

PRESENTATION TO OSC BY GLEN EGAN, ASSISTANT BOROUGH SOLICITOR

This paper sets out possible mechanisms for the assessment of any compensation that might be payable by the Council to Mr Stevenson.

Mr Stevenson has now instructed solicitors to act on his behalf. The basis of the claim seems to be Misfeasance in Public Office by the Council. Misfeasance in Public Office involves a statutory body misusing its powers to the detriment of another party.

Normally a claim of this kind would be heard in the High Court and would involve a lengthy trial. It is unlikely that resolution of the issues would take less than 12 months. Such a delay is inherent in the legal process and it is in neither the Council's nor Mr Stevenson's interests for the claim to take so long to be resolved

An alternative to court proceedings is Alternative Dispute Resolution (ADR). This involves parties to a dispute agreeing to submit to an independent arbitrator who has complete conduct of the claim. He or she sets down the procedural rules to which both parties must adhere; the Arbitrator makes rulings on which documents he/she requires, whether an oral hearing is required, and sets a timetable to which all parties must adhere.

I have been in contact with the Bar Council. They are able to nominate an experienced barrister to act as the Arbitrator. He or she could rule initially on the amount of legal representation that the Council should fund and then to determine whether Mr Stevenson is entitled to compensation from the Council. This arbitration would be held under the terms of the Arbitration Act 1996.

The advantages of arbitration are:

1. The claim can be determined much more quickly than through court proceedings.

2. Court procedures do not apply; the arbitrator determines the procedures to be followed. This shortens the process and saves costs.
3. Although the parties can be legally represented, the costs of the legal representation should be less than those that would be incurred in Court proceedings.
4. The arbitration is generally heard in private so avoiding the adversarial nature of a lengthy trial.

The disadvantages are:

1. The decision of the arbitrator is binding; both parties must agree to be bound by his/her decision.
2. As the arbitrator determines the procedures to be followed, he or she may limit the number of witnesses to be called and may also limit the duration of their evidence. It is also up to the Arbitrator to decide which documents he considers relevant; rules of court on admissibility of evidence may not necessarily apply.
3. There is little scope for either party to appeal the decision of the arbitrator. Section 68 of the Arbitration Act 1996 permits the Court to grant permission for an appeal to be heard if “there has been a serious irregularity in the conduct of the proceedings causing substantial injustice”. The Courts jurisdiction under Section 68 is far more limited than the jurisdiction of the Court of Appeal to hear an appeal from the High Court.
4. Similarly Section 69 of the Arbitration Act 1996 enables the Court to hear an appeal from an arbitrator’s award only if the court is satisfied that the arbitrator has made an error of law: The Court will not entertain an appeal simply because one party is dissatisfied with the decision. As stated above the essence of arbitration is to reach a fair and binding decision speedily.

Both parties must also appreciate that the courts are taking an increasingly dim view of parties who unreasonably refuse to submit to arbitration. If, for example, the Council refused to submit to arbitration and a claim was subsequently issued against the Council in the High Court, the court might penalise the Council in costs even if the Council is ultimately successful in defending the claim.

As stated above, I am in discussion with Mr Stevenson's solicitors and the Bar Council.

An oral update of the situation will be given at Committee.