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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY BRONAGH BOWDEN, AS PERSONAL REPRESENTATIVE OF LIAM HOLDEN (DECEASED) FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION TAKEN BY THE DEPARTMENT OF JUSTICE IN NORTHERN IRELAND**

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**Dessie Hutton KC (instructed by Harte Coyle Collins Solicitors) for the applicant**
**Philip McAteer of counsel (instructed by Departmental Solicitor's Office) for the respondent**

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**SIMPSON J**

*Introduction*

[1] The original applicant, Liam Holden, has died since the commencement of these proceedings. In this judgment he will be referred to as 'the deceased.' The case is now being pursued by his personal representative, Ms Bronagh Bowden, ("the applicant"). The respondent is the Department of Justice ("the Department").

[2] The issue in this case can be shortly stated: does the 'compensation' provided for in section 133A of the Criminal Justice Act 1988 ("the 1988 Act") include the costs incurred by an applicant in making the application for compensation.

[3] The background facts are not in any dispute so they, too, can be shortly stated.

[4] In 1973 the deceased was convicted of the (then) capital offence of murder and was sentenced to death; the sentence was later commuted to one of life imprisonment. In 1989 the deceased was released on licence. In 2012 the conviction was quashed by the Court of Appeal. The prosecution did not seek to support the

conviction. The relevant part of the Court of Appeal's judgment ([2012] NICA 26) identified the following reasoning:

> "[24] The case against the appellant depended decisively on the alleged admissions made to the army and the police. In light of the material now disclosed we consider that there is a real possibility that the admissions would not have been admitted in evidence and that if they had been admitted they may not have been considered reliable by the jury. Accordingly, we consider the conviction is unsafe and allow the appeal."

[5] Although that fact appears in the documentation accompanying the deceased's application for compensation, at the commencement of this application I reminded the parties that I had appeared for the prosecution at that appeal, when the prosecution indicated that it was not seeking to support the conviction. Neither party indicated any objection to my hearing this application.

[6] Following the quashing of the conviction the deceased, in February 2014, lodged an application for compensation for a miscarriage of justice pursuant to the provisions of section 133 of the 1988 Act. An independent assessor, then Kevin Rooney QC ("the IA") determined that the total amount of compensation for pecuniary and non-pecuniary loss was £1,182,166. However, since the provisions of the 1988 Act restricted the maximum award of compensation to £1 million, the deceased received £1 million. On 22 March 2017 the respondent wrote to the deceased's solicitors enclosing a document setting out the relevant figures and noting that the cap was £1 million. The deceased, if content to accept the payment, was to sign the document (and did sign the document on 23 March 2017), which read (where material):

> "I William Holden accept £1,000,000 in full and final settlement of my application with the Department of Justice for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988…"

[7] In the course of preparing his case for compensation the deceased incurred legal costs and the costs of instructing expert witnesses. Subsequently, the IA assessed as being "necessary reasonable and proportionate" the costs incurred in the sum of £120,171.12.

[8] The Department has refused to pay these costs. In an email of 3 May 2018 containing what the applicant says is the impugned decision, the respondent said, in response to a request for the payment of the costs:

> "Please note as previous correspondence has highlighted, Section 133A (5) of the Criminal Justice Act 1988 (as

> amended) applies in this case. As such your client has already received the maximum compensation that can be awarded."

[9] The dispute is neatly encapsulated in the Order 53 Statement, in para 2(b) of which the applicant seeks:

> "A declaration that the [deceased] should be entitled to payment of the necessary, reasonable and proportionate legal and other costs incurred by him in making his application for compensation for miscarriage of justice in addition to the statutorily capped maximum amount of compensation allowed for under S.133(4A) and S.133A(5) of the Criminal Justice Act 1988."

[10] I understand from the parties that this is the first occasion on which the compensation figure has (ignoring costs) exceeded the statutory maximum of £1 million. Therefore, it appears that this is the first time this issue has arisen. If, for example, the assessment of compensation had been £750,000 the amount for costs, described as "necessary reasonable and proportionate", would have been payable by the respondent, as clearly falling within the cap of £1 million.

***The opposing submissions***

[11] Mr Hutton KC identifies the principal issue of controversy between the parties as being the scope of the term 'compensation' in the relevant legislative provisions and whether it is properly to be interpreted as relating only to what he would term 'compensation per se' or whether it includes costs incurred by an applicant in making his case for that compensation. He submits that the fact that those within government historically might have considered that costs were included in 'compensation' is neither here nor there, and it does not follow that such a view can be the intention of Parliament when enacting the relevant legislative provisions.

[12] Mr Hutton draws a distinction between compensation (or damages) and costs. Included in his submissions on this issue is a passage from *Halsbury's Laws of England* as suggesting that there is a "bright, luminous line between the two." The passage begins: "Costs are on principle kept distinct from damages."

[13] Within the Order 53 statement, reiterated in the skeleton argument and emphasised in oral argument, the respondent's interpretation of the legislation (as articulated in para [8] above) is challenged on a number of bases. First, that it undermines the statutory intent that an applicant should "receive restitutio in integrum" subject to the statutory maximum. If, as is inevitable and anticipated by both an applicant and the respondent, legal costs are necessarily incurred in the making of the application for compensation, then the statutory maximum

compensation will never be paid. This is because deserving applicants will never receive the maximum amount of compensation, since their costs of making the application will come off that maximum amount. Thus, says the applicant, the respondent's interpretation leads to "undesirable or absurd adverse consequences." These are described as 'adverse' in the sense, says Mr Hutton, that Parliament can be presumed not to have intended those consequences, relying on *Bennion, Bailey and Norbury on Statutory Interpretation*, 12.1-12.7.[1]

[14] It is further submitted that an "alternate, proper, remedial and/or updating construction" of the provision is required so as to ensure that such an applicant is paid his "necessary, reasonable and proportionate legal and associated costs relating to the application for compensation." (*Bennion et al*, 8th ed. 14.1 and 14.2). This is because legal representation is necessary; forensic accountancy and other (eg medical) expertise is necessary; and not providing for those costs would impose an "inequitable and unjust burden on deserving applicants."

[15] In addition Mr Hutton submits that the power to provide for these costs can be found or inferred by necessary implication from the power to pay compensation. He relies on the legal maxim which, translated from the Latin, means that where anything is granted, that is also granted without which the thing itself is not able to exist.

[16] On behalf of the respondent Mr McAteer submits that if costs are to be payable separately under any statutory scheme, specific provision must be made in the legislation. Absent any such provision, there exists no power for the payment of costs. He adds that if costs incurred in making the application do not form part of the compensation payable then the result would not be that a separate payment would be made for costs but, rather, that there would be no power under the 1988 Act or the statutory scheme to make any payment in respect of costs at all.

[17] I am indebted to both counsel for their comprehensive and clear submissions. I confirm that I have read, and taken into consideration, all the papers in this case contained in the trial bundles.

***The background and the legislative provisions***

[18] Prior to the passing of the 1988 Act there was no statutory basis for the payment of compensation to persons. As deposed to by Susan Nicholson, Deputy Principal in the Department, in an affidavit filed in these proceedings:

> "For many years, the payment of compensation for miscarriages of justice was the subject of discretion exercised by the Home Secretary and was made on a wholly ex-gratia basis. There was no published guidance

[1] The most recent (8th) edition of the textbook discusses this issue at 13.1-13.7

> as to when the discretion would be exercised or the criteria for assessment of the amount awarded, although, from 1957, it became the practice for the amount of compensation to be fixed on the advice and recommendation of an independent assessor." (Para 8)

[19] She goes on to say (para 9) that the original legislative provision in the 1988 Act "helped address the United Kingdom's obligations under the International Covenant on Civil and Political Rights which was passed by the General Assembly of the United Nations on 20 May 1976." She cites Article 14(6) of the Convention which provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law…."

[20] From 1976 compensation payments were assessed by an assessor appointed by the Home Secretary, and the Home Secretary exercised a broad discretion in the payment of compensation. He was not bound to accept the assessor's recommendation, although he normally did. The applicant for compensation was not bound to accept the offer made, but could pursue the matter by way of a legal claim. He could not, however, accept the offer and make a legal claim.

[21] It was not until 1985 that the then Home Secretary set out the circumstances in which the discretion would be exercised.

[22] Section 133 of the 1988 Act came into force on 11 October 1988. However, according to Ms Nicholson (para 15 of her affidavit) for a period of time — until 19 April 2006 — there were "two compensation schemes in force: a statutory scheme and an ex-gratia scheme covering certain categories of case falling outside the scope of the legislation."

[23] The non-statutory scheme was abolished on 19 April 2006 following a decision by the government "to reform the arrangements under which state compensation was paid for miscarriages of justice" (Ms Nicholson at para 17). At para 18 she says:

> "The Written Ministerial Statement made by the Home Secretary on 19 April 2006 confirmed that the policy intention behind the reforms was to modernise and simplify the system and bring about a better balance with

the treatment of victims of crime. Para 16 of this Statement extended these changes to Northern Ireland."

[24] Accordingly, sections 133A and 133B were inserted into the 1988 Act by the Criminal Justice and Immigration Act 2008. The full history leading to the amendments to the legislation is set out in Ms Nicholson's affidavit between paras 17 and 28.

[25] The following are the provisions of sections 133, 133A and 133B of the 1988 Act which are relevant to this application:

"**133 Compensation for miscarriages of justice**

"(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to, his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned.

(2A) But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of the

compensation shall be assessed by an assessor appointed by the Secretary of State.

(4A) Section 133A applies in relation to the assessment of the amount of the compensation…

**133A Miscarriages of justice: amount of compensation**

(1) This section applies where an assessor is required to assess the amount of compensation payable to or in respect of a person under section 133 for a miscarriage of justice.

(2) In assessing so much of any compensation payable under section 133 as is attributable to suffering, harm to reputation or similar damage, the assessor must have regard in particular to:

(a) the seriousness of the offence of which the person was convicted and the severity of the punishment suffered as a result of the conviction, and

(b) the conduct of the investigation and prosecution of the offence.

(3) The assessor may make from the total amount of compensation that the assessor would otherwise have assessed as payable under section 133 any deduction or deductions that the assessor considers appropriate by reason of either or both of the following:

(a) any conduct of the person appearing to the assessor to have directly or indirectly caused, or contributed to, the conviction concerned; and

(b) any other convictions of the person and any punishment suffered as a result of them.

(4) If, having had regard to any matters falling within subsection (3)(a) or (b), the assessor considers that there are exceptional circumstances which justify doing so, the assessor may determine that the amount of compensation payable under section 133 is to be a nominal amount only.

(5) The total amount of compensation payable to or in respect of a person under section 133 for a particular

> miscarriage of justice must not exceed the overall compensation limit. That limit is—
> (a) £1 million in a case to which section 133B applies, and
>
> (b) £500,000 in any other case
>
> **133B Cases where person has been detained for at least 10 years**
>
> (1) For the purposes of section 133A(5) this section applies to any case where the person concerned ("P") has been in qualifying detention for a period (or total period) of at least 10 years by the time when—
>
> (a) the conviction is reversed,
> …
>
> as mentioned in section 133(1)."

[26] The deceased served more than 10 years' imprisonment, so section 133B applied to his case.

[27] Unlike the ex-gratia scheme, nothing in the amended 1988 Act prevents an applicant from pursuing a civil claim for compensation — as was done by the deceased (see the judgment of Rooney J [2023] NIKB 39).

[28] The affidavit of Ms Nicholson also includes an earlier draft of section 133A. This reveals that initially subsection (5) would have read:

> "The total amount of compensation payable to or in respect of a person under section 133 for a particular miscarriage of justice, disregarding any compensation payable in respect of excluded expenses, must not exceed the overall compensation limit. That limit is £500,000."

[29] In addition, there was a draft subsection (6) which read:

> "In subsection (5) 'excluded expenses' means;
>
> (a) any of the following to the extent that they were reasonably incurred in consequence of the person's conviction or with a view to reversing the conviction or securing his pardon-
>
> (i) legal or medical expenses;

(ii) other expenses in respect of any [necessary] [professional services];

(iii) expenses incurred by [relatives] or friends of the person in visiting him while in custody;

(iv) [expenses incurred in connection with any campaign conducted with a view to reversing the person's conviction or securing his pardon;]

(b) any legal or other expenses reasonably incurred in connection with the making of the application for compensation."

[30] In the event, in the legislation as enacted, subsection (5) omitted the words underlined above, raised the limit of compensation (in certain circumstances) to £1million and omitted the above version of subsection (6).

***The 2014 guidance***

[31] According to Ms Nicholson's affidavit the Department was established on 12 April 2010 as part of the devolution of justice matters to the Northern Ireland Assembly and it took over from the Northern Ireland Office the responsibility for decisions to pay compensation for a miscarriage of justice under section 133. Ms Nicholson goes on to depose (para 33):

> "The Department reviewed existing arrangement regarding the assessment process in consultation with the Ministry of Justice and legal advisers and developed new departmental guidance for applicants. These arrangements (which included policy in relation to legal and other expenses in the revised Note to Successful Applicants) were submitted for consideration by the Northern Ireland Audit Office and a number of recommendations were made to ensure we adhered to the strict standards required by the NI Assembly in the management of public funds."

[32] Following that review the respondent published, on 1 April 2014, a document entitled "COMPENSATION FOR WRONGFUL CONVICTION: NOTE FOR SUCCESSFUL APPLICANTS."

[33] The following paras of the Note are relevant to this challenge:

"**Principles applied to the assessment of awards**

6. The assessment of compensation will take account of both non-pecuniary and pecuniary loss arising from the wrongful conviction, and the Assessor will make his final assessment in accordance with the provisions of Sections 133A and 133B of the 1988 Act, as inserted by Part 4, Section 61 (7) of the Criminal Justice and Immigration Act 2008 (see Annex A). In reaching his assessment, the Assessor will apply principles analogous to those governing the assessment of damages for civil wrongs (subject to the maximum awards).

…

**Statutory provisions**

8. In assessing any compensation payable under section 133 as is attributable to suffering, harm to reputation or similar damage, the Assessor is required to have regard in particular to -

(a) the seriousness of the offence of which the person was convicted and the severity of the punishment suffered as a result of the conviction, and

(b) the conduct of the investigation and prosecution of the offence.

**Non-pecuniary loss**

Damage to character or reputation; hardship, including mental suffering; injury to feelings; and inconvenience.

**Personal pecuniary loss**

- the applicant's loss of earnings as a result of the conviction (please supply the best available documentary evidence, together with details of any State benefits received during the same period)

- the applicant's loss of future earning capacity

- loss of earnings for any one year is limited to 1.5 times the median annual gross earnings.

- legal costs incurred but generally restricted to the amount payable to a solicitor under the legal aid help rates (see below for further information) [2]

- additional expenses incurred, eg for travelling, in consequence of detention or campaign costs, including such expenses incurred by the immediate family of the applicant or (exceptionally) third parties. Where the Assessor includes in an award a sum in relation to such expenses, the compensation payment will if necessary make provision to ensure that that other persons' costs are in fact reimbursed.

- The total sum for both pecuniary and non-pecuniary loss will not exceed the maximum prescribed limits.

…

**Legal costs and other expenses**

12. When making his assessment, the Assessor will consider the extent to which any expenses, legal or otherwise, incurred by the applicant in pursuing his/her application for compensation should be met as part of the claim. The assessor will not include in his award the applicant's costs associated with judicial reviews before the Department's decision to award compensation. Other legal costs may be paid up to the full amount at the discretion of the Assessor, if he considers them to be reasonable and proportionate. **All legal costs are only payable as part of any payment up to the appropriate compensation limit**. In submitting their observations solicitors should provide an itemised schedule of costs, to enable them to be included in the final assessment. This should include estimated further costs for handling the final assessment. Prior agreement to the estimated costs of reports, e.g. for employment, accountancy or medical reports, should be sought from the Department of Justice.

[2] This is clearly a 'cut and paste' reference to English legal aid rates, as there is no such scheme in Northern Ireland

> 13. It is anticipated that the submissions regarding losses will be prepared by the applicant, the solicitor or other legal representative who is handling the application for compensation. The reimbursement of any counsel's fees in connection with those submissions will not be made as a matter of course, and prior permission must be obtained before counsel is engaged. Other disbursements, such as those listed in para 12 above, will require the prior approval by the Department and, again, a case must be made out for the commissioning of the reports in question, including the estimated costs."

(The emphasis in bold — in para 12 above — appears in the original guidance document)

***The decisions of the Independent Assessor***

[34] In a thoroughly detailed, careful and comprehensive assessment document, dated 15 March 2017 and running to some 51 pages, the IA rehearsed the history of the matter, the statutory scheme and set out relevant parts of the guidance note, before dealing with the facts of the case and analysing all relevant factors so far as they informed his assessment. Following the application of the then appropriate discount rate, he assessed non-pecuniary loss at £565,000 and pecuniary loss at £548,323, giving an overall figure of £1,113,323. Having referred to the statutory cap on compensation the IA said (in para 9.4):

> "It is clear from the above that the independent assessor does not have any discretion to increase an award above the statutory limit. Accordingly, for the purpose of this assessment, I make an award of £1,000,000 to include both non-pecuniary and pecuniary loss."

[35] Under the rubric "Legal Costs and Disbursements" the IA said:

> "This has been a difficult and complicated case. I will make a separate assessment in respect of the breakdown of costs supplied by the Applicant's Solicitors."

[36] In a further assessment document of some 13 pages entitled "Assessment for Costs" and dated April 2018 the IA considered in detail submissions and correspondence in relation to costs. In order to assist his assessment, the IA appointed and obtained a report from Mr Paul Kerr, Legal Costs Consultant. An email from Ms Nicholson dated 10 April 2017 records that:

> "The Assessor has recommended that the most appropriate and effective manner to deal with the claim

> for costs is to employ a costs drawer who has the experience and expertise to deal with such a claim. I would therefore propose to engage the services of Mr Paul Kerr."

[37] Following the receipt of Mr Kerr's report, Ms Nicholson invited (22 August 2017) submissions in relation to the Kerr report from the deceased's solicitors, who then obtained a report from Sheridan Legal Costing Services, dated 12 October 2017, in response to the Kerr report. At the direction of the IA a second report was obtained from Mr Kerr.

[38] At para 17 of the costs assessment document the IA said:

> "In conclusion, I have considered and agree with the calculations made by Mr Paul Kerr. In respect of Mrs Coyle's profit costs for the work done by herself, she is entitled to a sum of £100,000 plus VAT. This represents a small increase in the figure calculated by Mr Kerr. Regarding the work done by the legal executive, I am prepared to award £3,000 plus VAT. Again, this represents a small increase in the figure assessed by Mr Kerr. The total figure is, therefore, £103,000 plus VAT."

[39] To this was added the sum of £17,171.12 for certain disbursements, making a total sum of £120,171.12. This, therefore, was the total sum for costs which were regarded by the IA as being "necessary, reasonable and proportionate."

[40] It seems obvious from the whole nature of the exercise carried out by the IA that he was under the impression that he was awarding costs to the deceased's solicitors over and above the £1,000,000 awarded by way of compensation. It is obvious, also, that further costs were incurred by the deceased's solicitors in the costs assessment exercise and that these costs were incurred, if not with the encouragement, then at the very least with the condonation, of the respondent. However, this fact does not of itself answer the question of statutory interpretation which arises in this case.

***The modern approach to statutory interpretation***

[41] In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 Lord Bingham said (para [8]):

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a

> whole should be read in the historical context of the situation which led to its enactment."

At para [21] Lord Steyn said:

> "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763. In any event, nowadays the shift towards purposive interpretation is not in doubt."

[42] In *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for HMRC* [2020] UKSC 47 the leading judgment was given by Lord Reed and Lord Hodge, with whom Lord Lloyd-Jones and Lord Hamblen agreed. That case dealt, inter alia, with statutory limitation provisions. At para [155], identifying the "fundamental purpose", Lord Reed and Lord Hodge said:

> "But the question which the Appellate Committee [in the decision in *Kleinwort Benson Ltd v Lincoln City Council*] should itself have considered was whether the result of its decision would be consistent with Parliament's intention in enacting the 1980 Act. It is the duty of the court, in accordance with ordinary principles of statutory construction, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it. Lord Goff did not, however, undertake any analysis of section 32(1), and made no attempt to give it a purposive interpretation."

[43] *Kostal UK Ltd. v Dunkley and others* [2021] UKSC 47 was a case in which the Supreme Court had to consider the proper interpretation of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. Giving the majority judgment Lord Leggat, with whom Lord Briggs and Lord Kitchen agreed, said, at para [30]:

> "First, as with any question of statutory interpretation, the task of the court is to determine the meaning and legal effect of the words used by Parliament. The modern case law — including, in the field of employment law, the recent decision of this court in *Uber BV v Aslam* [2021] UKSC 5, para 70 — has emphasised the central

> importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose. Sometimes the context and background, or the statute viewed as a whole, provides clear pointers to the objectives which the relevant provisions were seeking to achieve. In other cases, however, the purpose needs to be identified at a level of particularity which requires it to be elicited mainly from the wording of the relevant provisions themselves."

[44] In a concurring judgment Lady Arden and Lord Burrows said (para [109]):

> "We are here faced with a question of statutory interpretation. It is therefore first crucial to clarify the approach we must take. The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose … In carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant consultation papers, and, within the parameters set by *Pepper v Hart*…, at ministerial statements reported in Hansard."

[45] Speaking extra-judicially[3], Lord Burrows has said:

> "Sometimes students are taught that there are three rules of statutory interpretation which the courts can choose between. The literal rule, the golden rule and the mischief rule. I think that is very misleading because there is only one correct modern approach — that one must ascertain the meaning of the words in the light of their context and the purpose of the provision — and none of those three rules quite captures that approach, albeit that the mischief rule perhaps comes the closest."

[46] I bear in mind all of this guidance when approaching the task of statutory interpretation in the present case.

***Discussion***

[3] Sir Christopher Staughton Memorial Lecture 2022 - 'Statutory Interpretation in the Courts Today'; University of Hertfordshire, 24 March 2022

[47] In the statutory scheme, as provided for in the 1988 Act as amended, there is no definition of 'compensation' for a miscarriage of justice. Section 133A sets out a number of matters which the IA has to take into consideration in the assessment of compensation. Section 133, however, provides:

> "(5) The total amount of compensation payable to or in respect of a person under section 133 for a particular miscarriage of justice must not exceed the overall compensation limit. That limit is — (a) £1 million in a case to which section 133B applies." [emphasis added]

[48] It is common case that there is no reference to costs in the Act nor is there any reference to the payment of costs. As noted above (para [12]), Mr Hutton KC relies on the citation from *Halsbury* that "Costs are on principle kept distinct from damages." I am content to accept that as an unassailable proposition, but the citation clearly relates to litigation in which one party sues another for compensatory damages. The introductory part of the para from which Mr Hutton takes his citation begins: "The term 'costs' signifies the sum of money which the court orders one party to pay to another party in respect of the expense of litigation incurred by the latter." I do not consider that the proposition from *Halsbury* assists in arriving at a conclusion in this case.

[49] In my view, for there to be a liability in costs, there must be a basis for a court or tribunal to order the payment of costs. So, for example:

- the power to award costs "of and incidental to all proceedings in the High Court and Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court…" is to be found in section 59(1) of the Judicature (Northern Ireland) Act 1978;

- in the County Court, rules of court made under article 47 of the County Courts (Northern Ireland) Order 1980 include Order 55 relating to costs; Order 55(1) stating that a "decree granted by a county court shall … carry such costs as are provided by this Order";

- Rule 33 of The Lands Tribunal Rules (Northern Ireland) 1976, made pursuant to the power in section 9 of the Lands Tribunal and Compensation Act (Northern Ireland) 1964, provides that "… the costs of and incidental to any proceedings shall be in the discretion of the Tribunal…";

- before the Charity Tribunal, the limited bases for an award of costs is provided for explicitly in section 13 of the Charities Act (Northern Ireland) 2008.

[50] The absence from the 1988 Act of any provision for costs to be awarded over and above the award of compensation is, in my view, significant. It is also, as the

respondent points out, in contradistinction to the wording of another statutory compensation scheme, namely that which is contained in the Criminal Injuries (Compensation) (Northern Ireland) Order 1988.

[51] In article 2 of that Order 'compensation" is defined as meaning "compensation under this Order." Article 3 provides, where material:

> "**Payment of compensation for criminal injuries**
>
> 3.—(1) Subject to and in accordance with the provisions of this Order, where a person sustains a criminal injury in Northern Ireland after the coming into operation of this Order the Secretary of State shall, on application made to him, pay compensation.
>
> (2) Where the victim of a criminal injury survives, compensation shall only be payable—
>
> (a) to the victim in respect of—
>
> (i) expenses actually and reasonably incurred as a result of his injury and any other expenses resulting directly from his injury which it is reasonable and proper to make good to him out of public funds;
>
> (ii) pecuniary loss to him as a result of total or partial incapacity for work;
>
> (iii) other pecuniary loss resulting from his injury;
>
> (iv) his pain and suffering and loss of amenities;
>
> (v) certain consequences of rape in accordance with Article 9."

[52] Article 6 deals with assessment of compensation and article 8 imposes a limit on compensation for pecuniary loss.

[53] Article 13 provides:

> "**Ancillary provisions as to payments**

> (1) The Secretary of State may, if he thinks fit, make one or more payments on account of the compensation payable but, subject to that, compensation shall be a lump sum.
>
> (2) Where on an application under Article 4 the Secretary of State pays compensation to any person, the Secretary of State shall also pay to that person, in respect of the costs and expenses incurred by him in making out and verifying his claim to compensation, such sum as is reasonable having regard to the circumstances and references to compensation in para (1) and (3) and Articles 17 to 21 shall be construed as including references to any such sum.
> …" [emphasis added]

[54] Thus, the (now historical) criminal injuries legislation specifically provided for the payment of "such sum as is reasonable" for costs, over and above the sum paid by way of compensation.

[55] A provision similar to the above could have been inserted in the 1988 Act when it was amended in 2008. Far from this (or some similar provision) being inserted in the Act, the respondent's evidence shows that any reference to costs was specifically removed from the final version of section 133A (see paras [28] to [30] above).

[56] I am satisfied that on a proper reading of the legislative provisions, the £1million awarded by way of compensation must include the costs incurred during the making of the application, and that there is no provision in any relevant legislation for the payment of costs over and above the compensation payment. I am satisfied that part of the purpose behind the amendments to the original legislation was deliberately to apply a cap to the payment of all moneys to an applicant, being pecuniary and non-pecuniary compensation and including the costs incurred in the making of the application for compensation.

[57] As noted above, Mr Hutton KC relied on *Bennion et al* at 12.1-12.7 (now 13.1-13.7) for the proposition that there is a presumption in statutory interpretation that an 'absurd' result has not been intended by the legislature. The authors of the textbook say that the concept of 'absurdity' has been given a very wide meaning,

> "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief."

[58] Being only a presumption it can be displaced, and one of the factors which can displace it is whether the legislative provision is part of a cogent statutory scheme.

[59] In light of my decision about the statutory scheme, I reject the contention that not to pay costs over and above the 'compensation' results in absurdity, irrespective of which adjective identified by *Bennion* one uses. In my view the legislation produces precisely the outcome sought and intended by the legislature. The reliance by the applicant on the maxim restitutio in integrum does not assist. By its very existence the statutory cap results in an applicant, whose compensation is assessed (as here) at more than £1million, will not be fully compensated, ie there could never be restitutio in integrum for such an applicant.

[60] Mr Hutton also asks the court to apply an "alternate, proper, remedial and/or updating construction" of the legislation (see para [14] above) and relies on paras 14.1 and 14.2 of *Bennion*. Para 14.1 of *Bennion* says:

> "Acts are usually regarded as 'always speaking.' Here, it is presumed that the legislature intends the court to apply a construction that allows for changes that have occurred since the Act was initially framed (an 'updating construction')."

And the "Comment" section begins:

> "Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. Although the language originally used endures in law, its current subjects may find that law more and more ill-fitting…
>
> The legislature, in the wording of an enactment, is expected to anticipate developments over time and drafters will try to foresee the future, and allow for it in the wording. However, the court may apply an updating construction even if the drafter's efforts in this regard have not been successful."

[61] I do not consider that this assists the applicant. The 1988 Act was amended in 2008, and the relevant provisions were inserted at that date. Nothing has changed in the subsequent years to suggest that the law enacted has become "ill-fitting." In the circumstances I do not consider that any 'updating' construction is warranted.

[62] I have referred above (para [15]) to the legal maxim relied on by Mr Hutton and I have considered whether the court can, or should, infer — essentially by necessary implication — that costs are payable over and above the maximum figure

for compensation. Mr Hutton KC made the point that it was inherent in the application that costs would be incurred. Medical evidence was necessary; accountancy evidence was necessary; in the costs assessment phase, the IA obtained a report from a costs drawer and the deceased's solicitors were asked for their submissions, which led to their instructing a costs drawer. Therefore, both parties were fully aware at all times that the very making of the application would involve the incurrence of costs.

[63] In paras [36] to [39] above I rehearsed in brief the sequence of events after the IA made his award of £1 million, being the statutory maximum. I have considered whether this can in any way inform my conclusion as to the statutory interpretation. In its skeleton argument the respondent says that the applicant knew "that he had incurred legal costs, that the Department was working on a separate assessment of those but that the Department would not pay a separate sum in respect of same."

[64] Following the IA's award capped at the statutory maximum the IA went on to assess the amount of reasonable costs with the encouragement, or at the very least, the acquiescence of the respondent. I consider that this was odd behaviour on the part of the respondent, since it at all times understood that whatever figure was assessed by way of costs, it did not intend to pay any figure in excess of the £1 million already awarded. While I understand that such an exercise would have been appropriate if the compensation figure had been, say, £750,000 — ie it would have been a proper exercise for the IA to determine what costs were "necessary reasonable and proportionate" — I find it impossible to comprehend why the further assessment was encouraged or permitted to be undertaken in the specific circumstances of this case. All that was achieved by this wholly futile exercise was the unnecessary expenditure of further public funds (to pay for the work undertaken by the IA, including the instruction of, and the obtaining of two reports from, the costs drawer) and the unnecessary incurrence of further costs by the deceased's solicitors which, as the respondent intended, would never be recouped from the respondent. I have little doubt but that the deceased's solicitors followed this exercise believing that the costs would be paid.

[65] However, whatever may have been the reasonable belief of the solicitors, I have to concentrate on the one issue in the case: whether the statutory provisions permit the payment of costs over and above the maximum compensation figure. I do not consider that one can infer, by necessary implication, into the particular legislative provisions under consideration in this case, the power to pay costs over and above the maximum compensation figure.

[66] Accordingly, I reject the submission of the applicant that the costs incurred in the making of the application for compensation are payable over and above the statutory maximum figure of £1 million.

***Application out of time***

[67] The respondent also argues that the application for judicial review is out of time and should be dismissed for that reason also. Order 53 Rule 4(1) provides:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[68] In *Magee, re Judicial Review* [2017] NIQB 66 Stephens J said:

> "[15] An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made for which see Order 58 Rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980. The courts have consistently emphasised the requirement for promptness, a recent example is found in *Turkington's Application* [2014] NIQB 58 where Mr Justice Treacy said:
>
> > '[32] As indicated by the use of the word "shall" this provision is mandatory. The overriding requirement is that the application for leave must be made "promptly." The three-month time limit is a 'back stop' and a claim is not necessarily in time if brought within the three-month outer limit. The time limit for bringing a claim for judicial review is much shorter than for most other types of civil claims. This short time limit is clearly intentional, and its rationale is clear. As Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC 237, 280H-281A:
> >
> > > 'the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely

> necessary in fairness to the person affected by the decision.'
>
> That passage was referred to by the Court of Appeal in Northern Ireland in *X's (A Minor) Application* [2015] NIQB 52."

[69] For the respondent Mr McAteer submits that when the deceased received the respondent's letter of 22 March 2017, he knew that no costs would be paid, and he accepted this when he signed the acknowledgement on 23 March 2017.

[70] I reject the respondent's argument about this aspect of the case. Had the respondent told both the IA and the applicant's solicitors that no costs assessment exercise was appropriate because costs would not be paid, there would be merit in the respondent's submissions. However, far from doing this the respondent permitted the IA to undertake a detailed costs assessment and encouraged (or condoned) the incurrence of further costs by the deceased's solicitors in the assessment exercise.

[71] In my view, therefore, the applicant is correct to regard the date of the impugned decision as being 3 May 2018. Even if I am wrong about this, I would have considered that there was good reason for extending the period within which the application ought to have been made. I would not have refused the application on the basis that it was brought out of time.

***Disposal***

[72] For the reasons given above, I refuse the application for judicial review.

[73} I will hear the parties on the issue of costs.