FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 37
P284/17

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in causa

GLASGOW CITY COUNCIL

Petitioners and Respondents

against

THE SCOTTISH LEGAL AID BOARD

Respondents and Reclaimers

and

PQ

Interested Party

Petitioners and Respondents: Poole, QC, Roxburgh; Glasgow City Council
Respondents and Reclaimers: Crawford, QC; Scottish Legal Aid Board
Interested Party: IG Mitchell QC; Drummond Miller LLP

23 May 2018

Introduction

[1] This is a reclaiming motion by the respondents (the Board) seeking to review the

interlocutor of the Lord Ordinary, dated 22 December 2017, granting the prayer of the petition and reducing decisions made by the Board to make civil legal aid available to the interested party. The legal aid was to enable him to reclaim a decision of a different Lord Ordinary dismissing petitions for judicial review of certain decisions of the petitioners (the Council) concerning the care of his mother. The issue for determination is whether the Lord Ordinary erred in holding that the Board had acted unfairly towards the Council in determining the interested party's legal aid applications.

The Statutory Framework

[2] Section 2 of the Legal Aid (Scotland) Act 1986 provides the Board with wide powers to do anything which it considers necessary or expedient in order to secure the provision of legal aid or which is calculated to facilitate, or is incidental to or conducive to, the discharge of its functions. Section 14 (availability of civil legal aid) states:

> "(1) ... civil legal aid shall be available to a person, on an application made to the Board if–
>
> (a) the Board is satisfied that he has a *probabilis causa litigandi*; and
>
> (b) it appears to the Board that it is reasonable ... that he should receive legal aid."

[3] Section 34 (Confidentiality of information) provides:

> "(1) ... no information furnished for the purpose of this Act to the Board ... shall be disclosed –
>
> (a) in the case of such information furnished by ... a person seeking ... legal aid, ... without the consent of the person seeking ... legal aid ...; or
>
> (2) Sub-section (1) above shall not apply to the disclosure of information –
>
> (a) for the purposes of the proper performance ... by ... the Board ... of duties of functions under this Act ...
>
> ...".

[4] Regulation 5 (Form of Application) of the Civil Legal Aid (Scotland) Regulations 2002 (SI 494) provides that:

> "(1) ... an application for legal aid ... shall be –
>
> ...
>
> (b) accompanied by a statement as to the nature of the case and the interest of the applicant therein;
>
> (c) accompanied ... by such precognitions and other documents as may be requisite to enable the Board to determine the application; ..."

[5] The Board's "*Civil Handbook*", which is produced for the guidance of applicants and others, narrates (at para 1.10) that the purpose of the statement in Regulation 5 is, first, to focus the attention of the Board on "what exactly legal aid is sought for" and, secondly, "to give notice to the opponent of what legal aid is sought for". It states that a lengthy detailed statement is not required. The applicant requires to specify the nature of the proceedings for which legal aid is being sought. Because the application may be sent to a lay person, such as a potential opponent, the description of what the applicant is seeking "by the action" should be expressed in lay terms, for example "sale of property".

[6] The *Handbook* continues:

> "The information in the statement needs to give sufficient notice to the opponent of the proceedings for which legal aid is sought. However, you do not have to set down every aspect of the case in the style of an initial writ. Examples of suitable or standard styles for statutory statements are ...
>
> *Reparation – personal injuries*
>
> ... The applicant seeks legal aid to raise an action for damages in the sheriff court ...
>
> ... On 28 August 2003 the applicant slipped on oil in the opponents' factory. He sustained injury as a result of their negligence and claims damages for loss.
>
> *Divorce – unreasonable behaviour*
>
> ... The applicant seeks legal aid to raise an action of divorce on the grounds of unreasonable behaviour in the sheriff court.
>
> ... The applicant also seeks legal aid to make the following claims for financial provision

- capital sum
- periodical allowance ...".

An example in relation to judicial review was apparently only introduced in 2015. Apart from specifying that the application is for a judicial review petition in respect of a decision made by the "opponent" on a particular date, the style encourages the applicant to complete the following sentence:

"The decision of the opponents is challengeable because ...".

There is a requirement to state that attempts to resolve the issue have failed or that the relevant pre-action protocol has been complied with. No example in relation to an appeal is provided. However, where legal aid for an appeal is sought, the applicant must (para 4.91) submit a statement of the grounds of appeal and, where counsel was instructed at first instance, an opinion on the prospects of success.

[7] The 2002 Regulations set out the procedure to be followed in relation to an opponent as follows:

"7 – Notification to opponent

(1) ... it shall be the duty of the Board to send to any opponent ... –

(a) notification that an application for legal aid has been made;

(b) a copy of the statement referred to in Regulation 5(1)(b) ...; and

(c) notice of the opponent's right ... to make representations to the Board.

8 – Right of opponent to make representations

(1) Any opponent may ... make to the Board representations in writing as to the application, and the Board shall ... consider any such representations before determining the application."

[8] Originally, in the Legal Aid (Scotland) Scheme 1958 (reg 94(3)), an applicant required to prepare a "memorandum ... explaining the nature of the case and the interest of the applicant therein". The memorandum had to be intimated to the opponent, who had to be

advised of "his right to lodge *objections* thereto" (reg 15, emphasis added). The opponent could make representations "limited to making written objections and submitting any documents other than precognitions relating thereto". Although there was a power to permit an applicant to appear before the Committee which had been tasked with deciding the application, it was specifically provided that the opponent had no such right (cf *McTear* v *Scottish Legal Aid Board* 1997 SLT 108).

[9] The *Handbook* explains the right to lodge representations by stating that one of the statutory tests relates to the reasonableness of making legal aid available. It would not be reasonable if proceedings were unnecessary "because the opponent is willing and able to resolve the matter". The statement allowed an opportunity for extrajudicial resolution.

[10] Under Regulation 19, the Board requires to notify the applicant and the opponent of the decision. If the application is refused, the Board provides the applicant with the general ground of refusal. These are set out in the Regulation; eg "the Board is not satisfied that the applicant has *probabilis causa litigandi*". The applicant can then apply for a review by the Board and, if that were refused, by the sheriff (1986 Act, s 14(4)). There is no statutory requirement for the Board to advise the opponent of the grounds for granting an application. In terms of Regulation 23(3), an opponent may provide the Board with information which might cause it to suspend or revoke the grant of legal aid.

[11] Where a person in respect of legal aid is found liable in the expenses of the action, he or she may seek a modification of the award (1986 Act, s 18). Where an opponent has been successful in an action, he or she may seek an award of expenses directly against the legal aid fund (*ibid* s 19). In proceedings at first instance, the unassisted party requires to demonstrate financial hardship if such an award is not made. That condition does not apply to appellate proceedings,

Background

[12] The Council are responsible for the provision of social care in the Glasgow area. The interested party is the son and legal representative of MQ, who is in receipt of social care. The Council and the interested party have been engaged in a long running dispute over the appropriate level of financial support which is provided for Mrs Q's care. The Council carried out an assessment in March 2010, and again in May 2015. In essence, the 2010 assessment had determined that Mrs Q required 24 hour (but not one to one) care in order to reduce the risk of her falling. She was, at that time, subject to a care package which enabled her to stay at home. The assessment was that this package, which was purchased from an external contractor, could not be sustained. A nursing home placement was required. Thereafter, Mrs Q was placed in a home but, following upon a below the knee amputation, she returned home. She was paid £594.70 per week, later reduced to £493.36, in order to revive and pay for the home care package. In the 2015 assessment, the amount already being paid was deemed appropriate (£101.34 being Mrs Q's personal contribution).

[13] The interested party challenged both assessments in judicial review petitions. On 5 October 2016 the Lord Ordinary ([2016] CSOH 137) dismissed the first petition, which challenged the 2010 assessment, as academic. The 2010 assessment had been superseded by the 2015 assessment. The second petition was also dismissed. The challenge had been, first, to the findings made in the assessment of needs under section 12A(1) of the Social Work (Scotland) Act 1968. The interested party had argued that the sums selected for the provision of care were irrational as they were less than the cost of home care. The assessment had failed to take into account expert and anecdotal evidence that one to one care was required. It had not taken into account the views of Mrs Q's family. As a

generality it had been unreasonable. The Lord Ordinary, in a detailed Opinion, rejected these contentions. He observed that Mrs Q was exceptionally well cared for. The assessment had been carried out by an experienced social worker, who was also qualified as a nurse, assisted by an occupational therapist and a district nurse. The assessor had been provided with expert reports instructed by the interested party. The Lord Ordinary concluded that the assessor was entitled to reject the content of the reports and rely upon her own judgment. That was that Mrs Q required 24 hour supervision, but in a residential setting. The assessor had taken into account the views of Mrs Q and her family.

[14] The second aspect of the challenge related to whether the Council had performed their duties under sections 4 and 5 of the Social Care (Self-directed Support) (Scotland) Act 2013. The contention was that the Council had failed to ascertain the cost of 24 hour care in a nursing home. Thus, there was no basis for the assessed payments. The Lord Ordinary held that the Council had properly assessed the cost of 24 hour (not one to one) care in fixing the amounts to be paid. No error of law was apparent.

[15] The interested party determined to reclaim the Lord Ordinary's interlocutors in both petitions. He sought legal aid to do so. He submitted various documents in support of his application, together with the statement required in terms of Regulation 5(1)(b). The statement said that legal aid was required for an appeal. The Council had:

> "not performed their functions adequately make (*sic*) reasonable payment to meet her assessed need. The [Council] erred materially in performing their duties. The judge erred in law in refusing Judicial review by virtue of the OH judgement of [the Lord Ordinary] of 5th October 2016. The applicant requires to Appeal. She has insufficient resources to fund the appeal and seeks civil legal aid".

[16] On 4 November 2016, the Board notified the Council of the application and the statement. The Council wrote to the Board asking for further specification of the basis for

the appeal. By letter dated 17 November, they made representations encouraging the Board to refuse the application. These included certain technical grounds and a complaint that the statement was "entirely lacking in any specification and forms no basis upon which Legal Aid could be properly granted for any appeal". It was said that there was no probable cause in relation to the first petition, which was academic. In the second petition the petitioner's contentions had been "fully and carefully considered" by the Lord Ordinary. Specific aspects of the Lord Ordinary's Opinion were mentioned prior to a general contention that there was again no probable cause. On 6 December, the Board refused the application.

[17] The interested party sought a review by the Board. On 28 December 2016, the Council wrote to the Board, asking for sight of any additional information provided in the review, and for an opportunity to make representations about it. The Council threatened to raise a judicial review against the Board if they were not provided with "the full details of the application". On 7 February 2017, the Board advised the Council that the interested party had refused to consent to the Council having access to the additional information. By letter dated 19 January, the Council again threatened judicial review. They complained that the Board had granted legal aid in 12 "similar matters", none of which had succeeded. The Council had incurred "considerable cost in irrecoverable expenses" and the public purse would have been similarly diminished.

[18] On 20 February 2017, the Board reversed their decision and granted legal aid. The precise basis for seeking a review are unknown. However, judging from the terms of the interested party's motion to sist the cause pending the review, the Board had requested an Opinion (presumably on the prospects of success) from senior counsel.

[19] The grounds of appeal lodged with the court ran to eight pages and prompted the court ([2018] CSIH 5) to make certain pointed comments on the requirement in RCS 38.18(1)

for such grounds to consist of *brief, specific* numbered propositions. After analysis, the court concluded that the grounds revealed only two propositions, *viz*:

> "(First) The Lord Ordinary erred in his finding that [the ... Assessment] was not unreasonable or irrational; and
> (Second) The Lord Ordinary erred in his finding that there was a proper and rational basis for [the Calculation of Direct Payments] being made by the respondent to Mrs Q under [the ... Assessment]".

[20] Notwithstanding the terms of the grounds, the interested party's Note of Argument in the reclaiming motion advanced an additional point. This was that the assessor was not, contrary to the Lord Ordinary's understanding, qualified as a nurse in the sense of being registered as such. The point was given short shrift as it became clear that the assessor had qualified as a nurse, although she had allowed her registration to lapse. An associated contention, that the lack of a current registration would have prompted the Lord Ordinary to reach a different decision, also met with a frosty reception given that it was not the Lord Ordinary's function to weigh the merits of the assessments against the views of others.

[21] The court reviewed the Lord Ordinary's reasoning in relation to the assessment and concluded that the interested party's challenge was an illegitimate attack on the merits of the assessment rather than its legality. The arguments regarding the calculation of payments were essentially the same as those which had been before the Lord Ordinary and were rejected on similar grounds. The reclaiming motion was refused on 17 January 2018 ([2018] CSIH 5).

[22] Meantime the Council had challenged the Board's decision to grant legal aid by lodging their own petition. First Orders were granted on 31 March 2017. The Council obtained permission to proceed on 3 May 2017. The hearing took place on 14 July 2017. On 22 December 2017, the Lord Ordinary granted the prayer of the petition and reduced the

decisions of the Board (in respect of the first and second petitions) to grant legal aid. That is the interlocutor which the Board now seek to review.

Lord Ordinary's reasoning

[23] The Lord Ordinary reasoned (para [23]) that the legal aid scheme was carefully calibrated to take into account the respective interests of applicant and opponent. The Board acted as a form of information portal. The parties supplied the necessary intelligence to enable the Board to apply a tripartite test; that it must be satisfied that: (1) the applicant met the financial criteria (1996 Act, s 15); (2) there was probable cause; and (3) it was reasonable to provide support. The nub of the Council's challenge was that the Board's procedure had been unfair. The Council could not properly engage in the legal aid process because they did not have the relevant information, being the basis of the appeal, to allow them to do so. The principles of procedural fairness were well-established (*Board of Education* v *Rice* [1911] AC 179 at 182; *Errington* v *Wilson* 1995 SC 550 at 554; and *R* v *Secretary of State for the Home Department*, *ex parte Doody* [1994] 1 AC 531 at 560). Fairness would often require that a person, who may be adversely affected by a decision, should have the opportunity to make representations. That person would have to be advised of at least the gist of the case which he had to answer.

[24] The Lord Ordinary considered that there were three aspects to what he described as the legal aid scheme's "disclosure regime": (1) confidentiality of the applicant's information; (2) recognition of the interests of the opponent; and (3) the role played by the statutory statement. The 1986 Act (s 34) protected the confidentiality of communications between applicants and the Board in order to promote honesty. The Council's argument, that the Board required to disclose relevant information to them, was an attempt to circumvent the

clear wording of the Act and was therefore rejected. To have decided otherwise would place the Board in a dilemma, whereby they may be subject to a criminal charge if they passed information to an opponent.

[25] The Lord Ordinary considered that the Council had a clear interest in the application process. A legal aid certificate was "a very valuable weapon in civil proceedings" (*R* v *Legal Aid Board, ex parte Owners Abroad* [1998] PIQR P116 at 121). Giving the Council a voice in the procedure was not just a matter of fairness. It had a utilitarian aspect (*R (King)* v *Justice Secretary* [2016] AC 384 at para 97), as the opponent's representations could assist the Board in determining both probable cause and reasonableness.

[26] The Lord Ordinary considered that the interested party had not complied with the guidance in the *Handbook* (*supra*). He had failed to give fair notice of his case, notably his grounds of appeal, to the Council. Where the interested party required to inform the Board about the grounds of appeal, he should be required to give the same information to the Council. An applicant, who had provided no detail of his case in the statement and who had declined to consent to the Board disclosing relevant information, subverted the scheme. That was unfair as it prevented an opponent from active participation in the process. The Board ought to have told the interested party that they would not consider his application until he had provided notice of the case to the Council. The Board could use their powers under the 1986 Act (s 2) to compel an applicant to do so. *Fife Regional Council* v *Scottish Legal Aid Board* 1994 SLT 96 was either distinguishable, because in that case the opponent had been aware of all of the issues, or was no longer good law; being "out of kilter with the trend towards greater transparency" (para [38]). The Board ought to have provided the Council with the reasons for its decision (*Stefan* v *General Medical Council* [1999] 1 WLR 1293 at 1304).

[27] The Lord Ordinary rejected the Council's contention that the Board had breached Article 1 of the First Protocol to the European Convention on Human Rights (the right to peaceful enjoyment of property) as it was not a "victim" (Article 34). In any event, the grant of legal aid did not interfere with the Council's possessions. The risk of irrecoverable expenses applied in all litigation. Any such interference was justified, proportionate and in the public interest, given the importance of making legal aid available to deserving persons. Short of a declarator of incompatibility, which was not sought, the reference to Article 1 could not result in a different interpretation of the 1986 Act.

Submissions

The Board

[28] The nature of the Board's duty to act fairly was dependent upon context and circumstances. The Board's function was to secure the provision of legal aid by exercising their discretionary powers (1986 Act, s 14). The Board's decision did not determine civil rights and obligations. The legal aid application process did not engage a civil right within the meaning of Article 6 of the European Convention (*R, on the application of Pattison* v *Legal Services Commission* [2004] EWHC 364 (Admin)).

[29] The Board had acted lawfully in making legal aid available. They were entitled to be satisfied that the interested party had probable cause and that it was reasonable that he should receive legal aid. The Board were under a duty of confidentiality. This promoted full and frank communication. The only information which had to be provided under Regulation 5(1)(b) was a statement of the *nature* of the case and the interest of the applicant. There was no "disclosure regime", nor did the Board act as an "information portal". Fairness did not require that the Council be given "sufficient" notice of the interested party's

case, nor did it entitle them to be told of its gist (*London Docklands Development Corp* v *Legal Aid Board*, Court of Appeal, 22 March 1994, unreported).

[30] What was fair depended on the context of the decision. The circumstances of the cases relied upon by the Lord Ordinary (*supra*) were far removed from those of the present. They did not support the proposition that the legal aid process was unfair and therefore unlawful. The Board had an obligation to determine legal aid applications fairly. However, what fairness required depended upon: (i) the character of the decision making body; (ii) the type of decision to be made; (iii) the nature of the rights and obligations affected by the decision; and (iv) the statutory framework within which the decision was to be taken.

[31] The Council were not a "party" to an application. They did not require to meet a case made by the interested party. The Board had no decision making function in the underlying dispute. Their decision was limited to deciding whether the interested party ought to receive legal aid. Parties would be provided with fair notice of the case to be met in the court process. The Board's decision was subject to a potential reasonableness or *vires* challenge. The test of unreasonableness was an exacting one (*Venter* v *Scottish Legal Aid Board* 1993 SLT 147 at 156; *McTear* v *Scottish Legal Aid Board* 1997 SLT 108 at 116).

[32] It would be difficult for the Board to assess what amounted to "fair" or "sufficient" notice of the applicant's case. That was a question of law and not an exercise of a discretion. The Board would have to reconcile the applicant's and opponent's competing views on the adequacy of notice outwith the 1986 Act regime. The Lord Ordinary's approach would produce satellite litigation.

[33] The Board were under a duty of confidentiality. This ensured that legally aided litigants were treated in the same way as privately funded ones. They would not require to provide notice of their case to their opponent until required by the court process. The Board

did not have a power to refuse to consider an application until an applicant had provided sufficient notice to an opponent or to compel an applicant to give consent to the disclosure of "relevant information". The Board's general powers (s 2) did not allow them to subvert the clear language of the Regulations (eg reg 5(1)(b)) or section 34 of the 1986 Act. The Council had made detailed and informed representations about the application. They had had all of the relevant information from the first instance proceedings to allow it to do so (*Fife Regional Council* v *Scottish Legal Aid Board* 1994 SLT 96 at 99).

[34] If new information came to light, the applicant required to bring that to the attention of the Board (reg 23). An opponent was entitled to do so too. The Board would require to consider the new information and to decide whether or not to terminate or suspend legal aid. It was not unfair for the Board to refuse to give reasons for the decision to grant legal aid (*R* v *Secretary of State for the Home Department, ex parte Doody* (*ibid*), at 564; *Stefan* v *General Medical Council* (*supra*) at 1300). In broad terms, the Council knew that, if legal aid had been granted, the applicant had satisfied the tests under the 1986 Act. This was sufficient in the circumstances of the regime of the 1986 Act.

[35] If the reclaiming motion were refused and the Board's decision to grant legal aid were reduced, the interested party would not be able to seek modification of his liability to pay any award of expenses (1986 Act, s 18). The Council could not seek an award out of the legal aid fund; ie against the Board (s 19). The decisions could not be reduced except in so far as affecting those matters (cf *McLeod* v *Cedar Holdings* 1989 SLT 620). A declarator instead of reduction might be appropriate.

Interested party

[36] The Lord Ordinary had erred in proceeding on the basis that the determination of

legal aid was some form of adjudication between two parties. This had coloured his whole approach. If it was right, the statutory scheme was inherently non-compliant with Convention rights since, inevitably, an opponent would be deprived of the information which supported an applicant's case. The provision of legal aid ensured equality of arms. This was a fundamental component of a fair hearing under Article 6 (*Airey* v *Ireland* (1979) 2 EHRR 305 at para 24) and at common law. The function of the Board was solely to determine whether legal aid was to be made available. This was a matter between the applicant and the Board. The opponent's sole function was to assist the Board.

[37] The duty of confidentiality was absolute. Legally privileged information was protected by both Articles 6 and 8, which offered increased protection to communications between lawyers and clients (*Michaud* v *France* (2014) 59 EHRR 9 at paragraphs 118-119). The effect of section 34 was to extend legal professional privilege to communications between the Board and the applicant. To require the Board to put pressure on an applicant to make disclosure of privileged information would circumvent the scheme of the 1986 Act, which was carefully considered and drafted in a way which was Convention compliant.

[38] The Council had focused on one aspect of the scheme, namely the initial application, but that was not the totality. The opponent had opportunities later to require the Board to review the grant such as when the grounds of appeal were intimated.

The Council

[39] The decision to grant legal aid did not only involve the applicants; it was an administrative decision which affected opponents, due to the value of a legal aid certificate as a weapon in civil proceedings. Both parties had to be treated fairly, and to be heard and involved in the decision making process. The court's function was not to review the Board's

judgment on what fairness required but to determine whether a fair procedure had been adopted (*R (Osborn)* v *Parole Board* [2014] AC 1115 at paras 65-68). The Board required to act "judicially", and not to hear one party behind the other party's back (*R* v *Manchester Legal Aid Committee, ex parte RA Brand & Co* [1952] 2 QB 413 at 425-430, citing *O'Reilly* v *Mackman* [1983] 2 AC 237 at 279). To enable them to act fairly, the Board were given power to regulate their own procedures (s 2; regs 2A, 5, 9 and 20). The requirements of the Act and the Regulations could be supplemented by the common law (Bennion: *Statutory Interpretation – A Code* (6th ed) at s 341 citing *Wiseman* v *Borneman* [1971] AC 297 at 308; *Errington* v *Wilson* (*supra*); *Pairc Crofters* v *Scottish Ministers* 2013 SLT 308 at paras [30], [42] and [45]; *McTear* v *Scottish Legal Aid Board* 1997 SLT 108 at 116).

[40] An affidavit from the Council's in-house solicitor had explained that, in his experience, the grant of legal aid was usually a determining factor in whether a case proceeded. He could not recall of an instance when legal aid had been refused, yet a petition for judicial review was initiated. He deponed that it was not the Council's wish to prevent persons with a legitimate case from challenging decisions. However, it was the Council's policy, in cases where it appeared to the Council that there was no merit in a challenge, to lodge "detailed objections" to the grant of legal aid, addressing both probable cause and reasonableness. The reason was that the Council would be spending "irrecoverable public money". The Council tried "to ensure that only actions with some merit or legitimate legal issue are funded" by the Board.

[41] The solicitor complained generally about what he described as minimal information being given in statements, such that "no real notice of ... the basis of the proceedings" was provided. He complained too of the failure of the Board to give reasons. He provided some detail of the steps which the Council had to take to investigate cases such as the present one

at social worker and managerial levels. In this case, he had ascertained that the grounds of appeal raised "for the first time" the qualifications of the social worker; adding that this had caused the social worker such distress that she had required to be absent from work. A further ground challenged a contention that, if the 2015 assessment had been reduced, then the 2010 figures would have revived. This was also inaccurate. Had he obtained notice of the grounds, he would have been able to contradict them. An appendix was produced showing that the Board had spent a variety of sums on legal costs in each of 11 judicial review petitions, all of which had been unsuccessful. This called into question whether the Board's current procedures enabled probable cause to be properly evaluated. The grant of legal aid to the petitioner confirmed this problem. The affidavit continued by bemoaning the current situation further and explaining its effect on the Council's limited finances.

[42] The Board had to have a statement of the grounds of appeal in order to determine the interested party's application (*Handbook,* para 4.91). They ought to have given the Council the opportunity to comment on those grounds, in order to correct or contradict any statement which was prejudicial to their view (*R* v *Manchester Legal Aid Committee, ex parte RA Brand & Co* (*supra*)). Any concerns about disclosure would be met by providing the Board with the gist of what had been said (*R* v *Secretary of State for the Home Department, ex parte Doody* (*supra*), at 560; *R (King)* v *Justice Secretary* (*supra*) at para 100; *Bank Mellat* v *HM Treasury* [2014] AC 700 at para 6). The Council were not trying to compel production. All that was sought was a properly detailed statutory statement. Confidentiality did not trump fairness. Fairness depended on the circumstances of the individual case, but the law had moved on since *Fife Regional Council* v *Scottish Legal Aid Board (supra)* (*R (King)* v *Justice Secretary* (*supra*) at paras 96-100 criticising *R* v *Deputy Governor of Parkhurst Prison, ex parte*

Hague [1992] 1 AC 58). *R* v *Secretary of State for the Home Department, ex parte Doody* (*supra*) had been decided after *Fife Regional Council*).

[43] The duty of fairness required the Board to give reasons for their decisions (*R* v *Legal Aid Board, ex parte Owners Abroad (Tour Operator*) (*supra*) at 124-5). If a review proceeded on new information, a gist of it had to be provided (*C* v *Scottish Legal Aid Board* 1999 SLT (Sh Ct) 48 at 50). The ability to revoke a legal aid certificate did not absolve the Board of the responsibility to act fairly (*R* v *P Borough Council, ex parte S* [1999] Fam 221).

[44] The Board's decisions interfered with an opponent's possessions. Convention (A1P1) rights required fair procedures, including the right to be heard, to be adopted in order to produce a balance (*Paulet* v *United Kingdom* (2015) 61 EHRR 39). The 1986 Act and the 2002 Regulations ought to be read in in a manner which avoided a conclusion that they breached Convention rights.

[45] The Lord Ordinary's interlocutor, in so far as it reduced the grants of legal aid, should be altered to one of partial reduction only (*McLeod* v *Cedar Holdings* (*supra*) at 622-4) so as not to interfere with the parties' abilities to seek modification of expenses or an award against the fund. Alternatively, a declarator might be pronounced.

Decision

[46] There is no doubt that, in determining whether to grant a person legal aid to pursue a civil action, the Board are under an obligation to act fairly, not only to the applicant but also to the "opponent", who may be affected by the decision. However, what fairness requires in different situations is variable. The *dictum* of Lord Mustill in *R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (at 560) remains pertinent:

> "The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, ... An essential factor is the context of the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

[47] In some situations, notably those which have a direct and substantial effect on a person's civil rights or obligations, fairness may dictate that the level of notice required should be the equivalent of that in a civil action and that both parties be afforded an equal opportunity to present their cases at a public, oral hearing. In others, where there is no such effect, but there may be some impact on a person's property or amenity, it may be sufficient that that person is advised of the general nature of the matter under consideration by the administrative body and that he or she be allowed to make representations, which the decision maker will be required to take into account.

[48] The system of civil legal aid is one which is designed, *inter alia*, to create an equality of arms in situations in which an impoverished person, who maintains that his rights have been infringed, seeks redress. Without legal aid, his Article 6 European Convention right of access to justice may be infringed (see generally *Airey* v *Ireland* (1979) 2 EHRR 305). However, the determination of a legal aid application does not of itself affect a potential opponent's civil rights or obligations. It may have some impact on the opponent in a practical sense in the longer term; in that it may result in legal action being raised against him; but that is all that it does.

[49] The grant of legal aid may be seen as part of a process which may ultimately determine civil rights or obligations. However, that process will, in a case of this nature, involve the applicant providing, in due course, the notice required in civil proceedings and will enable the opponent to respond to the applicant's case both in writing and at an oral

hearing. Where what is under consideration is, as here, a reclaiming motion against an interlocutor of a Lord Ordinary, the opponent will be given an equal opportunity to consider and to respond to the applicant's grounds of appeal, as required by the rules of court, in written and oral form. In short, looking at the process as a whole, there is no infringement of the Council's common law, or equivalent Article 6, right to a fair hearing. Such a hearing took place both before the Lord Ordinary and the appellate Division.

[50] The legal aid system does not infringe an opponent's right to the peaceful enjoyment of his possessions under Article 1 of the First Protocol. In that respect it is similar to other systems, such as Trade Union assistance or insurance cover, which fund litigation. It has no effect on that right. The expenses regime in civil actions may have such an effect in due course if an award is made against the opponent or if the opponent is unable to recover an award of expenses against an unsuccessful assisted person. However, in appeal proceedings, which is what are under consideration in this case, the successful unassisted person can apply for an order directly against the legal aid fund (1986 Act, s 19). It remains to be seen whether an application of that nature will succeed. Notwithstanding general complaints that litigants fail to recover all of their expenses against unsuccessful opponents, it remains the case that the Auditor is taxed with allowing a party with an award in his or her favour "such expenses as are *reasonable* for conducting the cause in a proper manner" (RCS 42.10; emphasis added).

[51] The statutory framework of the Legal Aid (Scotland) Act 1986 reflects the absence of a direct effect of the grant of a legal aid application on an opponent's civil rights and obligations. The opponent is given a right to receive intimation of the fact that an application has been made. He or she is provided with a limited amount of information about that application; notably the nature of the case. Just what is required will vary

according to circumstances, but what is clear is that provision of the detail of the legal underpinnings of the case is not what is intended. The *Civil Handbook*'s example in relation to a personal injury action is instructive in that it envisages that only the date and place of an alleged incident, coupled with no more than a contention that the applicant attributes loss arising from the incident to the negligence of the opponent, need be provided. There need be no further specification of what constituted the negligence.

[52] In relation to what the opponent may do, the statute permits him or her to make written representations (no longer "objections") about the application. These may, of course, be about the unreasonableness of legal aid or the lack of *probabilis causa*. However, it is clear from the limited nature of the right to intervene that the statute does not have in mind that the opponent will be able to launch a full defence to the merits of the applicant's case, as may ultimately be done in the civil action itself. Were it otherwise, the Act would create pre-litigation litigation (ie parallel litigation) and place the Board in a position which would require it, in many situations, to adjudicate between competing versions of the merits.

[53] The Act provides the opponent an opportunity to make any representation pointing to what might be termed obvious flaws in the application, such as the fact that the opponent is in the process of admitting liability and settling the case or that the incident complained of never happened or involved a different person. The Act studiously avoids giving an opponent a preliminary bite of the cherry thereby placing the applicant at the significant disadvantage of requiring him or her to present the full merits of the case twice and, on the first occasion, obliging him or her to do so before the rules of civil procedure so require. The Act is careful to avoid creating an imbalance in the overall civil process (see *London*

Docklands Development Corp v *Legal Aid Board*, Court of Appeal 22 March 1994, unreported, Leggatt LJ quoting Brooke J (first instance) at 13).

[54] The 1986 Act does not provide an opponent with the same opportunity to challenge the applicant's contentions as exist in either a civil action or where an administrative decision will have a direct effect on his or her civil rights or obligations. This is clearly deliberate, having regard to the nature of what is to be decided. In certain situations, the court will hold that a statutory framework is insufficient to create the necessary fairness and will supplement the statutory provisions accordingly (*Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, Lord Neuberger at para 35; *Pairc Crofters* v *Scottish Ministers* 2013 SLT 308, LP (Gill) at para [42]). However, given the limited nature of the decision to grant legal aid, there is no requirement to supplement the procedures in the 1986 Act, which are designed to, and do, create an appropriately balanced regime.

[55] There have undoubtedly been developments over the years in what is required in order to create a fair process in different administrative contexts. The courts have remained steadfast in their general view that what is required depends upon what is to be decided and its effect on a complaining party. *Fife Regional Council* v *Scottish Legal Aid Board* 1994 SLT 96 involved considerations not far removed from those in the present case. The question was what was needed to give fair notice of an application for legal aid to appeal a decree of absolvitor following a proof before answer in a reparation case. All that the application said, having referred to the sheriff's judgment, was that the applicant sought legal aid to appeal to the Sheriff Principal. The petitioners sought to reduce the Board's decision to grant legal aid because they had been prevented from properly exercising, what was categorised as a right to object, as the statement failed to disclose the nature of the case, notably the grounds of appeal. Lord Cameron of Lochbroom said (at 99):

> "The statement contained sufficient information in the case of an application for legal aid for an appeal to enable the petitioners to identify the nature of the case… It was clear on its face that the purpose of seeking grant of legal aid was to enable the applicant to challenge the sheriff's judgment on appeal in relation to the action originally raised by the applicant and heard by him. The petitioners were in possession of the sheriff's judgment. They had full knowledge of its terms and its conclusions on both fact and law. They were fully apprised of the history of the case. There is no requirement in the provisions of reg 5 that the statement itself should contain the specific and detailed grounds of appeal… In my opinion, there is no requirement that the statement demonstrated a *probabilis causa litigandi* as suggested by… the petitioners. It was not therefore defective in any way".

The contention in *Fife Regional Council* was that the Board had acted *ultra vires* by proceeding upon a defective application, which is slightly different than the more diffuse fairness attack in this case, but the issue is much the same.

[56] Although the Council seek to impugn *Fife Regional Council* on the grounds either that it is out of date or simply wrong, the court is unable to fault Lord Cameron's approach, having regard to current thinking on the requirements of fairness in administrative decision making. Furthermore, the circumstances seem indistinguishable from the present. The Council were aware of the full facts of Mrs Q's assessments and the decision of the Lord Ordinary. They may not have known what the grounds of appeal were to be, but, as already noted, they amounted, despite the surrounding verbiage, to two simple propositions, *viz*. that the Lord Ordinary had erred in finding that: (1) the assessment was not unreasonable; and (2) there was a rational basis for the calculation of direct payments. Although there would appear to be little reason for not disclosing these grounds to the Council (if they were then known), they hardly add much to what the application actually said, *viz*. that the Council had not performed their functions adequately in making reasonable payments to meet Mrs Q's needs. It is of note that the issue of the qualifications of the nurse were not included in the court's distillation of the grounds of appeal. It was, however, contained in

the unabridged version. The Council would have become aware of this when these grounds were lodged. Had they considered that they contained information which was manifestly inaccurate, it remained open to them, at that early stage in the appeal process, to draw this to the attention of the Board under Regulation 23. They did not do so.

[57] The degree of information which an application requires to contain will vary according to the circumstances. However, in the context of an appeal, where the Board (and the opponent) will have a copy of the Opinion relative to the interlocutor to be reclaimed, very little is required beyond a simple statement that legal aid is required for an appeal. Unless the grounds for an appeal are extraordinary, the general nature of the points to be made on appeal ought to be obvious to an opponent.

[58] This application was to mount an appeal against a detailed decision of a Lord Ordinary. The facts and circumstances, although already known to the Council, were set out in full, as were the legal considerations which formed the basis of both the submissions to the Lord Ordinary and his Opinion on the merits. The Council had more than sufficient notice of what the case was about, although they hardly required much given their existing state of knowledge. They ought to have been able to grasp that the argument in the appeal was, as it in the event transpired, that the Lord Ordinary had erred in law in deeming that the assessment had met the relevant statutory tests. The fact that there was a review adds nothing, given that the Board seem to have been seeking a supporting opinion from counsel, which they presumably obtained and which would not have been disclosable to the Council. The Council had sufficient information upon which they could, and did, submit representations. There was no apparent unfairness in any of this.

[59] It follows that that Court must disagree with the Lord Ordinary that the grounds of appeal required to be disclosed to the opponent. Such disclosure is specifically not required

by the Regulations or, *quantum valeat*, the *Civil Handbook*. In the context of this case, it was not required in order to meet the test of fairness. The Council were able to participate actively in the legal aid process on the basis of the information they already had, and they did so.

[60] There is no general rule that reasons must be given to every party affected, however incidentally, by an administrative decision (*R* v *Secretary of State for the Home Department, ex parte Doody* (*supra*, Lord Mustill at 564). This remains so, even if the situations in which reasons need not be given are rapidly diminishing (*Stefan* v *General Medical Council* [1999] 1 WLR 1293 Lord Clyde, delivering the judgment of the Privy Council, at 1300). Once again, although in the modern era reasons will almost always be required, especially where there is a right of appeal, context is important. The 2002 Regulations provide (reg 19) that, if an application is refused, the Board must inform the applicant of the grounds for refusal. These are expressed in very broad terms, but the need to specify them is obvious because of the applicant's right to a review (see eg *C* v *Scottish Legal Aid Board* 1999 SLT (Sh Ct) 48). In order to consider whether he or she has a basis for a review, he or she would need to know whether, for example, the refusal was on financial grounds, competency, reasonableness or *probabilis causa*. The Regulations require no further specification and certainly none which examines the merits of the case.

[61] In contrast, the opponent is not a party to the application. There is no right of review at an opponent's instance. This is all in keeping with the balance, but not equality, between the competing interests. If legal aid is granted, the opponent would be aware, without the need for any formal notification, that the reason for that was that the criteria in the 1986 Act had been met; *viz*. the applicant met the financial requirements, had *probabilis causa* and his application was both competent and reasonable. Fairness requires nothing more in the

limited context of such an application. Providing reasons of the nature of those normally supplied to an unsuccessful applicant would do little to advance the opponent's position.

[62] For these reasons the reclaiming motion is allowed. The interlocutor of the Lord Ordinary dated 22 December 2017 is recalled and the prayer of the petition is refused.