

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT (NORTHERN
IRELAND) 1972 SECTION 81(1)**

-and-

**IN THE MATTER OF AN APPLICATION BY THE LOCAL
GOVERNMENT AUDITOR**

COGHLIN J

[1] This is an application brought on behalf of the Local Government Auditor ("the Auditor"), John Buchanan, for a declaration that mobile telephone expenditure incurred by the councillors of Newry and Mourne District Council ("the Council") amounting to £9,349.54 for the year ended 31 March 2000 was contrary to law together with other associated relief. Mr Morrissey appeared on behalf of the Auditor while the Council was represented by Mr Keogh for the purpose of these proceedings. I am grateful to both counsel for the assistance that I derived from their carefully constructed skeleton and well-focused oral submissions.

The statutory framework

[2] Section 36 of the Local Government Act (Northern Ireland) 1972 ("the 1972 Act") provides as follows:

"36 - (1) Regulations may provide for the making by councils, subject to, and in accordance with the regulations of payments to councillors for, or in relation to anything done in connection with, service as councillors; but payments under the regulations shall not exceed such amounts or rates as the Department may determine.

- (2) In this section 'councillor' includes a member of a committee or sub-committee of a council, whether he is a member of the council or not."

[3] Regulation 3 of the Local Government (Payments to Councillors) Regulations (Northern Ireland) 1999 ("the Regulations") provides as follows:

"Basic Allowance

3 - (1) A council may make a payment to each councillor by way of an allowance ('basic allowance') for, or in relation to anything done in connection with, his services as a councillor, other than an approved duty.

(2) The amount of basic allowance shall be such amount as is determined by the council but shall not exceed such amount as the Department may from time to time determine.

(3) The amount of the basic allowance shall be the same for each councillor.

(4) Where the term of office of a councillor begins or ends, otherwise than at the beginning or end of a year, his entitlement shall be to payment of such part of the basic allowance as bears to the whole the same proportion as the number of days during which his term of office as a councillor subsists, bears to the number of days in that year."

[4] In September 1998 the Department of the Environment (Northern Ireland) ("the Department") published guidance on councillors' allowances, tax and social security benefits which included the following material in relation to basic allowance:

"Basic Allowance

10. Each district council must make provision in its scheme of allowances for a basic, flat-rate allowance payable to all councillors on the council.

11. The allowance must be the same for each councillor. The level of basic allowance is that

amount which the Department may from time to time determine.

12. It is for district councils to decide at what intervals payment of the basic allowance should be made. The Department would suggest that the allowance could be paid on a monthly or quarterly basis but, under no circumstances, should payment be made in advance.

13. Basic allowance is intended to recognise a time and expense commitment expected of all councillors, including such inevitable calls on their time as meetings, other than approved duties, with officers and constituents (including all civic duties). It is also intended to cover incidental costs such as the use of their homes and private telephones."

Background facts

[5] The Council's offices are located in Newry and councillors from the Newry urban area have easy access to telephones and other office facilities in the council premises for the purpose of council business. However, the Council is also responsible for local administration over a very wide rural area which encompasses a large part of South Down and South Armagh stretching from Kilkeel on the County Down coast to Crossmaglen near the South Armagh border. While the communication facilities at the Newry offices of the Council are in theory available to all councillors, in practical terms, they afford relatively little benefit to those councillors living in and responsible for the outlying areas. Efficient and speedy communication between such councillors and their constituents and/or council officers have long been a problem and, at times, some councillors who work mainly in the Republic of Ireland have been very difficult to contact.

[6] In such circumstances, with a view to solving or significantly reducing this communication problem, the Council resolved on 13 January 1998 to make mobile telephones available to certain of its officers and by a further resolution dated 7 July 1998 the Council extended this facility to all members of the Council.

[7] The system adopted by the Council was to make a bulk purchase of mobile telephones and to negotiate a competitive rental with an appropriate service provider. The mobile telephones were then distributed to council members. Councillors then furnished the Council with an itemised bill dealing with the cost of calls together with a pro-forma declaration by the

particular councillor distinguishing between calls made solely for the purpose of discharging Council duties and responsibilities and any private calls.

[8] As a result of the implementation of this system a significant disparity between councillors developed in so far as the councillors in the outlying areas tended to use the mobile phones upon a more frequent basis than those working in the Newry urban area. A further complication arose from the fact that many of the members of the Council represent areas that straddle the border between the Republic of Ireland and Northern Ireland and, consequently, found themselves frequently in locations where the dominant signal was from the Eircell Network. In such circumstances, the mobile phones automatically operated on Eircell incurring call charges at international rates and giving rise to increased charges for the receipt of incoming calls.

[9] As a consequence of the initiation of these proceedings by the Auditor Mr Thomas McCall, the Clerk and Chief Executive of the Council, frankly conceded that there were deficiencies in such a system and the Council decided to consult Daly Park Consultancy Limited, a firm of Chartered Accountants ("the Accountants") in Newry for advice.

[10] On 16 January 2003 a report from the Accountants setting out six options was considered by the Council's finance sub-committee and this meeting was also attended by the Council's solicitor. Ultimately the sub-committee decided to recommend the adoption of option number 4 and this recommendation was approved by the full council at its monthly meeting on 3 February 2003.

[11] In accordance with option number 4 the practice of the council would have been to meet the rental costs of the mobile phones together with a sum in respect of call charges up to a maximum of £300 per annum. I understand that the intention was that the call charges would be discharged by the Council in addition to sums paid to the individual councillors by way of basic allowance. However it appears that such a solution did not prove acceptable to the Auditor.

The submissions

[12] On behalf of the Auditor Mr Morrissey submitted that the only statutory authority for payments to councillors was contained in the 1972 Act and the Regulations as supplemented by the Department guidance. In such circumstances he argued that there was no statutory basis for:

- (i) providing a mobile phone at the Council's expense;
- (ii) paying the monthly rental for such a phone;

(iii) paying any sum in respect of call charges incurred by the use of such phones;

(iv) he argued that the basic allowance provided the only lawful means of meeting the telephone costs of councillors and relied upon Secretary of State for Scotland v Glasgow Corporation [1966] SLT 183.

[13] On behalf of the Council Mr Keogh referred to the long established rule of common law that a local authority may do only those things for which there is express or implied statutory authority but also anything which is reasonably incidental to the doing of such things relying upon Attorney General v Smithwick Corporation [1932] 1 Ch. 562 at 576 - 578. He referred to section 111 of the Local Government Act 1972 which applies only to England and Wales. Section 111 provides that ...

“Local authorities have power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

Mr Keogh argued that, in the absence of such a provision in the Act of 1972 the common law rule continued to apply. In the alternative, he submitted that the absence of a section equivalent to section 111 in the 1972 Act might be explained by section 17(3) of the Interpretation Act (Northern Ireland) 1954 which provides that where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof.

[14] Mr Keogh further argued that the facilitation of communication between councillors and council officials and councillors and constituents was no different, in principle, from the facilitation of such communication by the provision and establishment of telephone and office facilities in the Council premises in Newry. Mr Keogh contended that regular, easy and efficient communication between councillors, Council officers and constituents was not only incidental but essential to enable councillors to make meaningful contributions to the fundamental and primary decision making functions of the Council.

[15] In support of these submissions Mr Keogh referred me to Bennion on Statutory Interpretations 4th Edition p. 427 section 174 where it is stated that:

“The question whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the

accepted guides to legislative intention, to find the implication; and not on whether the implication is 'necessary' or 'obvious'."

He also drew my attention to a passage from Lord Selborne's judgment in Attorney General v Great Eastern Railway Company [1880] 5 App.Ca. 473 when he said at p. 478:

"...whatever may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

Conclusions

[16] It is clear that expenditure incurred as a result of the provision of mobile phones to councillors, the payment of rental and of a proportion of calls made using such phones is not expressly authorised by the Local Government Act (Northern Ireland) 1972. Neither counsel was able to offer an explanation as to why an equivalent section to section 111 of the Local Government Act 1972 was not included in the Northern Ireland Act, especially when both Acts were passed by the respective Parliaments in the same year. Ultimately, it seems to me that the most likely explanation is that tendered by Mr Keogh based upon the application in this jurisdiction of section 17(3) of the Interpretation Act (Northern Ireland) 1954. As he submitted this provision reflects the common law rule articulated by Lord Selborne in Attorney General v Great Eastern Railway Company [1880] 5 App.Ca. 473 at 478. Consequentially, Mr Keogh argued that the provision of the phones and the discharge of the rental could fairly be regarded as incidental to or consequential upon the Counsel's main business of informed decision making and did not fall within section 36 because such provision did not constitute payment to councillors.

[17] In his skeleton and oral arguments Mr Morrissey relied heavily upon Secretary of State for Scotland v Glasgow Corporation but in my view that authority is of limited relevance. The Glasgow Corporation case concerned a very different constituency, it concerned payments to cover the installation costs and rental of telephones in councillors private houses, long before the advent of mobile telephones, and Lord Wheatley, in particular, seemed to make a very clear distinction between convenient communications between councillors and their constituents and the efficient administration of the council's functions which I consider somewhat hard to justify. Indeed the use of councillors' private homes and telephones rejected by Lord Wheatley is clearly contemplated as legitimate by paragraph 13 of the Department guidance.

[18] At paragraph 5 of his affidavit sworn on 7 December 2001 the Auditor referred to the decision by the Council to supply councillors with mobile telephones as an aid to the administrative arrangements of the Council, a practice which has apparently been adopted by a number of councils, and recorded that he had accepted that the provision of a mobile telephone to a councillor could be justified on the basis that it enables council officials to be able to make efficient contact with a councillor at short notice. No doubt it was this acceptance by the Auditor that limited the item of mobile telephone expenditure specified in the summons to £9,349.54 the amount discharged by the Council in respect of call charges after deduction of the personal contribution. Mr Morrissey suggested that this might have been a “generous” concession but I am not so persuaded and, provided ownership of the mobile phones remains with the Council, there does not appear to be any significant difference in degree between the provision of such equipment and the provision of telephones, fax machines, computers etc at the Council’s central offices for the use by councillors in the course of their council activities and duties. Presumably, call charges incurred as a result of the use of such telephones are discharged directly by the Council as a matter of general expenses, with the approval of the Auditor, upon the assumption that they are used exclusively for Council business. It may be that the impugned call charges could be similarly accommodated if appropriate safeguards were agreed. In any event, no relief has been sought by the Auditor in these proceedings in respect of the provision and rental of the mobile telephones.

[19] In my opinion, the payments made to councillors by the Council in respect of call charges fall into a different category. To come within section 17(3) of the Interpretation Act (Northern Ireland) 1954 and/or the common law rule articulated by Lord Selborne the ancillary powers sought to be implied by the Council must be fairly regarded as reasonably necessary or incidental to powers given by the relevant enactment to the relevant authority to do any act or thing. Mr Keogh candidly accepted that the only relevant power contained in the Local Government Act (Northern Ireland) 1972 which contemplated the making of payments to councillors was section 36 as supplemented by the 1999 Regulations. Both the statute and the regulations specifically provide that such payments shall not exceed the amount that the Department from time to time determines and, as I have already noted earlier in this judgment, the defendant accepts that the impugned payments in respect of call charges were made over and above the amount fixed by the Department in respect of the relevant allowance, namely, basic allowance. In such circumstances, it seems to me that there is no lawful basis upon which such payments could be properly implied as reasonably necessary or incidental to the powers to make payments to councillors and, accordingly, they must be regarded as ultra vires. In such circumstances I propose to make the Declaration sought on behalf of the Auditor and to hear counsel in relation to any consequential relief.

[20] However, having reached such a conclusion, it seems to me that it might be appropriate to make two further observations:

(i) in my view, as a matter of practical public administration, the provision of mobile telephones for use in the course of council business and the discharge of call charges incurred in the course of such business was a sensible and pragmatic exercise for the defendant Council to undertake given the predominately rural character of the constituency and the widely distributed location of its constituents. It is of particular importance that those who might be relatively isolated in geographical terms should, nevertheless, be able to retain confidence in a sensitive and responsive local authority;

(ii) ultimately, it seems to me that, with the co-operation of the Department, the impugned expenditure could be made the subject of accommodation within the powers conferred by section 36 and the 1999 Regulations as being "in connection with service as councillors." As Mr Morrissey suggested, in such circumstances, consideration might well have to be given to devising a scheme that would aim to reflect, as fairly as possible, the differing needs of the local authorities in the province. However, given the realistic approach of the Auditor and the candid and constructive response of the Chief Executive of the Council in these proceedings it seems to me that a satisfactory resolution could be achieved.