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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

THE DEPARTMENT OF JUSTICE

Appellant

v

PHOENIX LAW SOLICITORS
(LEGAL REPRESENTATIVES FOR JOSEPH LYNCH)

Respondents

and

BETWEEN:

THE DEPARTMENT OF JUSTICE

Appellant

and

TERENCE MACDONALD KC
AND JONATHAN CONNOLLY BL
(AS REPRESENTATIVES FOR CHARLES VALLIDAY)

Respondents

_____

Dr McGleenan KC with Philip Henry KC (instructed by the Departmental Solicitor's Office) for the Appellant in the Lynch case
Dr McGleenan KC and Philip McAteer KC (instructed by the Departmental Solicitor's Office) in the Valliday case
Desmond Hutton KC (instructed by Phoenix Law Solicitors) for the Respondent Lynch.
Desmond Hutton KC (instructed by Elliotts Legal) for the Respondent Valliday

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KINNEY J

Introduction

[1] These are appeals brought by the Department of Justice (DOJ) "The Department" against decisions of the Taxing Master. The first appeal (Lynch) is brought against two decisions of the master dated 8 December 2022 and 24 March 2023. The second appeal (Valliday) is brought against a decision of the master dated

22 November 2022. They relate to the same statutory provisions and were listed before me as conjoined appeals. The decisions of the Taxing Master in Lynch arose from an appeal brought by the respondent solicitors as legal representatives of Joseph Lynch against the decision of the legal services agency (LSA). The second appeal arose from an appeal brought by the respondent legal representatives of Charles Valliday against a decision of the LSA.

The Lynch case

[2] The facts are relatively straightforward.

[3] The respondent solicitors represented Mr Lynch in criminal proceedings. Mr Lynch had the benefit of a legal aid certificate granted under the Legal Aid and Crown Court Proceedings (Costs) Rules (NI) 2005 (the 2005 rules).

[4] The Legal Aid for Crown Court Proceedings (Costs) (Amendment Number Two) Rules (NI) 2016 (the 2016 rules) inserted into the statutory scheme provision for exceptional payments under a legal aid certificate. The respondent solicitor applied for a certificate of exceptionality under the 2016 rules on 15 January 2019. The respondent requested 760 hours exceptional preparation based on work which would have to be carried out in excess of what would be required for a standard case. The LSA responded on 28 January 2019 stating that a certificate of exceptionality had been granted pursuant to Rule 11 C of the 2016 rules. The LSA stated that the certificate had been issued on a limited basis but the agency would consider further requests for additional hours as preparation for trial commenced.

[5] The certificate allowed 290 additional hours. The covering letter from the LSA set out the basis for allowing those hours. The LSA noted that the respondent was required to contemporaneously record the number of hours spent in preparation work together with the description of the nature of the work performed on each occasion. Those records had to be maintained in a permanently accessible format and on a form provided by the LSA entitled "contemporaneous records." The letter also requested that the respondent solicitor "submit your contemporaneous records of the work undertaken to date by 28 March 2018 (sic)."

[6] The respondent lodged a report with LSA on 12 February 2020 seeking payment of the hours authorised by the certificate. The report included a breakdown of the hours of exceptional preparation work completed and claim for. This work dated from November 2018 onwards. The LSA disallowed payment for 226 of the claimed 290 hours on the basis that the hours had been undertaken before the certificate issued on 28 January 2019. A determination was requested and the original LSA decision was upheld. The issue was one of retrospectivity. The LSA stated that its settled position was that the statutory scheme was prospective only. An appeal was made to the Taxing Master who delivered her written decision on 8 December 2022.

[7] The issue between the parties in this appeal is therefore the net point as to whether or not the work carried out under a certificate of exceptionality granted by LSA is prospective and must be carried out after the date of the certificate or whether work carried out before the grant of the certificate of exceptionality and appropriately recorded can be accepted.

The law

[8] Article 29 of the Legal Aid, Advice and Assistance (NI) Order 1981 makes provision for the grant of criminal legal aid in the Crown Court. This grant is not retrospective and does not cover work carried out before the granting of legal aid.

[9] Article 36 of the same Order provides:

> "36. (1) in any case where a criminal aid certificate has been granted in respect of any person, the expenses properly incurred in pursuance of that certificate including the fees of a solicitor and, where counsel has been assigned, of counsel, shall be defrayed out of monies provided by the Assembly, subject nevertheless to any rules made under this Article and to any directions as to the vouching of payments and the keeping of accounts, records or receipts which may be given by the Treasury."

[10] Article 37 provides:

> "37. The Lord Chancellor in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to –
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> (a) the time and skill which work of the description to which the rules relate requires;
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> (b) the number and general level of competence of persons undertaking work of that description;
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> (c) the cost to public funds of any provision made by the rules; and
>
> (d) the need to secure value for money,

but nothing in this article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this part."

[11] The rules governing the standard assessment and payment of Crown court fees are the 2005 rules.

[12] Rule 4 provides:

> "4.—(1) Subject to rules 16 and 17, costs in respect of work done under a criminal aid certificate to which these Rules apply shall be determined by the Commission in accordance with these Rules and having regard to such directions and guidance as may be issued by the Lord Chancellor.
>
> (2) In determining costs, the Commission shall, subject to and in accordance with these Rules –
>
> (a) take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and
>
> (b) allow a reasonable amount in respect of all work reasonably undertaken and properly done."

[13] Rules 16 and 17 provide:

> "16.—(1) Where the representatives of an assisted person consider that, owing to the circumstances of the case, if it proceeds to trial that trial would be likely to exceed 25 days, the solicitor (on behalf of himself and the advocate) may apply to the Commission for a Very High Cost Case Certificate and the Commission may, in its discretion, grant such application in accordance with paragraph (3).
>
> (2) An application under paragraph (1) shall be made as soon as is practicable after the assisted person has been committed for trial (and, in any event, as soon as the representatives become aware that the trial is likely to exceed 25 days) and shall be submitted to the Commission in such form and manner as it may, in consultation with the taxing master, direct.

(3) When considering an application under paragraph (1) the Commission shall have regard, among the matters which are relevant, to such particulars, information and documents (including any Trial Status Report form) as the solicitor may have submitted.

(4) Where the Commission certifies a case as being a Very High Cost Case, it shall require the solicitor to provide periodic reports and projections as to the future costs of the case in such a form as the Commission shall direct.

(5) If a solicitor fails to comply with paragraph (4) without good reason, the Commission may revoke the Certificate, provided that the Certificate shall not be revoked unless the representatives have been permitted a reasonable opportunity to show cause orally or in writing why the Certificate should not be revoked.

(6) Where a Very High Cost Case Certificate has been revoked under paragraph (5), the representatives' fees shall be determined under rule 8 and rule 11, as appropriate, as if the Certificate had never been granted unless the actual duration of the trial exceeded 25 days.

(7) A solicitor (on behalf of himself and the advocate) may appeal to the taxing master against a decision made under this rule by the Commission and, subject to rule 19, such an appeal shall be instituted within 21 days of receiving notification of the decision by giving notice in writing to the taxing master.

(8) The provisions of rule 14(3), (4), (5), (10) and (13) shall apply with the necessary modifications to an appeal brought under paragraph (7).

(9) The decision of the taxing master on an appeal under paragraph (7) shall be final.

17.—(1) Costs in respect of work done in a Very High Cost Case shall be assessed and determined by the taxing master in accordance with this rule and having regard to such directions and guidance as may be issued by the Lord Chancellor.

(2) When assessing the costs payable under paragraph (1), the taxing master shall have regard, among the matters which are relevant, to –

(a) the Basic Trial Fee, the Guilty Plea 1 Fee or the Guilty Plea 2 Fee which would otherwise be payable if the case in question were not a Very High Cost Case, as appropriate to the representative (including the category of advocate instructed, as applicable) and the offence for which the assisted person was tried, and

(b) the rates of payment set out in Schedule 2.

(3) The provisions of rules 4, 7, 8(1) and (3), 9, 10, 11(1) and (3), 12, 13, 14 and 15 shall apply with the necessary modifications to the costs payable under this rule."

[14] In *Re Kelly and others* [2012] NIQB the court considered the construction of rules 16 and 17 of the 2005 rules as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) (Rules) (Northern Ireland) 2009 (the 2009 rules). The particular issue before the court concerned the fees for preparatory work carried out by counsel where no contemporaneous records of hours spent were recorded by them. In the course of that judgment, Gillen J considered the legislative background then in play, including articles 36 and 37 of the 1981 Order. He also noted that there were two ways in which case became a very high cost (VHC) case. One was by virtue of certification as a VHC case and the second was where a trial lasted in excess of 25 days. At para [23] the court said:

"23. Representatives are entitled to be remunerated for all the work pertaining to the case whether it is before or after the grant of a certificate or before or after the 25 day period has elapsed at the special rate applicable to VHC cases. However, it is only logical that the same requirement to assess the fees claimed on the basis only of hours recorded in the contemporaneous notes should apply as much to the period before the grant of the certificate or before the 25 day period has elapsed as to the subsequent period."

[15] The court noted in the following paragraph that

"It is common case that the consequence of a case becoming a VHCC is that such status is applied retrospectively. Professional fees are claimed at VHC rates from the outset. I can see no logical reason why rule

> 17(3)(a) does other than refer to the representatives recorded time spent on the case irrespective of whether that time was invested before or after a certificate of VHCC status was granted or before or after the 25 day rule was invoked. The purpose behind rule 17 was to produce a single and predictable method of assessment which was to be applied in all VHC cases."

[16] The Legal Aid and Crown Court Proceedings (Costs) (Amendment) Rules (NI) 2011 removed the provision for VHC cases leaving a costs regime of essentially standard fee only.

[17] There followed a number of cases in which this new cost regime was challenged and there was considerable judicial criticism of the failure to devise rules which allowed payment to be made reflecting the time and skill necessary to carry particular types of criminal legal aid work (see for example *Re Brownlee's Application* (2014 NI 188) and *Re Burns' Application* (2015) NIQB 24).

[18] The appellant then issued a consultation on introducing an amendment to the scheme, "Consultation Document; Remunerating Exceptional Circumstances in Cases in the Crown Court" in September 2015). This consultation document inter alia recognised the cases quoted above as an impetus for the new proposals. The consultation document stated that the application of exceptional provisions may remunerate work that lawyers are "or were" reasonably required to undertake (para 3.1) and also recognised that exceptionality could be determined in three different ways, which were to recognise the merit of the application and grant exceptional status at the outset, refuse exceptional status as the criteria were not met, or to defer consideration of the application until the case had concluded so that there was clear evidence to allow the agency to determine the application either by granting it or refusing it (para 4.2 (c)).

[19] Para 4.2(d)–(e) provided an indication as to how assessment under the proposals would be conducted:

> "4.2(d) Agency approval of entry to the exceptionality provision will be conditional and that the sums payable to a representative can only be determined at the end of the case when the Agency will have full access to the complete set of contemporaneous records maintained by the representative of the additional work done by them and can determine whether the work was both reasonably undertaken and properly done. The agency will advise in respect of each individual application whether costed case plans and periodic reports will be required.

(e) The exceptionality provision will be based on a preliminary approval by the Agency of the additional work required. However, the additional amount payable will be determined by the actual work undertaken by the representative and whether it was reasonably undertaken and properly done, in accordance with the general provision in rule 5(2)(b) of the 2009 rules. As such the final determination could be for an amount which is greater or lesser than the preliminary approval granted."

[20] There is a footnote to para 4.2(d) which reads:

"It is proposed that the relevant provision to be inserted into the 2005 rules will be modelled on the rule 17 (Very High Cost Cases – Determination of Representatives Fees) provision which was substituted into the 2005 rules by the 2009 Amendment rules. See also *Kelly QC v Lord Chancellor* [2012] NIQB 70."

[21] Para 4.2(h) provided:

"On the facts of a particular case, it may not be possible for a prospective exceptionality determination to be provided to the legal representative. In such circumstances, the agency will consider the case retrospectively but can only do so based on the contemporaneous records of work done as maintained by the representative involved."

[22] The 2016 rules provided for the new concept of exceptionality by inserting rules 11A–11E into the 2005 rules. By article 1 of the 2016 rules they came into operation on 16 April 2016. Rule 3 of the 2016 rules provides:

"3.—(1) Without prejudice to paragraph (2), these Rules apply for the determination of costs which are payable in respect of work done under a criminal aid certificate granted under Article 29, or deemed to have been granted under Article 36(2), of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 on or after 16th April 2016.

(2) These Rules also apply for the determination of costs which are payable –

(a) in respect of work done under a criminal aid certificate granted under Article 29, or deemed to

have been granted under Article 36(2), of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 before 16th April 2016;

(b) a Certificate of Exceptionality is granted to the representative under rules 11A to 11D of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended by these Rules ("the amended Rules"); and

(c) subject to paragraph (3), the work which is the subject-matter of the Certificate of Exceptionality was done on or after 16th April 2016.

(3) If satisfied that it is in the interests of justice to do so, the Department of Justice may treat any work done before 16th April 2016 as forming part of the additional hours of preparation work authorised under rule 11C or 11D of the amended Rules, as applicable."

[23] Rule 6 provides:

"6. After rule 11, insert –

"**Exceptional Preparation – Application for Certificate of Exceptionality**

11A.—(1) Where a representative considers that a case (or part of a case which is the subject-matter of the application) –

(a) involves a point of law or factual issue that is very unusual or novel;

(b) additional preparation work is reasonably required on the part of the representative in order to prepare the assisted person's defence; and

(c) that work is substantially in excess of the amount normally required for cases of the same type,

the representative may apply to the Department for a Certificate of Exceptionality in accordance with the provisions of this rule.

(2) The application may be submitted by a representative on his own behalf or on behalf of himself and another representative of the assisted person.

(3) The application shall be submitted by the representative at the earliest opportunity after the assisted person has been returned for trial and, subject to paragraph (4), not later than the commencement of the trial.

(4) If satisfied that it was not reasonably practicable for the representative to submit the application earlier, the Department may accept such application after the commencement of the trial.

(5) The application shall be submitted to the Department in such form and manner as it may direct, specifying –

(a) the basis upon which the application is made;

(b) the nature of the work which is the subject-matter of the application;

(c) the number of additional hours sought for each piece of work which is the subject-matter of the application; and

(d) the representative or other fee-earner who will be responsible for each piece of the work.

(6) A representative applying for additional funding under this rule shall supply such further information and documents (including a Costed Case Plan) as may be required by the Department in support of the application.

(7) In this rule a "Costed Case Plan" means a case plan in such form as the Department may direct setting out the additional preparation work which the representative is proposing to undertake, together with the estimated hours and cost of same in accordance with the prescribed hourly rates of payment applicable to that category of representative or other fee-earner.

Exceptional preparation – Determination of application

11B.—(1) The Department may grant an application for a Certificate of Exceptionality only if it is satisfied that each of the criteria prescribed in rule 11A(1) is met.

(2) Subject to paragraph (1), the Department shall grant a Certificate of Exceptionality to each representative it deems satisfies the criteria.

(3) If it is not satisfied that the criteria prescribed in rule 11A(1) are met, the Department shall refuse the application or, if it considers it appropriate to do so, it may defer its decision on the application until such time as the representative supplies further information to satisfy the criteria.

(4) The Department shall communicate its decision made under this rule, together with its reasons for refusing the application or deferring its decision, as applicable, in writing to the representative (or each representative, as applicable).

Exceptional Preparation – Grant of application

11C.—(1) This rule applies where the Department grants a Certificate of Exceptionality under rule 11B.

(2) The Department shall authorise additional hours by the representative or other fee-earner, as applicable, at the rate specified in the relevant table following rule 11E(7), up to a specified maximum to cover such additional preparation work as it will approve under the Certificate.

(3) Where the Department has authorised additional preparation work under paragraph (2), the representative may carry out such additional work up to the maximum number of hours specified under the Certificate.

(4) If further hours of preparation work are required, in excess of those authorised under paragraph (2), the representative shall apply in advance to the Department for an extension under the Certificate.

(5) Without prejudice to paragraphs (2) to (4), the Department shall require the representative (or each representative, as applicable) –

(a) to record contemporaneously the number of hours the representative or other fee-earner spends in preparation work on the case, together with a description of the nature of the work performed on each occasion and a note of the fee-earner performing that work, as applicable;

(b) to maintain such records in a permanently accessible format; and

(c) to provide periodic reports and projections as to the future costs of the case to the Department at such times and in such a form as the Department shall direct.

(6) The periodic reports provided to the Department under paragraph (5)(c) shall, if so directed by the Department, include copies of the records maintained by the representative under paragraph (5)(b).

(7) If a representative fails to comply with paragraph (5) without good reason, the Department shall revoke the Certificate granted to that representative, provided that the Certificate shall not be revoked unless the representative has been permitted a reasonable opportunity to show cause in writing why the Certificate should not be revoked.

(8) Where a Certificate of Exceptionality granted to a representative has been revoked under paragraph (7), that representative's fees shall be determined under rule 8 or 11, as appropriate, as if the Certificate had never been granted.

Exceptional Preparation – Appeal to the taxing master

11D.—(1) A representative may appeal to the taxing master against a decision made by the Department under rule 11B or 11C and, subject to rule 19, such an appeal shall be instituted within 21 days of receiving notification of the decision by giving notice in writing to the taxing master.

(2) The provisions of rule 14(3) to (13) shall apply with the necessary modifications to an appeal brought under paragraph (1).

(3) The decision of the taxing master on an appeal under paragraph (2) shall be final.

Exceptional Preparation – Determination of representatives' fees

11E.—(1) This rule applies to the determination of fees where the fees are claimed by a representative to whom a Certificate of Exceptionality has been granted under rule 11B, and that certificate has not been revoked under rule 11C.

(2) Fees payable under this rule shall be assessed and determined by the Department in accordance with this rule and having regard to such directions and guidance as may be issued by the Department.

(3) When determining the fees payable to a representative under paragraph (2), the Department shall –

(a) have regard to any standard fees payable to the representative under rule 8 or rule 11, as appropriate;

(b) assess the fees claimed for any additional preparation work based only on the hours recorded in the contemporaneous records maintained by the representative; and

(c) where it decides that an additional payment is required under Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (1), allow fees for such additional preparation work at rates no higher than those set out for the appropriate representative (or other fee-earner, as applicable) in the relevant table following paragraph (7).

(4) If the Department authorised additional preparation work under rule 11C(1) to (4) –

(a) the representative shall account to the Department for the manner in which any authorised hours were expended; and

(b) the work allowed this rule shall not exceed the total number of hours so authorised.

(5) The Department shall not allow payment for any additional hours claimed under the Certificate of Exceptionality unless satisfied by the representative that the additional preparation work was reasonably undertaken and properly done.

(6) The Department may require the representative to provide any further information which it requires for the purpose of the determination under this rule.

(7) Any fees allowed under this rule shall be paid to the representative together with the standard fees allowed under Schedule 1."

[24] As part of the current proceedings the court received an affidavit from Paul Andrews who is the chief executive of the LSA. He referred to the LSA's guidance which he described as operational in nature. Para 17 of the guidance advised that representatives should routinely allow 10 working days to enable any application for a certificate to be processed. However, a combination of receiving more applications than had been anticipated and dealing with queries from the applications received resulted in the resources the LSA had for this system "being overwhelmed." In the period from 1 July 2019 to 31 March 2020 the LSA received 740 applications for a certificate but only 32% of those were processed within 10 days.

[25] Mr Andrews averred that the LSA was unable to process applications in a timely manner and therefore sought to accommodate the progress of cases by determining applications as effective from the date on which the application was received rather than the date of the actual decision. For reasons which are not explained in the affidavit, the LSA concluded during 2020 that this approach was not permissible as it was not in keeping with the rules. The circular was issued on 19 August 2020. Para 3 of that circular reminded practitioners:

"that the Agency considers that the scheme is prospective and all requests should be submitted on that basis."

Submissions

[26] I do not intend to set out the extensive written or oral submissions provided by the parties in this case. I am satisfied their positions can be reasonably and fairly summarised in the following way.

Appellants' submissions

[27] The appellants' case is that the matter turns on the proper analysis of the 2016 rules. It maintains that on a fair and proper reading of the rules, and in particular the new rules 11A to 11E, it is clear that the 2016 rules are prospective in application only. It is impermissible to make payment for hours worked before the certificate of exceptionality has been granted. The jurisprudence on legal aid legislation repeatedly states that there cannot be retrospective application for costs unless there is a specific provision within the relevant statutory instrument authorising such an approach. The appellant contends there is no such provision in the 2016 rules. Therefore, in the absence of such provision the operation of the scheme can be prospective only and not retrospective. The appellant has made reference to a substantial body of legal aid jurisprudence which mainly concerns the initial granting of a legal aid certificate.

[28] The decision of the Taxing Master relies on a wide discretion read into rule 11E. There is no discretionary provision to allow such a read into the rules. If there is no such statutory provision it is not open to the court to interpret a rule such as rule 11E (4) as if it provided such discretion. It is a feature of legal aid schemes that a certificate will not have retrospective effect as a matter of general principle. The language of the new rules is clearly prospective. It is up to the applicant to bring a timeous application. The LSA properly took the view in 2019/2020 that retrospective application is ultra vires the rules. Providing examples where the LSA has provided retrospective payment is not a proper answer.

[29] The older 2005 scheme allowing for the VHC case was very different. If a certificate was in place it was open-ended and there was no requirement for a prior allocation of permitted hours. The 2016 rules avoid those difficulties. The considerations are not just about fair remuneration but also about cost and value for money. The case of Kelly therefore has little relevance.

Respondent's submissions

[30] The new rules introduced in 2016 must be seen in context and in particular the environment in which they were intended to work. The 2016 rules were designed to facilitate fair remuneration in the most difficult cases. A number of examples were given to the court of cases where retrospective payment had been made under the 2016 rules and also of the excessive delays in processing applications for certificates of exceptionality sometimes running into years. The essential principle was one of fair remuneration for work properly done.

Evidentially, the approach taken by the LSA between 2016 and 2020 is relevant to the intention behind 2016 rules. The LSA is part of the appellant. The consequence of the construction sought by the appellant is a system which is arbitrary and unfair which points away from the validity of such a construction. The history, starting with the 2005 rules and culminating in the 2016 rules, is to ensure fair payment. Cases can be novel and unusual but this will only become apparent on viewing the case as a whole. If an application is made but not initially accepted it could be considered under the deferral mechanism. However, if the certificate cannot relate back to work already completed it is too inflexible and the parties are not remunerated in the way that the rules envisaged. Guidance was prepared and issued. This required the keeping of contemporaneous records for work done including work done before the certificate is issued. Why should there be a requirement to keep records if it is not possible to make a claim for those hours before the grant of the certificate?

[31] There is no issue in this case of seeking payment for work done before the granting of legal aid certificate. The 2016 rules are predicated on a legal aid certificate already being in place.

[32] The new rules anticipate a two-stage process. First is the consideration of the granting of a certificate under rule 11B. The second stage is the consideration of the number of hours to be authorised under 11C. Significantly, rule 11B allows for the deferral of a consideration for granting a certificate. Rule 11D provides for an appeal from any decision under rules 11B and 11C. This allows, therefore, for an appeal against the deferral or a refusal following a deferral. However, that appeal must be an effective remedy and this cannot be effective if payment can only be made for hours worked subsequent to any grant of a certificate.

[33] The 2016 rules are essentially the same in their application as the VHCC provisions. Both provided for the provision of a certificate, the ability of the LSA to grant, refuse or defer and that contemporaneous records must be kept. The Kelly case makes clear that work could be done before or after the grant of a certificate. Under the Barras principle, where a phrase has been the subject of previous judicial interpretation in the same or a similar context it may be possible to infer that the legislature intended the word or phrase to bear the same meaning as it had in that context.

[34] Rule 3 of the 2016 rules and in particular rule 3(3) makes it clear that work carried out before 16 April 2016 (the date on which the 2016 rules came into effect) can be part of the additional hours of preparation work authorised under rule 11C or 11D. These provisions are clearly therefore retrospective.

[35] This retrospectivity was recognised in this case in the covering letter of 28 January 2019 from the LSA which asked for contemporaneous records to date to be provided. There was no reason to require contemporaneous records for work

before the grant of the certificate unless it was clearly anticipated that these may form part of the work covered by the certificate.

Consideration

[36] The main thrust of the appellant's case is that the 2016 rules are prospective only and do not authorise retrospective application. It relies heavily on jurisprudence relating to legal aid legislation which makes emphatically clear that such legislation cannot have retrospective application unless a specific provision within the relevant statutory instrument authorises such an approach. As I have noted earlier in this judgment, much of the jurisprudence offered by the appellant to support this contention relates to the initial grant of a legal aid certificate. That is not the circumstance in play in this case. There is no dispute that a legal aid certificate had been granted in relation to the crown court proceedings. What is, however, the subject of dispute in this case is the evolving mechanism for establishing appropriate payments for work done. The core issue in this case is not one of retrospective application but instead understanding the effect of the grant of a certificate in relation to payment for work done.

[37] The historical background to the creation of the 2016 rules is clearly relevant. The 2005 rules creating the concept of VHCC certificates was a subject of concern and criticism which led to the changes brought in by the 2011 rules. These were determined to be too inflexible and contrary to the requirements of the enabling legislation. This led to the consultation which was expressly stated to envisage a regime similar to the VHCC but with more controls over costs. The consultation document also made reference to the case of Kelly. In that case as noted already, the court expressly observed that the VHCC certificate could cover work which had already been carried out. This was never challenged or criticised and no mention was made in the consultation document on the issue of the retrospective or prospective effect of the certificate of exceptionality created by the 2016 rules.

[38] Rules 11A-11E are silent on that subject. I do not, however, consider that is the end of the matter and nor do I accept the appellant's rather sweeping submissions that in the absence of an express authority for retrospective effect in the rules themselves such retrospectivity is impossible. That was clearly not the case under the previous VHCC procedure and it was common case in the Kelly proceedings that work conducted either before or after the grant of the certificate could be remunerated under the certificate as long as the other safeguards were met, including contemporaneous record keeping.

[39] A certificate of exceptionality under the 2016 rules is not about the grant of legal aid. It is about authorising payment for work carried out under the extant legal aid certificate. Any work carried out before the grant of the legal aid certificate itself cannot be included as the authorities have made clear.

[40] I am satisfied that a certificate of exceptionality once granted can cover work already done under the legal aid certificate even if it predates the certificate of exceptionality itself and provided it satisfies the other safeguards set out in the rules. A considered reading of the rules clearly supports this interpretation.

[41] Rule 3 of the 2016 rules makes it clear that work carried out before the commencement of the rules, i.e. 16 of April 2016, can be treated as forming part of the additional hours of preparation work authorised under rule 11C or 11D of the amended rules. If the appellant's interpretation is correct then it would create the anomalous and illogical position where work carried out before 16 April 2016 can form part of the hours authorised by a certificate of exceptionality, but work carried out between 16 April 2016 and the date of the certificate could not form part of those hours.

[42] Rule 11B (3) allows the Department to refuse an application or to defer its decision. This means that an application could be made with a decision deferred until the end of the case and then potentially granted. An express statutory power to defer must have utility. A subsequent grant of a certificate effectively becomes a nullity if only prospective work can be remunerated. Any work properly carried out during the period of deferral could not be remunerated at the exceptionality rates. It was accepted by the appellant that the LSA had the power to defer taking a grant decision until after the criminal proceedings had completed. That in my view is entirely inconsistent with an interpretation of the rules which causes them to operate prospectively only.

[43] Rule 11C (4) provides that if further preparation work is required in excess of the hours authorised under the certificate, then the representative shall apply in advance to the Department for an extension under the certificate. This would be an unnecessary and otiose provision if the appellant's argument is correct and work could only be carried out on a prospective basis.

[44] Rule 11D provides a right of appeal to the Taxing Master against the decision made by the Department under rule 11B or 11C. It is the Department's case that the Taxing Master does not have a wide discretion in hearing such an appeal and is also constrained by the prospective nature of the rules. One possible outcome of such an appeal is for the master to return the matter to the LSA for further consideration. Any grant of a certificate of exceptionality made thereafter would again be a nullity and the right of appeal is effectively and unlawfully constrained.

[45] A further argument raised by the appellant is that the principle governing payment for criminal legal aid work is not just about fair remuneration but also cost and value for money. The appellant argues that such principles are only satisfied with the grant of the certificate as prospective in application. However, the amendment to the 2005 rules contained in the 2016 rules is to provide appropriate additional remuneration in exceptional cases. A certificate of exceptionality is appropriate where a legal representative is required to undertake additional

preparation work. Rule 11A sets out the criteria involved before a representative applies for a certificate of exceptionality. The Department shall only grant a certificate if it is satisfied that each of the criteria prescribed in rule 11A are met. There are then additional safeguards to ensure that there is a level of control relating to the expenditure under such a certificate. First, under rule 11C (5) the representative is required to keep contemporaneous records of the hours worked on preparation including details and descriptions of the nature of the work performed and the fee earner performing that work. Those records must be maintained in a permanently accessible format and the representative must provide periodic reports and projections as to the future cost of the case at such times and in such form as the Department should direct. Failure to comply with these requirements can lead to the revocation of the certificate under rule 11C (7). Rule 11E (4) states that the work allowed will not exceed the total number of hours authorised by the certificate. Rule 11E (5) further provides that there will be no payment for additional hours claimed under the certificate of exceptionality unless the Department is satisfied that the additional preparation work was both reasonably undertaken and properly done. It is clear that the additional safeguards envisaged within the amended rules can be met whether the work was carried out before or after the granting of the certificate of exceptionality.

[46] This interpretation of the rules is supported by the contemporaneous documentation including the consultation paper on the creation of the 2016 rules, the guidance on the rules provided by the Department and the LSA and the findings and conclusions reached in the case of Kelly on the basis of the Barras principle. The appellant was clearly mindful of the decision in Kelly when creating these rules and there is no doubt that the legislature created the rules in the knowledge of and having regard to relevant judicial decisions.

[47] In the particular circumstances of this case there is nothing in the terms of the letter granting a certificate of exceptionality which expressly states that the funding is effective only for work undertaken from the date of the grant and not before. Examples were provided of cases where payment was made for work undertaken before the grant of the certificate. The LSA first made an assertion of a policy position in 2020. They have not provided the basis of that policy decision and, indeed, there is a certain irony that the Department now seek to apply that policy decision retrospectively to certificates granted before 2020. At the time that the certificate in this case was granted it was clearly the practice of the LSA to pay for pre-certificate work. There was no evidence placed before me that the initial interpretation adopted by the Department and the LSA was wrong.

[48] There is a generalised assertion in Mr Andrews affidavit that the LSA was concerned about its inability to process the applications for certificates in a timely manner and that during 2020 "on considering the situation" the LSA then concluded that its approach to accommodate the progress of cases by paying for work done before the grant of certificate was not in keeping with the rules. Indeed, the circular promulgated on 19 August 2020 by the LSA simply said that the agency "considers

that the scheme is prospective" rather than an assertion that the rules themselves compel an interpretation for prospective work only. There is no evidence that the LSA ever considered that payment for work carried out before the granting of certificate was wrong. Indeed, if it did believe this to be the case it then purported to exercise a discretion to make such payments which did not exist on its own analysis. Finally, on the evidence before me there is no suggestion that anyone, including the Department or the LSA, ever raised the issue of retrospectivity before 2020, some four years into the operation of the rules.

The Valliday case

[49] In this case counsel representing Mr Valliday made applications for certificates of exceptionality on 23 January 2017 requesting approximately 375 hours of additional work. Certificates were granted to each counsel on 3 April 2017 allowing 116 additional preparation hours. The covering letter sent by the LSA included the following:

> "The Agency recognises that further work will have been carried out by senior counsel in the course of proceedings after you submitted the application and that you will be seeking exceptional preparation time on a whole case basis.
>
> At this time, the Agency is granting the Certificates of Exceptionality to cover the preparation work that is required for the consideration of the evidence/further disclosure as submitted in your application – evidential statements, written exhibits, additional evidence, review of disclosure and photographic albums. The Agency has not allowed, at this time, for the 20 hours sought by you for viewing logs and other disclosure for comparison with CCTV footage. The agency will require further details of the work carried out and the actual time spent to consider these hours.
>
> The Agency has not at this time provided hours beyond the review of the evidence and disclosure as we recognise that the proceedings have developed since the date of application. The agency now asks that you forward your contemporaneous records for the work carried out to date. We also ask that you forward further details, on the costed case plan template, of the work you envisage to be carried out as you prepare for the next stage of the trial…"

[50] Both counsel subsequently claimed for additional hours exceeding the 116 hours allowed. The additional hours were based on contemporaneous records of work which were submitted to the LSA. The LSA paid for the 116 hours in accordance with the certificate. The LSA informed the respondents that they had expended the additional hours granted under the certificate and they had not sought further additional hours under the certificate. It did not allow further hours.

[51] The respondent sought a review which upheld the decision of the LSA. A further review then took place which again upheld the initial decision of the LSA. The panel held that there was no statutory obligation on the part of the Department to advise a representative at the point that they had exhausted the hours granted under the certificate of exceptionality. The panel considered that the exceptional preparation provisions in the rules were clearly prospective and that the panel would be acting ultra vires if they granted hours in excess of those allowed under the certificate.

[52] Both counsel sought reviews and the decision of the review panel was communicated to them by letter from the Agency dated 11 January 2019, the content of which has been set out at para [10] of the Master's determination. The panel affirmed the assessment of additional hours in line with their initial grant of 116 hours outlining:

> "The panel was acutely aware that the lack of further request for additional hours over and above the 116 hours initially granted via letter to both senior and junior counsel was the germane issue in this review request."

[53] Reference was also made to Rule 11C(4) which provides:

> "If further hours of preparation work are required, in excess of those authorised under paragraph (2), the representative shall **apply in advance** to the Department for an extension under the Certificate."
> [Agency's emphasis]

[54] It was held by the panel that neither counsel had complied with this requirement and that a statutory responsibility lay with them to do so. Rule 11E(4) was also referred to which provides,

> "(4) If the Department authorised additional preparation work under Rule 11C(1) to (4) -
>
> (a) the representative shall account to the Department for the manner in which any authorised hours were expended; and

(b) **the work allowed under this rule shall not exceed the total number of hours so authorised."**

[Agency's emphasis]

[55] The Panel also referred to the judgment of Gillen J in the case of *Kelly* and how the principle of public accountability for expenditure of public finance was at the heart of the handling of the claim.

[56] A further review was conducted in April 2019. The panel communicated its decision by letters dated 20 June 2019. Ultimately, the initial decision of the Agency was upheld. Reference was made to the relevant rules and corresponding guidance. It was concluded that the Department was under no statutory duty to perform any actions on foot of receipt of the contemporaneous records or periodic reports, it did not form part of a requisitioning process. There is no statutory obligation on the part of the Department to advise the representative when they have exhausted their hours under the certificate of exceptionality. It was also held to be unreasonable to take an inference from the Agency's acknowledgment of contemporaneous records/periodic reports and interpret this as an acceptance of its contents. The panel held the exceptional preparation provisions were "clearly prospective." It held that the panel would be acting ultra vires if it granted hours in excess of 116 as no other course of action was open to it and it could not approve retrospectively.

[57] The appellant has submitted that rule 11C (4) is the key provision. Neither counsel took steps under this rule to seek an extension of the certificate of exceptionality to cover further hours of work completed by counsel. The appellant also relies on rule 11E (4)(b) as set out above and emphasised by the appellant. The work to be allowed cannot exceed the total number of hours authorised under the certificate.

[58] The respondents submit that the covering letter accompanying the certificate of exceptionality constitutes a partial grant of the application and a partial deferral. The LSA has the power to defer a decision under rule 11B (3) and to request further information before making a further grant. The respondents further submit that they continued to work on the case and submitted contemporaneous records believing that the initial grant would be revisited on receipt of the further information. The respondent also relied on the indication from the LSA in the covering letter that it acknowledged the respondents would be seeking exceptional preparation time "on a whole case basis." The respondents believed that their contemporaneous records provided sufficient information and clarification on what had been done on the whole case to allow for a full assessment on the merits of the case on its conclusion in line with rule 11E.

[59] The guidance document issued by the LSA (referred to above) includes the following:

"19. The Agency will either advise the representative(s) that the application cannot be considered if it is incomplete, refuse the application if it is deemed not to meet the criteria, defer making a determination if it is not clear that there is sufficient evidence to support the application at that time, or issue a Certificate of Exceptionality.
…

42. In circumstances, where the Agency deems it appropriate to grant a Certificate of Exceptionality but with fewer preparation hours this will be stated and written reasons will be provided.
…

45. In certain circumstances the Agency may consider it appropriate to defer its decision on the application until such times as the representative supplies further information to allow the application to be considered more fully; the Agency will provide written reasons as to why its determination of the application has been deferred. In such circumstances, the representative(s) should continue to maintain contemporaneous records of the preparation time expended should a Certificate of Exceptionality be granted in the future.

Section 6 - Request for an Extension to the Certificate

"50. Representative(s) should not exceed the maximum number of hours specified under the Certificate of Exceptionality. Rule 11C(4) provides for the representative to seek an extension to the hours granted under the Certificate of Exceptionality.

51. Any request for further preparation hours must be sought in advance of the total number of hours already granted under the Certificate of Exceptionality being expended. The representative(s) should not carry out any further preparation work in excess of the maximum hours already in place without receiving confirmation from the Agency that the Certificate of Exceptionality will be extended as any such work will be disallowed when the fees are being assessed should the Agency refuse the extension request.
…

68. A request for a review of the Agency's decision not to grant a Certificate of Exceptionality, or the Agency's decision to grant a Certificate but with a reduction in the additional preparation time requested by the representative(s) should be made in writing to the Agency within 21 days of receiving notification of the Agency's decision. Any such request for a review will be considered by a Review Panel of senior managers within the Agency.

Request for a re-determination of fees payable

69. Any request for a re-determination of the fees authorised for payment against the Certificate of Exceptionality that is in place should be submitted in writing, setting out the full reasons as to why the fees should be re-determined. A request for a re-determination of fees payable will be considered in the normal way (that is, the process in place for any request for a redetermination of fees payable under the 2005 Rules). Requests for a re-determination of Crown Court fees are considered by a Review Panel of senior managers of the Agency.

…

73. Where a representative is dissatisfied with the Agency's decision on the determination of their fees for Exceptional Preparation at the conclusion of the case, including the Agency's redetermination of those fees, they may appeal that decision to the Taxing Master in the normal way. In such circumstances, there is also a further potential appeal to the High Court."

Consideration

[60] It is clear that the matter is not as straightforward as the appellant's position suggests which, baldly stated, is that as there was no application in advance for hours beyond those granted by the certificate of exceptionality and no further hours were authorised, then the respondents request must be refused. I have already decided that the provisions within the amended rules are not solely prospective in nature and in any event in this case it is clear that the certificate granted to the respondents was made in respect of work that had already been carried out. The LSA letter of 3 April 2017 accepted that work was carried out by the respondents in the course of proceedings after the submission of the application for a certificate of exceptionality but before the grant of that certificate. The letter also expressly acknowledged that the respondents were seeking exceptional preparation time on a

whole case basis. I consider that it is significant that the letter from the LSA went on to say:

> "**At this time,** (my emphasis) the Agency is granting the certificates of exceptionality to cover the preparation work that is required for the consideration of the evidence/further disclosure as submitted in your application…"

[61] The letter also confirmed that it had not allowed additional hours for certain work but expressly stated that the LSA would require further details of the work carried out and the actual time spent "to consider these hours."

[62] The position stated in the LSA letter is not consistent with the subsequent decisions of the LSA and the panels that there was no power to effectively approve additional hours retrospectively. The letter in fact highlights that the LSA recognised that they had considered the application for certificates only on a partial basis and had deferred consideration of other aspects of the application. Additional hours had initially been requested in the application for identified areas of work and these were not additional hours under rule 11C(4). There is no dispute that the LSA has the power under the rules to defer a decision and there is a requirement for contemporaneous records to be kept should a certificate be granted for those hours in the future. In this case once further information was provided by the respondents to the LSA, no decision was made on the remainder of the hours that had already been applied for in the initial application.

[63] The LSA was fully aware at all times and in particular from the date of the grant of the certificate, that it related only to part of the application made by the respondents and the LSA itself anticipated additional claims would be forwarded in the manner prescribed by them. Rule 11E (4) does not assist the appellants as it refers to the work which has been authorised by the appellant and not the element which has been deferred. Rule 11E (5) retains the safeguard of ensuring that work is reasonably undertaken and properly done before any payment will be made.

[64] It is clear from my conclusions that the rules allow the LSA to consider work carried out in any criminal proceedings even after they have concluded and potentially grant payment in respect of the hours worked in accordance with contemporaneous records kept as long as the other safeguards within the rules are met. In relation to this aspect of the appeals, I am satisfied that the LSA failed to properly or appropriately consider the remainder of the hours sought in the original application once the requested information was provided and failed to apply the statutory test to determine if further payment should be made for the deferred element of the original application.

Conclusion

[65] In light of the above findings, I dismiss the appeals brought in relation to both the Lynch and the Valliday cases. This court has the same powers as the taxing master and may reverse, affirm or amend the decision of the Taxing Master which has been appealed or, indeed, to make such other order as this court thinks fit.

[66] In Lynch, I note that the Taxing Master originally ordered the parties to seek to agree payment for recorded hours based on the contemporaneous records and that they should be calculated from the date of submission of the request for a certificate. This was subsequently amended following a communication from the respondent which was in effect a submission to the master inviting her to change the conclusion in her ruling. The appellant was not invited to respond to this submission.

[67] The master contacted the parties shortly after receipt of the respondent's submission to amend the order. In that correspondence she stated that she did not intend to limit the hours payable in the way set out in the decision and she amended the conclusion to provide that the parties should seek to agree payment for recorded hours carried out in the case based on the contemporaneous records.

[68] This is an unfortunate and inappropriate way to deal with any issues arising from an order which has been promulgated to the parties. A party should not advance unsolicited submissions to a court after a final order has been promulgated without informing all other parties. All parties should be included in any correspondence sent to the court in such circumstances.

[69] I will hear the parties on any orders necessary to give effect to the judgment of the court.