



Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

**New Provisions Relating to Court Funds and
Solicitors' Rights of Audience**

8 February 2011

NORTHERN IRELAND ASSEMBLY

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**New Provisions Relating to Court Funds and Solicitors' Rights of
Audience**

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Members present for all or part of the proceedings:

Lord Morrow (Chairperson)
Lord Browne
Mr Thomas Buchanan
Mr Paul Givan
Mr Alban Maginness
Mr Conall McDevitt
Mr David McNarry
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr Gareth Johnston)	Department of Justice
Mr Robert Crawford)	
Ms Maria Dougan)	
Ms Geraldine Fee)	Northern Ireland Courts and Tribunals Service
Mr Michael Kelly)	
Mr Richard Ronaldson)	

The Chairperson:

We welcome again Geraldine Fee, who is head of criminal policy and legislation division at the Northern Ireland Courts and Tribunals Service, Michael Kelly and Richard Ronaldson. I remind the Committee that, on 3 February 2011, we were briefed on the Department's proposals to

introduce provisions by way of amendment with regard to funds in court legislation. The Committee agreed to consider the proposed provision further at today's meeting. Further information has been tabled as requested. I ask officials to comment at this stage, if they have anything further to add.

Ms Geraldine Fee (Northern Ireland Courts and Tribunals Service):

Chairman, we simply want to highlight the point that is addressed in the further letter to the Committee, which is that provision has been taken in the Courts and Tribunals Service's accounts for 2010-11 to enable the service to make restitution to anyone whose funds were deducted in the event that the High Court should rule against us in the forthcoming application. Some members had queried why they had not seen that in the budget proposals presented by the Department for 2011-12. The reason is that it is an accounting issue. It had been taken as a provision in 2010-11. I am reliably assured that it would move from annually managed expenditure (AME) into departmental expenditure limit as part of an accounting change. Members had also requested a copy of section 81 of the Judicature (Northern Ireland) Act 1978, to which the amendment would be made. That was also provided.

The Chairperson:

Does any member wish to comment, ask further questions or seek clarification?

Mr O'Dowd:

It is difficult to know whether we are making good law, because it has not been consulted on and the public have not had a chance to have a say on it. I am not questioning the good faith of the Department or the individuals from the Department, but we are relying on their good faith to ensure that we have proper legislation.

Mr A Maginness:

The intention is to insert a provision in the Justice Bill, in case the court rules against the present practice, which is the deduction of fees. What would the net effect of that provision be? Would it be to make the deduction lawful at the order of the court?

Ms Fee:

Yes.

Mr A Maginness:

It would, therefore, be a matter for the court to determine whether it was suitable in such circumstances to deduct the fees. You are dealing with people who have a disability or who are minors. They are people who could not directly give their consent for the deduction of funds. Is that correct?

Ms Fee:

They could not, but their representatives could. As you rightly described, it is done under the protective jurisdiction of the court. Therefore, any deductions made by the accountant general would be on foot of a court order. That court order would authorise three things: the investment of the funds in court in accordance with the proposal put forward; that the fees for the stockbrokers could be deducted; and the rate or amount of those deductions. Each of those, individually, would be the subject of the approval of the High Court or the County Court.

Mr A Maginness:

If the High Court says that it has looked at the issue and declares that previous practice, or the current practice, which has been suspended for the time being, is unlawful or improper, and then you introduce this provision, is it likely for the court to say that, although it ruled against it at one stage, it will determine in favour of it in future. That I cannot understand.

Ms Fee:

The difficulty with the practice is that there was an absence of expressed statutory authority. It was considered that the power in section 81 of the Judicature Act was sufficiently wide to allow the accountant general not only to invest the funds, but anything reasonably incidental to that. It proceeded for years on the basis that the deduction of stockbrokers' charges fell within that power. The High Court has been asked to rule on whether that interpretation of the provision was right. If it is not right, we will take the expressed statutory provision to cover that gap. It is not that the High Court will be ruling to say that they should not be taking stockbrokers' fees from these funds. Rather, it is that there was not a statutory power and, in the absence of an expressed statutory power, what was in the legislation was not wide enough.

I will return to Mr O'Dowd's point. I know that the exact terms of the provisions were not consulted on publicly, but the proposal was part of the equality impact assessment, which was consulted on. So, the planned intention of the Department in this regard was consulted on, and it

received broadly welcoming support. It was commented that whatever we were doing here should be consistent in due course with any mental capacity legislation that would be brought forward. The Department has given a commitment that it will take into account any changes made as part of that legislation.

Mr A Maginness:

I presume that the fact that you use stockbrokers to invest these funds is to the advantage of the plaintiff. So, there is a value added to the fund in the sense that the plaintiff gets the benefit of the increased investment. If the court in general were not able to do that, the fund would be thrown to government bonds or gilts, which would not have as good a return.

Ms Fee:

Yes; that is exactly right. The alternative to investing on the basis of stockbrokers' advice is to invest in cash deposits with a limited interest rate. That is one of the reasons why it is considered important to be able to take stockbrokers' advice. It allows people who would not ordinarily be able to make their own decisions about such issues to have the opportunity to make a return on their investment. That having been said, given the nature of those clients, stockbrokers are very aware that they must use a low-risk investment strategy to protect their money and to get some form of return for them.

The Chairperson:

Given that no one else wishes to comment, I will remind members that the new provisions are not part of the Justice Bill, so the Committee does not have to formally agree them. However, the Committee may wish to make its views known about whether it supports the provision, and those views can be reflected in the Committee report.

Mr O'Dowd:

Can the Committee be informed of when the hearing is taking place?

Ms Fee:

The application has not actually been made yet. We hope to make it within the next month. Thereafter, it will be a case of getting the matter listed before the High Court. We hope that the matter will be resolved within the next few months. As I said last week, we had taken provision to cover the costs of this until the end of the first quarter. We should, hopefully, have a decision

from the High Court by June. However, I do not want to say that the High Court will have definitely decided the issue within that time, but we hope so. We can come back or write to the Committee to inform it of when the application is being made. We will obviously keep you informed of the outcome of the application in due course.

Mr O'Dowd:

OK.

The Chairperson:

Mr Kelly and Mr Ronaldson are leaving.

Do members wish to note or express any other views on the report?

Mr A Maginness:

The proposal is reasonable, and I certainly support it. It is of benefit to a plaintiff who is under a disability or a minor. This should be done in their interests.

The Chairperson:

Do members agree to adopt the line as outlined by Mr Maginness?

Members indicated assent.

The Chairperson:

We will move on to consider the new provisions for solicitors' rights of audience. I welcome back Mr Crawford and Maria Dougan. I remind members that, on 3 February, the Committee was briefed by the Department on proposals to introduce provisions by way of amendment for solicitors' rights of audience. The Committee also took oral evidence from the Law Society on the issue and agreed to consider written evidence from the Bar Council at the meeting on 8 February. All relevant papers and the written evidence from the Bar Council are in members' packs. Do the officials have anything that they wish to add or say at this stage?

Ms Fee:

As members will recall, last week, the Law Society submitted a paper in advance of the hearing and then spoke to several of the issues. The first issue related to what the Law Society considered

to be a technical drafting point with new article 40A. It felt that that needed to be amended to provide a definition of legal representation, so as to ensure that the duty to advise the client applied only for oral representation in the High Court or the Court of Appeal. I advised the Committee that the Department considered that the clause, as drafted, provided that definition. However, we undertook to consult with legislative counsel, and it confirmed the Department's understanding. That should satisfy the concerns that were expressed by the Law Society.

The Chairperson:

I draw members' attention to the paper from the Bar Council, which has just been tabled. Paragraph 22 of that paper is of some significance, and it states:

"If the Minister really does want to attract quality and expertise of representation at the highest levels and sustain supply in the future, the extension of the solicitor advocate scheme is not the way to go about it. Evidence of the points presently being advanced are widely apparent in the functioning of publicly funded work in England & Wales. The Minister has chosen to ignore this."

Do any members wish to comment on that? We will pause for members to read the paper.

Mr A Maginness:

It is difficult to go through papers like this when they have only just been tabled. If it is possible, it may be better to defer comment until Thursday's meeting.

The Chairperson:

The paper has come at the Committee so late that I am unsure whether it can take a definitive position on it. As a halfway house, we may agree in principle to solicitors' rights of audience, but that may be as far as we can go. To go into all the details at this stage may —

Ms Ní Chuilín:

It is too late.

The Chairperson:

Yes; it is simply too late. Do any of the officials want to comment on that while they are here?

Mr Gareth Johnston (Department of Justice):

Sorry; we were talking while you were talking.

Ms Ní Chuilín:

What? *[Laughter.]*

Mr A Maginness:

I do not know what the sentence would be for that. *[Laughter.]*

The Chairperson:

I know the feeling all right.

Ms Fee:

My colleague informs me that you are suggesting that Committee agrees in principle to solicitors' rights of audience.

The Chairperson:

Yes, in principle. We do not reckon that we are in a position to go into the gory details, because of the lateness of the hour and where we are with the Bill.

Ms Fee:

I am conscious of the time commitment for the Bill and the Committee. We are happy if that is how the Committee wishes to proceed.

The Chairperson:

Are members agreed with that approach?

Members indicated assent.

The Chairperson:

I thank the witnesses for their attendance today.