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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PETER CAMPBELL MARTIN MALLON and FRANK MacELHATTON for JUDICIAL REVIEW

KERR LCJ

Introduction

[1] This is an application by Peter Campbell, Martin Mallon and Frank MacElhatton, all solicitors of the Supreme Court of Judicature in Northern Ireland, for judicial review of the decision of the County Court Rules Committee and the Lord Chancellor not to give reasons requested by the applicants on behalf of the Belfast Solicitors Association for the present County Court rates and scales and in particular the specified hourly rate.

Background

[2] In the final report of the Civil Justice Reform Group into the review of the Civil Justice System in Northern Ireland (June 2000) a recommendation was made that the system of scale fees in the County Courts prescribed by the County Court Rules Committee should continue. It was also recommended that the scales should be regularly reviewed and that the rules committee, when conducting such a review, while having regard to similar scales provided for in England and Wales and to the need for professional services to be remunerated on a fair and reasonable basis, should also take into account the need to ensure that litigation in the County Courts in Northern Ireland is conducted efficiently and economically.

[3] County Court rules are made under procedures provided for in article 47 of the County Courts (Northern Ireland) Order 1980. The rules committee makes rules which are then certified and transmitted to the Lord Chancellor

who then consults the Lord Chief Justice. The Lord Chancellor may then approve, reject or amend the rules.

[4] On 25 April 2001 Belfast Solicitors' Association received a written invitation from the secretariat of the County Court rules committee to make representations on the issue of scale costs in the County Court. Peter Campbell, the chairman of the association has described this as the beginning of an unprecedented consultation process. The initial consultation document was entitled 'Review of County Court scale costs'. Paragraph 10 of that document said this: -

> "It is recognised that when fixing what the actual rate should be in Northern Ireland it is appropriate to have regard to scales prescribed in England and Wales. However, it is also recognised that it is important that like is compared with like. There are significant differences in the systems which operate within the two jurisdictions. Moreover, a number of cases that fall in the fast track system in England and Wales would otherwise lie to the high Court in Northern Ireland. It would stand to reason that fewer fast track cases could be dealt with at any time leading to less remuneration. **Do you agree?** Moreover overheads and hourly rates are distinctly higher in England and Wales. In Northern Ireland the established solicitor's hourly rate for 1996-97 was £61.50 as compared to an average hourly rate in England and Wales of £115.88-£145.10 for 2001 (assistant solicitor to partner respectively).

[5] Mr Campbell, in an affidavit filed on behalf of the applicant suggested that the assertion that overheads ere different and that hourly rates in Northern Ireland were correspondingly lower was "untrue". It would have perhaps been more sensible to describe the assertion as inaccurate, for the suggestion that the assertion was untrue carries the implication that the committee had deliberately made a statement that it knew to be wrong which, I am confident, was not Mr Campbell's intention. In any event, Mr John Bailie, chief executive of the Law Society wrote to the rules committee secretariat making a number of points about the statement as to overheads and hourly rates contained in paragraph 10 of the consultation paper and this resulted in a notice being issued by the committee in which it was stated that the £61.50 figure did not make allowance for what is referred to as the 'B' factor which, when taken into account, could bring about a higher hourly rate. It was accepted that this should be taken into account when making a comparison with England and Wales. In a letter dated 28 June 2001 the rules committee

acknowledged that the statement that overheads were higher in England and Wales than in Northern Ireland was not evidence based.

[6] The association made two submissions to the rules committee on 13 August 2001 and 9 November 2001. In the first of these the association referred to the differences that existed between scale costs in Northern Ireland and those in England and Wales. The consultation document had referred to the historical position that increases introduced in England and Wales had been mirrored in Northern Ireland. The association suggested that applying the same percentage increases could be "misleading" because the cost bases were "entirely different" and that this could produce increasing disparity because professional fees in this jurisdiction did not start on the same footing as in England and Wales. In the second submission the association suggested that hourly rates for some areas in Great Britain such as Oxford, Chester and North Wales could serve as useful comparators for Northern Ireland.

[7] The rules committee completed its deliberations in June 2002 and after unanimous agreement as to their content submitted the draft rules to the Lord Chancellor. The County Court (Amendment No 2) Rules (Northern Ireland) 2002 were duly made on 30 December 2002 and came into operation on 3 March 2003. In November 2002 Mr Campbell became aware of fixed costs proposals that were due to come into operation in England and Wales. He concluded that the proposed costs scales in Great Britain were significantly higher than the costs bands that were to be introduced by the 2002 rules and he therefore wrote to the chairman of the rules committee, His Honour Judge Hart QC, the Recorder of Belfast on 11 February 2003. In his letter Mr Campbell asked that his association be provided with certain information including "the basis of the calculation underpinning the new rules, and specifically the hourly rate which has been adopted by the rules committee". Judge Hart replied on 19 February 2003 enclosing copy of his response to a letter from the President of the Law Society which, he pointed out, was for the greater part identically worded to the letter from Mr Campbell.

[8] In his letter to the President Judge Hart said that it had not been the practice of the rules committee to disclose its minutes, working papers etc and that he would not be prepared to depart from that practice without consulting other members of the committee. He acknowledged, however, that the outcome of the review was of considerable interest to solicitors and for that reason he was prepared to give a general indication as to the approach that the rules committee adopted and the decisions that they reached. He stated that the rules had been considered intensively at a number of meetings of both the full committee and sub-committees and that their deliberations involved careful consideration of representations that they had received from those whom they had consulted. The letter continued with this passage: -

"We had before us and debated a wide range of submissions and our conclusions were arrived at after taking into account a number of considerations, some of which are to be found in the final report of [the Civil Justice Reform Group] at paras 79-83. We summarised these considerations as follows.

1. Professional services require a fair and reasonable return for work done.

2. It is proper to have regard to any scales prescribed for England and Wales for work that appears to be comparable.

3. The [Civil Justice Reform Group] expected the advantage of the Northern Ireland civil justice system being less expensive that that in England and Wales to be maintained in the future, and that the rules committee was to be alert to keep the costs of litigation in the County Courts in Northern Ireland as economical as possible, consistent with the need to ensure that professional services are properly remunerated. We considered that echoed the comments of the Lord Chief Justice in *Re C & H Jefferson* when he observed that the County Court should be a court "in respect of whose proceedings the costs and fees should be both moderate and ascertainable." [1998] NI at 409.

4. We sought to maintain the principle that there should be a measure of proportionality between the amounts awarded and costs.

5. Wherever possible we sought to simplify and, if necessary clarify, the cost scales, many of which seemed to be no longer relevant to present day litigation patterns. For example, in the Equity scales seven pages of obsolete provisions have been removed; by reducing the number of bands in many scales to seven and providing that wherever possible the same fees should be allowed in each scale.

6. In a number of areas we made no change other than to increase the scales, or the amounts specified for certain categories of ancillary procedures by 4.3% being the estimated rate of inflation since the last increase came into effect in December 1999 until the end of April 2002. That date was chosen as we initially hoped to complete our review by that time.

7. In *Re C & H Jefferson* the Lord Chief Justice commented that the scales "are largely related to the amount at stake in the proceedings and operate on the swings and roundabouts principle: in some cases solicitors and counsel may be fairly handsomely paid for a case which does not involve a great expenditure of time and effort, in others they may have to do a great deal of work for a very modest reward". The swings and roundabouts principle is fundamental to the operation of the scale costs system. By its very nature any system of scale costs cannot provide for the circumstances of every individual case which may vary widely. We considered the operation of the swings and roundabouts principle at considerable length on an number of occasions, taking into account the various submissions made to us. Whilst we were entirely satisfied that the swings and roundabouts principle is a fair one and should be preserved, nevertheless we also recognised that in Northern Ireland the majority of awards in the County Court are for £5000 or under (89% in 2000). Therefore the scope for the benefit of the swings and roundabouts principle taking into account larger awards is more limited, and we therefore sought to weight any increases towards the lower end of the scales.

8. Whilst the majority of cases heard in the County Courts are road traffic accidents and other straightforward personal injury

cases, there are a significant number of cases which are particularly complex and demanding in terms of attention and preparation, and these tend to distort the operation of the swings and roundabouts principle because the cost of preparing them can substantially exceed the scale costs permitted. We recognised that this was a legitimate concern and decided to provide for such cases by providing for an uplift of 1/3 on the scale if certain conditions were met, including the cause of action coming within a statutorily defined category and the judge retaining a discretion whether or not to certify the uplift.

9. Throughout our deliberations we looked at each proposed increase in the overall context of the proposed changes in the scales or in the rules to ensure that the changes were balanced and took into account the effect of individual changes."

[9] Mr Campbell wrote again to the Recorder on 26 February raising a number of issues, particularly on the topic of the use made by the committee of English rates or scales and asking whether these had informed the committee's deliberations in reaching a final conclusion on the 2002 rules. The Recorder replied on 4 March saying that he did not consider that it was appropriate for him to comment on this issue.

[10] Mr Campbell had also written to the Lord Chancellor on 11 February 2003 in the same terms as the letter to the Recorder of the same date. The Lord Chancellor replied on 24 February enclosing a letter that he had sent to the President of the Law Society on 2 February. In this letter the Lord Chancellor pointed out that the rules had been considered by a committee consisting of representatives of the judiciary and the profession and that there had been a long period of consultation. He stated that he was satisfied with the overall level of increases and the provision for uplift in complex cases as with the proportionality of the costs. The potential impact of the new rules on legal aid was also taken into account but the Lord Chancellor did not regard this as a significant consideration.

[11] Mr Campbell wrote again to the Lord Chancellor on 25 February identifying as the major area of concern the manner in which the Lord Chancellor had regard to any prescribed scale of costs in England and Wales

before approving the recommendation of the committee. The Lord Chancellor replied on 23 March stating that he had had regard to the costs payable in fast track cases in road traffic cases in England and Wales that settle pre-trial. He pointed out that although costs prescribed in England and Wales were higher than in Northern Ireland, one of the advantages identified by the Civil Justice Reform group was that the system in this jurisdiction was less expensive. He asserted that the committee was well placed to reach a view on what was fair and reasonable.

The case for the applicants

[12] For the applicants Mr Larkin QC submitted that the refusal of the committee and the Lord Chancellor to disclose whether they had taken into account an hourly rate in fixing the scale costs was unwarranted given the "centrality" of this issue to the fairness of the rates chosen. One may perhaps observe that, if the matter was of such critical importance, it is a little surprising that it does not receive greater prominence in the submissions made by the association and in the letters written to the Recorder and in the Lord Chancellor. It is to be noted, however, that in his letter of 19 February 2003 the Recorder stated: -

> "We tested whether the various proposals would constitute fair and reasonable remuneration by assessing what might be the result if cases were subjected to taxation using the accepted principles. During these discussions we had regard to the Law Society's submissions as to the appropriate hourly rate, as well as that allowed by the Taxing Master. We also had regard to the information contained in the report prepared by Paul Kerr for the Law Society."

[13] Whatever view one takes as to the status of the issue in the exchanges between the association and the Recorder and Lord Chancellor, one may accept that whether a request to provide information on the hourly rate was sufficiently articulated in correspondence is secondary to an examination of whether they are under an obligation to do so since it has become the centrepiece of the applicants' judicial review challenge and it has, of course, been open to the respondents to provide the information after proceedings began.

[14] Mr Larkin contended that the purpose of the letters sent to the respondents was to "locate the fulcrum of the reasoning" underlying the enactment of the rules. He suggested that the applicants were ignorant of a number of matters and, absent information on these issues, were unable to understand the results of the consultation process or to engage constructively

in the rule making process in future. He also submitted that even if the rule making powers of the rules committee would not conventionally attract the duty to give reasons, given the extensive consultation exercise undertaken in this instance, it was necessary that reasons be given so as to verify that the representations of the association had been conscientiously taken into account. The matters which, Mr Larkin said, the association remained ignorant of were: -

1. Whether the rules committee had persisted in the error in paragraph 10 of its consultation document;
2. Whether the rules committee accepted in full or at all the contentions of the Law Society on paragraph 10 of the consultation document;
3. What hourly rate underpins the new scales;
4. What number of hours are notionally assigned for the completion of a solicitor's work in County Court litigation;
5. Whether any hourly rate underpins the new scales.

[15] Mr Larkin claimed that the decision in *Bates v Lord Hailsham* [1972] 1 WLR 1373 (which held that considerations of natural justice or fairness did not affect the legislative process on which a rules committee was engaged) was "redolent of a vanished era in public law" and should not be followed. The justification for a general exclusion from the duty to give reasons for legislation could only be founded on the availability of parliamentary scrutiny and this was not present in this instance. He suggested that the approach of Sedley J in *Regina v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 WLR 254, approved in *Stefan v GMC* [1999] 1WLR 1293, was to be preferred. The present rules sound particularly on the interests of the applicants and other practitioners and appear aberrant in view of the comparison that the committee had accepted was to be made with English scale costs. Finally, Mr Larkin suggested that with the introduction of the Freedom of Information Act 2000 (which he accepted was not in force at the material time in this case) heralded a new era of openness in public law and militated towards the giving of reasons in a case such as the present.

The case for the respondents

[16] For the respondents Mr Morgan QC stated that the respondents' primary submission was that they were not under a duty to give reasons on the authority of *Bates*. He accepted, however, that there was no blanket immunity from the giving of reasons and that each case required to be analysed by reference to its own particular circumstances before a view could be reached as to whether they required to be given.

[17] On the question whether an explanation was needed for the decision of the committee not to adopt the scale costs in England and Wales Mr Morgan pointed out that, although much was now made about the need for parity

between England and Wales and Northern Ireland, the association in its first submission had referred to the entirely different costs bases in the two jurisdictions. Indeed the association had made the explicit claim in its interim submission that "fast track costs are very different [from] our County Court scale costs and operate on a different premise and for a different purpose". Moreover, the statement in paragraph 10 of the consultation document that there were significant differences in the systems had never been challenged.

[18] Mr Morgan suggested that it was obvious from the Recorder's letter that an hourly rate had not been adopted by the committee. That letter, he claimed, was comprehensive in its explanation of the approach of the committee and required no elaboration. It had explained the committee's consideration of the 'swings and roundabouts' principle and had given reasons that the committee felt that this had to be mitigated somewhat because of the preponderance of smaller claims in the County Court. It was significant, Mr Morgan observed, that, although in his letter of 26 February 2003 Mr Campbell had asked whether the committee had made use of English rates or scales, he did not complain of any inadequacy in the reasons that had been given for the committee's decisions in the Recorder's letter of 19 February.

Bates v Lord Hailsham

[19] The case of *Bates* involved a challenge to the decision of a committee set up under section 56 (1) of the Solicitors Act 1957 to proceed with an order that scale fees for all conveyancing transactions be abolished. It was claimed that the committee was obliged, before making the order, to give the opportunity to the British Legal Association (representing some 2900 solicitors) the opportunity to make representations. Megarry J held that the committee's function was not quasi-judicial or administrative but was to make or refuse to make a legislative instrument under delegated powers, and considerations of natural justice or fairness did not affect the legislative process, whether primary or delegated. At page 1374 he said: -

> "The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those

> affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act 1961, Schedule 4), I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative."

[20] As Mr Morgan pointed out, some commentators still regard this decision as good law – see, for instance *Wade on Administrative Law* 8th edition at page 544 and *de Smith Woolf and Jolowicz, The Principles of Judicial Review*, paragraph 7-032. I consider, however, that there is much force in Mr Larkin's submission that a general exclusion from the duty to give reasons for legislation can only be justified where some form of scrutiny other than that provided by the courts by way of judicial review is available.

The scope of permissible challenge

[21] Whether legislative activity (other than enacting primary legislation) is amenable to judicial review on the same basis as was adumbrated by Sedley J in *ex parte Institute of Dental Surgery*, however, is open to question. That case was very different from the present. It involved the allocation of research grants by rating institutions according to the quality of their research, on the basis of a research assessment exercise. A challenge was mounted to the decision to refuse to give reasons that the institute had had its level of rating reduced from that which it had previously enjoyed. Although the application for judicial review was dismissed, Sedley J set out certain principles that could be prayed in aid in judging whether reasons should be given. At page 263 he said: -

> "… (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. (2) One such class is where the subject matter is an interest so highly regarded by the law

> (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right. (3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent; (b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision. And (c) procedurally, the grant of leave in such cases will depend upon *prima facie* evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unalloyed exercise of an intrinsically unchallengeable judgment. If the respondent succeeds, the application fails. If the respondent fails, relief may take the form of an order of mandamus to give reasons, or (if a justiciable flaw has been established) other appropriate relief."

[22] These observations were made about administrative decisions and whatever may be said about the deliberations of the rules committee and the Lord Chancellor, their function remains unquestionably legislative. It seems to me unlikely that the principles outlined by Sedley J can be imported wholesale into the legislative domain. Even if they can be, I am satisfied that the procedures followed in the present case do not fall foul of the principles that he enunciated. In the first place the subject matter of the rules under challenge is not one that could reasonably be described as 'so highly regarded by the law' as meriting on its own account a right to reasons. Nor do I believe that any plausible case can be made that the decision was aberrant. I agree with Mr Morgan's submission that it was clear from Judge Hart's letter that the rules committee had not adopted an hourly rate as the basis for the rates that they determined. In view of the many references to the differences in the two systems (especially those in the documents generated by the applicants) and in light of the history of fixing scale costs for the County Courts in this jurisdiction, the decision not to adopt hourly rates was not only not aberrant, it was entirely unsurprising.

[23] Since it is unnecessary for me to reach a final opinion on the question of how far, if at all, the making of rules by a committee such as the rules committee in this case is amenable to judicial review, I will refrain from expressing any opinion on it. I should merely observe that it seems to me likely that if judicial review is available its contours would have to be fixed to reflect the particular circumstances in which the rules are made, for instance,

the level of consultation, the degree of independent supervision of the rule making process etc.

Were the reasons given inadequate?

[24] The short answer to the question, 'were the reasons given inadequate' is supplied by the conclusion that the Recorder's letter was sufficient to convey that the committee had not used an hourly rate in fixing the scale costs because the principal argument of the applicants was that they were unaware that this was the position. If they had been so aware, as I consider they should have been, much of the objection to the inadequacy of the reasons falls away.

[25] That the applicants ought to have been left in no doubt that hourly rates were not the basis on which the new scale costs had been arrived at is clear from the following passage from the Recorder's letter: -

> "Ultimately, the basic structure of the new scales was arrived at by applying the highest fee on the previous scale to each of the new bands and adding 4.3%. Some of the figures were then rounded off or adjusted. This results in smaller increases in some cases, but larger increases in others, an approach which we felt provided a balanced result overall when the distribution of increases across the scales as a whole is considered."

[26] On the question whether the committee had continued to labour under the mistake that appeared in paragraph 10 of its consultation document, an even briefer answer can be given. It is absolutely clear, in my opinion, that the notice and letter referred to in paragraph [5] above signalled the committee's acceptance of the correction that the Law Society and the association had provided.

[27] I am entirely satisfied that the comprehensive letter sent by the Recorder was sufficient to answer all legitimate inquiries made by the association. It conveyed to them the approach adopted by the committee in fixing the new scales. It asserted that all the representations made by the association had been taken into account as had the submissions of the Law Society and the report of Mr Paul Kerr. It acknowledged that scale costs in England had to be considered while accepting that there were significant differences in the two jurisdictions. It explained the committee's approach to the 'swings and roundabouts' principle and how that had been modified to take account of representations that the association itself had made. It stated that the committee had sought to maintain the principle that there should be a measure of proportionality between the amounts awarded and costs. In my

view, everything that could reasonably be expected to be communicated to the association was provided by this letter. I do not consider that greater candour than was displayed by the Recorder was demanded by freedom of information considerations.

[28] In this context it is not without significance that the County Court rules committee comprises three County Court judges, two barristers, two solicitors, one circuit registrar, one chief clerk and one other. As Mr Morgan pointed out in his skeleton argument, it is not inconceivable that the unanimity of the committee on the content of the rules was achieved by different routes. Discovery of the 'fulcrum of reasoning' which Mr Larkin said was the objective of the association's inquiry could not necessarily be easily provided. It is to be noted that the process of reasoning may not always be synonymous with the provision of reasons for taking a decision. It seems to me that this may well be a case where the reasoning of individual members of the committee may have differed although they agreed on the outcome. This is yet a further reason that the insistence on full examination as to what actuated the committee is impracticable as well as unnecessary as a matter of law. In any event, as I have said, such reasons as were required to satisfy the appropriate inquiries and concerns of the association were in fact provided.

Conclusions

[29] I am satisfied that the applicants' complaint that they have not been provided with sufficient reasons for the committee's decision and that of the Lord Chancellor has not been made out. The application for judicial review must be dismissed.