

[2015 Gib LR 201]

IN THE MATTER OF WHATLEY

SUPREME COURT (Dudley, C.J.): July 16th, 2015

Legal Aid and Assistance—qualification for legal assistance—“steps preliminary or incidental to any proceedings”—Registrar may grant legal assistance for advice on whether to pursue appeal—step “preliminary or incidental” to proceedings, within meaning of Legal Aid and Assistance Act 1960, s.12(3)

Legal Aid and Assistance—refusal of legal assistance—counsel’s opinion on merits—Registrar may rely on advice of appellant’s leading counsel rather than independent barrister consulted under Legal Aid and Assistance Act 1960, s.14(3) in deciding whether to grant legal assistance for appeal—Registrar to give weight to independent barrister’s report but not bound by it

The appellant appealed against decisions of the Registrar of the Supreme Court to refuse to grant him legal assistance.

The appellant instructed solicitors in respect of two personal injury claims but they failed to institute proceedings within the limitation period and he brought a successful claim against them for professional negligence. After a quantum hearing in which he was represented by Mr. Nolan, Q.C., the Supreme Court awarded him £100,000 in damages. He wished to appeal against that decision.

He applied for legal assistance to fund a client conference with and written advice from Mr. Nolan on whether to bring an appeal and then to bring that appeal. Mr. Nolan indicated that a client conference was unnecessary.

The Registrar of the Supreme Court referred the appellant’s application to an independent barrister, Mr. Nuñez, under s.14(3) of the Legal Aid and Assistance Act 1960. He stated that the Act did not permit the Registrar to

grant legal assistance to cover advice on whether to bring an appeal but the appellant's proposed appeal had merit and legal assistance should therefore be granted to fund it.

Contrary to Mr. Nuñez's advice, the Registrar granted legal assistance to cover written advice from Mr. Nolan on whether the proposed appeal had merit, but he refused legal assistance for a client conference.

Mr. Nolan advised that the proposed appeal did not have a reasonable prospect of success, and the Registrar therefore refused legal assistance to fund it.

The appellant appealed against the Registrar's decisions. He submitted that (a) a client conference was necessary because it would allow him to go through alleged factual inaccuracies in the Supreme Court's judgment in a way that would not be possible in writing; and (b) legal assistance should have been granted to enable him to bring the proposed appeal based on the recommendation given by Mr. Nuñez. Adopting Mr. Nuñez's view that legal assistance could not lawfully be granted for the purpose of obtaining advice from Mr. Nolan on whether the appeal had merit, the Registrar should have disregarded that advice and relied on Mr. Nuñez's view that the appeal had merit instead.

Held, dismissing the appeal:

(1) The Registrar was entitled to rely on Mr. Nolan's opinion that a client conference with the appellant was unnecessary and to refuse legal assistance for such a conference (para. 18).

(2) Similarly, the Registrar was entitled to rely on Mr. Nolan's advice that the appellant's proposed appeal had no reasonable prospect of success and to refuse legal assistance for that appeal, despite Mr. Nuñez's view that it had merit. Mr. Nolan had had the advantage of acting for the appellant during the quantum hearing, had comprehensive knowledge of the proceedings, and had produced detailed written advice. By contrast, the report produced by Mr. Nuñez under s.14(3) of the Act was inherently superficial as he had not examined the evidence given during the quantum hearing and, although the Registrar should give it due weight, he was not bound by it. In exercising his discretion under s.12(4) of the Act, he was therefore entitled to rely on Mr. Nolan's advice rather than that of Mr. Nuñez (para. 16; para. 19).

(3) The Registrar was permitted to grant legal assistance in respect of advice as to whether to pursue an appeal. The words "steps preliminary or incidental to any proceedings" in s.12(3) of the Act indicated that instituting proceedings was not a prerequisite of or the sole purpose for which legal assistance could be granted. Obtaining advice as to the prospects of success of an appeal was a step "preliminary or incidental" to proceedings being instituted and could therefore be funded by legal assistance (para. 17).

Legislation construed:

Legal Aid and Assistance Act 1960, s.12: The relevant terms of this section are set out at paras. 16–17.

1 **DUDLEY, C.J.:** This is an appeal from a refusal by the Registrar to grant the appellant (Mr. Whatley) legal assistance for the purposes of an appeal against my judgment handed down on November 14th, 2013, with the orders flowing from that judgment having been made on June 4th, 2014.

2 By virtue of r.16(3) of the Legal Aid and Assistance Rules 1960 (“the Rules”), an applicant who is aggrieved by the decision of the Registrar may appeal to the Chief Justice. Mr. Whatley is aware that I am dealing with this appeal and has not suggested that I am somehow precluded from dealing with it. Indeed, I see no good reason why I should recuse myself. As judges, we are used to analysing competing arguments and assessing their relative strengths and weaknesses and are aware when our determinations are clear cut or evenly balanced, and can form a view about the prospects of success which appeals from our decisions may have.

Background

3 The underlying action was instituted as far back as 2003. The claim was one of professional negligence arising out of the conduct of two actions. The appellant instructed solicitors in respect of two distinct claims for personal injury which arose from a falling steel prop and a road traffic accident. In both instances, the writs were issued after the expiry of the limitation period. By an order of June 11th, 2004, Schofield, C.J. directed, *inter alia*, that “the action proceed on the basis that the breach of duty towards the claimant is not an issue.” On April 27th, 2005, I handed down a judgment following a trial (in which the appellant was represented by Harvey McGregor, Q.C.) and I determined that Mr. Whatley had lost something of value because of the defendant solicitors’ failure to issue writs within the limitation period. In respect of Action 1997 W No. 142, I assessed the percentage loss of chance at 7% and in respect of Action 1999 W No. 168, I assessed the percentage loss of chance at 90%.

4 That decision was appealed and cross-appealed to the Court of Appeal which, by a majority, increased the percentage chance for the first action from 7% to 80% and upheld my 90% valuation of the second action. The defendant solicitors appealed that decision to the Privy Council which, in a judgment of May 2nd, 2007 (reported at 2007–09 Gib LR 82), reduced the percentage chance in respect of the first action to 28%. The Privy Council also ordered that the defendant solicitors were to have the costs of the appeal to the Privy Council from the expiry date of an offer of settlement made by the defendant solicitors and were entitled to set off those costs against the costs order made in Mr. Whatley’s favour in the

Court of Appeal, any costs thereafter found to be due to Mr. Whatley arising in the proceedings, and, significantly, any damages or interest recoverable by Mr. Whatley under any future judgments in his favour.

5 At the quantum hearing, Mr. Whatley was represented by Dominic Nolan, Q.C. (“Mr. Nolan”). At that stage, the claim was valued at £2,140,177 inclusive of interest. My judgment, given on November 14th, 2013, was converted into an identifiable single sum of damages and interest, which was of the order of £100,000. The appellant was also awarded 50% of his costs of the liability and quantum hearings at first instance.

6 Throughout all these proceedings, in which Mr. Whatley has been represented by three different firms of lawyers and two Queen’s Counsel, he has had the benefit of legal assistance certificates. As yet, costs have not been assessed and, because of the set-off provision ordered by the Privy Council, Mr. Whatley has not received any sum in respect of the damages and interest awarded, and he therefore meets the legal assistance financial criteria.

7 An application for legal assistance dated June 10th, 2014 (but under cover of a letter from Mr. Whatley’s solicitors, Messrs. Triay Stagnetto Neish (“TSN”), dated July 8th, 2014) structured the application as follows:

“(1) An application limited to obtaining advice on the proposed appeal from lead counsel in the trial, Dominic Nolan, Q.C., who is best placed to give advice on the prospects.

If you are not minded to grant legal assistance for the purpose of obtaining advice, consideration should be given to an application for—

(2) Legal assistance limited, in the first instance, to the costs of obtaining a full transcript of proceedings so that our client can draft full grounds of appeal.

Lastly, if you are not minded to provide an initial grant of legal assistance limited as set out above, that you—

(3) Consider our client’s application for legal assistance on the basis of the grounds contained in the application.”

8 On July 9th, 2014, the Registrar referred the application to a barrister in accordance with s.14(3) of the Legal Aid and Assistance Act 1960 (“the Act”) for him to investigate the merits of the case and report thereon. Mr. Joseph Nuñez reported to the Registrar on August 28th, 2014. Mr. Nuñez expressed the view that the Act did not permit the Registrar to grant legal assistance for the purposes of obtaining the advice or the transcript, whilst in relation to the proposed grounds of appeal he had this to say:

“Turning then to the various grounds of appeal specified in the annex to the application. Without having examined the evidence given during the hearing, and with only the benefit of the background contained in the above-mentioned judgment of November 15th, 2013, it is impossible for me to state that any one or more of the grounds of appeal set out in the annex to the application is with or without ‘merit.’ The issues raised are legal as well as factual and consequently, whilst I am far from satisfied that the appeal is as strong as the applicant believes it is, I am of the opinion that it is not without some merit.

In the light of the information before me, I am of the opinion that, on the face of it, for the purposes of the Act, there is merit in the applicant’s application and that, consequently, legal assistance should be granted.”

9 Despite the opinion expressed by Mr. Nuñez, by email of November 14th, 2014 the Registrar informed TSN that he was granting legal assistance for the purpose of obtaining the advice from counsel on the merits of an appeal. In that email, the Registrar made the following point: “It would also seem to me to be sensible to ask Mr. Nolan, Q.C. to provide the opinion. However, it would have to be on the basis that the opinion is as much for my consideration and benefit as it is for your client. If this would be an issue, please revert.” He then went on to point out that, notwithstanding favourable advice from counsel, he would still have to consider whether or not it was reasonable to grant legal assistance. There is nothing in subsequent communications between the Registrar and TSN to suggest any objection to the Registrar’s condition that the advice be also for his consideration and benefit.

10 On February 4th, 2015, Mr. Nolan, Q.C. sent an email to TSN in which he provided an estimate of his fees for a written reasoned advice and in which he went on to state:

“I *do not* need to see Mr. Whatley in conference to advise upon appeal prospects. Given that we had numerous conferences in advance of and during the trial, I am aware of the detail of his case.

That being said, if he has impressed upon you particular points that he would wish me to consider, then if you set them out in an email to me I will do my best to address them in my advice.” [Emphasis in original.]

Notwithstanding Mr. Nolan’s view, TSN informed the Registrar that its client wished to see Mr. Nolan in person and requested that he consider allowing for the extra cost of a client conference. The Registrar approved the cost of the preparation of the advice on the basis of Mr. Nolan’s

estimate, but, given the indication by Mr. Nolan that a client conference was unnecessary, declined the invitation to approve that extra funding.

11 By email of February 18th, 2015, TSN informed the Registrar that its client had taken “a very firm view” that he needed a client conference with Mr. Nolan and asked the Registrar to reconsider his funding decision in that regard. It then went on to state that, in any event, Mr. Whatley had requested that it ask Mr. Nolan to delay his advice to enable him to provide Mr. Nolan with his views in writing and went on to ask the Registrar whether he would allow for that delay. The Registrar replied stating that he was not minded to reconsider the issue of the client conference, whilst in relation to the timing of the provision of the advice he indicated that he did not consider it appropriate to express a view, as the other party to the litigation could have views on the consequential delays which could arise. TSN replied informing the Registrar that it would ask Mr. Nolan to delay his advice and that it would advise Mr. Whatley of the possible consequences.

12 In a detailed 10-page advice dated February 24th, 2015, Mr. Nolan reached the conclusion that he did not see a realistic prospect of success for an appeal from my judgment of November 14th, 2013.

13 On March 12th, 2015, the Registrar wrote to TSN informing it that, in light of the advice tendered by Mr. Nolan and having considered the matter, pursuant to r.16(1)(d) of the Rules he was refusing legal assistance for the proposed appeal. Rule 16(1)(d) provides that the Registrar should refuse an application if an applicant “has not shown that he has reasonable grounds for taking . . . the proceedings . . .”

14 By letter dated April 1st, 2015, Mr. Whatley indicated that he intended to appeal the Registrar’s refusal of legal assistance. At my request, the Registrar provided Mr. Whatley with a copy of the reporting barrister’s letter and accurately went on to state that legal assistance appeals are ordinarily dealt with without a hearing.

15 Mr. Whatley’s substantive grounds of appeal on the refusal of legal assistance are contained in a letter dated June 4th, 2015 and set out a factual matrix, but essentially he appeals on the basis that, if he was required to see a reporting solicitor chosen by the Registrar, it must follow that he should also have been allowed to see Mr. Nolan. He says that this was necessary because it would have allowed him to go through what he says are factual inaccuracies in my judgment and that the time allowed and his personal circumstances were such that this could not properly be undertaken in writing. Albeit not fully articulated in Mr. Whatley’s letter, I understand that the following propositions are also advanced as further grounds of appeal: that, given the recommendation by Mr. Nuñez, legal assistance should be granted; and, adopting Mr. Nuñez’s view that legal assistance could not properly be granted for the purpose of obtaining a full

advice from counsel, that the advice should be disregarded when considering the grant of legal assistance.

The recommendation by the reporting barrister

16 Section 14(3) of the Act requires the Registrar to refer an application for legal assistance to a barrister or solicitor, not being the lawyer selected by the applicant, to investigate the merits of the applicant's case and to report thereon to the Registrar. There is nothing in the Act to suggest that the Registrar is bound by the report produced by the reporting lawyer. Indeed, s.12(4) provides:

“A person shall not be given legal assistance in connection with any proceedings unless the Registrar is satisfied that such person has reasonable grounds for taking, defending or being a party thereto and may also be refused legal assistance if it appears to the Registrar unreasonable that he should receive it in the particular circumstances of the case.”

Although evidently the Registrar must give due weight to the opinion of the reporting lawyer, ultimately whether or not he is satisfied that there is merit in taking or defending an action, or, as in this case, appealing a decision, is a matter to be determined by him.

The grant of legal assistance to obtain counsel's advice

17 For my part, I disagree with Mr. Nuñez's conclusion that it was not open to the Registrar to grant legal assistance for the limited purpose of seeking counsel's advice. Section 12(3) of the Act provides:

“Legal assistance shall consist of representation, on the terms provided for by this Part, by a solicitor and, so far as necessary, by a barrister including all such assistance as is usually given by solicitor or barrister in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.”

Although an applicant must evince an intention to institute proceedings should it prove necessary, it is evident from the words “steps preliminary or incidental to any proceedings” that instituting proceedings is not a prerequisite or the sole purpose for which legal assistance can be granted. Obtaining advice from counsel as to the prospects of success of an appeal is a preliminary step or incidental to proceedings being instituted. If, as in this case, the advice persuasively indicates that an appeal has no realistic prospects of success, it avoids those proceedings being instituted.

Not allowing for payment for a conference between Mr. Nolan and Mr. Whatley

18 It is apparent that Mr. Nolan did not think it necessary to have a conference with Mr. Whatley. Given that he acted for him at the hearing, he was best placed to make that determination, and the Registrar was perfectly entitled to rely upon that assessment. There is also no ignoring that Mr. Whatley had solicitors in Gibraltar who, as Mr. Nolan suggested, could be the conduit for the transmission of any particular points which Mr. Whatley wanted considered. To the extent that Mr. Whatley had personal difficulties in producing a document for counsel, that was not something specifically relied upon in the February 18th, 2015 email from TSN to the Registrar.

Conclusion

19 Counsel's advice having been obtained, it properly formed part of the material that the Registrar could consider when exercising his discretion pursuant to s.12(4) of the Act. Unlike the report by Mr. Nuñez, which was produced by him "without having examined the evidence given during the hearing," Mr. Nolan had the advantage of having acted for Mr. Whatley during the nine-day quantum trial, having given numerous previous written advices, and having had numerous conferences in advance of and during the trial. I intend no criticism whatsoever of the report produced by Mr. Nuñez, but, by its nature, it is relatively superficial. In contrast, Mr. Nolan's advice (for which Mr. Whatley had sought funding) considered in some detail the proposed grounds of appeal and the prospects of success. The Registrar was entitled to give Mr. Nolan's advice substantial weight and rely upon it when making his determination.

20 For these reasons, the appeal is dismissed.

Appeal dismissed.