

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Finucane's (John) Application [2011] NIQB 86

AN APPLICATION BY JOHN FINUCANE
FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant John Finucane, a partner in the firm of Finucane & Toner Solicitors, challenges a decision of the Legal Services Commission ("the LSC") refusing to confirm that the criminal legal aid certificate issued to defendants represented by him would be funded under the provisions of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules"), as opposed to the new funding regime introduced by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 ("the 2011 Rules"). The issue is of significance because of the change in the rates effected by the 2011 Rules.

[2] The applicant was represented by Karen Quinlivan, the LSC by David Scoffield, the Department of Justice, who was granted permission to intervene, by Jonathan Swift QC and Jason Coppel and the Bar Council, who was also granted permission to intervene, was represented by Sean Doran.

Background

[3] On 12 May 2011 the applicant left his employment with Kevin R Winters, Solicitors and set up the firm of Finucane & Toner with Ciaran Toner. On or about 14 May 2011, Messrs Brendan Conway and Eamon Hutchison ("the defendants"), who are charged with kidnapping, robbery, carrying a firearm with criminal intent and false imprisonment, who had been represented by the applicant in his previous employment, instructed the applicant that they wished to be represented by him.

[4] Both defendants had been granted legal aid on 11 March 2010 by District Judge Bagnall. On 20 May 2011 Arthur Harvey QC applied to Judge Devlin to have the defendants' legal aid certificates transferred to the applicant's firm. This application was granted and criminal aid certificates dated 20 May 2011 were issued in respect of each defendant. The applicant avers that having considered the said certificates, he came to the view that they did not reflect what the Judge intended when he acceded to the application and, as a consequence, an amended transfer of criminal aid certificate in the Crown Court was issued in respect of each defendant, also dated 20 May 2011.

[5] The applicant subsequently entered into correspondence with the LSC seeking confirmation that he and counsel in the case would be remunerated in accordance with the rates ("the original rates") applicable under the 2005 Rules prior to the 2011 amendments. The LSC states that the applicant and counsel are to be remunerated in accordance with the 2005 Rules as amended by the 2011 rules ('the new rates') and it is this decision which is the subject of challenge.

[6] Patricia Coyle, partner in the firm of Harte Coyle & Collins, filed an affidavit outlining her experience with the LSC in the analogous situation under the predecessor rules where the criminal aid certificate was granted to a defendant under the 1992 Rules¹ and legal aid was transferred to herself as assigned solicitor and to new counsel subsequent to the introduction of the 2005 Rules².

[7] She has deposed as to her involvement in three cases in which this issue has arisen. It arose in relation to the case of Patricia O'Kane who was a defendant in *R v Brogan & Ors* which was heard before Girvan J (as then was). O'Kane who had been represented by Madden & Finucane Solicitors sought to transfer to Harte Coyle & Collins after the commencement of her trial. She was also seeking fresh counsel. Ms Coyle made an application for transfer before **Girvan J** a short time into the trial.

[8] Para 3 of Ms Coyle's affidavit avers as follows in respect of the O'Kane case:

"At the conclusion of the case a difficulty arose in that the LSC sought to pay Counsel under the 2005 Rules as opposed to the 1992 Rules. There was an extensive exchange of correspondence and the matter had to be referred back to Girvan J, who was invited to amend the wording of the Order originally made by him in order to reflect the intention of the Court which was to assign a fresh Solicitor and Counsel under the original legal aid certificate. Girvan J did amend the Order and

¹The Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992

²The Legal Aid (Crown Court Proceedings) (Costs) Rules (Northern Ireland) 2005

thereafter the LSC paid Counsel under the 1992 Rules.”

[9] She further avers that the same issue arose in relation to two further cases. In *R v O’Brien* her office reverted to **Hart J** to amend his original Order. Likewise in the case of *R v Magee* her firm had to revert to **Deeny J** to amend his Order.

[10] In each of the three cases application had been made to the introduction of the 2005 Rules that the certificate be transferred to Harte Coyle Collins and to the new Counsel instructed in each case. In each case their firm reverted to the Court and asked them to reformulate the Order to reflect the ruling of Higgins J in *R v Lees* in the passage which is set out later in this judgment. In each case the application was acceded to by three different High Court Judges. Moreover, in each case, the LSC **paid** Counsel in each case under the 2005 Rules. And, as already noted, HH Judge Devlin purported to follow the same course in the instant case.

[11] An affidavit was sworn by Paul Andrews, the Chief Executive of the LSC. The LSC assumed responsibility on 1 November 2003 for the provision of publicly funded legal services in Northern Ireland. The LSC is an executive Non-Departmental Public Body that is sponsored by the Court Service, an agency of the Department of Justice for Northern Ireland. Mr Andrews has held the position of Chief Executive of the LSC since February 2010.

[12] Dealing with the previous cases referred to by Ms Coyle he said as follows:

“19. The applicant has relied in his affidavit upon a number of cases in respect of which it appears that legal representatives who came on record for a defendant after the operative date of the 2005 Rules were remunerated under the earlier ... 1992 Rules. I have caused enquiries to be made into these cases and have been advised of some of the detail of what occurred in relation to the defendants Paul O’Brien and Stephen Magee.

20. In each of these cases the defendant was originally granted a legal aid certificate at the time the 1992 Rules were operative; but a new legal team later came on record for the defendant *after* the 2005 Rules had become operative and a new certificate (with a new certificate number) was granted at that time. In each case the first legal team claimed payment in accordance with the 1992 Rules and the second legal team also claimed payment in accordance with those Rules ... The cases were each considered by an internal review panel, which simply recommended that the claims

be considered by the appropriate authority as the body with statutory responsibility for determining remuneration for cases which fell to be remunerated under the 1992 Rules.

21. It was the appropriate authority which determined that the fees could be paid in accordance with the 1992 Rules, although it is also correct to say that the Taxing Master certified the fees determined by the appropriate authority as "proper". ...

22. I do not consider the basis of payments made in these cases to be relevant to the issue the Court now has to determine. Although payments may have been made under the 1992 Rules the Commission was *effectively implementing decisions of the appropriate authority* which had considered it appropriate to remunerate these cases under the 1992 Rules. ..." [My Emphasis]

[13] Although Mr Andrews provides an explanation of the decision making process within the LSC in relation to the cases of *R v O'Brien* and *R v Magee* no explanation was furnished in relation to the decision making process in *R v O'Kane* which was the first case in which Ms Coyle had been involved in and in which this issue had arisen. Following the lodging of this affidavit the applicant wrote to the Chief Executive on 19 September 2011, inter alia, requesting disclosure of certain documentation including the internal documentation in respect of the decision making process in relation to the identified cases of O'Kane, Magee and O'Brien. Mr Les Graham, Assistant Legal Adviser to the LSC, responded on 22 September 2011. Mr Andrews swore a further affidavit on 26 September 2011 in which he deposed that his previous averment at para20 was made on the basis of information provided to him by LSC staff from records they had available to them at that time. At para4 he states:

"... My attention has been drawn to a short record of the outcome of the internal review panel on 23 June 2009 in which the decision is recorded as follows:

'The panel directed that the claim submitted under the 1992 Rules be assessed in accordance with the provision of the Rules applicable to Solicitor and Counsel'."

He then goes on to state at para5:

“Thereafter, the claims were forwarded to the appropriate authority for consideration. However, it seems that the statement in my previous affidavit to the effect that the internal review panel did nothing more than refer the case on is *inaccurate* and that *it did make a decision to the effect that payments should be allowed under the 1992 Rules* (although without setting out any reasons why this was so). I apologise to the Court for this mistake and have sought to correct it as soon as practicable.”

[14] Since leave to judicially review the LSC’s decision was granted by this Court an identical issue arose before Hart J in the case of *R v Karen Walsh (No 2)* [2011] NICC 30. In that case a change in the assigned solicitor and the “transfer” of legal aid to that solicitor, had taken place subsequent to the operative date for the 2011 Rules, albeit the certificate as originally issued to that defendant pre-dated the operative date. An application was made to Hart J seeking confirmation that it was the intention of the Court to amend the existing legal aid certificate (in which case the 2005 rules would certainly apply) as opposed to issuing a fresh certificate. Hart J acceded to the application.

[15] In correspondence with the applicant the LSC has confirmed that they disagree with Hart J’s analysis and are awaiting the outcome of the present application.

The Application for Judicial Review

[16] The applicant seeks, inter alia, an order of certiorari quashing the decision of the LSC that the defendants’ legal representation is to be funded at the new rates.

[17] The grounds of the application are:

(i) the legal aid certificate is the defendants and was granted at a time when the original rates were in force and therefore the decision of the LSC is unlawful;

(ii) the assigning of a new solicitor to represent criminal defendants does not constitute the issue of a fresh certificate and consequently Rule 3(1) of the 2011 Rules is not applicable;

(iii) alternatively, Rule 3(2) of the 2011 Rules continues to apply because the defendants are persons in respect of whom a criminal aid certificate was granted before 13th April 2011 under

**Article 29 of the Legal Aid, Advice and Assistance
(Northern Ireland) Order 1981.**

Statutory Framework

[18] Criminal aid certificates are granted under Article 29³ of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (“the 1981 Order”) which provides:

“29.—(1) Any *person* returned for trial for an indictable offence ... shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor *and* counsel assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36, if a criminal aid certificate is granted in respect of him in accordance with the provisions of this Article.”
[My Emphasis]

[19] Article 36(3) of the 1981 Order contains the relevant rule making power:

“(3) The Department of Justice, after consultation with the Lord Chief Justice, the Attorney General, and, where appropriate the Crown Court Rules Committee, the County Court Rules Committee and the Magistrates' Courts Rules Committee, and with the approval of the [Department of Finance and Personnel in Northern Ireland], may make rules generally for carrying this Part into effect and such rules shall in particular prescribe-

(a) the form of criminal aid certificates;

(b) the manner in which counsel and solicitors are to be assigned in pursuance of such certificates;

³“29.—(1) Any person returned for trial for an indictable offence or in respect of whom a notice of transfer has been given under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (serious and complex fraud) or under Article 4 of the Children's Evidence (Northern Ireland) Order 1995 (certain cases involving children) shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36, if a criminal aid certificate is granted in respect of him in accordance with the provisions of this Article.”

(bb) the form for the purpose of Article 28A(2)(a);

(c) the form for the purpose of Article 32(1);

and

(d) the rates or scales of payment of any fees, costs or other expenses which are payable under this Part.”

[20] Article 37 of the 1981 Order makes provision in relation to the matters to be taken into account when rules are being made:

“37. The [Department of Justice] 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-

(a) the time and skill which work of the description to which the rules relate requires;

(b) the number and general level of competence of persons undertaking work of that description;

(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.”

[21] The Legal Aid Certificates Rules (Northern Ireland) 1966⁴ (‘the 1966 LAC Rules’) make provision for legal aid in magistrates’ courts proceedings:

“Legal aid certificates

⁴ The 1966 Rules remain in force in accordance with section 29(3)(a) of the Interpretation Act (Northern Ireland) 1954.

4. - (1) A legal aid certificate shall be in the form specified in the Schedule.

(2) *When granting a legal aid certificate a magistrates' court shall, after taking into account any representations which the person charged may make, assign to him, from the register maintained in pursuance of Rule 1, a solicitor to whose services the person shall be entitled...*"

[22] The Legal Aid (Defence Certificates) Rules 1966 ('the 1966 LADC Rules') make provision in relation to legal aid for Crown Court trials and provide:

"Defence Certificates

2. - (1) A defence certificate granted by a Magistrates' Court shall be in form A(i) or A(ii) in the Schedule, and the clerk of petty sessions shall, as soon as practicable after the certificate has been granted, send a copy thereof to the chief clerk, the Director of Public Prosecutions and the Secretary of the Legal Services Commission.

(2) A defence certificate granted by a Judge shall be in form B(i) or B(ii) in the Schedule and the chief clerk shall send a copy thereof to the Director of Public Prosecutions and to the Secretary of the Legal Services Commission.

(3) A certifying authority shall, when granting a defence certificate, after taking into account any representations which the person charged may make, assign to him, from the register maintained in pursuance of Rule 1 of the Legal Aid Certificates Rules (Northern Ireland) 1966 a solicitor, to whose services the person shall be entitled.

(4) Where the charge is one of murder, or the case appears to present exceptional difficulties, a certifying authority may certify that in its opinion the interests of justice require that the person charged shall have the assistance of two counsel.

(5) The chief clerk shall furnish to the solicitor assigned as aforesaid a copy of the depositions in the case and, if the complaint is in writing, of the complaint.

(6) Any member of the Bar whose name appears in the register maintained in pursuance of Rule 2 of the Legal Aid Certificates Rules (Northern Ireland) 1966 may be instructed, on behalf of the person charged, by the solicitor assigned as aforesaid, and, in any case in which a certifying authority has given a certificate as provided for in paragraph (4), one such member of the Bar and a member of the Bar, being one of Her Majesty's Counsel who has expressed his willingness to undertake the defence, may be so instructed. Any member of the Bar instructed as aforesaid shall, for the purposes of these Rules, be regarded as having been assigned in pursuance of a defence certificate.'

[23] The rates payable for legal representation in Crown Court proceedings are set out in the 2005 Rules. These were amended on 13 April 2011 by the 2011 Rules which, inter alia, reduced the levels of standard fees for guilty pleas, trials and other hearings.

[24] Rule 3⁵ of the 2011 Rules makes provision for commencement of the amendments and, in material part, provides:

“3. – (1) Subject 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, ... on or after 13th April 2011.

(2) The [2005 Rules] continue to apply as if these Rules had not been made in respect of cases in which a criminal aid certificate was granted under Article 29, ... before 13th April 2011.” [My Emphasis]

Parties Submissions

⁵“3. – (1) *Subject 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 13th April 2011.*

(2) The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 continue to apply as if these Rules had not been made in respect of cases in which a criminal aid certificate was 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 13th April 2011.”

[25] The applicant and the Bar Council both contended that the assignment of the applicant as the defendants' solicitor did not involve the grant of a new certificate. The defendants' criminal legal aid certificate was granted in March 2010, thereafter there was a change in the assigned solicitor, and the certificate was amended accordingly. The operative date of the certificate however remains March 2010, consequently the 2005 Rules apply. Thus, according to the applicant, relying on *R v Walsh*, the effect of the Order made by HH Judge Devlin is that the original certificate granted to the Defendant by the District Judge at the time of the Defendant's committal for trial remains in force, the case is governed by Rule 3(2) and the 2005 Rules accordingly apply."In reliance on the judgment of Higgins J (as then was) in *R v Lees* [2003] NIJB 17 and *R v Walsh*, the applicant submitted that the certificate vests in the defendant and the relevant certificate issued in March 2010. The decision to "transfer" the certificate, or to change the identity of the assigned solicitor, does not amount to the issue of a fresh certificate.

[26] In support of its central thesis the applicant also relied on the LSC's "consistent" practice under the 2005 rules. The applicant submitted that the 2011 Rules do not, in terms of their approach to the transitional arrangements change in any material respect the approach which was taken in the 2005 Rules; the 2005 Rules have consistently been interpreted and applied as meaning that, if a certificate issued before the 2005 Rules came into operation, even if there was a change in solicitor and/or counsel thereafter, the pre-existing Rules (the 1992 Rules) would govern payment under the certificate. The applicant maintained that in the absence of an express statement of intention to the contrary that it was reasonable to assume that the legislature did not intend to change in the approach adopted. Had it been the intention of the legislature to change its approach then, according to the applicant, it would have been a simple matter to do that within the body of the 2011 Rules. The absence of any express statement accordingly pointed to the interpretation advanced on behalf of the applicant as being the correct interpretation.

[27] The applicant also relied on the presumption against absurdity, to which I shall later return, and Section 17(3) of the Interpretation Act 1954 which provides:

"Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof."

To similar effect the applicant also relied on Section 174 of *Bennion on Statutory Interpretation* at p497 which considers the issue of implied ancillary powers. Based on Section 17(3) and *Bennion* the applicant contended that the amendment of an existing certificate was reasonably necessary, incidental or ancillary to the principle power in Art29

[28] The LSC and DoJ on the other hand contended that the precise issue in the present proceedings did not arise in *Lees* and that *Walsh* was wrongly decided. They contended that the statutory framework envisaged what they characterised as a “one step process” in which there was no power to make an assignment independent of the grant of a certificate. Thus any subsequent assignment to another solicitor *necessarily* involved the issue of a new grant/certificate and accordingly the 2011 Rules were engaged. The LSC and the DoJ contended that Art 29 treats the grant of a certificate and assignment of representatives as happening simultaneously and “more importantly” that the assignment shall occur in such manner as prescribed by Rules made under Art 36. The LSC placed particular reliance on the underlined portions of Rule 4(2) of the 1966 LAC Rules set out above as making clear that the assignment of a solicitor happens simultaneously with the grant of a certificate. This construction was reinforced further by Rule 4(1) of those Rules which provides that the certificate *must* be in the form set out in the schedule which shows the certificate assigning the solicitor in question. This, it is said, constitutes clear evidence that the statutory intention was for an assignment and grant to occur simultaneously. Attention was also drawn to the similar provision made in the 1966 LADC Rules, for instance Rule 2(3).

[29] The proposition that there is no power to alter a defence certificate after it has been granted but that new representatives can be assigned by the grant of a new certificate had been confirmed in *Winward*. The decision was approved by Hart J in *Morrison* [2010] NICC 36⁶. There is no suggestion in the judgment that the analysis in *Winward* was wrong.

[30] Section 25 of the Interpretation Act (NI) 1954 provides:

“Where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead, shall not invalidate the form used.”

[31] The LSC contended the intention is clear. Where a form is prescribed by legislation – such as the form of a criminal aid certificate prescribed by the 1966

⁶In recent years, as *Winward* demonstrates, there has been a practice on the part of some defendants of changing their legal advisors, in some cases more than once, and expecting to be provided with fresh legal representation at the public expense. In *Winward* McCollum LJ concluded that the court has a discretion whether a further defence certificate would be granted, and that in order to exercise the court’s discretion in an appropriate way ‘the court is entitled to know the circumstances in which the original defence certificate has ceased to be effective.

... if the court took the view that the defendant had capriciously or unreasonably discharged his legal advisors then the court would be slow to grant a further defence certificate. ...

If the court concludes that the defendant has capriciously or unreasonably discharged his legal advisors then the court will be slow to grant a further defence certificate, and is not obliged to do so”.

Rules – it is not to be deviated from. Any deviation from the form having a material effect on the substance – which includes the amendment of it to include reference to the discharge of one solicitor and the addition of a further solicitor – invalidates the form used.

[32] The LSC accepts that Hart J's recent ruling in *R v Walsh* is at odds with its position, namely that there is a grant of a new certificate when a different solicitor is assigned. They challenged his analysis as being contrary to the statutory framework and inconsistent with decisions such as *Winward* and contended that the current legal aid certificates of the applicant's clients required payment under the 2011 Rules. When the applicant was assigned on 20 May 2011 this involved the grant of a *new* legal aid certificate and the grant of such a certificate after 13 April 2011 engaged and required payment under the provisions of the 2011 Rules.

Discussion

[33] The LSC placed some reliance on *Winward* [1997] NIJB 187. However in *Winward*, notwithstanding that no express provision existed for the discharge or amendment of a defence certificate, McCollum LJ relying on Section 17(1) of the Interpretation Act (NI) 1954, concluded that there was power to issue a new certificate. The issue before this Court was not addressed in *Winward*⁷.

[34] In *R v Lees* [2003] NIJB 17 Higgins J stated:

“The rules make no provision for the grant of a criminal aid certificate in any other circumstances. Nor do they make provision for the transfer of certificate already granted from one solicitor so assigned to another solicitor. It would appear that neither the legislature nor the rule making authority contemplated that once granted any further application would be made in respect of a defence certificate. Nor do they make provision for the assignment of another solicitor. Thus it seems

⁷“No provision exists in the order or in the rules governing the issue of defence certificates for the discharge or amendment of a defence certificate. No provision therefore has been made to meet the situation in which the solicitor assigned is either unable or unwilling to continue to act on behalf of the defendant. However, s 17(1) of the Interpretation Act (Northern Ireland) 1954 provides as follows: ‘Where an enactment confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time, as occasion requires.’

It appears to me therefore that when for any reason a defence certificate ceases to serve the purpose for which it is granted the court is empowered under s 17(1) of the Interpretation Act (Northern Ireland) 1954 to exercise its power to issue a new certificate.”

tolerably clear that the certifying authority (the magistrates court or the Crown Court) has power

(a) to *grant* a criminal aid certificate in respect of a person for the preparation and conduct of his defence at trial;and

(b) to *assign* solicitor and counsel to that person for that purpose. *Both powers* have been exercised by the magistrates court as certifying authority and thus the requirements of the legislation and of a fair trial and legal representation for that trial have been met.

It is not unknown for applications to be made in the Crown Court for "a defence certificate to be transferred to another solicitor". However an application couched in those terms would seem to be inappropriate. It would seem that what is meant or intended by such an application is that a different solicitor be assigned to the person charged. *The criminal aid certificate is granted in respect of the person charged and not to or in respect of a solicitor.*"

[35] Hart J dealt with the issue in August 2011 in *R v Karen Walsh*. In that case, the defendant was charged with murder and she changed solicitor which gave rise to an issue as to whether the original criminal legal aid certificate granted on 12 May 2010 continued in force notwithstanding the assignment of a new solicitor. The Judge looked at the structure of the criminal legal aid scheme since its inception in 1945 to date. He went on to state in para14:

"...I am entirely satisfied that the present statutory framework continues to provide for the grant of what is now a criminal aid certificate (and was formerly a defence certificate) to an individual as the first stage in the process. It is the individual who is granted criminal legal aid, not the solicitor or counsel. Provision is made that the court assigns a specific solicitor to the defendant in respect of whom a criminal aid certificate has been granted. That solicitor is then entitled to instruct the counsel of his choice in accordance with the authority conferred upon him by the criminal aid certificate, either one counsel or two counsel."

[36] He applied the reasoning in *R v Lees* stating:

“[16] I respectfully agree with the reasoning of the learned judge which is in accordance with the structure of the framework contained in the statute and the rules to which I have referred. The distinction between granting a criminal aid certificate to an individual defendant, and then subsequently assigning to that defendant an identified solicitor is not always clearly expressed by judges or practitioners, who frequently refer to “granting a new defence certificate” when the court assigns a new solicitor under a criminal legal aid certificate, and I for one have been guilty of the same lack of clarity in the past. When an application is made by a solicitor who has agreed with a client to take on his case in the Crown Court in place of the solicitor initially assigned by the court, the court does not grant a new criminal aid certificate, but assigns a new solicitor in place of the previous solicitor assigned by the court under the criminal aid certificate which has already been granted. The result is that the original criminal legal aid certificate continues in force, but a different solicitor is substituted for the original solicitor by way of an assignment by the court under the original defence certificate.

[17] This was what happened when I made the order assigning Mr Houston as the defendant’s solicitor. This was not correctly described in the original order drawn up by the court, and accordingly I amended the criminal legal aid certificate to correctly record that Mr Higgins had been discharged as the defendant’s solicitor under the criminal legal aid certificate, and assigned Mr Houston as the defendant’s solicitor in his place. The effect of the order made by me is that the original criminal aid certificate granted to the defendant by the district judge at the time of the defendant’s committal for trial on 12 May 2010 therefore remains in force, and so this case is governed by Rule 3(2) of the 2011 Rules, and not Rule 3(1). I am fortified in this conclusion by the knowledge that a number of other judges have taken this course in the past when similar issues have arisen, and more recently His Honour Judge Devlin has, I understand, made a similar order.”

[37] In *Lees* it is apparent that Higgins J considered that Art29 conferred two powers (and not one as the LSC and DoJ contend) (a) to *grant* a criminal aid certificate and (b) to *assign* legal representatives. That he construed Art29 to confer two powers namely grant and assignment is emphasised by his reference in the passage quoted above to “both powers”. Accordingly, as in *Winward* there is no reason why, applying Section 17(1) of the Interpretation Act (Northern Ireland) 1974 the power of assignment cannot be exercised from time to time as occasion requires.

[38] It is common case, as held in *Lees*, that a certificate vests in the defendant since it is “granted in respect of the person charged and not to or in respect of a solicitor”. Since the grant has already been made and the certificate vests in the defendant there is no good reason why the assignment of a new solicitor should require a fresh grant and therefore a new certificate.

[39] Moreover the assignment under the certificate, by virtue of Art29 of the 1981 Order, is of solicitor **and** counsel. If, as the LSC and DOJ contend, the grant and assignment are simultaneous and cannot be disassociated that must apply as much to counsel since the statute presupposes assignment of solicitor **and** counsel. Rule 2(6) 1966 LADC Rules provides:

“2 - (6) Any member of the Bar ... may be instructed, on behalf of the person charged, by the solicitor assigned as aforesaid, and, in any case in which a certifying authority has given a certificate as provided for in paragraph (4), one such member of the Bar and a member of the Bar, being one of Her Majesty's Counsel who has expressed his willingness to undertake the defence, may be so instructed. Any member of the Bar instructed as aforesaid shall, for the purposes of these Rules, be regarded as having been assigned in pursuance of a defence certificate.”

[40] It is thus clear that not only is a solicitor assigned to the case when a certificate issues but also that counsel instructed in the case is regarded as having been assigned in pursuance of a defence certificate. On the LSC's analysis, as the applicant has contended, it would absurdly follow that each time the identity of counsel is changed, by virtue of the passing of papers, a fresh certificate ought to issue and the date upon which papers are passed becomes the operative date of the certificate.

[41] The LSC on the other hand rejected this claimed absurdity submitting that the Rules permit a greater degree of flexibility where counsel is concerned. They asserted that the real significance of 2(6) is that it makes express provision for a counsel who is briefed to be deemed to be assigned within the certificate. The LSC contends that this supports rather than confounds the interpretation which they

have advanced pointing out also that there is no equivalent provision in relation to a solicitor.

[42] If however counsel is regarded as *assigned* in pursuance of a certificate it is illogical that other counsel can be assigned under the existing certificate but not another solicitor since both are assigned for the same purpose under Art.29. Thus, on the LSC's case, counsel can be assigned *without* the need for a new certificate. This means that, provided no new solicitor is assigned after the cut-off date, counsel (senior and junior) *whenever* assigned (before *or* after the cut-off date) would still be paid at the 2005 rates. In contrast it also means the applicant's counsel who had been instructed all along (first by Winters & Co and then by this applicant) will now be governed by the significantly less favourable 2011 rates. So if the defendants first solicitor had remained unchanged but in May 2011 he had instead instructed a completely new team of Senior and junior counsel that assignment would be within the original certificate thus attracting 2005 rates. Neither the LSC nor the DOJ made the case that assignment of new Counsel after the cut-off date of itself necessitated a new certificate. Indeed it was acknowledged that the rules did *not* necessitate a new certificate in such circumstances. Accordingly, on their case, provided there was no change of solicitor, the assignment of new counsel never involved a new certificate. Therefore irrespective of the fact that the costs of assigning a new team of counsel might dwarf any additional costs incurred by the assignment of a new solicitor no new certificate was required to mandate that assignment. Since an existing certificate covers assignment of new counsel the statutory framework does not, in my view, impel the conclusion that assignment of a new solicitor can only be achieved by the grant of a new certificate. To hold otherwise would produce illogical and absurd results.

[43] I am fortified in my conclusion by the evidence before the Court as to –

- (i) the practice of amending certificates by three different High Court Judges,
- (ii) the decision of the LSC to direct payment in accordance with the earlier Rules, and
- (iii) the failure of the LSC to amend the Rules to communicate a material change in the interpretation and application of earlier transitional rules which are not materially different from those in the present case.

[44] In light of the conclusion that the Court has come to I consider that it is unnecessary to reach a concluded view on the applicant's alternative submission, supported by the Bar Council, that since *a* certificate had been granted before 13 April 2011 within the meaning of Rule 3(2) that the 2005 Rules continue to apply.

[45] Accordingly I quash the decision of the LSC that the defendants' legal representation is to be funded at the new rates under the 2011 Rules.