

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2004 No. 25

IN THE MATTER OF AN APPLICATION BY THE LAW SOCIETY OF  
NORTHERN IRELAND FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE CHIEF EXECUTIVE OF THE  
NORTHERN IRELAND LEGAL SERVICES COMMISSION

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GIRVAN J

Introduction

[1] The Law Society of Northern Ireland ("the Society") seeks an order of certiorari to quash a decision made by the Northern Ireland Legal Services Commission ("the Commission") made on 11 November 2003 and communicated practitioners by letter dated 10 December 2003 directing staff to use rates for the remuneration of legal aid fees which were in existence prior to the fixing of new rates by the Legal Aid Committee of the Law Society in September 2003 and an order of mandamus directing the Commission to apply the rates for the remuneration of civil legal aid fees which were fixed by the Legal Aid Committee of the Law Society in August 2003.

[2] On the hearing of the application Mr Larkin QC and Mr Scofield appeared on behalf of the Society Mr O'Hara QC and Mr McGleenan appeared for the Commission and Mr Sales and Mr Lewis appeared on behalf of the Lord Chancellor as notice parties to the application. The issues raised

in the application were many and complex and in the court is indebted to counsel for their full and well marshalled submissions.

### **The factual background**

[3] Against a background of concern by members of the Legal Aid Committee of the Society that no systematic evaluation of the appropriateness of costs payable to practitioners in legal aid cases had been conducted for a considerable period of time and that the fees needed review and updating, the Legal Aid Committee established a sub-committee in August 2001 with Mr Broderick, a solicitor, as Chairman to review the rates payable. Over a two year period the sub-committee reviewed the existing rates of remuneration. A report was obtained from Paul Kerr of Patricia Kerr Legal Costs Consultants. In that report the point was made that in many categories of cases the amounts assessed in the Fees Assessment Committee as laid down in guidelines were substantially less than the amounts allowed in taxation. Such assess costs were opened to challenge and should be increased to bring them more into line with tax costs. The view was expressed that the level of fees had been set so long ago that they could no longer be said to represent fair and reasonable remuneration. Where such costs had been identified Mr Kerr recommended that they be increased. The sub-committee produced a report in June 2003 which recommended across the board increases in rates, summonses recommending rates higher than those recommended by Mr Kerr.

[4] To be satisfied as to and to confirm the statutory powers and authority of the Legal Aid Committee the Committee sought advice from senior counsel. According to Mr Broderick affidavit the Committee concluded from the advice and from their understanding of the legislative scheme that it was proper and necessary for it to fix fair rates for remuneration and to the amend the existing rates.

[5] According to senior counsel's opinion and supplementary opinion the statutory framework suggested that the legislative intention was to ensure that those providing legal aid should be remunerated on the basis set out in schedule 2 paragraph 4 of the Legal Aid (Northern Ireland) Order 1981 without any question of affordability of the scheme being taken into account. Under Article 18(1) the 1981 Order although the concurrence of the Treasury in relation to the scheme was required and although this might suggest that the issue of affordability was therefore a material consideration in relation to the preparation and adoption of the scheme there did not appear within the scheme to be any consideration in relation to the assessment remuneration and of costs and consequently it was difficult to see how the concurrent of the Treasury in relation to the scheme could be said to introduce the notion of affordability as a consideration in the determination of fair and reasonable remuneration. The Legal Aid Advice and Assistance Regulations (Northern

Ireland) 1981 contains pointers which tended to argue against the proposition that affordability was intended by the legislation to be a consideration to be taken into account in the assessment process. Similarly in relation to the Legal Aid (General) Regulations (Northern Ireland) 1965. Counsel recommended that an investigation should be carried out on the approach taken by the Legal Aid Committee both prior to and subsequent to the implementation of the 1981 Order. A court might take into account the factual circumstances as at the time of the making of the relevant legislation to see how affordability was taken into account. In counsel's view it was tolerably clear that the Committee could only lawfully pay money which it had. If the legal aid fund was exhausted it was not open to the Committee to make payments. The relevant financial memoranda to which I shall refer later in this judgment did not in counsel's view provide any support for the notion that affordability could be introduced as a criterion in relation to payment when it was not a lawful criterion in relation to the assessment of costs. The memoranda provisions could not have any effect on the lawful obligation of the Committee to assess costs in accordance with the legislation even if that assessment is one which is likely to lead to material change to the estimate. But there was a strong procedural legitimate expectation that the Court Service would be consulted at the earliest opportunity in relation to a proceed obligation to act in such a way so as not to ensure that it had an opportunity to make representations so as to effectively contribute to the decision-making. If the Court Service were to decline to provide the necessary funding for the legal aid funded on the basis of affordability then their action would be unlawful.

[6] On 20 June 2003 the Legal Aid Committee approved provisionally the sub-committee's report and recommendations in respect of increased fees. The report was provided to the Law Society and the Bar Council for Northern Ireland for consideration and comment. A copy was sent to the Court Service but not until 26 June 2003. It will be necessary to look at the degree of consultation later in the judgment since the question of the adequacy of consultation has been raised as an important issue in the case. On 29 August 2003 the Legal Aid Committee adopted the recommendations of the sub-committee and approved the new rates of remuneration with effect from 1 September 2003.

[7] The Chief Executive of the Society at the direction of the Council of the Society wrote to all practitioners on 11 September informing as to the new rates of remuneration and that they would apply from 1 September 2003. As will appear more fully later the Court Service was not in agreement with the Law Society in relation to a decision to promulgate the new rates and it made clear that it could not make a case to the Treasury for the additional funding entailed.

[8] While the review of fees was going on it was apparent that under the Access to Justice (Northern Ireland) Order 2003 a newly constituted Northern Ireland Legal Services Commission was to be established. The Commission was established with effect from 28 July 2003. As from 1 November 2003 the Commission took over the administration of the legal aid fund from the Law Society and took over responsibility for the delivery of publicly funded legal services from the Society as from that date. Its remit was to review the current arrangements for the delivery of publicly funded legal services. On 10 December 2003 it wrote to all practitioners in his letter in paragraph 10 Mr Crossan the Chief Executive stated:

“As the position taken by the Northern Ireland Court Service became clearer to me and to the Commission on the early days of its existence, I authorised my staff to revert to using the rates for authorities for certain types of legal aid that were in existence prior to the issue of Alan Johnston’s letter of 22 October 2003 until such times as the Commission and I could fully ascertain the status of the decision of the statutory Legal Aid Committee of the Law Society of Northern Ireland to implement revised rates for civil legal aid in the light of the Northern Ireland Court Service position.”

That decision is the subject matter of the present judicial review application.

[9] Discussions and correspondence between the Society and the Court Service to which it would be necessary to refer greater detail later revealed a conflict of views between the two organisations. As stated earlier it was apparent that the Court Service was not happy with the new rates or the steps taken to fix them and indicated that additional funding would not be available to meet the new rates. Mr Johnston the then Chief Executive of the Legal Aid Department in the Society and the Government Accounting Officer with the responsibility of the administration of the legal aid fund received a clear indication from the Court Service that the Lord Chancellor’s Department would not fund the increase rates and Mr Johnston explained to the Legal Aid Committee that the effect of a decision to approve the new rates would lead to a shortage of money in the legal aid fund. The Legal Aid Committee however took the view that they had a statutory responsibility to revive reasonable remuneration for work reasonably undertaken and properly done and that their statutory responsibility in the event of a conflict with any obligation under the financial memoranda (to which I shall refer later) took precedence. The Committee approved the new rates. Mr Johnston was given a clear direction from the Chairman of the Legal Aid Committee to instruct his staff to implement the revised legal aid rates. Mr Johnston in his affidavit referred to an earlier financial impasse in 2001-2002 to discharge monies

owing to practitioners on foot of assessed bills. At that stage senior counsel advised that the legal aid budget was demand led and that affordability should not play a part in the assessment of fees. Once fees became properly payable to a solicitor the Legal Aid Department and its sponsoring body the Lord Chancellor's Department was required by law to pay the fees. In the event the Court Service provided the money to discharge the fees properly payable and conceded that it could not impose budget predictability.

### **The Commission's Approach**

[11] In his affidavit Mr Crossan the Chief Executive of the Commission draws attention to the fact that the provision of legal aid will depend on the Lord Chancellor providing appropriate funding for that purpose. Schedule 4 paragraph 6 of the 2003 Order when it comes into force will require account to be taken of four factors: the time and skill involved in doing the work, the number and general level of competence of people undertaking work, the cost to public funds in any provision made and the need to secure value for money.

[12] He states in his affidavit that he understood that the Court Service only received from the Legal Aid Committee the report and recommendations for fee increases on 26 June some five weeks before the end of the period which included the July holidays. He referred to the correspondence to which I shall refer later that Mr Crossan was not briefed by the Legal Aid Department in advance of 1 November 2003 about the position adopted by the Court Service in relation to the review of civil appeals and he was not made aware of the decision of the Legal Aid Committee to direct Mr Johnston to implement the new fees or his letter to practitioners on 22 October 2003. After he became Chief Executive Mr Crossan formed the view that any financial transactions made by the Commission on the new fees structure would contravene propriety and fundamental principles of Government accounting in terms of regularity because there was no approval or consent from the Treasury. He believed that if the Commission was to authorise or make payment out of the legal aid fund against the background of the clearly stated position of Court Service the Legal Aid Committee did not have the approval to increase fees and that funding was not available to meet the fees those authorities and payments would be irregular and improper. This would lead to the Commission spending more than the funding allocated to it in the 2003-2004 period with the subsequent possibility of an excess vote. This would create significant liabilities for the Commission in resource terms and there would be a fundamental lack of control over public expenditure for which he carried responsibility as accounting officer. For those reasons he directed his staff on 17 November 2003 to revert to using the previous fees in issuing authorities and making judgments. His decision to do this was taken to ensure that he fulfilled his responsibilities as accounting officer to ensure the proper application of the management framework within which the

Commission operated. He made clear that he has not formed any view as to the fairness or reasonableness of the fee structure which had been introduced by the Legal Aid Committee. On the contrary the Commission had not and still has not formed any opinion on the fairness or reasonableness of the Kerr Report. The Commission saw and approved the circular sent by Mr Crossan to practitioners on 10 December indicating that the Commission was going to apply the old rates. In its first circular of 2004 sent to practitioners on 10 February the Commission stated that reviews would be required appropriate research and meaningful consultation before decisions were made about a new fees structure. The Commission intended to review the increases to the fees and the basis for them and a decision-making process which led to the issue and Mr Johnston's letter of 22 October 2003. The Commission intended to invite the Law Society, the Bar Council, the Court Service and other interested parties to contribute to the review. In the meantime the Commission would not sanction of fees at the rates which were approved by the Legal Aid Committee on 29 August 2003 when the Commission would continue to issue authorities and make related payments using the fee level that were in existence prior to the issue of Alan Johnston's letter of 22 October 2003.

### **The Court Service's Approach**

[13] In her affidavit Ms Devlin the Director of the Public Legal Services Division (formerly known as the Legal Aid Division) of the Northern Ireland Court Service set out the reasons relied on by the Lord Chancellor to challenge the Society's decision. Firstly, the Society and the Legal Aid Committee had an obligation under Article 18(1) to seek Court Service approval and the concurrence of the Treasury for the increase in legal aid fees which they purported to adopt. Secondly, the Legal Aid Committee failed to consult properly with the Court Service as it was required to do on grounds of legitimate expectation, fairness and in the fulfilment of his legal obligation to inform itself about factors relevant to the exercise of its functions. Thirdly, the Legal Aid Committee acted unlawfully in setting rates for the future at a point when its responsibility for administering the legal aid fund and having to balance the monies made available for the fund from Parliament with expenditure from the fund was about to terminate without consulting the Commission a successor body. Fourthly, the Legal Aid Committee misdirected itself in law in assuming that the 1981 Order created a legal obligation on the Court Service to provide additional funding thereby ignoring the true legal position namely that any funds for the legal aid scheme had to be voted by Parliament from time to time. As to which there could be no binding legal obligation. It failed to have regard to a relevant factor namely the likely availability of financing from central funds for the rate increase.

[14] The Legal Aid Committee acted unlawfully in setting new rates without informing itself properly about the true cost of implementing the increase.

[15] Payment of legal aid in Northern Ireland are public monies voted by Parliament to the Lord Chancellor. The Lord Chancellor is responsible to Parliament for legal aid in Northern Ireland. The Lord Chancellor acts through the Northern Ireland Court Service in making available the funds voted by Parliament. Each Government department which spends monies voted by Parliament is required to nominate accounting officers who have responsibility for ensuring that payments made are within ambit of the amount of the vote for that department and that appropriate approval by Parliament for expenditure is sought and obtained. The Director of the Northern Ireland Court Service is the departmental accounting officer. He is responsible for ensuring in relation to all legal aid funding voted by Parliament for Northern Ireland that legal aid expenditure satisfies the requirements of the relevant Treasury manual Government accounting, the Government's financial bidding and approval mechanisms and statutory requirement to report expenditure to Parliament.

[16] To assist the management of the relationship between them the Court Service and the Society agreed two sets of management statements and financial memoranda covering civil and criminal legal aid which had effect from December 1997. These documents were brought forward by a joint working group.

[17] In the agreed management statement it was agreed in paragraph 2.1 that the Lord Chancellor was responsible to Parliament for legal aid and one of its objectives was to ensure that the overall cost of legal aid has to be affordable and controllable and the overall objectives are that the Legal Aid Committee included acting in ways which generally support and further the Lord Chancellor's objectives for legal aid. The legal aid fund payments should not exceed the provision approved by Parliament (paragraph 3.1(a)) and civil legal aid and administration payments should not exceed the provision approved by Parliament. Provision was made for a rolling corporate plan covering a three year period. One of the objectives was the planning being to enable the Court Service to assess the level of the Legal Aid Department of Funding alongside a Government's changing priorities and objectives.

[18] The financial memorandum set out the conditions on which the Court Service paid to the Society a grant to maintain the legal aid fund out of monies voted by Parliament. The Legal Aid Department agreed to operate in accordance with the guidance contained in non-departmental public bodies: a guide for departments and in accordance with the management statement. The Legal Aid Committee accepted it was responsible for (inter alia) ensuring

value for money and for overseeing procedures to ensure propriety of expenditure and good financial management. Under paragraph 3.5 the Legal Aid Committee agreed to ensure that the department did not commit itself to any expenditure in current or future years without provision and approval. Any request for additional provision must be supported by detailed analysis of the circumstances in which the request is made including (inter alia) a thorough assessment of the capacity for savings to be made in all other aspects of the work of the department to offset the additional cost to be incurred. By paragraph 5.1 it was agreed that acceptance permitted by the memorandum at paragraph 5.2 any departure from the approved estimates and proposals likely to involve new or increased expenditure shall not be affected without the prior approval of the Court Service.

[19] The Treasury manual Government Accounting referred to in the financial memorandum sets out procedures relating to the budgeting for and authorisation of expenditure of public monies. Paragraph 2.4.1 provides that no resources can properly be committed or expenditure incurred without the approval of the Treasury. This extends to commitments to spend whether continuant or otherwise. Paragraph 2.4.2 provides:

“The requirement for Treasury approval is the longstanding convention, being one aspect of the Treasury’s power to control all other departments in matters of finance and public expenditure. In addition, many statutes contained a requirement for Treasury approval or consent. Where legislation specifically requires Treasury consent, any expenditure or resource consumption without such consent is illegal. Where there is no statutory requirement for Treasury approval, expenditure or resource consumption without Treasury approval is irregular.”

Paragraph 8.3.14 provides:

“NDPB must ensure that where the need for specific departmental approval is provided for in legislation or in a framework of controls established by the sponsor department, that approval is obtained before the NDPB enters into any commitment; and that the approval in any conditions attached to it is scrupulously observed. Any expenditure in such cases which has not been approved by the Department is irregular, as is any expenditure in breach of a condition attached to the Department’s approval.”



[20] Mr Sales referred to the legal aid annual accounts made by the Society under Article 18(a) of the 1981 Order in which the Society consistently recognised the obligation to act within approved funding and to consult with and liaise with the Court Service in a good business like relationship on matter which were of common interest and concern and in relation to legal aid finance and staffing. In addition the Legal Aid Department corporate plans accepted that they were bound by the funding arrangements contained in the management statement and the financial memorandum recognising that the Legal Aid Department's overall financial goal was to comply with Government accounting policy and procedures thus ensuring propriety and regularity of all expenditure and the production of unqualified annual accounts. The 2002 corporate plan identified as an issue to be addressed "effective communication with the Court Service regarding the transfer of responsibilities from the Law Society to the proposed Legal Services Commission".

[21] From time to time up until 31 October 2003 it had been necessary for the Legal Aid Committee to set rates for new areas of work which were brought within the scope of civil legal aid. When this arose for example under the Life Sentences (Northern Ireland) Order 2001 and also for appeals under the Nationality Immigration and Asylum Act 2002 the Legal Aid Committee consulted with the Court Service seeking their comments on the level of guideline fees - rates which the Legal Aid Committee was proposing. Miss Devlin contrasted this practice with the proposed introduction of new rates without consultation with an approval of the Court Service. In paragraph 61-116 of her affidavit Miss Devlin sets out the Court Service's version of the sequence of events which the Court Service relied on to support their contention that there was no effect of her proper consultation on the part of the Legal Aid Committee with the Court Service before the decision was made to introduce the new rates and to inform practitioners of them.

[22] The Society contends that there was proper and adequate consultation with the Court Service. Two representatives of the Court Service were members of the Legal Aid Committee namely Mr Hunter and Miss Quinn. They were entitled to and did attend meetings of the Legal Aid Committee throughout the two year period during which these were being researched. Mr Broderick who was on the Committee and the subgroup delegated to take the fees review forward contends that the Court Service were well aware of the decision-making process and were intimately involved in it. The Court Service had the cost drawers report for some two years in advance of the decision to increase the rates. It should however be noted that although that is true the actual figures which the subgroup recommended and which the Legal Aid Committee accepted should be the new fees and in some cases represented increases on what was specified in the care report. It was open to

the Court Service to make representations on the cost drawers report and the fees review process. The Society contends that such representations as they did make were taken into account. Miss Devlin in her affidavit complained that the Court Service had given no proper or adequate opportunity to conduct its own research or present contrary information and recommendations. Mr Broderick says that they have never made any such complaint. It was, he says, open to the Court Service to conduct their own search and present contrary information and recommendations.

### **The Relevant Provisions of the 1981 Order**

[23] Civil Legal Aid provision is governed by the provisions of Part II of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 with provision being made for the provision of legal advice and assistance and assistance by way of representation and proceedings. Provision is made for the determination of eligibility for Legal Aid, the scope and general conditions of Legal Aid, the financial conditions of Legal Aid and the financial assessment of resources, the recovery of contributions, how costs of successful unassisted parties should be dealt with and, importantly in the present context the remuneration of persons giving Legal Aid. A solicitor who has acted for a person receiving Legal Aid shall be paid for so acting out of the Legal Aid fund. Subject to rules of court made under the Family Law (Northern Ireland) Order 1993 under Article 13(2) it is provided that the sums payable under paragraph (1) to a solicitor or counsel shall not exceed those allowed under Schedule 2.

[24] Schedule 2 makes provision for the sum allowed to a solicitor in connection with proceedings in the High Court, the Court of Appeal and in the House of Lords. The solicitor is entitled to the full amount allowed and taxation of costs. When a solicitor receives taxed costs in this way taxation is carried out on an objective basis like other tax costs on the standard basis (see paragraph 4 of the Schedule) and the means or availability of funds on the part of the paying party would not be a relevant matter for the Taxing Master to consider. In the case of the solicitor's costs in the County Court the solicitor is entitled to full amount of the costs allowed and taxation (see paragraph 2(2)(a) of the Schedule which in paragraph (b) goes on to provide:

“Where the costs are not taxed, such amounts as the Lord Chancellor after consultation with the County Court Rules Committee may by order determine.”

In the case of the Magistrates' Courts civil proceedings under paragraph 2(3) it is provided that the sums allowed to solicitors shall be “such amounts as the Lord Chancellor after consultation with the County Court Rules Committee may by order determine.” The sums allowed by a solicitor in any other case shall be such as may be determined in the “prescribed manner”.

Paragraph (4). "Prescribe" means prescribe by regulations. Under paragraph (5) regulations may provide that for the purposes of the Schedule instead of costs being taxed in the ordinary way the amount of costs shall be fixed whether by an officer of the court or not by an assessment made without taxation but with a view to allowing as nearly as may be the same amount as on taxation. In exercising powers under the Schedule to make an order as to the amounts of the sums allowed to counsel or a solicitor and in making any regulations relating to such amounts for the purpose of the Schedule and any person by whom any such amount is determined under any such order or regulation in any particular case shall have regard to the principle of allowing fair remuneration in accord to the work reasonable undertaken and properly done.

[25] Article 22 provides that the Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to Part II or for preventing abuses thereof by persons seeking or receiving Legal Aid advice and assistance and regulations may make different provisions in relation to advice and assistance and in relation to Legal Aid respectfully.

[26] Article 18 has an importance in the present application, Article 18(1) provides:-

"Subject to this part, it shall be the responsibility of the Law Society to make arrangements, in accordance with the scheme made by them with the approval of the Lord Chancellor and with the concurrence of the Treasury for securing that legal aid, advice and assistance are available are available required by this Part and generally to administer this Part."

Mr Sales on behalf of the Lord Chancellor conceded that the printed version of Article 18(1) appeared to omit a comma which should have appeared after the words "with the concurrence of the Treasury."

Article 18(6) provides:

"Any scheme under this article shall, subject to paragraphs 4 and 5 define the constitution of any committee established under that scheme, may regulate the forum, procedure and tenure of office of the members of such committee and may provide for the payment to those members of such committee and may provide for the payment to those members of fees and allowances: but any such committee shall have power to determine its own procedure so far as not regulated as aforesaid."

Article 18(7) provides:-

“Subject to this part, a scheme under this article may include provisions as to the persons by whom and in the manner in which questions arising in the administration of this part are to be determined and as to any other matters incidental to the administration thereof.”

[27] The Society under Article 19 was given the function of establishing and administering the Legal Aid Fund. Receipts and expenses of the Society attributable to Part II are to be paid into and out of the Legal Aid fund and the Society's general funds shall be indemnified out of that fund against any liability in respect of those expenses. Under Article 19 the sums required to meet payments out of the Legal Aid fund after allowing for sums received apart from that provision shall be paid to that fund by the Lord Chancellor at such times and in such manner as the Lord Chancellor may with the approval of the Treasury determine. Estimates of the sums required as aforesaid shall from time to time be submitted to the Lord Chancellor by the Society. An estimate must be submitted at once in every financial year at such time as the Lord Chancellor may with the approval of the Treasury direct. An estimate shall be in such form and give such particulars as may be so directed. Under Article 20 an annual statement of accounts must be prepared the comptroller and Auditor General must examine every statement and report, inspect the accounts and any records relating thereto and shall certify every such statement and lay a copy together with his report before Parliament.

### **The Relevant Regulations**

[28] Under Regulation 21 of the Legal Aid (General) Regulations (Northern Ireland) 1965 as amended in proceedings other than in the County Court or a court of summary jurisdiction the Legal Aid Committee may authorise payment to solicitors and counsel of such amount as it fixes (ie outside the framework of formal taxation) in certain circumstances set out in paragraph 1(a) to (i). In the case of paragraph (b) where an assisted party's claim has been settled without any court directions on terms that include provision for an agreed sum in respect that costs to be paid to that assisted person which the solicitor is willing to accept the amount is “fair remuneration” for work reasonably undertaken and properly done. In other cases for example in the case of a settlement in terms it has resulted in a judgment or order of the court that the assisted person will be paid his part in party costs by an unassisted person and the amount of such costs has been agreed the amount is “the amount as estimated by the Legal Aid Committee which would have been allowed to the solicitor or counsel had the costs been taxed under the Schedule.” Under Regulation 21A in the case of the Lands Tribunal the

tribunal may direct Legal Aid costs to be determined by taxation in accordance with the Schedule or by the Legal Aid Committee as being the amount assessed by the Committee which would have been allowed the solicitor and the counsel had the costs been so taxed after taking into account any actual taxation that may have taken place. In the case of proceedings in the County Court the Legal Aid Committee may authorise payment of such amount as is prescribed by order of the Lord Chancellor and in relation to proceedings under the equity jurisdiction is the amount estimated by the Legal Aid Committee which would have been allowed by the solicitor and counsel had the costs been taxed under the schedule after taking any actual taxation that may have taken place in the proceedings or the amount agreed in the terms of settlement. No authorisation shall be given to the Legal Aid Committee where any member of the Committee dissents and in that event the amount must be taxed. Under Regulation 27 the sums allowed to solicitors and counsel in connection with authorised summary proceedings shall be such as are assessed by the Legal Aid Committee in accordance with an order made by the Lord Chancellor. Under the Legal Aid (Remuneration of Solicitors and Counsel in Authorised Summary Proceedings) Order (Northern Ireland) 1981 the sums allowed to solicitors or counsel acting for assisted persons in connection with authorised summary proceedings shall be assessed by the Legal Aid Committee in accordance with the schedule which provides for modest basic fees. However, a solicitor aggrieved as to any sum allowed by an assessment in accordance with the schedule to those Regulations may make representations to the Council of the Society which may allow such costs and fees as representative of their remuneration according to the work reasonably undertaken and properly done. The schedule and regulations on their proper construction lead to the conclusion that in the case of the Legal Aid Committee having to assess their remuneration their task would be to ascertain the costs which in the Legal Aid Committee's view would be allowed in a taxation situation if taxation had taken place. For example in the case of Regulation 21(1)(c) fair remuneration must mean such costs as the Committee considers would be allowed in a formal taxation since the assessment is intended to say at the cost of a formal taxation. Similarly in relation to the provisions relating to County Court costs. If a member of the Committee objects to the amount fixed the matter will go to taxation. It is clear that the Committee is intended to try to arrive at a figure that it considers would be allowed in a taxation. In seeking to establish fair remuneration having regard to taxation principles the Legal Aid Committee would not be entitled to take account of the question of the means of the paying party.

### **The Scheme**

[29] Under the relevant scheme as approved by the Lord Chancellor and the Treasury made in 1978 but with continuing effect by virtue of Section 29(3)(a) of the Interpretation Act (Northern Ireland) 1954 a Legal Aid

Committee was established and subject to the provision of the regulations and to other directions from as from time to time given to them by the counsel as provided in paragraph 7 the Legal Aid Committee was charged with generally administering the scheme and amongst its power was the obligation to “deal with questions as to the payments to solicitors of sums due under the provisions of the Order and the Regulations. The scheme does not in terms subject the exercise of those powers and duties to the approval of the Lord Chancellor or the concurrence of the Treasury.

### **The Access to Justice (Northern Ireland) Order 2003**

[30] The 2003 Order makes provision for the establishment of the Commission. Under Article 3(3) when it comes into operation (and it has not yet been put into force) the Commission will be charged with the function of securing “within the resources made available and priorities set out in accordance with Part II” that individuals have access to civil legal services that effectively meet their needs and promoting the availability to individuals of such services and securing that individuals involved in criminal investigations in relevant proceedings have access to such criminal defence services as the interests of justice require. Under Article 11 the Lord Chancellor shall pay to the Commission the sums which he determines are appropriate for the funding of civil legal services by the Commission and in funding civil legal services the Commission shall aim to obtain the best possible value for money. Under the Access to Justice (Northern Ireland) Order 2003 (Commencement No 1) Order (Northern Ireland) 2003 Article 3(1) creates the Commission as from 28 July 2003 the transitional provisions are given a commencement date of 1 November 2003.

[31] Schedule 3 of the Order contains transitional provisions under which from 1 November 2003 until to as yet an unspecified date the Commission steps into the shoes of the Law Society to administer the old fund, that is the Legal Aid fund maintained by the Law Society up until 31 October 2003. Paragraph 2 of Schedule 3 provides:-

“(1) Subject to paras 3 and 9 on the first appointed day (1 November) all rights, obligations and property of the Law Society which are referable to its functions under the 1981 Order shall become rights obligations and property of the Commission.

(2) Any payments which are required to be made into or out of the old fund in connection with Legal Aid or advice or assistance under the 1981 Order shall, on and after the first appointed day, be paid to or by the Commission.

(5) Any reference in any document including any statutory provisions constituting or relating to anything transferred by subparagraph (1):-

- (a) to, or to the counsel of, the Law Society or
- (b) to the Legal Aid Committee, certifying committee or any other committee or tribunal established by the Law Society under Part II of the 1981 Order or
- (c) to any member or office holder of such committee or tribunal

shall, so far as is required for giving effect to that subparagraph, be construed as a reference to the Commission, or in relation to a function exercisable by any individual or committee under arrangements made by the Commission under Article 7(4) of the Order, as a reference to that individual or committee.

(6) The Lord Chancellor may by order make any consequential, incidental, supplementary or transitional provisions and any savings which appear to him to be appropriate in consequence of or otherwise in connection with the transfer effected by subparagraph (1)."

[32] Under paragraph 4(2) it is provided that with effect from the appointed day ie 1 November until the as yet unappointed second appointed day it shall be the responsibility of the Commission:-

"(a) To establish and maintain fund which would be deemed for all purposes the 1981 Order to be the Legal Aid fund,

(b) Subject to the provisions of Part II of the 1981 Order and this Schedule, to make arrangements with the approval of the Lord Chancellor and the concurrence of the Treasury for securing that Legal Aid advice and assistance are available as required by Part II of the 1981 Order."

## The Society's Arguments

[33] Mr Larkin QC argued that the decision of the Commission and the Court Service to treat the new rates fixed by the Legal Aid Committee as unlawful was an usurpation of the jurisdiction of the court. The failure to apply to judicially review the LAC decision in accordance with Order 53 was a breach of the principle of the procedural exclusivity of Order 53. The respondent's case is in breach of this principle. The fact that no challenge was brought is indicative of an acceptance on the part of the Court Service that the Committee had the power to adopt new rates and did so validly.

[34] The Legal Aid Committee was the body charged with generally administering the Legal Aid scheme in dealing with the questions as to payment to solicitors and barristers of sums due under the provisions of the Act and the Regulations. The Court Service provided no constructive input on the level of rates during the review and appeared to have been acting in the knowledge that the Commission would in due course do its bidding.

[35] The Court Service contention that Article 18(1) requires the approval of the Lord Chancellor and the concurrence of the Treasury for any increase in the standard fees was belied by the language of the provisions. The scheme was made with the approval of the Lord Chancellor and the concurrence of the Treasury. The scheme empowered the Legal Aid Committee to generally administer the scheme. This included the fixing of rates to ensure fair remuneration. Increasing rates of standard fees does not in itself require additional funds to be provided whether or not additional funds would be required by the Legal Aid Department would depend on the nature and the number of claims made by practitioners with the unpredictability of funding requirements being dealt with in the usual manner. One must not conflate the separate questions of assessment (a responsibility of the Committee) and of funding to meet claims made by practitioners (a responsibility of the Chief Executive of the Legal Aid Department). The agreed accounting procedure set out in the financial memorandum and management statement were accounting procedures which could not override the Committee's statutory duty to ensure fair remuneration if there was to be a cap on levels of remuneration it could only be imposed by regulations not by memorandum of non statutory character.

[36] The Legal Aid Committee was not determining whether and what further funding was required but rather was concerned with setting fair and reasonable rates for assessing what was payable to practitioners under a certificate. The task the Committee was embarked on essentially was that of assessment, providing what rates should be payable to the profession in any given case.



[37] Mr Larkin contended that the suggestion that there was insufficient consultation with the Court Service is misconceived. The Court Service had two representatives who attended the meeting of the Legal Aid Committee throughout the entire two year period. There were high level contacts between the Committee, the Society and the Court Service throughout the relevant period under the auspices of a contact group. The Court Service was able to make any representations which it wished. It was open to it to conduct its research to present contrary arguments. The Commission does not itself rely to any significant degree on the argument of lack of consultation.

[38] In relation to the contention that the Committee did not inform itself of the costs of implementing the increase as it was contended that Mr Johnston did submit estimated costs to the Court Service and these were provided to the Committee. The Committee was of the view an entitled to take the view that even with the Society's increased costs of implementing the new rates the new rates were reasonable and appropriate.

[39] The rates set by the Committee being lawful, the Chairman of the Commission had no power unilaterally to disapply those rates. At the time of transfer of functions on the appointed day the Society was obliged to remunerate practitioners on the basis of rates fixed by the Committee in September 2003. The Commission was therefore similarly so obliged unless and until a properly determined new rate on the basis of the new statutory criteria in the 2003 Order and after proper consultation. The Chief Executive of the Commission personally directed his staff to disregard the rates which were properly fixed by the Committee without identifying any legal or statutory basis on which he purported to act save that he did so as the Accounting Officer for the Commission. This was done without proper authority and without any procedural safeguards. The result is that the rates currently being applied by the Commission do not represent fair and reasonable remuneration for work done by practitioners. The Chief Executive took an improper decision and had placed the Commission in breach of its obligations under Regulation 21 of the Legal Aid (General) Regulations (Northern Ireland) 1965 and paragraphs 5 and 6 of Schedule 2 of the 1981 Order as those obligations transferred by paragraph 2 of Schedule 3 of the 2003 Order.

[40] The Commission is frustrating the substantive legitimate expectations of those solicitors who have completed work and submitted fees on the basis of the new fees during the period when they had been informed that those fees had been adopted.

### **The Commission's Contentions**

[41] The Legal Aid Committee's proposals were only defined in mid June 2003 when the Committee adopted recommendations made to it by its subgroup. These recommendations in a number of instances recommended rates of remuneration higher than the figures referred to the Kerr report. There had to be proper consultation after that date when the specific proposals which would have been put forward to take effect from 1 September 2003. The end of the consultation period was specified to be 31 July, a very short period of time particularly in the light of the summer holidays. The minutes of the Committee meeting of 13 June 2003 record that Mr Doran outlined why the subgroup did not consult confirming that there was no consultation by the subgroup and said that consultation had been considered. However the fact that its members brought their own experience as practitioners to the process brought a degree of independence in his assessment. At that meeting it was recommended by Mr McGettrick that the final report and recommendations should issue to the Court Service, a consultation process should be entered into with a profession with a consultation period of 31 July and that the rates should be agreed and implemented on 1 September 2003. It is not clear from the minutes what actual decision was made on foot of that recommendation. The minutes of the committee meeting on 20 June 2003 recorded that Mr Bailey, the Society's Chief Executive, suggested an amendment of the recommendation that a consultation period should be entered into with the profession with a proposal that "The Committee having come to a decision to endorse the recommendations, an opportunity comment was to be effected to the profession against a said timetable". The minutes of that meeting record his action; "The forward and report as approved by the committee to be sent to Mr Hunter, NICTS".

[42] The Legal Aid Committee was unable to provide an accurate estimate of the potential impact which the recommendations would have on the legal aid fund. That inability remained a feature of the process during the period up to and after 31 August 2003. Providing a reliable estimate is at the very least a relevant and important element of a proper consultation process. The consultation process if it can be so described was curtailed within a short time over the traditional summer holiday period.

[43] In relation to the suggestion of the legitimate expectation of solicitors engaged in work since 1 September 2003 a legitimate expectation to be legitimate has to be properly based. In this case the legitimate expectation was founded on increases fixed without proper consultation with the Court Service. The circular of 11 September and 22 October were issued without proper consultation. They were issued in the knowledge that Court Service challenge the increase, a fact which the society chose not to alert its members to. In so far as the first circular asserted that the new rate applied to back log cases which remained to be assessed it could not create a legitimate

expectation because the work was already done at a time when there was no expectation.

[44] There was on the face of it a tension if not a direct conflict which has to be resolved between the requirement imposed on Mr Crossan and the Commission as a non-departmental public body to be accountable to the director of the Court Service for the regularity of its expenditure and the entitlement of solicitors to receive fair and reasonable remuneration. The Commission faced a direction from the Court Service which effectively prohibited payment of the increased rate which you could not blindly ignore.

### **The Lord Chancellor's Contentions**

[45] Mr Sales on behalf of the Lord Chancellor's Department argued that the legal aid increased rates were not validly adopted because:

- (a) the Committee and Society had an obligation under Article 18(1) to obtain Court Service approval on the concurrence of the Treasury,
- (b) the Legal aid Committee was required on the grounds of legitimate expectation and fairness and fulfilment of its legal obligation to inform itself about factors relevant to the exercise of its functions. It had failed to do so properly,
- (c) the Legal Aid Committee should have consulted with the Commission which the Committee knew would take over responsibility and which would have had to implement the increased rates adopted,
- (d) the Committee failed to have regard to a relevant factor namely the likely availability of funding from Central Funds and mis-directed itself in assuming that the 1991 Order created a legal obligation on the Court Service to provide what additional funding the Committee said was required,
- (e) the Committee acted unlawfully in failing to inform itself properly or at all about the cost of implementing the increase.

[46] In support of proposition (a) and (d) Mr Sales called in aid the constitutional principle that there must be full parliamentary control over expenditure of central funds and as a corollary that the Executive has no legal right to take monies from central fund save in so far as monies have been voted by Parliament.

[47] The fact that a legislative requirement imposed obligations on a government department or a public body to make payments would not have

itself provide parliamentary authority for payments out of central funds. The usual position is that central funds are made available to departments and through them to other public bodies subject to such obligations under the authority of the annual appropriation act. The Treasury is the government body responsible for assessing periodically what sums are required for particular public purposes and in arranging parliamentary authority to be granted for the release of central funds for those purposes. The fact that the Legal Aid Committee might decide on a new increased rate to be applied and to be funded out of central funds could not of itself provide the Court Service with legal authority to take central funds to enable those increased rates to be paid. The Legal Aid Committee did not have legal power about its own decision making to require that the Treasury and Parliament make central funds available to fund any increased rates of remuneration it might decide upon. There is a need for the legal requirement to ensure that governmental co-ordination can be effectively carried out "scheme" in Article 18(1) should be construed as covering any new general statement of rates. The constitutional requirement that parliament contains direct control of public expenditure operates as an aid to construction of statutory provisions. A purposive construction of Article 18(1) supports the same result. The concurrence of the Treasury for the making of any scheme is to ensure proper financial control of the legal aid budget hence "scheme" must be given a wider construction and cover features of the scheme for the payment of legal aid which effect the actual cost to the public purse.

[48] The new rates were not binding on the Commission which has its own statutory responsibilities to administer the legal aid fund informing its opinion of what was fair remuneration the Commission was not bound by the view adopted by the Legal Aid Committee if the Commission wish to adopt or apply new rates which had not been approved by the Court Service or Treasury it had an obligation to obtain their approval. The Commission required the approval of the Court Service and Treasury under paragraph 4(2)(b) of schedule 3 to the 2003 Order.

[49] The Court Service had a legitimate expectation that it would be properly consulted before any change in the legal aid rate. The Society's position involved a certain conflict of interest between the public purpose and the interest of its members such that the ability of the Court Service to be properly consulted and make representations about rates was particularly important in the interests of good and proper administration. The management statement and the financial memorandum read with the Treasury manual of which the Legal Aid Committee had agreed to abide established a legitimate expectation that the Court Service and Treasury approval would be sought before any change would be made that had a significant impact on funding. However in this situation it was accepted that the Court Service and the Treasury could not veto the Treasury's proposals (if it had the power to make them) since a legitimate expectation cannot over-

ride a statutory duty. The Court Service, however, had to have the opportunity to make representations as to why the Committee should not proceed without Court Service and Treasury approval before the Committee make its final decision. The previous established practice of consultation confirmed this approach.

[50] There was a failure to properly consult. The Legal Aid Committee provided inadequate information, allowed the Court Service an inadequate period of time to respond effectively and the Committee approached the exercise with a closed mind providing the Court Service with information only at a stage when the Legal Aid Committee had already effectively decided what it was going to do. There was an applied duty of fairness to the Court Service to allow the Court Service an opportunity to make representations before the Committee adopted any increased rates. The Commission owed the same duties to the Court Service as the Legal Aid Committee.

[51] The promulgation of general rates of remuneration itself constituted an aspect of the fulfilment of the Legal Aid Committee's general function of administering the scheme. The Legal Aid Committee had to have regard to availability of funding and it had to have regard to that in exercising its general function. The system could not be administered properly without regard to the availability of funding for it. The Committee was on notice that government funding might be lost if it did not follow proper procedures in ensuring that its expenditure remained within parameters set by the parliamentary vote of monies. The Legal Aid Committee failed to have regard to a factor relevant to the exercise of its powers under the 1981 Order. Moreover it failed to inform itself properly about the cost of implementing the increases. When it decided on 29 August 2003 to promulgate the increased rates the Committee did not have adequate information available to it as to what the cost of the increase would be.

[52] Since the Legal Aid Committee's decision to promulgate the increased rate was unlawful the increased rate was invalid from the outset and there could be no legitimate expectation that the Commission should implement the invalid and unlawful rates. Since November 2003 it has been the Commission which would have the statutory obligations in relation to the assessment and payment of legal aid. Statements made by the Society and the Committee about the rate which would apply could not bind the Commission of the proper decision maker.

### **The Collateral Challenge Point**

[53] Mr Larkin QC's contention that the respondent is bound by the Legal Aid Committee's decision since the decision was not and is not subject to any judicial review attack appears to be logically the first issue that must be

addressed. As a general proposition the court will treat an administrative act or order as invalid only if the right remedy is sought by the right persons in the right proceedings. Clearly a decision or administrative act may be challenged in judicial review proceedings but may also be challenged collaterally as for example by way of defence to a criminal charge or by way of defence to a demand for some payment. In *Wandsworth LBC Windor* (1985) AC 461 a local authority's tenant sued for increased rent was entitled in his defence to contend that the increase was ultra vires and void. In *R v Wicks* (1998) AC 92 and in *Bodington v The British Transport Police* (1999) 2AC 143 the House of Lords reviewed the law in the context of a defendant's right to challenge the validity of a planning enforcement notice and the validity of regulations in criminal proceedings. In the absence of a contrary intention in the relevant legislation the criminal courts were entitled to allow a collateral plea so that the validity of any relevant Act or Order could be challenged before them. In this case the Society is in essence contending that the Commission is bound to make payments to solicitors at the new rates. The Commission must be entitled to defend itself in the Society's proceedings and is in my view entitled by way of defence to seek to rely on the illegality of the Society's decision. If the Society's decision is legally flawed it would be recognised as having no legal effect at all and the Commission's decision not to follow the Society's decision would be justified subject to any other arguments as to whether the Commission is fulfilling its current duties to ensure fair remuneration to solicitors. Accordingly I reject Mr Larkin's contention that the Commission and the Court Service are precluded from raising the arguments which they have raised in respect of the legality of the Society's decision.

### **The Article 18(1) Point**

[54] In the case of any publicly funded scheme or service it is a self-evident social imperative that the expenditure of the public funds is properly and adequately controlled the absence of proper mechanisms for control would be a recipe for financial confusion and potential conflict. In the context of the Legal Aid scheme under the 1981 Order it is clear that the sums required to meet payments out of the Legal Aid fund after allowing for sums received shall be paid to the fund by the Lord Chancellor "at such times and in such manner as the Lord Chancellor may with the approval of the Treasury determine" (see Article 19(6)). The expenditure of central funds is subject to Parliamentary control and the Executive requires Parliamentary approval for the expenditure of money from central funds. Dainlith and Page in "The Executive in the Constitution (Structure, Autonomy and Internal Control)" points out that in effect that "effective Parliamentary control cannot come into being unless Government itself possesses properly functioning systems for relating overall revenue and expenditure needs determining how revenue is to be raised, setting limits on expenditure, allocating it between functions and ensuring that those limits and functions are respected .... The Treasury has

depended on Parliament for the public ventilation of its control problems and a marshalling of political pressure in favour of the adoption of more effective systems of control. Parliament have in its own turn depended on the Treasury to deliver systems which as well as being effective are transparent; that is to say they incorporate the specific virtue of generating sufficiently detailed and consistent information about financial decisions to enable a body outside the administration to maintain a genuine process of supervision.”

[55] In relation to the funding of a scheme such as the legal aid scheme there is obviously the potential for differing views, demands and expectations. The Legal Aid Committee and Society in fulfilling their functions may take a strong view as to how they consider public funds in the legal aid funds and the legal aid fund should be expended (in this case by increasing solicitors remuneration out of public funds). The Lord Chancellor’s Department (now the Department of Constitutional Affairs) as a sponsoring department will have its own views on how the Legal Aid Committee’s proposals fit in to the wider picture against a background of limited resources and a need to obtain additional funding which require Treasury approval and which in turn are subject to Parliamentary scrutiny. Any workable system involves a close working relationship between in the first instance the Legal Aid Committee and the Lord Chancellor’s Department and in turn between the Lord Chancellor’s and the Treasury. The Legal Aid Committee cannot compel the Lord Chancellor’s Department to provide additional funding just as the Lord Chancellor’s Department cannot compel the Treasury to recommend additional funding to Parliament and Parliament’s vote cannot be compelled by any party. If the Legal Aid Committee were free to make a binding commitment to incur substantial increased public expenditure commitments without any form of guarantee that public funding would be available then the Committee would be free to starting incurring liabilities that it could in no way be sure of being able to fulfil. This in turn would mean that the Executive would to an extent be later held to ransom for if it did not take steps to fund the shortfall brought about by the Committee’s decision the result would be that the fund would be put into a state of insolvency, an event which would in doubt be regarded by everybody as entirely undesirable. The Lord Chancellor’s Department would feel compelled to seek a additional funding without any guarantee that Parliament would be prepared to meet the additional bill to bail out the legal aid fund which had been put in its state by a decision of the Legal Aid Committee to incur substantial increased public expenditure without the approval in the first place of the Lord Chancellor’ Department and the concurrence of the Treasury.

“The ability to cut a department’s financial lifeline is clearly a nuclear deterrent among powers and in an age when Parliamentary democracy has replaced limited monarchy it is natural that the likeliest

moment for bringing that deterrent to bear should be that of the request to Parliament for funds rather than of denying departmental axes to funds already granted by Parliament to the Executive.” (Dainlith and Page).

[56] Against this background in the context of the well established principle that expenditure out of central funds without the sanction of Parliament is unlawful and the importance of Parliamentary control of expenditure it seems unlikely that Parliament would have intended to confer on the Legal Aid Committee a power to enter into public funding spending commitments without the approval of the sponsoring department and the Treasury. Lord Bridge in Steele Ford and Newton v CPS (1994) 1 AC 22 at 33d-g said:

“... Important in the present context is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure. As it was put by Viscount Haldane in Auckland Harbour Board v The King (1924) AC 318, 326:

“It has been a principle of the British constitution now for more than two centuries ... that no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself.”

[57] The Society argue that under Article 18(1) what the Lord Chancellor and the Treasury had to approve was the “scheme” as drawn up and this they had done. The scheme had passed decisions on funding questions to the Legal Aid Committee and they were empowered to administer the scheme without having to have the approval and concurrence of the Treasury in relation to the occurring of expenditure. It seems clear that the rationale behind the requirement for the concurrence of the Treasury and the approval of the Lord Chancellor to the making of the scheme was to enable the Treasury to be satisfied that funding arrangements for the administration of the legal aid fund were in accordance with the principle of Treasury oversight and departmental control. If the effect of the scheme was in fact that the Treasury had abandoned their oversight and that the Lord Chancellor had



abdicated his overall superintendence in matter of expenditure then this would have been an abdication of the responsibility on the part of the Lord Chancellor and the Treasury that ran counter to the intention of Parliament that they should have overall control and responsibility in matters of major financial decision-making. Bearing in mind the principle of law stated by Lord Bridge in Steel Ford and the clear policy and intent of the legislation that the Lord Chancellor should have overall superintendence I accept as correct the arguments of Mr Sells that for the purposes of Article 18 "scheme" requires to be viewed in the wider way that he contends.

[58] One could arrive at the same result by reading into the scheme itself an implied term that the Lord Chancellor's approval and the concurrence of the Treasury is required when in the course of administering the scheme the Committee makes decisions that involve more than merely day to day administrative decisions. To give efficacy to the scheme and to avoid the type of funding and constitutional crisis that would flow and has flowed from the untrammelled exercise of power by the Legal Aid Committee it would be necessary to imply into the scheme an obligation to obtain the Lord Chancellor's approval and Treasury concurrence in relation to the proposed decision. The practice which the parties have followed up until the decision in the present case confirmed this approach.

[59] The overall decision by the Society and Committee must be viewed as a decision that the current rates were inadequate, a decision that the rates that they proposed to introduce were the right rates for the work specified, a decision that those rates should be adopted as fair remuneration and a decision that the Legal Aid Committee should proceed to promulgate those rates and introduce them with effect from 1 September without the concurrence and contrary to the wishes of the Lord Chancellor and without Treasury concurrence. Since in my view the Lord Chancellor's consent and the Treasury concurrence was necessary the decision was in my view out with the powers of the Legal Aid Committee. If the Society felt aggrieved by what they considered to be an unjustifiable refusal of the Lord Chancellor to consent to their proposal and/or the refusal of the Treasury to concur the remedy was not to promulgate and introduce the new rates. If the Society felt aggrieved by a refusal by the Lord Chancellor to consent to the proposal and/or by the refusal of the Treasury to concur their remedy was not to promulgate and introduce new rates against the wishes of the Lord Chancellor (thereby initiating a funding crisis) but to challenge the Lord Chancellor by judicial review if necessary. If the Society had accepted the Lord Chancellor's decision and decided not to proceed with a change in the rates it would have been open to an aggrieved solicitor or solicitors to challenge the refusal by the Lord Chancellor to review and increase the rates. If it were considered that the rates were too low against the background of the obligation on the relevant decision-makers to ensure a fair remuneration

(which as indicated above in light of this part of 1981 Order pointed to remuneration equivalent to what would be recoverable on taxation).

[60] If contrary to my decision that the Legal Aid Committee and Society needed the consent of the Lord Chancellor and the concurrence of the Treasury, the Commission when it took office on 1 November 2003 was entitled to and bound to exercise its powers in the proper way. The Commission was subject to paragraph 4(2)(b) of the Third Schedule. If Article 18(1) of the 1981 Rule falls to be construed as Mr Larkin contends, the wording of Article 4(2)(b) makes clear that so far as the 2003 Order is concerned the duty of the Commission is to make arrangements for securing legal aid provision that meets the approval of the Lord Chancellor and has the concurrence of the Treasury. Adopting the rates determined by the Legal Aid Committee was contrary to the approval of the Lord Chancellor and the without the concurrence of the Treasury. The Commission would be acting in breach of its responsibilities if it had applied the new rates which had not been approved and which were not going to be funded. The Commission accordingly was bound to take the decision which it took. In fact in view of my interpretation of Article 18(1) the effect of Article 18 is equivalent to the effect of paragraph 4(2)(b) so far as the new Commission is concerned.

[61] If Article 18(1) falls to be construed as Mr Larkin contends the decision would nevertheless have been invalid since I am satisfied that it was arrived at without proper consultation with the Court Service. It is clear in terms both of fairness and of legitimate expectation that proper and adequate consultation with the Court Service was necessary before the decision could validly be made (assuming contrary to my conclusion that it would have been open to the Legal Aid Committee and Society to make the decision without the approval of the Lord Chancellor and concurrence of the Treasury). What was being proposed would have resulted in a significant increase in funding requirements of the Court Service (or rather the Lord Chancellor's Department) as the sponsoring department immediately affected by the decision. Fairness therefore demanded close consultation with the Court Service. Moreover consistent past practice and agreed procedures set out in the management of a financial memorandum pointed to a well established legitimate expectation to be consulted. The Society accepted a duty to consult (and senior counsel in his initial advice on the matter had advised that such consultation should take place). The Society contends that there was proper consultation.

[62] The demands of fair consultation procedures will vary from case to case and will depend on the factors involved. The well known requirements were stated by Mr Sedley QC (as he then was) in argument and adopted by Hodgkin J in R v Brent London Borough Council ex parte Gunning (1986) 84 LGR 168R:

“First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third ... that adequate time must be given for consideration and response and finally fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

[63] If one assumes contrary to my express conclusion that the Legal Aid Committee was free to fix rates without the concurrence of the Treasury and consent of the Lord Chancellor it would be clear that as an ultimate paymaster the Lord Chancellor would have to find and supply funds and seek to persuade Parliament to increase the funds for the Department to meet the additional expenditure unless the Lord Chancellor was prepared to allow the legal aid fund to go into insolvency with all the enormous problems that that would cause. It is clear that the Lord Chancellor will be entitled to receive clear, detailed submissions as to the full costed implications of the proposal and be put in the position to consider the information and respond to it. He would be entitled to receive clear detailed submissions to justify each and every proposed increase in rates. Consultation in this case I am satisfied fell short of fair consultation. The Court Service was not represented on the sub-group which worked on the question of rates increases in the light of the Kerr Report. It was not consulted or involved in the proposals in the sub-group's work and the sub-group did in fact come to conclusions which in some instances went beyond what the Kerr Report was recommending. The figures which the Legal Aid Committee adopted in June were then the subject matter of a very short period of consultation, a fact that the Society itself commented on adversely. The minutes of the Legal Aid Committee meetings point a way from an open mind on the issue of whether the rates would be changed at all in the course of consultation. The concept of consultation became reduced to a process of receiving comments against the background of an expressed desire to give effect to the decision quickly on 1 September. The Court Service was not furnished with figures until 26 June and the consultation period was expressed to end on 31 July. This was all against a background of an inadequate assessment of the cost implications of the changes. The Court Service required a detailed response to the question of the financial impact of the proposed increases and the information supplied fell short of being fully costed or convincingly presented. I am satisfied the Committee did not allow the Court Service an adequate period of time to respond effectively on what were complex and difficult matters with potentially far reaching consequences for the legal aid fund. The determination of what constitutes “fair remuneration” on any view entails a strong element of judgment on the part of the decision makers. There is no definitive right answer as to what the correct payment rate should be. The

Legal Aid Committee in fact adopted higher figures than those put forward in the Kerr Report. Since there is no definitive right answer there must be considerable room for debate and the decision maker is bound to inform himself of as many relevant factors as possible. Proper consultation accordingly was central to the overall process.

[64] The Legal Aid Committee appears to have taken the view that it did not need to concern itself with the question of whether central government funding would be provided. However the legal aid system cannot be administered properly without regard to the availability funding for it. The Committee was however bound to have regard to the likelihood of such funds being made available by Parliament and Treasury. They failed to have regard to that relevant factor. The decision to promulgate the rates at a time when there was a major question mark hanging over the availability of funding was a recipe for confusion and could be misleading to practitioners. It could lead to major financial dissociation resulting in the possibility of solicitors not receiving payment or having to receive payment in a later financial period and there was always the potential for insolvency. All these factors highlighted the importance of considering the funding implications.

[65] Apart from its duty to ensure that its arrangements to administer the legal aid fund met the approval of the Lord Chancellor and the concurrence of the Treasury the Commission itself when it took office had to decide how it should exercise its powers properly. It was open to the Commission to conclude that the decision of the Society was the product of an inadequate consultation process and was based on an erroneously legal approach. A decision maker may itself conclude that an earlier decision was wrong and should not be acted on. Thus for example in R v Lambeth Borough Council ex parte Clayhope Properties Limited (1988) QB 562 the court accepted that a local authority may plead the invalidity of its own repairs notices in resisting tenants applications for grants to meet the costs of compliance. It could not be said that the Commission, the statutory successor to the Society, was acting unlawfully and perversely in concluding that it should treat the Society's decision as flawed.

[66] The Law Society contends that the Commission having set aside the Society's decision to increase rates are failing in their duty to ensure fair remuneration to solicitors. In the absence of approval to increased rates and an agreed increase in funding the Commission cannot do other than it has. If the result is that solicitors consider that the rate of remuneration falls below the level of reasonable remuneration then the complaints fall to be directed to the Lord Chancellor whose decision it is that prevents the Commission making any additional payment at this point. The present judicial review application is not the procedural mechanism for dealing with such a case.

[67] In the result I dismiss the application.\