there's an old saying which I just made up: 'Can't dodge the Hodge!' In *Harrington Scott Ltd v Coupe Bradbury Solicitors Ltd*,[7] the defendants made an application to strike out the case including specifically striking out the familiar demand for interest at 8% as bad in law. At that point, HHJ Hodge KC began the smackdown:

> […]Indeed, I consider that there is something surreal, as well as novel, about this part of the defendant's application: it is commonplace for statements of case to include claims for interest at 8% pa yet I have never previously encountered an application to strike out

6 [2022] EWHC 910, Ch
7 [2022] EWHC 2275, Ch

> such a claim as being bad in law and devoid of any prospect of success. I doubt whether the defendant would ever have pursued this part of its application as a stand-alone matter. Further, although I received no submissions on this point, I note that since 7 August 2002 the rate of interest prescribed under the Late Payment of Commercial Debts (Interest) Act 1998 has been 8% over the Bank of England's official dealing rate. For these reasons, I dismiss this part of the defendant's application.

The Dalí-inspired tag of 'surreal' is a special smackdown for lawyers: Dalí famously depicted clocks melting, and lawyers are paid by the hour (and so have a special affinity for clocks). The experience HHJ Hodge KC brings to bear then adds to the full wait of telling counsel that His Honour had 'never ' previously seen such an application, and by surmising the claim was just added on and wouldn't be brought on its own, is pouring a full smackdown of judicial disapproval onto counsel. Then, just to enhance the smackdown, the brutal final point: His Honour takes out a point not even brought to His Honour by counsel. That's right: the judge is smacking down so comprehensively he brought a packed point from home, and it was devastating: a statutory point, letting His Honour smack down with the full weight of parliamentary sovereignty. Turns out what they say is true: you can't dodge the Hodge!

§ 5 *Simler LJ*

The epic drama of the lawsuit against the former King of Spain, *Sayn-Wittgenstein-Sayn v HM King Juan Carlos I of Spain*,[8] may have obscured that the case also delivered the (it is submitted far superior) epic drama of an appellate smackdown. When examining whether alleged acts by the former King were made in a personal or official capacity, Simler LJ delivered the following blow:

> [**58**] But even if the test was whether the alleged acts were acts any private individual could carry out, it seems to me that these were not such acts: a private individual could not ordinarily have procured the use of state machinery by the head of the state intelligence and security service. A clearly pleaded evidential basis to support a conclusion or inference that these were acts of a private individual was required, but was not advanced. It is fanciful to suggest, as Mr Lewis did, that the clear facts alleged in the pleading demonstrate that the appellant, when head of state, procured the General to use state machinery simply as his friend. For the reasons already given, that submission is without foundation.

Mr James Lewis KC had presented quite an argument on this point, but Simler LJ did not need to bother with them. The suggestions were not serious law, but rather 'fanciful', like a child might argue in Unicorn Court before HHJ Father Christmas. All Her Ladyship had to do was re-state the argument, and let its own risibility do the rest of the work. If Mr Lewis KC went to court that day without makeup on (as would seem a reasonable suggestion), then after the hearing both his face and his argument were without foundation.

8 [2022] WLR(D) 483, CA. *Nota bene*: the King in the case stylings is the former King of Spain, having abdicated, but still entitled to the styles and title enjoyed as a reigning monarch.

§ 6 Tribunal Judge Greg Sinfield

To the First-tier Tribunal now, where in the case of *Gill v HMRC*,[9] the succinct tribunal style of Judge (and Tax Chamber President) Greg Sinfield launched into smacking down after just two paragraphs:

> [3] The evidence in this appeal consisted of a bundle of documents, principally correspondence between the parties with relevant legislation and case law, in both electronic and physical form. The bundles were unsatisfactory in several respects. First, the paper bundle used by Mr Edrick Dublin, who appeared for Ms Gill, and the electronic bundle used by the tribunal panel did not contain the same documents: the electronic bundle was 794 pages; the paper bundle was 513 pages. Secondly, the pagination of the bundles was not the same (even for the first 513 pages). Finally, the Appellant's documents and HMRC's documents were included in separate sections which meant that the correspondence was not in chronological order and there was some unnecessary duplication. When preparing electronic bundles, parties should follow the Tax Chamber General Guidance on PDF Bundles dated 7 June 2021. Failure to do so can lead to, at best, confusion and, at worst, an unnecessary adjournment and re-listing of the hearing to allow the bundles to be put into good order.
>
> [4] It was also less than satisfactory that there were no witness statements in this case. Both parties seemed to be content to rely on the correspondence between the parties and some other documents in the bundle as the evidence in the case. That may be sufficient where the facts are agreed and the only issue is one of law. Where matters are not agreed, the party who bears the burden of proving a disputed fact on the balance of probabilities must fail if there is no positive evidence. In this case, HMRC must prove that the penalties were correctly imposed but Ms Gill has the burden of proof in relation to all other issues. The statements of representatives are not evidence. In our view, Ms Gill faced an impossible task in trying to discharge the burden of proof because she did not provide a witness statement or attend the hearing so that she could, with permission, give oral evidence and be asked questions.

This is my kind of smackdown: smackdown about document preparation. No sooner had the representatives set down a heavy bundle than Judge Sinfield set the entire thing on fire by pointing out that, in his chamber, sloppy bundling was *not* going to fly. When the judge says 'unsatisfactory', the inverse powers of judicial understatement mean we can read incandescence into his discussion of the guidance for the preparation of electronic bundles. Then, turning to the substance (or lack thereof) of the bundles, Judge Sinfield smacks down a case approach that somehow brings in 700 pages of bundling without a witness statement in a case where the facts are in dispute. Suddenly, the parts of the bundles that claimed to be evidence are

9 [2022] UKFTT 368 (TC)

shredded into tiny pieces by Judge Sinfield, who makes it smackingly clear that he is not some supply judge, who can be fooled by advocates cheekily claiming that they've done their homework. Bring evidence to his tribunal, or prepare to get smacked down!

§ 7 UTJ Blum & UTJ Chana

We stay in the tribunals system, but move up one level to the Upper Tribunal, for some good, old-fashioned, judge-on-judge smackdown action in *Rhema Ngoh Aqum v ECO*.[10] The case of the appellant was not very strong, and the grounds of appeal were described as 'poorly written and difficult to follow.' However, it emerged that the appellant had one trump card on his side: the propensity to error of First-tier Tribunal Judge Lucas. As UTJ Blum & UTJ Chana said, smackingly:

> [**14**] We are satisfied that the judge's decision contains a material error of law requiring it to be set aside. It is apparent from the face of the application form, and from the Reasons For Refusal Letter, and from the skeleton argument before the First-tier Tribunal (as well as the decision of Upper Tribunal Judge Lindsley) that the case was advanced on the basis of paragraph 297(i)(f). This reads, in material part:
>
> **297.** The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> [...]
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;
>
> [**15**] The judge did not however engage with this requirement. The judge wrongly stated that "this is a sole responsibility case". It was not a sole responsibility case. The person the appellant was seeking to join was not a parent. The only applicable provision was paragraph 297(i)(f). Given that the judge failed entirely to engage with the relevant legal test, we find that he committed a legal error by way of either legal misdirection or by failing to consider the relevant test.

There is not much to add in the way of commentary because the utter barbarity, the utter force, the utter glory of the phrase 'the judge failed entirely to engage with the relevant legal test' is about as self evident as a smackdown gets.

10 HU/10440/2019

§ 8 HHJ McCabe

We go now to the family court, where a financial remedies case, with the typically generic styling of *X v Y*,[11] featured some vicious judge on witness smackdowns. After the breakdown of a marriage of 37 years, a vicious dispute complicated a single case, racking up £330,000 in costs by the time it came in front of HHJ McCabe. As Her Honour worked to divide the assets according to law, the quondam husband of the ill-fated couple came into court and gave extremely unreliable witness evidence . HHJ McCabe gave this unsatisfactory witness a proper smacking down, and at some length, showing the art of a pummelling, intense smacking against a bad witness. We join the smackdown after HHJ McCabe has gone over a number of contradictory answers in submissions to the court about the question of the husband owning land in India:

> [**51**] It is nothing short of staggering that such entirely contradictory answers are given in legal documents prepared for the Court (at least two of them supported by a statement of truth). The answers are, moreover, provided with a degree of detail and specificity, and the promise of documents 'to follow'. They are not just contradictory; they give opposite versions of events. There are, very unfortunately, a reasonable number of examples such as this, where the forensic trail is impossible to follow. It would not be proportionate or appropriate to set them all out in this judgment, but I have them well in mind, due to the careful and thorough case preparation on behalf of the Wife.
>
> [**52**] When he was, predictably, cross examined about this example (and a good many others) the Husband's evidence became little short of farcical. He started by saying that at the time of the original statement that he made to the Court (the Section 37 response statement) in December 2019 (3 months after the parties had separated) he was so distraught at the end of the relationship that he was unable to focus on any level of detail. I would note that this is not born out by the level of detail that is in fact provided within that statement.
>
> [**53**] Of his subsequent documents his general approach was to blame his solicitors. I note that his current legal team is his sixth. It was not clear how many of the previous sets of solicitors would be included within his criticisms, but they ranged from 'my solicitor didn't accurately set out what I told them' to 'my solicitor never asked me the question, she just put the answer in' or 'the solicitor missed it out totally'. He suggested that he had completely failed to read documents before signing them, he then suggested that the solicitor had only sent him the signature page, so he had never had the opportunity to read the contents. He suggested that the solicitor had written the narrative themselves, and completely mis-represented the truth.
>
> [**54**] As officers of the Court, it is so exceptionally unlikely that a solicitor would behave in that manner (let alone more than one solicitor, let alone on repeated occasions) that I have no

11 [2022] EWFC 143

> hesitation at all in rejecting this part of the Husband's evidence as being simply untrue. Moreover, the types of narrative contained in these documents allegedly not written by him are particularly personal and very much sound as though written by a lay person rather than a legal professional[…]
>
> [**55**] …
>
> [**56**] The Husband was evasive, argumentative and I had to give him the warning against self-incrimination. He was a profoundly unsatisfactory witness.
>
> [**60**] This whole issue, the 'evidence', the approach of the Husband, the things he has asserted about it, the way in which he has changed his position, is deeply, deeply troubling. I consider that it demonstrates that the Court has before it a party who will stop almost at nothing in order to achieve the outcome he is aiming for, which is significantly to deny the other party their fair share of the assets upon divorce. I can see no other way of characterising this whole episode and it renders the Husband's credibility almost absent in this case.

Once again, the smackdown speaks for itself. Nothing I say could add to the sheer smack-tacular fashion in which HHJ McCabe has taken down this terrible witness.

§ 9 Costello J

For our penultimate smackdown, we hop over to Ireland, for the shortest smackdown of this list, showing how precision and economy can be just as vicious and brutal. In *Doyle v Foley*,[12] Costello J of the Irish Court of Appeal delivered the following destructive sentence:

> [**51**] […] As regards the rather audacious argument that in failing to issue a motion to dismiss for delay at an earlier point in time that, when a defendant does issue such a motion, the relief should be refused because the defendant also delayed, in his case, in seeking to dismiss the proceedings, is not one which I find persuasive or attractive[…]

This is the 'Boom, Headshot!' trope in legal smackdowns. The hon. judge does not find the argument persuasive or attractive, and the fact that she does not feel the need to say anything further cuts far deeper than a lengthy takedown.

§ 10 Hayden J

Our final smackdown of 2022 came only last week, from proceedings in the Court of Protection: *TN v RN*.[13] Mr Paul Diamond was making submissions on behalf of a father against the capacity of an impaired adult to make certain decisions. Hayden J picks up the story:

12 [2022] IECA 193
13 2022] EWCOP 53

[**25**] Mr Diamond concludes thus:

> The concept of a modern, liberal democratic State rejects the notion of a universal and state-imposed set of values but allows each individual (and, by implication, each family) to chose their own notion of the 'good': the principle is live and let live. Liberalism's uniqueness is that individuals are free to choose their own 'good'.

[**26**] I am bound to say that this elegantly expressed sentence strikes me as supporting the exact opposite of the case Mr Diamond is seeking to advance. It is RN's freedom that is to be protected here and not that of his mother. As is clear from this judgment, RN has a quality of life which is dignified and meaningful. I emphasise again, that he is capable of expressing both his enjoyment and his displeasure, his acquiescence and his resistance. The care plan reflects these fundamental facets of his autonomy and dignity.

This is a magnificent downsmacking on which to conclude. The submission by Mr Diamond was not merely poor, but a literal *own goal*! It actually made the point entirely opposite to what intended, and the careful ease with which Hayden J points this out only aggravates the brutality of the smackdown.

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