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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

ICOS No: 20/027712

Delivered: 05/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BARRY PHILLIPS  
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE LEGAL SERVICES AGENCY  
NORTHERN IRELAND

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Mr McHugh QC and Ms Rice BL (instructed by Fergusons Solicitors) for the applicant  
Ms Murnaghan QC with Mr Sands BL (instructed by the Departmental Solicitor's Office)  
for the respondent

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**QUINLIVAN J**

*Introduction*

[1] The applicant, Barry Phillips is challenging a decision of the Legal Services Agency<sup>1</sup> to apply the statutory charge to the applicant's legal aid certificate. The applicant was granted a legal aid certificate to bring matrimonial proceedings, including ancillary relief proceedings. As a result of the ancillary relief proceedings the applicant received a sum of £10,000 and the respondent seeks to recoup the costs, or some of the costs, of the ancillary relief proceedings from the applicant by means of the statutory charge.

[2] The matrimonial proceedings between the applicant and his wife resolved by way of an agreement which was made a rule of court on 18 November 2019. Under the agreement the applicant was to receive the sum of £10,000 from his former wife. The applicant characterises this sum as a "lump sum" within the meaning of Article 25 of the Matrimonial Causes (NI) Order 1978 ("the 1978 Order"). The respondent characterises the payment as a "property adjustment order" within the meaning of Article 26 of the 1978 Order.

[3] The dispute as to the characterisation of the payment is significant as the Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2010 ("the 2010

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<sup>1</sup> The NI Legal Services Commission became the Legal Services Agency on 1 April 2015.

Regulations') which were then in force provided, in summary terms, that a "lump sum" as defined in Article 25(1) of the 1978 Order was exempt from the statutory charge, while a "property adjustment order" within the meaning of Article 26 of the 1978 Order was not so exempt.

[4] Mr McHugh QC and Ms Rice BL appeared for the applicant, instructed by Fergusons Solicitors. Ms Murnaghan QC with Mr Sands BL, appeared for the respondent, instructed by the Departmental Solicitor's Office. I am grateful to counsel for the quality of their oral and written submissions.

### *Factual Background*

[5] On 7 July 2010 the applicant applied for legal aid in order to bring divorce proceedings and an application for ancillary relief. In his application for legal aid the applicant stated that he wished to apply for a divorce and further stated "I also wish to claim my share of the equity in the matrimonial home."

[6] In applying for legal aid the applicant signed a declaration which confirmed that:

"... if I recover or preserve property (including money in the case in which I am applying for funding), and if the case is disposed of with me making a claim on the legal aid fund in respect of the costs incurred by my solicitor in bringing (or defending) the proceedings, the statutory charge will apply.

...

I understand that the statutory charge will apply in these circumstances unless I can satisfy the Legal Services Commission that my case falls within one of the exemptions to the statutory charge set out in Regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) 1965."

[7] His solicitor also signed a declaration confirming that she had explained to the applicant how the statutory charge might affect the outcome of his case.

[8] Legal aid was granted on 28 February 2012. The proceedings between the applicant and his former wife settled by way of agreement on 18 November 2019. The relevant terms of the agreement provide as follows:

"(i) The Respondent shall pay the Petitioner a lump sum of £10,000 (ten thousand pounds) within 12 weeks of the date hereof ...

- (ii) In consideration for the lump sum referred to as (1) above, the Petitioner shall relinquish any interest, whether legal or equitable, which he has in the former matrimonial home ...”

[9] Following the conclusion of proceedings, on 20 November 2019, the applicant’s solicitor completed a statutory charge report on the computerised system. The form invites the solicitor to “Summarise the claim and any counterclaims or concessions made during the proceedings”, in response to which the applicant’s solicitor replied:

“Ancillary relief proceedings to determine the split of matrimonial assets. The sole asset was the former matrimonial home ... The Wife was the registered owner and the Husband sought to enforce his equitable claim further to his occupation of the property for a period of five years prior to separation in 2007.”

[10] The form also asked the solicitor to “indicate what each party sought at the outset and at any point in the proceedings”, to which the applicant’s solicitor replied:

“The husband sought a financial buy out of his equitable interest in the property at 40% if [sic] of the equity. The wife did not recognise the husband’s entitlement and did not make any proposals up until the date of the hearing.”

[11] In the same document the solicitor identified the assets as the matrimonial home and the wife’s retirement pension and thereafter advised that:

“The case resolved on the date of the hearing at Dungannon Courthouse further to negotiations between the parties after an indication from the court. The Wife agreed to pay the husband the lump sum of £10,000 to relinquish his equitable claim to the former matrimonial home.”

[12] Thereafter the applicant’s solicitor claimed an exemption on the £10,000 pursuant to regulation 17(9) of the 1965 Regulations (‘the 1965 Regulations’) and the 2010 Regulations on the ground that:

“My client’s legal aid certificate is dated the 28<sup>th</sup> of February 2012. He is due to receive a lump sum payment of £10,000 on foot of ancillary relief proceedings. By virtue of Regulation 17(9) of the Legal Aid (General) Regulations (NI) 1965 and the subsequent restatement of

the provision in the form of Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2010, lump sum payments under Article 25 of the Matrimonial Causes (NI) Order 1978 are exempt from the statutory charge. This applies to all Legal Aid Certificates granted after 1 April 2010.”

[13] The Legal Services Agency determined that the sum of £10,000 was not exempt, as in their view the applicant had received a property adjustment order and not a lump sum payment within the meaning of Article 25 of the 1978 Order. In communicating their decision they stated as follows:

“Assisted person received £10,000 lump sum in recognition of his equitable interest in the property known as ... This is a Property Adjustment Order pursuant to Article 26 of the Matrimonial Causes (Northern Ireland) Order 1978. Therefore the Statutory Charge applies.”

[14] On 25 November 2019 the applicant’s solicitor sought a review of the decision and forwarded an opinion from counsel. In their submission they made the case that:

“It is legally and factually incorrect to state that there was a property adjustment order in this case. To be clear, there was no property adjustment order made by agreement or order of the court but rather a cash lump sum under Article 25 of the Matrimonial Causes (NI) Order 1978. A property adjustment order must entail an actual transfer or change of ownership on the title from one party to the other or a settlement of property which would refer to the establishment of a Trust or an Order varying an ante nuptial or post nuptial agreement of extinguishment or reduction of an interest under such a settlement. There has been no transfer of title or ownership as the assisted person did not have a registered legal interest to transfer or retain, the wife was the sole registered owner on the title and this remains the case. ... The lump sum also took into account the assisted person’s contribution to the 21 year marriage including payments made to discharge a joint loan, potential inheritance from the wife’s mother’s estate and compensation from an RTA that the wife received since the date of separation. It is not the case that the cash lump sum was purely in recognition of the assistant [sic] person’s equitable interest in the former matrimonial

home. The said equitable interest was never expressly accepted by the wife during the course of the proceedings.”

[15] The submission was supported by a short opinion from counsel who had appeared in the case in which she stated that “there was no Property Adjustment Order made by agreement or Order of the Court, but rather a modest lump sum agreed made up of £10,000 payable to the husband by the Wife by virtue of a Matrimonial Agreement made an Order of Court.”

[16] The matter was reviewed by a different official within the Agency on 13 December 2019. This official also considered that the payment to the applicant was a property adjustment order to which the statutory charge applied. He gave reasons as follows:

“I refer to the Agreement dated 28<sup>th</sup> November 2019 which was made a rule of court. It was consented and agreed that the respondent pay the petitioner 10k and in consideration for the lump sum, the petitioner shall relinquish any interest, in the former matrimonial home. This is a Property Adjustment Order pursuant to Article 26(4) of the Matrimonial Causes (Northern Ireland) Order 1978. Therefore the Statutory Charge applies.”

[17] Upon receipt of the decision the applicant issued pre-action correspondence and thereafter an application for leave to judicially review the Legal Service Agency’s decision. Leave to judicially review the respondent was granted by McAlinden J on 15 June 2019. Subsequently there were applications for discovery which were dealt with by Scofield J on 21 April 2021. These proceedings were heard by me on 3 March 2022.

### *Legal framework*

[18] In his affidavit on behalf of the respondent Mr McNab outlined the history of the statutory charge which he described as a “clawback in circumstances where a person has recovered or preserved money or property with the help of Legal Aid.” He stated that it was “designed to put legally aided litigants as far as possible in the same position as successful non-legally aided litigants, who would be responsible for the payment of their own legal costs if their opponent did not or could not pay them.” I don’t understand there to be any dispute as to the purpose of the statutory charge.

[19] Section 3(6) of the Legal Aid, Advice and Assistance Act (Northern Ireland) 1965 provided a general rule that all property recovered or preserved in any proceedings is subject to the statutory charge, unless an exception applies.

[20] Regulation 17(9) of the 1965 Regulations is one such exception. Prior to amendment in 2010, it provided as follows:

“The provisions of this regulation shall not apply to:

- (a) payments of money under the provisions of –
  - i. Section 1 of the Inheritance (Family Provision Act (Northern Ireland 1960); or
  - ii. Sections 17, 19 and 22 of the Matrimonial Causes Act (Northern Ireland 1939 and Sections 4 and 5 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1951 . . .
- (b) Monies paid in lieu of or with respect to arrears of any payments referred to in sub-paragraph (a); or
- (c) Monies payable, whether by arrears or otherwise under an agreement in writing made between the parties to a marriage for the purposes of living separately and continuing financial arrangements (whether made during the continuance or after the dissolution or annulment of the marriage); or
- (d) Payment of money under the provisions of any Act which provides for the enforcement of or for giving effect to an order made under one of the sub-sections set out in sub-paragraph (a); or
- (e) Monies so paid as a result of proceedings taken in a court in Northern Ireland to enforce an order made by a court outside its jurisdiction in proceedings for relief comparable to that which may be given by a court in Northern Ireland under the provisions mentioned in this paragraph;

And monies so payable or property passing in lieu shall not be the subject of a charge within the terms of Section 3(6) of the Act.”

[21] When the 1965 legislation and the ensuing regulations were passed the 1978 Order was not in existence and petitions for ancillary relief were brought under the

provisions of the Matrimonial Causes Act (NI) 1939 ('the 1939 Act') referred to above.

[22] The regulation 17(9)(a)(ii) exceptions where the statutory charge did not apply were sections 17, 19 and 22 of the 1939 Act, which provided for:

- The power to order periodic payments (s17);
- The power to order payment of a lump sum or annual payments (s. 19(a));
- The power to order interim payments (s19(b)).

[23] Following the introduction of the 1978 Order the 1965 Regulations were not amended and the exemptions continued to refer to the 1939 Act.

[24] The Legal Services Agency in their affidavit evidence before this court stated that following the passage of the 1978 Order the approach taken by them was to seek to apply the exemptions in the same way when a power contained in the 1939 Act was re-enacted under the 1978 Order. Thus, they exempted periodic payments and lump sums because those provisions were contained in the 1939 Act. They averred that because there had been no provision for property adjustment orders under the 1939 Act the approach of the Legal Services Agency was that no exemption applied to property adjustment orders under the 1978 Order.

[25] In 2010 new regulations were introduced to update regulation 17(9)(a) of the 1965 Regulations, removing the references to the 1939 Act and replacing them with the references to the 1978 Order. The 2010 Regulations came into force on 1 April 2010 and continued in force until the Legal Aid (General) (Amendment) Regulations (NI) 2012 which came into force on 1 December 2012.

[26] The applicant's legal aid certificate, which is dated 28 February 2012 is thus governed by the 2010 Regulations. As I understand matters, the 2012 Regulations now provide that lump sum payments are subject to the statutory charge, so the issues in this case relate to legal aid certificates issued before 2012.

[27] An Explanatory Memorandum accompanied the 2010 Regulations and so far as relevant stated as follows:

"7.3 Regulation 17(9) of the 1965 Regulations sets out a number of exemptions to the statutory charge. However, the legislative references in regulation 17(9)(a) detailing those exemptions are not up-to-date. This has led to some confusion in particular regarding property adjustment orders made under Article 26 of the 1978

**Order. The amendments made by this instrument make it clear that such orders are not exempt from the operation of the statutory charge.” [emphasis added]**

[28] When the 2010 Regulations were introduced the Legal Services Commission (as it then was) also issued guidance to practitioners in Northern Ireland on the application of the statutory charge. So far as relevant the guidance stated as follows:

**“Why has the Commission restated Regulation 17(9)?**

4. In order to clarify the correct operation of the charge the Commission has carried out an exercise to “restate” those parts of Regulation 17(9) which provide for the exemptions from the charge in relation to family proceedings, and in relation to social security benefits.

5. The restatement sets out the exemptions from the statutory charge including the recovery or preservation of money or property under the following legislative provisions:

...

(ii) Articles 24, 25(1) and (2), 26A, 29(6), 33(1), 33(2)(a) to (dd), 33(2)(f) and 33(3) of the Matrimonial Causes (Northern Ireland) Order 1978.

...

**The Matrimonial Causes (Northern Ireland) Order 1978**

6. It should be noted that the restatement exercise clarifies that the exemptions from the statutory charge only extend to the recovery or preservation of monies in ancillary relief proceedings under the ambit of Articles 24, 25, 29 and 33 of the Matrimonial Causes (Northern Ireland) Order 1978. Recovery under other articles of the 1978 Order is therefore subject to the charge. The Commission would particularly draw the attention of legal representatives to the fact that the recovery or preservation of property under Article 26 of the 1978 Order is **not** exempt from the statutory charge under the existing “restated” regulation.” [emphasis in original]

[29] The 2010 Regulations simply state that the Legal Aid (General) Regulations (Northern Ireland) 1965 are amended as follows.

“6(1) For regulation 17(9)(a) substitute -



- (a) payments of money under provisions of  
...
- (ii) Articles 24, 25(1) and (2), 26A, 29(6), 33(1), 33(2)(a) to (dd), 33(20(f) and 33(3) of the Matrimonial Causes (Northern Ireland) Order 1978.  
..."

### *Applicant's Case*

[30] The applicant's case primarily turns on the question of whether the payment of £10,000 represented a "lump sum" order within the meaning of Article 25, or a "property adjustment order" within the meaning of Article 26.

[31] In the alternative the applicant relied on the fact that in a number of cases involving another solicitor's firm, which factually were broadly similar to the applicant's case, the Legal Services Agency had not applied the statutory charge. According to the applicant, the respondent's conduct of similar cases historically demonstrated such inconsistency and arbitrariness that the system could be considered flawed and that the applicant had a legitimate expectation that the statutory charge would not be imposed in the circumstances. Alternatively, the applicant contended that the decision to apply the statutory charge in his case was irrational.

### *Lump sum or property adjustment order*

[32] This issue involves consideration of the 1978 Order. Section 2 is the interpretation section which provides so far as relevant that:

- "(3) In this Order-
- (a) references to financial provision orders, periodical payments and secured periodical payments orders and orders for the payment of a lump sum, and references to property adjustment orders, shall be construed in accordance with Article 23."

[33] Article 23, entitled 'Financial provision and property adjustment orders' provides as follows:

- "(1) The financial provision orders for the purposes of this Order are the orders for periodical or lump sum provision available (subject to the provisions of this Order) under Article 25 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for

divorce, nullity of marriage or judicial separation and under Article 29(6) on proof of neglect by one party to a marriage to provide, or to make a proper contribution towards, reasonable maintenance for the other or a child of the family, that is to say –

- (a) any order for periodical payments in favour of a party to a marriage under Article 25(1)(a) or 29(6)(a) or in favour of a child of the family under Article 25(1)(d), (2) or (4) or 29(6)(d);
- (b) any order for secured periodical payments in favour of a party to a marriage under Article 25(1)(b) or 29(6)(b) or in favour of a child of the family under Article 25(1)(e), (2) or (4) or 29(6)(e); and
- (c) any order for lump sum provision in favour of a party to a marriage under Article 25(1)(c) or 29(6)(c) or in favour of a child of the family under Article 25(1)(f), (2) or (4) or 29(6)(f);

and references in this Order to periodical payments orders, secured periodical payments orders, and orders for the payment of a lump sum are references to all or some of the financial provision orders requiring the sort of financial provision in question according as the context of each reference may require.

(2) The property adjustment orders for the purposes of this Order are the orders dealing with property rights available (subject to the provisions of this Order) under Article 26 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say –

- (a) any order under paragraph (1)(a) of that Article for a transfer of property;
- (b) any order under paragraph (1)(b) of that Article for a settlement of property; and
- (c) any order under paragraph (1)(c) or (d) of that Article for a variation of settlement.”

[34] Article 25, entitled 'Financial provision orders in connection with divorce proceedings, etc.' provides, so far as relevant that:

“(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say-

...

(c) **an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;**

...” [emphasis added]

[35] Article 26, entitled 'Property adjustment orders in connection with divorce proceedings etc.' provides, so far as relevant, that:

“(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say –

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the

marriage, other than one in the form of a pension arrangement (within the meaning of Article 27D);

- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement, other than one in the form of a pension arrangement (within the meaning of Article 27D);**

subject, however, in the case of an order under sub-paragraph (a) to the restrictions imposed by Article 31(1) and (3) on the making of orders for a transfer of property in favour of children who have attained the age of 18.

..." [emphasis added]

[36] The applicant makes the case that the £10,000 was a lump sum payment within the meaning of Article 25(1)(c) of the 1978 Order. The respondent makes the case that the applicant's case falls within Article 26(1)(d) of the said order and that the £10,000 paid by the applicant's former wife to the applicant represented a payment made in order to extinguish his equitable interest in the former matrimonial home.

[37] While the agreement itself at paragraph (i) states that the respondent was to pay the petitioner a "lump sum of £10,000", at (ii) it expressly states:

"In consideration for the lump sum referred to at (1) above, the Petitioner shall relinquish any interest, whether legal or equitable which he has in the former matrimonial home."

[38] The agreement also refers to the wife retaining her pension in its entirety.

[39] I accept the respondent's submission that the respondent in determining whether the payment came under Article 25 or Article 26 of the 1978 Order was entitled to look at the substance of the agreement and was not bound to accept that the agreement came within Article 25 simply because of the use of the phrase 'lump sum' in paragraph (i) of the agreement, or because of how the applicant's solicitors thereafter sought to characterise the agreement.

[40] While it was contended on the applicant's behalf that the payment of £10,000 represented a lump sum rather than a property adjustment order, I am unable to accept that submission. A number of factors have influenced my decision in that regard.

[41] I note that, when asked to identify the assets that were the subject of the proceedings, the applicant's solicitor in response to the Legal Services Agency, identified two assets: the matrimonial home with a residual equity of £56,514 and the applicant's wife's retirement pension, with a cash equivalent transfer value of £905.86. While references were made in subsequent submissions to: the repayment of a loan; the potential of the wife inheriting from her mother's estate; and the wife's receipt of damages for a personal injury claim, I am satisfied that the assets in issue were those identified by the solicitor in the communication referred to above, namely the matrimonial home and the wife's pension.

[42] Evidently, when one considers the sums involved, the matrimonial home was the most significant asset in issue in the proceedings. Moreover, from the outset of his engagement with the Legal Services Commission (as it then was) the applicant clearly maintained that he had an equitable interest in the matrimonial home, despite it always having been in his wife's sole name.

[43] I don't accept the submission that for the payment to be characterised as a property adjustment order there must have been some transfer of title in the property. The fact that the property was never in the applicant's name and was always in his wife's name is a matter which is to be taken into consideration in determining the nature of the court order, it is not however dispositive of the matter. I accept the respondent's position that the applicant claimed an equitable interest in the matrimonial home and received a payment in return for relinquishing that interest. That appears to me to be the substance of the agreement between the parties and in those circumstances I am satisfied that the £10,000 was a property adjustment order within the meaning of Article 26 of the Matrimonial Causes (NI) Order 1978 and not a lump sum within the meaning of Article 25 of the said order. It follows that the payment is not exempt from the statutory charge.

#### *Legitimate expectation/irrationality*

[44] Another solicitor's firm, Meyler McGuigan, Solicitors, shared with the applicant details of a number of cases in which that firm had been instructed and in which the Legal Services Agency had initially sought to impose a statutory charge but reversed their decision on the basis of representations made by the solicitors. In broad terms these cases were similar to that of the applicant. As outlined above, the applicant contends that this demonstrates inconsistency and arbitrariness on the respondent's part and further gives rise to a legitimate expectation on his part.

[45] Dealing with the legitimate expectation issue in the first instance. The evidence before the court establishes the following:

- (i) There is no evidence of any representation being made by the Legal Services Agency to the applicant or his solicitors, or for that matter more generally to the legal profession about the circumstances in which the statutory charge would be applied. In fact the Guidance issued by the Legal Services Agency,

referred to above, clearly and unambiguously stated that the statutory charge would be applied to property adjustment orders.

- (ii) There is no evidence that either the applicant, or the applicant's solicitors, were aware of the Meyler McGuigan cases in February 2012, when the applicant signed the declaration about the statutory charge and when his solicitor confirmed that they had provided advice to the applicant about the statutory charge.
- (iii) In fact, a review of the table produced by the Legal Services Agency in relation to this issue, illustrates that the determinations involving Meyler McGuigan post-date the applicant's application for legal aid and his being granted a legal aid certificate.
- (iv) The respondent's evidence, having reviewed the Meyler McGuigan cases, was that the decisions relied upon were made in error, or there was some other reason unrelated to the facts of this case which meant that the decision was correct.

[46] In the first instance I can identify no action on the part of the respondent which could give rise to a legitimate expectation on the part of the applicant to the effect that, if he was the beneficiary of a property adjustment order during the ancillary proceedings, the statutory charge would not be applied. No 'clear and unambiguous' promise or representation was made to the applicant to that effect.

[47] Even had I been persuaded that there had been conduct on the part of the respondent giving rise to a legitimate expectation on the part of the applicant I am satisfied that: the regulations themselves; the Explanatory Memorandum; and the Guidance issued by the Legal Services Agency, made it absolutely clear that property adjustment orders were not exempt from the statutory charge. The respondent, if it recognised that it had exempted property adjustment orders in the past in error was entitled, having identified the error, to apply the regulations as they were intended to be applied. I accept Ms Murnaghan QC's submission that the statutory charge took effect as a result of the regulations which the Legal Services Agency were legally obliged to apply, this was not an area of discretionary judgment and mistakes made in the past did not bind the Agency to repeat those mistakes in the applicant's case.

[48] I therefore dismiss the applicant's claim inasmuch as it is reliant on legitimate expectation.

[49] I am equally unpersuaded by the applicant's claim of irrationality or arbitrariness. While it is clear that Meyler McGuigan Solicitors were successful in persuading the Legal Services Agency that some cases, which the Agency

retrospectively recognises should have been identified as property adjustment orders, were exempt from the statutory charge, this is not a basis for the disapplication of the statutory charge in the instant case.

[50] Lord Carnwath in **R(Gallaher Group Ltd) v Competition and Markets Authority** [2019] AC 113 addressed the issues of equal treatment and fairness, stating:

“24. Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said in the passage relied on by the defendant (para 19 above), is a “generally desirable” objective, but not an absolute rule.”

And thereafter:

“31. Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law. ...

32. Simple unfairness as such is not a ground for judicial review.  
...

41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson MR’s words [216] Bus LR 1200, para 53, ‘whether there has been unfairness on the part of the authority having regard to all the circumstances’ - is not a distinct legal criterion. Nor is it made so by the addition of terms such as ‘conspicuous’ or ‘abuse of power.’ Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by references to those principles that cases such as the present must be judged.”

[51] The question therefore is whether the decision of the Legal Services Agency can be characterised as irrational. In light of my ruling to the effect that the applicant had benefitted from a property adjustment order I am satisfied that the Legal Services Agency were simply applying the regulations and previous errors cannot transform that decision to a species of irrationality. I therefore dismiss this application on that basis also.

[52] I do want to make it absolutely clear that I make no criticism of the manner in which Meyler McGuigan Solicitors represented their clients. Ms Meyler swore an affidavit in these proceedings, and I entirely accept that she acted in good faith in seeking to protect the interests of her clients and advanced in good faith arguments which were persuasive on her clients' behalf. That it now appears retrospectively that mistakes were made by the Legal Services Agency in cases in which she made representations is not because of any fault on her part.

[53] I dismiss the applicant's claim on this basis also.