DOLMANS INSURANCE BULLETIN

Welcome to the May 2024 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

The Supreme Court Overturns the Decision of the Court of Appeal that the Defendant Local Authority was Responsible for Residual Diminution in Value of the Claimant's Land Following Treatment of Japanese Knotweed

M C Davies v Bridgend County Borough Council

The Supreme Court has handed down Judgment in the case of *M C Davies v Bridgend County Borough Council* [2023] UKSC 16. They have overturned the decision of the Court of Appeal that the Defendant Local Authority was responsible for residual diminution in value of the Claimant's land following treatment of Japanese knotweed, even where the spread had occurred before breach.

Matthew White, Counsel, represented Bridgend County Borough Council in the Supreme Court and was instructed by Dolmans.

The key points at a glance are:

- If Japanese knotweed spread from a defendant's land to a claimant's land before the defendant was in breach of duty, then the defendant is not responsible for either (a) the cost of treating Japanese knotweed on the claimant's land; or (b) the residual post-treatment diminution in value of the claimant's land. That is, in cases of historic spread of Japanese knotweed, defendants have a good causation defence.

- By analogy, if the spread was more than 6 years before issue and the loss arose outside of the limitation period, a defendant is not responsible for the need for treatment or the residual post-treatment diminution in value. That is, if the Japanese knotweed spread more than 6 years before issue (i.e. as of claims issued now if the spread was before 2018), defendants have a good defence.

- It is for a claimant to prove that breach caused loss.

- *Delaware Mansions v Westminster City Council* [2002] 1 AC 321 ("*Delaware*") is properly interpreted as determining that a claimant landowner is entitled to recover the reasonable costs of abating a continuing nuisance.

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REPORT ON

Background

The Claimant owned a terraced house with a garden at the back in South Wales. Beyond his back garden wall was an embankment leading down to a cycle path on an old railway line. As is common on rail corridors, there was Japanese knotweed by the cycle path at the bottom of the embankment, but the evidence was that Japanese knotweed at the top of the embankment had probably not grown up from the bottom. Rather, it had probably been dumped over the garden wall by one of the residents. There it had grown, unnoticed by the Defendant Local Authority. Sometime before 2004, when the Claimant bought his property, the Japanese knotweed had encroached from the Defendant Local Authority's land, underground, such that there were rhizomes on the Claimant's land before 2004.

The Claimant first became aware that Japanese knotweed might be a problem in 2017. He made no attempt to find out who owned the land beyond the end of his garden until someone knocked on his door to tell him that he had Japanese knotweed on his property and that they could represent him in a claim. A Letter of Claim was sent in 2019.

The case followed what has become a fairly ordinary pattern: the Claimant chose his preferred Japanese knotweed valuation experts and instructed them unilaterally. Somewhat unusually, the Claimant decided against using the first two experts from whom he had obtained reports, and replaced them, again unilaterally, with two new experts. At case management stage, the Court, in the usual way, determined that the value of the claim (which was put at £10,000 to £40,000 on the Claim Form and about £34,000 within the Particulars of Claim, although the realistic value of what was claimed was closer to £12,000) did not justify separate experts for the parties and required a new single joint Japanese knotweed expert. The Defendant Local Authority 'lived' with the Claimant's (second) valuer.

Just before Trial, the Defendant Local Authority found and disclosed previously undiscovered documents which suggested that it knew about the knotweed well before its evidence showed that it started treating it in 2018. District Judge Fouracre followed the approach in *Williams & Waistell v Network Rail Infrastructure Limited* [2019] QB 601, and held that date of knowledge of a foreseeable risk of harm was after publication of the Royal Institution of Chartered Surveyors' paper in 2012 and that from 2013 the Defendant Local Authority ought to have been treating the Japanese knotweed. The Defendant Local Authority was held to be in breach of duty from 2013 to 2018. The Defendant Local Authority proved treatment of the Japanese knotweed on its land from 2018. Accordingly, there was an actionable and continuing nuisance from 2013 to 2018.

REPORT ON

The First Instance Decision on Damages

A claim for general damages for distress and inconvenience was dismissed. The Judge rejected the Claimant's evidence that he was 'immensely distressed' by the presence of Japanese knotweed on his land, noting that from when he first became aware that Japanese knotweed might cause a problem – no earlier than 2017 – he did nothing to discover who owned the land at the end of his garden or contact the Defendant Local Authority.

That left the claim for diminution in value of the property, which was made up of various elements, dealt with as follows:

- *Cost of treatment*: This was claimed at £3,600 on the basis of the Claimant's expert's figure, upon whom the Claimant did not have permission to rely. The single joint expert gave a figure of £1,800. The Defendant Local Authority argued that it was always going to be necessary to spend that money, even before breach, because the Japanese knotweed had spread before breach. The Claimant accepted that argument and conceded that this sum was irrecoverable (a concession which, incidentally, the Supreme Court considered properly made).

- *Disturbance and inconvenience*: The Claimant claimed £1,200 for the inconvenience of having Japanese knotweed treatment. This faced the problems that there was no Japanese knotweed to see on the Claimant's land by the time of the single joint expert's inspection and that treatment was always going to be required regardless of breach. It was not pursued.

- *Neighbour cooperation*: The sum of £1,400 was said to reflect the need to secure cooperation from neighbours in treating the Japanese knotweed. Since the relevant neighbour was the Defendant Local Authority, who was actively treating the Japanese knotweed – and, therefore, obviously cooperating – this was held to be irrecoverable.

- *Temporary loss of land*: This was claimed at £1,000, but since there was no visible Japanese knotweed in the garden by the time of the single joint expert's inspection, it was impossible to say there would be temporary loss of use of the land, so this was rejected.

That left the claim for residual diminution in value after treatment. Whilst claims are sometimes put on the basis of diminution in value ignoring the effect of treatment, the correct measure of loss, if recoverable, would be cost of treatment and the residual diminution in value. That residual diminution arises due to an enduring stigma or 'blight' associated with Japanese knotweed.

District Judge Fouracre found, and this was upheld by HHJ Beard on first appeal, that the residual diminution in value was irrecoverable because it was pure economic loss and the tort of nuisance did not exist to protect economic interests.

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REPORT ON

The Court of Appeal on Diminution

The Court of Appeal overturned the decision on residual diminution. They held that the ratio of *Williams* is that there is no nuisance in the absence of encroachment of rhizomes merely because having Japanese knotweed next door reduces the value of a claimant's property. To hold otherwise would be to allow a claim for pure economic loss. However, if there has been encroachment, there has been physical interference with a claimant's property and consequential losses, including diminution in value, these are recoverable.

That part of the decision of the Court of Appeal was not appealed further to the Supreme Court. Rather, the Supreme Court's decision relates to causation.

The Court of Appeal on Causation

Whilst the Claimant accepted that the treatment cost was always going to be necessary (regardless of breach), he also contended that the residual diminution was recoverable. The nuisance was a continuing nuisance. The Defendant Local Authority argued that but for the breach the Claimant would have had a property affected by (value diminished by) Japanese knotweed, and given the breach he had a property affected by (value diminished by) Japanese knotweed, such that the breach had made no difference. Put another way, the rhizomes had, on the evidence, spread by 2004, so it made no difference that the Defendant Local Authority had failed to treat the Japanese knotweed from 2013 to 2018; the problem had arisen before the breach. The Defendant Local Authority's proposition was that loss which precedes breach cannot have been caused by the breach.

The Court of Appeal rejected that argument. They drew an analogy with *Delaware*. In that case, tree roots caused damage to a property in 1989 and the property was sold to new owners in 1990. The new owners spent over half a million pounds on underpinning and sued the tree owner. At first instance, the claim failed on the basis that the damage was said to have occurred during the original owner's ownership. The Court of Appeal and House of Lords disagreed with that decision, holding that the cost of underpinning arising from the tort could be recovered by the owner who had to incur the cost.

In *Davies*, Birss LJ summarised this (at paragraph 47 of the Judgment) as *"The fact the encroachment was historic was no answer when there was a continuing breach of duty as a result of persisting encroachment."*

The Supreme Court on Causation

The Defendant Local Authority's argument had always been simple: if loss preceded breach, then breach cannot have caused loss, and since the concern was with the residual (post-treatment) diminution in value of the Claimant's land, that loss had arisen before breach. *But for breach,* the Claimant would have had a property that required treatment of Japanese knotweed and was then a property that once had Japanese knotweed growing on it; *Given the breach*, the Claimant was in the same position, with a property that required treatment of Japanese knotweed and was then a property that once had Japanese knotweed growing on it.

That is, the Supreme Court has agreed with the Defendant Local Authority's argument.

As a matter of logic, the same argument applies in relation to limitation too. *Davies* was argued on the basis that Japanese knotweed is a continuing nuisance. Since *Jalla v Shell* [2023] UKSC 16; [2023] 2 WLR 1085, that is open to doubt, and the intervener in *Davies* positively contended that Japanese knotweed is not a continuing nuisance. Whether Japanese knotweed is properly seen, on the facts of any given case, as a continuing nuisance, likely by *further* encroachment of rhizomes from a defendant's land to a claimant's land, it ought not impact on the limitation defence. Encroachment over 6 years before a claim is brought is statute barred, whether the nuisance was a continuing one after the encroachment or not. That argument will probably see off more Japanese knotweed claims than a determination that the encroachment probably occurred before the date of legal knowledge (which, for large/institutional landowners, is generally taken as 2012/13 following *Williams*). For a claim issued now, in 2024, the encroachment would need to be 2018 or later.

It is also worth particularly noting the Supreme Court's explanation of *Delaware*. The reasoning of the House of Lords in that case could perhaps have been clearer. It has been clarified that the reason why the new owner could recover the cost of underpinning was because a claimant can recover the reasonable costs of abating a continuing nuisance. In *Delaware* itself, Lord Cooke of Thorndon (at paragraph 33 of the Judgment) suggested that a potential claimant ought to give a potential defendant the opportunity to deal with an ongoing nuisance before becoming entitled to the cost of abatement.

REPORT ON

What Next?

Looking online, it is possible to find some rather scathing comments about claimant solicitors running Japanese knotweed claims. Experience is that claimant solicitors' costs are very significantly larger than the sums at stake in the litigation. The new fixed costs rules for sub-£100,000 cases will stop some of the excess, but costs are still likely to be a significant part of the landscape in these claims. That makes one think that claims might well continue. With reluctance to make predictions for the future, best guesses are:

- It is suspected that claimant firms will continue to wish to use Japanese knotweed experts who tell them what they want to hear. What they will want to hear now is that the Japanese knotweed spread within the last 6 years, to avoid the limitation problem. A change in the default position of regular claimant experts has already been noticed: back in 2020/21, reports were expected to say that the Japanese knotweed rhizomes had probably spread to a claimant's land long ago, thereby suggestive of greater (longer) culpability. When defendants started running the argument in *Davies*, claimant experts' default position seemed to change to say that Japanese knotweed had been present for a relatively short time. It would not be surprising to see more of that.

- It is expected, therefore, that the same problematic battle will continue in which defendants justifiably do not accept the expert selected by a claimant and ask the Court on allocation to appoint a more balanced single joint Japanese knotweed expert. Experience is that that request is almost always acceded to, it being the proportionate way to deal with these claims.

- Perhaps claimants will seek to prove that breach has *increased* if Japanese knotweed encroached before breach (or more than 6 years before issue) that will have given rise to a treatment cost and a post-treatment residual diminution in value, and that which arose before breach (or more than 6 years before issue) will not be recoverable. Perhaps, however, a claimant could show that there is more treatment cost or more residual diminution in value arising as a result of the period of breach. Such argument will face evidential difficulties, but is theoretically available.

Comment

Whilst this case is, undoubtedly, a significant win for the Defendant Local Authority and defendants alike, defendants should not see it as a justification for taking Japanese knotweed less seriously. It remains a significant problem. Landowners should, as before, think about what steps they need to take to meet their legal duty to take reasonable care for their neighbours.

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CASE UPDATES

Abuse of Process - Strike Out

Watford Control Instruments Limited v Brown [2024] EWHC 1125 (Ch)

The Claimant ('C') issued proceedings in June 2018. A first Case Management Conference took place in July 2019 with some directions being made. The Case Management Conference was adjourned for further directions to be listed on the first open date after 30 September 2019. Between September 2019 and March 2022, C did not take any steps to pursue the claim. In July 2022, C applied to relist the Case Management Conference. In response, the Defendant ('D') applied to strike out the claim on the grounds that C's 'warehousing' of the claim amounted to an abuse of process. The Master who heard the Application concluded that C's failure to pursue the claim between September 2019 and March 2022 involved C taking a unilateral decision not to pursue the claim for a substantial period of time while maintaining an intention to pursue it at a later juncture. That was an abuse of process of the kind identified in *Grovit v Doctor [1997].* Nevertheless, the Master held it would be disproportionate to strike out the claim and a more proportionate sanction was to require C to provide security for costs. D appealed on the ground that having found that C was guilty of *Grovit* abuse the Master applied the wrong test in deciding what sanction to apply, which resulted in him failing to strike out the claim when he should have done.

The Judge considered the relevant authorities relating to *Grovit* abuse, including *Board of Governors of the National Heart and Chest Hospital v Chettle (1998)* in which the Court of Appeal said that once an action came to amount to an abuse of the process of the Court it required to be struck out unless compelling reasons to the contrary could be demonstrated. D submitted that this was a binding statement of principle. The Judge concluded that the proposition in the *Chest Hospital* case that 'compelling reasons' are needed to prevent a claim involving *Grovit* abuse from being struck out remains good law and had not been overturned by the CPR. Whilst the CPR stresses the proportionality of any sanction the Court imposes, the *Chest Hospital* case decides that in cases of *Grovit* abuse strike out will be a proportionate sanction unless compelling reasons to the contrary are shown.

It was held that the Master had not applied the correct test. In re-exercising the discretion, the Judge held that, on the facts of this case, there was no compelling reason why the claim should not be struck out. D's appeal succeeded.

CASE UPDATES

Fundamental Dishonesty - Indemnity Costs

Thakkar and Others v (1) Mican (2) AXA Insurance UK PLC [2024] EWCA Civ 552

The Court of Appeal held that there is no default entitlement (or presumption) to indemnity costs on the part of a claimant in circumstances where a defendant has unsuccessfully suggested that the claim is fundamentally dishonest.

The claim arose out of a road traffic accident. The Claimant ('C') alleged that the First Defendant drove his van into C's car. The First Defendant alleged that C pulled out from a parked position into the side of his van. The accident was witnessed by Mr P, who was not known to or related to either party. The Second Defendant Insurers denied liability pre-action and sought to contact Mr P. Mr P withdrew his co-operation when he became aware of the Insurer's suggestion that he might be accused of fraud.

Proceedings were issued and served in October 2020. A defence was filed stating that C's credibility and honesty would be challenged at trial. In May 2021, the Defendants ('D') sought permission to amend the Defence to allege fundamental dishonesty. The Trial Judge who dealt with the Application refused permission to amend on the grounds that the matters put forward came nowhere near to what was required to plead fraud and/or fundamental dishonesty. The parties' accounts of the accident circumstances were entirely different, but that was not unusual in a road traffic accident. It was, however, accepted that if, after cross-examination at trial, there were grounds to do so, Counsel for D could make submissions as to fundamental dishonesty at trial.

The trial took place in April 2022. The Trial Judge found in favour of C, based largely on the evidence of Mr P. The Trial Judge did not express or address any suggestion of fraud or dishonesty, nor did she find that the First Defendant had lied.

It was accepted that C's costs up to May 2021 should be assessed on the standard basis. The Trial Judge's Order provided for C's costs of the trial to be assessed on the indemnity basis because C had beaten a Part 36 offer. C submitted that the costs from May 2021 (when the Application to plead fundamental dishonesty was made) up to trial should be assessed on the indemnity basis. D submitted those costs should be assessed on the standard basis. The Trial Judge agreed with D. C unsuccessfully appealed and made a further appeal to the Court of Appeal on grounds to the effect that (i) the Trial Judge misdirected herself as to the test to be applied when considering indemnity costs and/or that the absence of proper reasons in her decision was sufficient to throw doubt on the test she applied; (ii) the Trial Judge reached a conclusion which no reasonable judge could have reached; and (iii) the refusal to award indemnity costs to C was perverse.

C submitted that in Commercial and Chancery cases the failure of allegations of fundamental dishonesty attracts a 'presumption' that indemnity costs will be awarded and the same approach should apply in personal injury cases. This would reverse the burden of proof and the Trial Judge failed to identify a single issue or feature which pointed against awarding costs on the indemnity basis.

The Court of Appeal held that there is no presumption or even starting point (sufficient to reverse the burden of proof) in favour of indemnity costs. It will always depend on the circumstances of the particular case and the judge retains a complete and unfettered discretion. The default position is always that standard costs will be assessed and paid, unless the party seeking indemnity costs can demonstrate why they are appropriate in all the circumstances.

The Court noted, however, that this does not detract from the statement of the obvious: '*that, because the making of a dishonest claim will very often attract an indemnity costs order against a claimant, a failed allegation of dishonesty will very often lead to the making of an indemnity costs order against the defendant, on the simple basis that 'what is sauce for the goose is sauce for the gander' … A defendant who makes allegations of this kind therefore runs a very significant risk that, if the allegations fail, indemnity costs will be awarded against them.'*

The Trial Judge had not applied an incorrect test and the reasons stated in the Judgment were sufficient to explain the Order she made. Whilst not uncritical of D's conduct, the Trial Judge concluded that, in all the circumstances, this was not a case that met the high hurdle for indemnity costs. Whilst other Judges might have reached a different view, the Trial Judge reached a view to which she was entitled to come, in the exercise of her discretion.

Appeal dismissed.

Multiple Claimants - Proceedings - CPR 7.3 and CPR 19.1

Morris and Others v Williams & Co Solicitors and Others [2024] EWCA Civ 376

The Court of Appeal has given guidance as to when multiple claimants may bring claims in one Claim Form and one set of proceedings.

CASE UPDATES

Background

134 Claimants had issued a single Claim Form against the Appellant law firm seeking damages for breach of the firm's duty to advise properly in relation to the Claimants' investments.

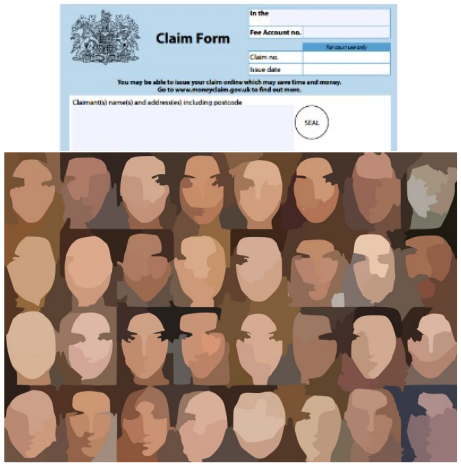
The law firm applied to strike out the Claim Form under CPR 3.4(2)(b) or (c) on the basis that it was an abuse of process or did not comply with CPR 7.3.

Dismissing the firm's Application, HHJ Jarman KC expressly followed *Abbott v Ministry of Defence [2023] EWHC 1475*. He accepted that common issues existed: the definition and scope of duty; breach; recoverable heads of loss and other matters. The existence of individual issues, including causation and reliance, did not outweigh the importance of the common issues.

The law firm appealed.

The Grounds of Appeal

The firm argued that *Abbott* was wrongly decided and that the words of CPR 7.3 and CPR 19.1 severely restricted the situations in which numerous claimants could bring separate claims in one Claim Form.



In relation to CPR 7.3 ("*A claimant may use a single Claim Form to make all claims which can be conveniently disposed of in a single set of proceedings*"), the firm argued that this permitted a single claimant to assert his/her causes of action if it would be convenient for those causes of action to be determined *together.* It was argued that multiple claimants did not come within the rule.

In relation to CPR 19.1 *("Any number of claimants or defendants may be joined as parties to a claim*"), the firm argued that "claim" means "causes of action" – i.e. the cause of action of the single claimant under CPR 7.3. Other people could be joined as claimants to that cause of action, but they could not assert their own causes of action in the same proceedings.

Decision

The appeal was dismissed.

The Divisional Court in *Abbott* had erred in suggesting that CPR 7.3 required the application of the "real progress" test, "real significance" test or the test involving a requirement that the determination of common issues in a claim by multiple claimants, under CPR 19.1, would bind all parties.

CPR 7.3 and CPR 19.1 meant what they said.

CASE UPDATES

Any number of claimants or defendants could be joined as parties to proceedings and claimants could use a single Claim Form to start all claims which could be conveniently disposed of in the same proceedings. The Court would determine what was "convenient" according to the facts of every case, but "convenience" was an ordinary word which required no gloss or test.

The CPR did not restrict the flexibility of CPR 7.3 and CPR 19.1 by imposing a requirement that one or more issues had to be common to, or bind, all or even most of the other parties.

Given HHJ Jarman KC's finding that the 134 claims included significant common issues of law and fact, the Court of Appeal exercised the case management discretion afresh. It concluded that the Claimants were entitled to use a single Claim Form because it would be convenient for their various claims to be tried in a single set of proceedings.

QOCS - Costs of Detailed Assessment

Challis v Broadpiece
[2024] EWHC 1124 (SCCO)

The Claimant had settled their case by way of a Tomlin Order. There was a subsequent assessment of costs. The Claimant failed to beat the Defendant's Part 36 Offer in relation to the costs of the assessment. The Court was required to determine whether the Claimant had QOCS protection – a hitherto undecided point of law.

The provision in issue was CPR 44.13, which provides:

(1) This section applies to proceedings which include a claim for damages:

(a) For personal injuries;

(b) Under the Fatal Accident Act 1967; or

(c) Which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934;

But does not apply to Applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (Applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this section, 'claimant' means a person bringing a claim to which this section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or additional claim.

In light of CPR 44.13, QOCS applies – and only applies – to "*proceedings which include a claim for damages … for personal injuries*" within CPR 44.13(1)(a). If detailed assessment proceedings are not "*proceedings which include a claim for damages … for personal injuries*", then QOCS does not apply at all. If they are, it does.

The issue for the Court to determine, therefore, was whether or not detailed assessment proceedings arising out of a personal injury claim fell within the definition of CPR 44.13 (1)(a).

Decision

Deputy Costs Judge Roy KC analysed the QOCS regime, its purpose and its application to detailed assessment proceedings. The arguments for and against the application of QOCS to detailed assessment proceedings were thoroughly examined.

Having done so, Judge Roy KC held that QOCS does apply to detailed assessment proceedings and, therefore, precluded the enforcement of the Defendant's Costs Order.

The Judge found the Claimant's interpretation – on the basis of the broad interpretation of the word "proceedings", the purposes of QOCS and the lack of an explicit exclusion for detailed assessments – to be more compelling. That decision was influenced by the Supreme Court's analysis in *Ho v Adelekun [2021] UKSC 43* and the intention behind QOCS to prevent a net costs liability for personal injury claimants. The Judge's view was that if QOCS were not to apply, this would be contrary to the legislative intention.

The specific and explicit exception for pre-action disclosure juxtaposed with the lack of any such exception for detailed assessment proceedings. If the intention had been to exclude detailed assessment proceedings as well as PAD applications, the rules would and could have said so.

CPR 47.20(7) provides that: "*For the purposes of r36.17 (costs consequences of failing to beat a Part 36 offer following Judgment), detailed assessment proceedings are to be regarded as an independent claim".* The Court held this suggests that detailed assessment proceedings should not be regarded as a separate claim for other purposes.

The Claimant's construction, whilst somewhat strained, was not considered to be 'overly so', such that the Judge was compelled to reject it, notwithstanding that it gives much better effect than the Defendant's to the legislative purpose as the Court discerned it to be.

Having made this decision, however, the Judge concluded the test for permission to appeal was very clearly met, due to the significance and difficulty of the legal point, and, therefore, permission was granted to the Defendant should they wish to pursue the point further. For the time being, however, QOCS protection extends to detailed assessment proceedings.

For further information on any of the above cases updates, please contact:

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