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Bates v Lord Hailsham of St Marylebone and others

CHANCERY DIVISION

[1972] 3 All ER 1019, [1972] 1 WLR 1373

HEARING-DATES: 19, 20 JULY 1972

20 JULY 1972

CATCHWORDS:

Solicitor - Remuneration - Order prescribing and regulating remuneration for non-contentious business - Statutory committee - Duty to act fairly - Proposals for major change in method of remuneration - Preparation of draft order - Consultation with outside bodies - Draft required to be sent to the Council of the Law Society - Observations of council to be submitted to statutory committee within one month of receipt - Draft of order abolishing scale fees - Whether when major change proposed period should be extended and representative bodies other than council consulted - Whether draft sent to council should be first approved by committee - Solicitors Act 1957, s 56.

HEADNOTE:

The plaintiff was a solicitor and a member of the National Executive Committee of the British Legal Association ('the association'). To that association about 2,900 of the 26,000 solicitors with practising certificates belonged. On 1st May 1972 the Lord Chancellor announced at a press conference that it was proposed to abolish the scale fees prescribed under Sch 1 to the Solicitors' Remuneration Order 1883, as amended a, and to apply the quantum meruit system under Sch 2 to all conveyancing transactions. Anticipating the draft order that the Lord Chancellor was required by s 56 (3) b of the Solicitors Act 1957 to send to the Council of the Law Society ('the council') before any such order regulating the remuneration of solicitors in respect of non-contentious business was made by the statutory committee under s 56 (2), the association sent out a circular to all solicitors about the proposals. On or about 6th June the Law Society received a draft of the proposed order, for consideration by the council and for the submission of observations within a month for consideration by the committee, as provided by s 56. The date of the meeting of the committee for the making of the order was fixed for 19th July at 4.30 p m. On 21st June the draft order was published in full in the Law Society's Gazette. On 11th July the association sent printed submissions to the committee. These concluded with a request that the order should not be approved at that juncture and that the Lord Chancellor should seek further consultations with the profession and professional organisations. On 14th July the association despatched letters to each member of the committee seeking further time and suggesting a deferment of the final decision 'for perhaps two months'. On 17th July the association sent out a circular making a series of accusations against the Lord Chancellor and the Law Society. On 18th July the Lord Chancellor wrote to the association saying that he saw no reason for postponing

the meeting of the committee or for refraining from making an order in such terms as the committee approved. On the same day the plaintiff issued a writ against the members of the committee. He contended that the draft sent to the Law Society had been prepared by the Lord Chacellor's department and had not been considered by the committee, and claimed (i) a declaration that any order made by the committee under s 56 would be ultra vires and void unless the draft had been considered by the committee and an opportunity had been given for representations on the proposed order to be made by the association and other representative bodies, and (ii) an injunction restraining the committee from making an order until those steps had been taken. At 2.00 p m on 19th July the plaintiff moved ex parte for an injunction to stop the committee making an order at its meeting at 4.30 p m.

a By SR & O 1925 No 755, SR & O 1944 No 203, SI 1953 No 117 and SI 1959 No 2027

b Section 56, so far as material, is set out at p 1022 d to f, post

Held - The motion would be dismissed for the following reasons --

(i) The committee's function under s 56 was of a legislative and not an administrative, executive or quasi-judicial nature, and so it was not bound by rules of natural justice or by any general duty of fairness to consult all bodies that would be affected by the order it made under the powers delegated to it by s 56. It was only required, under s 56, to consider before making the order the written submissions of the council, so that even when a momentous change, such as that proposed in May by the Lord Chancellor, was to be made it was not required to extend the time limit or to provide an opportunity for representations by bodies other than the council (see p 1023 j to p 1024 c and f g, post).

(ii) There was nothing in s 56 which prescribed or implied that the draft sent to the council must be a draft which the committee itself had first drafted or approved (see p 1025 b, post).

(iii) In any event the delay in applying for the injunction had not been sufficiently explained. Ex parte injunctions were for cases of real urgency, where there had been a true impossibility of giving notice of moting (see p 1025 h, post).

NOTES:

For orders regulating the remuneration of solicitors, see 36 Halsbury's Laws (3rd Edn) 107, para 142.

For the Solicitors Act 1957, s 56, see 32 Halsbury's Statutes (3rd Edn) 60.

For the Solicitors' Remuneration Order 1883, as amended by SR & O 1925 No 755 and SI 1953 No 117, see 20 Halsbury's Statutory Instruments (Second Re-Issue) 225, and for the amendments made by SI 1959 No 2027, see ibid p 239.

CASES-REF-TO:

Liverpool Taxi Owners' Association, Re [1972] 2 All ER 589, sub nom R v

Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299, [1972] 2 WLR 1262, CA.

INTRODUCTION:

Motion. By a writ issued on 18th July 1972 against the defendants, Quintin McGarel Baron Hailsham of St Marylebone, John Passmore Baron Widgery, Alfred Thompson Baron Denning, Sir Desmond Heap, George Pownall Atkinson and Theodore Burton Fox Ruoff, the plaintiff, George Bernard Bates, suing on behalf of himself and all other solicitors save the fourth, fifth and sixth named defendants, sought: (1) a declaration that any order affecting solicitors' remuneration under s 56 of the Solicitors Act 1957 made or purported to be made by the defendants would be ultra vires and void unless before making such order (i) the draft of such order sent to the Law Society by the first defendant under that section had first been considered at a duly convened meeting of the defendants as the committee established by that section and (ii) the defendants had given to the plaintiff and the British Legal Association and other representative bodies of solicitors a reasonable opportunity to formulate and present to the defendants representations on the terms of any proposed order; (2) an injunction to restrain the defendants and each of them from making or purporting to make any such order unless and until the steps (i) and (ii) in the declaration had first been taken. On 19th July, before the writ had been served on any of the defendants, the plaintiff moved ex parte for an injunction restraining the defendants from making an order under s 56 at a meeting to be held on that day. The facts are set out in the judgment.

COUNSEL:

Donald Nicholls for the plaintiff.

PANEL: MEGARRY J

JUDGMENTBY-1: MEGARRY J.

JUDGMENT-1:

MEGARRY J. This is an ex parte motion by the plaintiff, who is a solicitor and a member of the National Executive Committee of the British Legal Association. In the writ he is expressed to sue on behalf of himself and all other solicitors save the fourth, fifth and sixth defendants. On this I make no comment, save that I take it that the only solicitors intended to be included are solicitors of this court and not of other countries; and any references that I make to solicitors are made in this sense. The defendants are Lord Hailsham of St Mary lebone LC, Lord Widgery CJ, Lord Denning MR, Sir Desmond Heap (the President of the Law Society), Mr George Pownall Atkinson (whom I understand to be the President of the Bristol Law Society) and Mr Theodore Burton Fox Ruoff (the Chief Land Registrar). They constitute the committee set up by the Solicitors Act 1957, s 56, which has certain functions relating to the remuneration of solicitors, authorising the making of general orders. The motion is for an injunction over next Friday restraining the defendants from making any order under s 56. The motion was launched by 2.00 p m yesterday, and a meeting of the committee was due to take place at 4.30 p m that day. Counsel for the plaintiff concluded his address to me at 4.15 p m, whereupon, in view of the time element involved, I did not attempt to give judgment but instead stated that in my judgment the application failed and the motion would be dismissed;

and I added that I would give my reasons this morning. I now proceed to do so.

The matter arises in this way. Under the Solicitors' Remuneration Order 1883, as amended, two schedules set out the prescribed remuneration for business done by solicitors. In respect of what may broadly be called converyancing matters, there are scales of charges under Sch I related to the amount of consideration for the transaction in question. In relation to all other non-contentious business, Sch II (of which the present version was inserted by the Solicitors' Remuneration Order 1953 n1) prescribes 'such sum as may be fair and reasonable, having regard to all the circumstances of the case and in particular' to seven specified matters. I can indicate these sufficiently by mentioning complexity, skill, the number and importance of any documents, the place, the time expended, the value of the property involved, and the importance of the matter to the client. For brevity, I may refer to the two different bases of charging as 'the scale' and the 'quantum meruit'.

n1 SI 1953 No 117

The British Legal Association was founded in 1964. The evidence is that the total number of solicitors with practising certificates is a little under 26,000. The association has about 2,900 members and the Law Society about 23,500 members. Although much smaller in its membership than the Law Society, the association has exhibited a considerable degree of activity in relation to solicitors and their professional concerns In 1970 the association registered itself as a trade union. When in October 1971 it became known that the government proposed to change the present system of solicitors' remuneration, the association was naturally interested in the proposals. At first, the Lord Chancellor consulted the Law Society with proposals for retaining the scale for transactions where the consideration did not exceed £ 10,000, but treating the scale figures as maxima. Where the consideration exceeded £ 10,000, the scale was to be abolished. There was also a proposal that solicitors should be prohibited from acting for both the vendor and the purchaser of any property. These proposals met with considerable opposition from solicitors, and ultimately, on 1st May 1972, the Lord Chancellor announced at a press conference that it was proposed to abolish scale fees altogether, so that the quantum meruit system would apply to all conveyancing transactions.

At this stage I should set forth the relevant provisions of s 56, as amended. Nothing turns on s 56 (1), which constitutes the committee with six members. Five are ex officio, and the sixth is 'a solicitor, being the president of a local law society, nominated by the Lord Chancellor to serve on the committee during his tenure of office as president'. It is under this head that the fifth defendant is a member of the committee. Section 56 (2) provides:

'The committee or any three of the members thereof (the Lord Chancellor being one) may make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of non-contentious business and any order made under this section may revoke or alter any previous order so made...';
and there is then a proviso restricting the functions of the Chief Land Registrar to business under the Land Registration Act 1925. No point on this arises as the proposals in question relate to all land, whether registered or unregistered. By s 56 (3):

'Before any such order is made, the Lord Chancellor shall cause a draft

thereof to be sent to the Council, and the committee shall, before making the order, consider any observations in writing submitted to them by the Council within one month of the sending to them of the draft, and may then make the order, either in the form of the draft or with such alterations or additions as they may think fit.'
In that provision, 'the Council' means 'the Council of the Law Society'. Section 56 (7) makes any order subject to a negative resolution of either House of Parliament. On those provisions, counsel for the plaintiff has taken a technical point as well as a point of substance, and to these I shall turn in due course. For the present, I shall merely return to the march of events.

On or about 6th June 1972 the Law Society received a draft of an order proposed to be made under these provisions. The plaintiff believes that 5th July had originally been fixed for a meeting of the statutory committee to consider the draft order, but as that left less than the statutory month in which the Council of the Law Society could make its observations, the date was, at the request of the Law Society, changed to 19th July, that is, yeaterday. Nearly a fortnight went by before the draft order was published in extenso in the issue of the Law Society's Gazette dated 21st June. The quantum meruit provisions in the draft order differ slightly in detail from those in Sch II to the Solicitors' Remuneration Order 1883, but the divergences are insignificant, and there seems to be nothing in the draft order to surprise anyone who had followed the course of events. The Law Society's Gazette is despatched by post, and so probably this issue arrived at the addresses of most solicitors by 22nd or 23rd June. The association had anticipated the draft order by sending out a circular to all solicitors at the end of May. On 17th July (that is, three days ago) the association sent out another circular, dated 7th July, making a series of accusations against the Lord Chancellor and the Law Society. On 11th July, between the despatch of these two circulars, the association had sent printed submissions to the committee, and these concluded with a request that the order should not be approved at this juncture, and that the Lord Chancellor should seek further consultation with the profession and the professional organisations. I may say that I obtained the date of despatch of these documents by questioning counsel for the plaintiff; the plaintiff's affidavit discloses none of them. On 14th July the association wrote letters to each member of the committee, seeking further time and suggesting a deferment of the final decision 'for perhaps two months'. On 18th July the permanent secretary to the Lord Chancellor replied to one of these letters, saying, inter alia, that the Lord Chancellor saw no reason for postponing the meeting of the committee or for refraining from making the order in such terms as the committee approved. On the same day the plaintiff issued the writ, generally endorsed with a claim for a declaration and an injunction. On the next day, which was yesterday, 19th July, counsel for the plaintiff moved ex parte, the plaintiff's solicitors having previously notified the Treasury Solicitor of this intention. The writ, I understand, has not yet been served on any of the defendants.

Counsel for the plaintiff had two main points, and I raised a third. There was another point to which little time was devoted, and I may mention this first. Counsel for the plaintiff submitted briefly that the exalted judicial offices held by the first three defendants afforded them no immunity against an injunction, in that, although members of the committee ex officio, they were not as such exercising any judicial office. This I readily accepted. His two main points were, first, that if the order was made at the meeting of the committee, the committee would not be complying with its duty to act fairly. The committee, he said, would be exercising not judicial or quasi-judicial

functions, but administrative functions; and where, as here, so vast a change was going to be made as the overturn of the entire basis of charging in conveyancing transactions, a basis that had lasted for nearly 90 years and affected a profession of some 26,000 spread throughout the country, it was not fair to make it without a substantially longer period for consultation and representations. His second point was one which he accepted as being technical; but in effect he said that it was advanced in a good cause. It was that it was implicit in s 56 (3) that the draft of the order which was to be sent to the Council of the Law Society must be a draft prepared or approved by the committee, and not, as appeared to be the case here, a draft prepared by or on behalf of the Lord Chancellor's Department, without previous consultation with the committee.

On the first point, counsel for the plaintiff relied on Re Liverpool Taxi Owners' Association n2; and he read me some passages from the judgments of Lord Denning MR and Roskill LJ. It cannot often happen that words uttered by a judge in his judicial capacity will, within six months, be cited against him in his personal capacity as defendant; yet that is the position here. The case was far removed from the present case. It concerned the exercise by a city council of its powers to license hackney carriages, and a public undertaking given by the chairman of the relevant committee which the council soon proceeded to ignore. The case supports propositions relating to the duty of a body to act fairly when exercising administrative functions under a statutory power n3. Accordingly, in deciding the policy to be applied as to the number of licences to grant, there was a duty to hear those who would be likely to be affected. It is plain that no legislation was involved: the question was one of the policy to be adopted in the exercise of a statutory power to grant licences.

n2 [1972] 2 All ER 589, [1972] 2 QB 299

n3 [1972] 2 All ER at 593, 594, 596, [1972] 2 QB at 307, 308, 310

In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act 1961, Sch 4), I do not know of any implied right to be consulted or make objections, or any principle on which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature,

which is plainly legislative.

There is a further point. The power in question in Re Liverpool Taxi Owners' Association n4 was a general power to 'license... such number of hackney coaches or carriages... as they think fit' under the Town Police Clauses Act 1847, s 37, with no special procedure laid down for the process of licensing. Here, Parliament has laid down the procedure to be followed. Expressum facit cessare tacitum. It is easier to imply procedural safeguards when Parliament has provided none than where Parliament has laid down a procedure, however inadequate its critics may consider it to be. Parliament has here provided that the committee must, before making any order, consider any observations in writing submitted to it by the Council of the Law Society within one month of the draft having been sent to the council. What in effect the plaintiff is seeking to do is to add by implication a further requirement that if the draft will make momentous changes, more than a month must be allowed, and opportunities must be given for representations to be made by bodies other than the Council of the Law Society. Counsel for the plaintiff understandably shrank from asserting that the process of consultation need go beyond any substantial organised body of solicitors, or that the committee need accede to a request for further time from any other body or persons. My difficulty is to see how even the organised bodies that he postulated can be implied into the subsection or imposed on it. If the procedure laid down by Parliament is fairly and substantially followed, I cannot see that the committee need do more; and I see nothing in the evidence to suggest that the committee has not fully and fairly complied with the statutory requirements.

n4 [1972] 2 All ER 589, [1972] 2 QB 299

I turn to the second point. Section 56 (3) begins by stating what must be done before 'any such order is made'. This phrase relates back to s 56 (2), dealing with 'general orders' prescribing and regulating the remuneration of solicitors in non-contentious matters. Before 'any such order is made' the Lord Chancellor is to cause 'a draft thereof' to be sent to the Council of the Law Society. 'Thereof' must still refer to the same order. Then the committee must, 'before makig the order', consider the council's written observations. The committee may then make 'the order', either as drafted 'or with such alterations or additions as they may think fit'. I can see nothing in this which prescribes or implies that the draft to be sent to the council must be a draft which the committee itself has first drafted or approved. There is, no doubt, an implied restriction in one sense. The order that the committee makes must either be the precise order which has been sent to the Council of the Law Society for comment, or it must be that order 'with such alterations or additions' as the committee thinks fit. I think it follows that the committee could not in effect tear up the order which has been sent to the council for comment and make a completely different order; the substratum of the draft order must still be there, so that the order in fact made can still be recognised as the draft order with some alterations, or with some additions, or with both alterations and additions. A limitation such as that emerges by implication from the language of the subsection. But I can see nothing to imply that the only order the committee can make is a draft order of which the committee has been previously seised, to use counsel for the plaintiff's phrase. If Parliament had wished to prescribe this, it could easily have been achieved by making relatively small changes in the language of the subsection. The section works, I think, by looking at the order in fact made, and then seeing whether a

draft of that order, alterations and additions apart, was sent to the Council of the Law Society. If it was, the section is complied with, no matter whose hand produced the draft.

Finally, there is the point that I raised, that of timing. An application made at 2.00 p m for an injunction to restrain certain acts which may take place at 4.30 p m on the same day is an application made at a desperately late hour. Indeed, when the submissions of counsel continue until 4.15 p m, the application could scarcely run it finer. There are, of course, occasions when circumstances make an earlier application impossible. But here, the dates speak for themselves. The announcement by the Lord Chancellor of the proposal to abolish scale fees altogether was made over two and a half months ago. The association's first circular was sent out at about the same time. The draft order was published nearly a month ago. Well over three weeks ago it was in the hands of solicitors generally. Not until a week ago did the association send its submissions to the committee, following them up with individual letters some five days ago. For nearly three weeks the association has known that the committee was to meet today. On what counsel for the plaintiff told me in answer to questions, it seems that it was not until 8th July that the executive committee of the association sent a memorandum to the chairman, and then on 10th July the chairman instructed the secretary to consult counsel. On these facts counsel for the plaintiff did his best; but the material was intractable. An injunction is a serious matter, and must be treated seriously. If there is a plaintiff who has known about a proposal for ten weeks in general terms and for nearly four weeks in detail, and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on an ex parte application made two and a half hours before the meeting is due to begin. It is no answer to say, as counsel for the plaintiff sought to say, that the grant of an injunction will do the defendants no harm, for apart from other considerations, an inference from an insufficiently explained tardiness in the application is that the urgency and the gravity of the plaintiff's case are less than compelling. Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion. The present case does not fall into that category. Accordingly, unless perhaps the plaintiff had had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiently explained delay alone. As it is, the plaintiff's case fails both on the substance and on the technicality.

I would add only one brief comment. I should make it clear that the plaintiff's case, temperately yet forcefully put forward by counsel on his behalf, was not one that I regarded as wholly lacking cogency. I can understand the grievance; but in my judgment, even if it were far stronger than it is, the wording of the statute would not make it possible to give effect to it. Furthermore, it is not as if the views of the association had never been put before the members of the committee, nor is the membership of the committee such as to provide any foundation for a belief that these views would be brushed aside without due consideration. If those views have failed to persuade the committee, the plaintiff and the association may count themselves unfortunate; but for the reasons that I have given I do not think that there is any ground on which the court can or should interfere. It was for those reasons that yesterday I dismissed this motion.

DISPOSITION:

Motion dismissed.

SOLICITORS:

Jeffrey Gordon & Co (for the plaintiff).