CAMC3173

13 April 2000

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY BRIAN KENNEDY, PHILIP MAGEE, BRIAN G McCARTNEY, JOHN COYLE, PATRICIA SMYTH, BARRY J MACDONALD, SEAMUS TREACY, KIERAN MALLON AND KAREN QUINLIVAN

CAMPBELL LJ

The nine applicants are junior barristers in practice at the Bar of Northern Ireland who have been retained to act on behalf of individuals granted representation by the Bloody Sunday Inquiry. This application is concerned with the relationship which their fees should bear to those allowed to leading counsel briefed with them to appear for the same individuals.

The applicants ask this court to quash a decision of the Inquiry contained in a letter of 29 October 1999; to declare that the rate of remuneration payable to them should be two-thirds of the rate of remuneration paid or payable to leading counsel; and to declare that the law and practice in Northern Ireland in relation to the rate of remuneration of junior counsel applies to the measurement and rates of fees payable to them.

The Bloody Sunday Inquiry, as it is known, is a Tribunal of Inquiry established under the Tribunals of Inquiry (Evidence) Act 1921 by resolution of both Houses of Parliament. The Act does not give anyone the right to be legally represented before a tribunal however a tribunal has a discretion as to whether or not to allow a person to be represented before it - see report of Royal Commission on Tribunals of Inquiry 1966 Cmnd 3121 ("the Royal Commission") at para. 54.

As the Royal Commission noted in its report (at para. 59) the Act contains no provision giving the tribunal power to order that a witness should be paid his costs out of public funds.

Although the Royal Commission considered that the Act should be amended to allow for this, to date it has not been.

The practice has been for tribunals of inquiry to recommend that the reasonable costs of any party granted representation should be paid by the relevant Government department.

From an early stage the Tribunal has stated and reiterated that it is prepared, in principle, to recommend that the reasonable costs of representation at the Bloody Sunday Inquiry should be paid out of public funds. The recommendation is made to the Northern Ireland Office as the relevant department of Government and for this reason it is the other respondent to this application.

In Order 62 Rule 12(1) of the Rules of the Supreme Court the "standard basis" for the taxation of costs is defined as "a reasonable amount in respect of costs reasonably incurred ...". This has been the basis on which the reasonable costs recommended by tribunals of inquiry have, in recent years, been assessed.

In the letter of 29 October 1999, which was addressed by the solicitor to the Inquiry to the solicitors instructing the applicants, and concerned the interim arrangements which the Tribunal has decided to adopt for the payment of solicitors' bills and counsels' fees, he stated that the tribunal planned to submit these bills and fees for determination on the standard basis by the chief taxing master for England (now the senior costs judge). The writer explained that they could not approach the taxing master for Northern Ireland as he had acted on behalf of clients represented at the Widgery Tribunal.

In the letter of 29 October 1999 the passage dealing with counsels' fees is in these terms:

> "I last wrote to you on 20 August about this. The Tribunal plans broadly to adopt the scheme set out therein as the basis for making interim payments. In the light of points made in response to the 20 August letter, however, we propose to raise the cap on preparatory work fundable by the Tribunal to 25 hours per week averaged over a 52 week year. We also received a number of representations on the issue of the rate for junior counsel relative to that of their seniors. The Tribunal has noted all the points made but plans in the interim to adhere to a 50% rate for juniors, leaving that issue, among others,

> for determination by the Taxing Master. Interim payments for counsels' preparatory work will therefore be at rates of £200 per hour for seniors and £100 for juniors. Interim payments during the hearings will be at £1,500 per day for senior counsel and £750 for juniors: beyond that fundable preparatory work during the days when the Tribunal sits will be subject to a limit of 2 hours per day. As with solicitors' bills, counsels' fee notes will be subject to scrutiny
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> by the Tribunal's independent costs assessor. Similarly, the interim
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> rates set by the Tribunal reflect no pre-judgment as to the eventual
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> determination by the Taxing Master".

On 22 December 1999 the solicitor for the applicants replied to this letter on their behalf and also on the instructions of the General Council of the Bar. In his letter he stated:

> "That as a matter of law our clients holding briefs as junior counsel are entitled to be remunerated in accordance with the law and practice of Northern Ireland".

The solicitor to the Inquiry, in his reply of 11 January 2000, emphasised that his letters of 29 October 1999 concerned interim measures and that they were without prejudice to the determination of the chief taxing master of England on both the rates of payment and the manner of payment. He stressed that although many of the parties are represented at the Inquiry by Northern Ireland solicitors and counsel there are also English counsel instructed in the matter; and that although the Inquiry is concerned with events in Northern Ireland it is an Inquiry of the United Kingdom established by resolutions of both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland. He continued:

> "There can therefore be no pre-conception that the practices in
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> relation to the remuneration of solicitors and counsel in one part of
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> the United Kingdom should prevail over the practices in other
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> parts".

On 18 January 2000 the solicitor for the applicants replied that it was "not accepted that the chief taxing master in England is entitled to purport to determine our clients' rights in relation to the

terms of their engagement. Having been disputed by you on behalf of the Inquiry we contend that this is a matter for the court to decide on foot of judicial review proceedings which we are now initiating".

Leave was granted to the applicants to apply for judicial review by Kerr J. on 15 February 2000 at which time the Northern Ireland Office was joined as a respondent. On the hearing of the application Mr Smith QC, (who appeared with Mr Francis O'Reilly for the applicants), submitted that, as a matter of law, in the taxation of costs in this jurisdiction on the standard basis the starting point in assessing the fees of junior counsel, who appeared with leading counsel, is two-thirds of the fee accorded to the leader. Secondly, that the taxation of costs in the Bloody Sunday Inquiry should be on the standard basis as it is understood in Northern Ireland.

Mr Smith relied on a passage in the judgment of Carswell L.J. (as he then was) in Adair and others v Lord High Chancellor [1996] NIJB 237 at page 253 where he said:

> "The taxing master correctly recognised that there has for generations been a firmly established tradition at the Northern Ireland Bar that junior counsel's brief fee would be two thirds of that of his senior counsel. This has been eroded to some extent in civil cases in recent years, but it has persisted in criminal cases. Whatever may have been the rule in the past, it is clear from the taxing officers' notes for guidance in use in England that the starting point is half, though it may be increased to two thirds or even more when junior counsel has to undertake unusually heavy responsibility. I am not qualified to comment with any authority for the reasons underlying this difference, though Mr Birts indicated in argument that it may perhaps reflect the fact that leading counsel in England may commonly conduct more of a case himself, and because of the larger pool of counsel available should ordinarily be able to remain in personal attendance for more of a trial. Be that as it may, by common logic it must follow that if the brief fees for Queen's Counsel were the same in each jurisdiction, the total bill for the defence would be higher in Northern Ireland. One might draw the conclusion from this that leading counsel's fees may be relatively higher and junior counsel's fees relatively lower in England.
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> ... It is inevitable that in some cases one will have a relatively heavier or lighter burden, but that is part of the roundabouts and swings of the regular working relationship between senior and junior

> counsel and the traditional ratio between their fees. Expressly or impliedly they agree on the division of work between them in any given case, and it may be supposed that over a period of time the disparities even themselves out. I accordingly consider that unless a strong and clear reason is established - which in my judgment has not been the case here - the regular ratio should be maintained in respect of brief fees and refreshers".

In an affidavit Mr E A Comerton QC, who has been Chairman of the Bar Fees Committee for many years, has confirmed that in civil litigation junior counsel have invariably marked and been paid on the basis of two-thirds of senior counsel's brief and refresher fees. He mentions some slight erosion in the fees paid by insurance companies to junior counsel appearing for a plaintiff when the action settles before trial. Adair was a criminal case but Mr Smith suggested that there was no good reason why the passage I have quoted from the judgment should be confined to criminal cases. He emphasised the words used by Carswell L.J. in the judgment when he said "that unless a strong and clear reason is established the regular ratio should be maintained in respect of brief fees and refreshers" to demonstrate that this is a legal principle as such a heavy onus would not be appropriate for a mere evidential burden on the balance of probability.

Mr McCloskey QC, (who appeared with Mr Paul Maguire for both respondents), argued that this passage from the judgment of Carswell L.J. in Adair refers to a general rule in criminal cases which may be displaced and it acknowledges that there is no general rule that junior counsel is to receive two-thirds of the leader's fees in civil cases. Furthermore there is no reference in the passage to tribunals and in particular to tribunals of inquiry under the 1921 Act. In Adair the judge was not required to decide if two-thirds was payable so that his remarks are obiter.

Mr McCloskey referred also to the fact that a number of counsel appearing at the Inquiry are English barristers and not members of the Bar of Northern Ireland.

I do not accept that in this passage from Adair Carswell L.J. was stating or intending to state a legal principle. As he said at the outset there has been a tradition at the Northern Ireland Bar that junior counsel's brief fee would be two-thirds of that of his senior counsel.

In a taxation on the standard basis in Queen's Bench and Chancery actions the master has accepted that two-thirds usually represents a fair and reasonable assessment of the relationship between the fees of junior counsel and those of his leader. To attempt to elevate this into a statement of legal principle that two-thirds is the starting point unless displaced under a heavy onus is in my judgment wrong.

If it were otherwise it would fetter the discretion of the taxing master who is called upon by Order 62 Rule 12(1) to decide what is a reasonable amount in respect of all costs reasonably incurred.

If the senior costs judge in England is in due course called upon to measure the proportion of leading counsels' fees to which junior counsel are entitled he will, I have no doubt, have regard to the figures that are normally considered reasonable both in England and Wales and in Northern Ireland before deciding what is appropriate in the circumstances of this Inquiry and with regard to particular counsel whose fees are under consideration.

If there was a presumption, recognised by law, that in Northern Ireland junior counsel would receive two-thirds of their leader's fee, in the absence of strong reason to the contrary, it is relevant that a number of counsel appearing at the Inquiry are members of the Bar of England and Wales and not of the Bar of Northern Ireland. It would produce an absurd result if the senior costs judge was obliged to find that a reasonable amount in respect of junior counsels' fees for identical work before the Inquiry was larger solely because the junior counsel happened to have been called to the Bar of Northern Ireland and not to the Bar of England and Wales.

The second line of argument advanced by Mr Smith was that the applicants had a legitimate expectation of a *procedural* benefit by having the assessment of their fees commence at the two-thirds

level and that the representation by the Tribunal that costs would be paid on a standard basis took on the character of a contract.

One of the applicants (Mr Kennedy) said in his affidavit "(at) the time of accepting instructions I assumed that I will be remunerated on the basis of two-thirds of senior counsels' fees and nothing was indicated to me at that time to suggest otherwise". A legitimate expectation may be induced by implication but it is important to inquire what legitimate expectation these applicants were entitled to hold?

The Tribunal induced the expectation that a recommendation would be made that costs should be paid on the standard basis. It is not suggested by the applicants that it was this representation that led them to believe that they would be paid in the ratio of two-thirds of their leaders' fees. As Mr Kennedy frankly stated he made an assumption when he was retained. The most that the applicants were entitled to assume from the statements of the Tribunal was that costs would be recommended on the standard basis and that due regard would be paid to a ratio of two-thirds as being taken in the jurisdiction as representing a reasonable amount in normal circumstances. Further, that if agreement could not be reached with the Tribunal a taxing authority would also have regard to this.

In his affidavit (sworn on 15 March 2000) the Secretary to the Inquiry has confirmed that one of a number of factors taken into account with regard to junior counsels' rates was the existence of conventional practices both in England and Wales and in Northern Ireland in relation to the payment of junior counsels' fees in respect of certain types of legal work. In particular the practice of paying one half senior counsel fees in certain proceedings in England and Wales and the practice of paying two-thirds senior counsels' fees in most types of litigation in Northern Ireland was taken into account. Therefore all that could legitimately have been expected has happened.

The respondents have decided that, on an interim basis, they will recommend and pay junior counsel 50% of the fees to be paid to leading counsel. They were entitled to do so and if junior

counsel wish they may have this reviewed on taxation. Whether junior counsels expectation, based on an assumption, falls within the concept of abuse of power in relation to a *procedural* or a *substantive* benefit - as Sedley L.J. said in R v North and East Devon Health Authority ex parte Coughlan [1999] Lloyd's Rep Med 306 at para 59 "In many cases the difficult task will be to decide into which category the decision should be allotted" - in my judgment there has been no abuse of power.

Mr Smith's final line of attack was that the Tribunal in reaching a decision about junior counsels' fees took into account factors which it ought not to have taken into account.

The factors taken into account are set out in the affidavit of the Secretary to the Inquiry and I do not find it necessary to repeat them in their entirety here. Number (vii) was "the criterion of reasonableness in relation to the issue of costs" and (viii) "the need to ensure that fees when being met out of the public funds are value for money from the point of view of the tax payer".

Where costs are taxed on a standard basis the `pocket' of the paying party would not be a relevant consideration in deciding what is reasonable. In Creednz Inc v Governor General [1981] 1 NZLR 172 Cooke J. said at 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision ...".

I do not consider that taking the tax payers' interests into consideration invalidates the decision to pay fees on the interim basis that the Tribunal has reached.

In his response to the arguments advanced by Mr Smith on behalf of the applicants, Mr McCloskey placed reliance on the fact that the issue of the ratio to be applied will be a matter for consideration by the senior costs judge if the recommendation of the Tribunal is unacceptable to the applicants. In R v IRC ex p Preston [1985] 1 AC 835 Lord Templeman said at page 862:

> "Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal

could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available ...".

For the reasons that I have stated this application must fail. If it had succeeded on any of the grounds advanced by the applicants I would not have been inclined to exercise my discretion in their favour where there is a suitable arrangement in place for the assessment of the appropriate fees and the arrangements under review have been introduced only on an interim basis.

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JUDGMENT

OF

CAMPBELL LJ
