

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

CASES BB/0001/2011 ONWARDS

BETWEEN:

BRADFORD & BINGLEY APPLICANTS

Applicants

- and -

PETER CLOKEY

(As the Independent Valuer for The Bradford & Bingley plc Compensation Scheme)

Respondent

**SKELETON ARGUMENT OF THE RESPONDENT
FOR THE DIRECTIONS HEARING ON 15.11.11.**

- 1 This Skeleton Argument, a copy of which has been published on the Valuer's website, addresses the question as to how these proceedings should be managed, having regard in particular to the apparent absence of any Applicant willing to act in a representative capacity.

Background

- 2 The Valuer was appointed by Her Majesty's Treasury (the **Treasury**) on 24 June 2009 as independent valuer for the purposes of The Bradford & Bingley plc Compensation Scheme (the **Scheme**). The Scheme is established under The Bradford & Bingley plc Compensation Scheme Order 2008 (SI 2008/3249) (the **Compensation Scheme Order**), which came into force on 19 December 2008.
- 3 The Valuer issued an assessment notice (the **Assessment Notice**) on 5 July 2010 in accordance with paragraph 10 of the Schedule to the Compensation Scheme Order. The

Assessment Notice explained that the Valuer had determined that no compensation is payable by the Treasury to former shareholders under the Scheme (the **Valuation**) and set out the Valuer's reasons for the Valuation.

4 The Assessment Notice invited anyone dissatisfied with it to request the Valuer to reconsider the Valuation. Following consideration of such requests, the Valuer issued a revised assessment notice (the **Revised Assessment Notice**) on 14 March 2011 in accordance with paragraph 11 of the Schedule. The Revised Assessment Notice explained that the Valuer upheld the Assessment Notice and the Valuation.

5 Paragraph 12 of the Schedule provides that persons who are affected by the determination of the amount of any compensation which is contained in the Revised Assessment Notice and who are dissatisfied with the Revised Assessment Notice may refer the matter to the Tribunal.

6 The Valuer understands that more than 700 Reference Notices (**Notices**) have been sent by persons claiming to be affected (**Applicants**) to the Tribunal challenging the Valuation.

7 The Tribunal has previously given general case management directions on 19 May 2011 (the **May Directions**) and 31 August 2011 (the **August Directions**).

8 The May Directions addressed preliminary case management issues concerned with disclosure and the timing of replies (**Replies**) to the Valuer's Statement of Case (the **Valuer's Statement of Case**), which was filed on 6 June 2011.

9 The Valuer understands that a number of Replies have been received by the Tribunal.

10 The August Directions provided (among other things) that:

10.1 Mr Blundell, (who is understood by the Valuer to be the Chairman of the "Bradford & Bingley Action Group"), would be a party to the proceedings (together with the Valuer), representing Applicants who recorded in section B of their Notices that their representative was Mr Blundell, the Bradford and Bingley Action Group or the BBAG;

10.2 Any other Applicant might apply in writing to the Tribunal by 7 October 2011 to be added as a representative party;

10.3 A Case Management Conference would be held on 15 November 2011;

10.4 The main hearing would be fixed to commence in 2012 with a time estimate of five days (or such other period as should be determined at the Case Management Conference);

10.5 By 5pm on 4 November 2011, the parties should indicate whether they intend to rely on any expert evidence at the main hearing, and if so, the intended nature and scope of such evidence and when it would be served.

11 Subsequently:

11.1 The Valuer understands that no other Applicant has written to the Tribunal applying to be added as a representative party;

11.2 At his request, Mr Blundell has received permission from the Tribunal to withdraw from the proceedings (both in his own capacity and as Chairman of the Bradford & Bingley Action Group);

11.3 The Tribunal has extended the time for compliance with the direction recorded at 10.5 above, until further directions.

Lack of Active Parties

12 As a consequence of Mr Blundell's withdrawal, there is currently no active party to advance any case against the Valuation.¹

13 The Tribunal has suggested that one option might be to approach the Attorney General to request the nomination of an "amicus". However, it is respectfully submitted for the reasons set out in paragraph 15 below that this is not the appropriate course. Before setting out those reasons, the Valuer explains in paragraph 14 what he considers the appropriate course to be.

14 The Valuer submits that in the circumstances of this case, it is not appropriate to proceed to a hearing without the active participation of at least one Applicant. In making this submission, the Valuer suggests that it may be appropriate for Applicants to be given a further opportunity to indicate a desire to participate actively, because some Applicants may have assumed that there was no need to participate actively whilst it appeared from the August Directions that Mr Blundell would take the role of representative Applicant

¹ It is particularly significant that, as the Valuer understands, the only institution to submit a Notice (AXA Investment Managers UK Ltd) has previously informed the Tribunal that it is not willing to be a representative party to the proceedings and the Tribunal has recorded in directions given on 26 August 2011 that it is not an Applicant in its own right.

challenging the Valuation. Consequently, the Valuer invites the Tribunal to give further directions along the following lines:

- 14.1 Any Applicant may apply in writing to the Tribunal by 6 December 2011 to be added as an active party to the proceedings;
 - 14.2 Any Applicant who makes such an application will be added as an active party only if the Applicant satisfies the Tribunal (which will take account of any observations made by the Valuer) that:
 - (a) the application identifies precisely by reference to the Applicant's Reference Notice and/or Reply (and, where possible by reference to the relevant paragraph number from the Valuer's Statement of Case) the challenges to the Valuer's Valuation that the Applicant intends to advance at the main hearing; and
 - (b) such challenges fall within the scope of the Admissible Issues (as defined in paragraph 4.1 of the August Directions);
 - 14.3 If any Applicant is admitted as an active party, a further Case Management Conference will be held;
 - 14.4 If no Applicant is admitted as an active party, all references will be dismissed.
- 15 The Valuer's reasons for submitting that the course outlined above is appropriate, and is to be preferred to the approach of inviting the Attorney General to appoint an advocate to the court, are as follows:
- 15.1 The current guidance relating to the appointments of advocates to the court (the new official terminology for an "amicus") indicates as follows²:
 - (a) A court may properly seek the assistance of an advocate to the court where the court considers that there is a danger of an important and difficult point of law being decided without the court hearing relevant argument;

² See the memorandum agreed between the Attorney-General and the Lord Chief Justice in 2002, as published in the Law Society Gazette on 1 February 2002, a copy of which is annexed to this Skeleton Argument.

- (b) The role of an advocate to the court is usually limited to providing assistance on the relevant law and its application to the facts of the case;
- (c) An advocate to the court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts; and
- (d) An advocate to the court does not represent any person;

15.2 It is submitted in relation to this guidance that:

- (a) Complaints within Category 1 set out in paragraph 4.1 of the August Directions³ involve points of law, but not of a kind likely to impinge upon the development of the law in a manner affecting persons who are not parties to these proceedings; and
- (b) The other categories of complaint turn in whole or part upon issues of fact of a kind that would not normally be addressed by an advocate to the court (and would be likely to require factual and/or expert evidence);

15.3 The Valuer is an objective independent professional, who was appointed to carry out a valuation and in that capacity has carried out an inquisitorial process;

15.4 The Compensation Scheme Order contemplates that the proceedings before the Tribunal relating to the Valuation will be adversarial litigation between active participants. It does not contemplate a second tier of inquisitorial review;

15.5 The Tribunal's resources and procedures are (like those of the courts in England and Wales) not designed for the conduct of an inquisitorial review process;

15.6 All Applicants have had an opportunity (and under the Valuer's proposed directions will have a further opportunity) to participate actively in the proceedings;

15.7 In the light of the points made above:

³ Complaints about the Valuer's interpretation and application of the statutory assumptions contained in section 5(4) of the Banking Act

- (a) There is no public interest to justify further proceedings before the Tribunal, at the public expense, without the active participation of any Applicant; and
- (b) The conduct of any such proceedings would effectively be inquisitorial, and as such would fall outside the scope of the Tribunal's statutory remit and procedural framework and would place an unjustified burden upon the Tribunal's resources.

16 The alternative (although the Valuer does not advance this as an appropriate course, for the reasons given in paragraph 15 above), if the Tribunal is not persuaded that it would be appropriate to dismiss references without a hearing in the event that no Applicant comes forward to participate actively in the proceedings, is for the Tribunal to adopt the following procedure at and in place of the step suggested in paragraph 14.4 above:

- 16.1 The Tribunal should review the Notices and indicate to the Valuer the issues upon which it wishes to hear submissions, identify any issues upon which it considers evidence would be helpful and set out in draft the directions that it is proposing (subject to any comments from the Valuer) for the trial of such issues; and/or
- 16.2 If considered appropriate in the light of the guidance memorandum⁴, the Tribunal should invite the Attorney-General to appoint an advocate to the court, indicating the particular points of law upon which assistance is sought, and the nature of the assistance required;
- 16.3 The Valuer (and the advocate to the court, if appointed) should comment on the proposed issues and directions, inviting the Tribunal to fix a directions hearing if this is considered necessary;
- 16.4 The Tribunal should consider the Valuer's comments (and those of the advocate to the court, if appointed) and decide whether to fix a directions hearing and/or what directions to make.

⁴ See footnote 2 above.

16.5 The case should thereafter proceed to a final hearing in accordance with the directions given.

David Blayney

Counsel for the Respondent

10 November 2011

The Law Gazette

Notice

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Advocate to the Court

From: the Attorney-General, Lord Goldsmith QC

A little belatedly the amicus curiae, or friend of the court, is getting a make-over.

The Latin tag is being dropped as a further step in the process of modernising legal language.

At the same time, the Lord Chief Justice and I have issued guidance to judges on making requests for an advocate to the court.

The guidance is published in full below.

Traditionally, a court can call on any advocate in court to assist in relation to a point of law.

However, in practice it is a function of the Attorney-General, in all but certain types of cases involving children or adults under a disability, to appoint an advocate to provide that assistance following a request by the court.

The only previous guidance was in an unreported practice note of April 1975.

Last year my predecessor, Lord Williams, in consultation with Lord Woolf, set up a working group to draft guidance.

Published in the form of a memorandum to judges, it gives guidance in relation to the circumstances in which an advocate to the court can assist and highlights those situations where the appointment of an advocate to the court would not be appropriate.

Memorandum - requests for the appointment of an advocate to the court

1.

The memorandum has been agreed between the Attorney-General and the Lord Chief Justice.

It gives guidance about making a request for the appointment of an advocate to the court (formerly called an amicus curiae).

2.

In most cases, an advocate to the court is appointed by the Attorney-General, following a request by the court.

In some cases, an advocate to the court will be appointed by the Official Solicitor or the Children & Family Court Advisory Service (CAFCASS) (see paragraphs 11 and 12 below).

The role of an advocate to the court

3.

A court may properly seek the assistance of an advocate to the court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument.

In those circumstances the Attorney-General may decide to appoint an advocate to the court.

4.

It is important to bear in mind that an advocate to the court represents no one.

His or her function is to give to the court such assistance as he or she is able on the relevant law and its application to the facts of the case.

An advocate to the court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts.

In particular, it is not appropriate for the court to seek assistance from an advocate to the court simply because a defendant in criminal proceedings refuses representation.

5.

The following circumstances are to be distinguished from those where it will be appropriate for the court to seek the assistance of an advocate to the court:

i) Where a point of law which affects a government department is being argued in a case where the department is not represented and where the court believes that the department may wish to be represented;

ii) Where the attorney believes it is necessary for him to intervene as a party in his capacity as guardian of the public interest;

iii) Where the court believes it is appropriate for a litigant in person to seek free (pro bono) assistance;

iv) Where, in a criminal trial, the defendant is unrepresented and the advocate to the court would be duplicating the prosecutor's duty as a minister of justice 'to assist the court on all matters of law applicable to the case';

v) Where, in a criminal case, in relation to sentencing appeals there are issues of fact which are likely to arise and the prosecution ought to be represented, or it would be reasonable to ask the prosecutor to be present and address the court as to the relevant law.

6.

In the first of these five cases, the court may invite the attorney to make arrangements for the advocate to be instructed on behalf of the department.

In the second, the court may grant the attorney permission to intervene, in which case the advocate instructed represents the attorney.

In neither case is the advocate an advocate to the court.

7.

In the third case the court may grant a litigant in person an adjournment to enable him or her to seek free (pro bono) assistance.

In doing so, the court should bear in mind that it is likely to take longer to obtain free (pro bono) representation than funded representation.

In contrast to an advocate to the court, a free (pro bono) legal representative will obtain his or her instructions from the litigant and will represent the interests of that party.

His or her role before the court and duty to the court will be identical to that of any other representative of the parties.

Accordingly, it will not be appropriate for the court to take such a course where the type of assistance required is that provided by an advocate to the court.

8.

In the fourth case the prosecutor's special duty is akin to an advocate to the court.

In the fifth case, in relation to appeals against sentence where the defendant is represented, it may be preferable to request the attendance of the prosecutor who will be able to address the court on issues of fact and law.

It would not be proper for an advocate to the court to take instructions from the prosecuting authority in relation to factual matters relating to the prosecution.

An advocate to the court should only be asked to address the court as to the relevant law.

Making a request to the Attorney-General

9.

A request for an advocate to the court should be made by the court as soon as convenient after it is made aware of the point of law which requires the assistance of an advocate to the court.

The request should set out the circumstances which have occurred, identifying the point of law upon which assistance is sought and the nature of the assistance required.

The court should consider whether it would be sufficient for such assistance to be in writing in the form of submissions as to the law, or whether the assistance should include oral submissions at the hearing.

The request should ordinarily be made in writing and be accompanied by the papers necessary to enable the attorney to reach a decision on the basis of a proper understanding of the case.

10.

The attorney will decide whether it is appropriate to provide such assistance and, if so, the form such assistance should take.

Before reaching a decision he may seek further information or assistance from the court.

The attorney will also ask the court to keep under review the need for such assistance.

Where the circumstances which gave rise to the original request have changed, such that the court may now anticipate hearing all relevant argument on the point of law without the presence of an advocate to the court, either the court or the attorney may ask the advocate to the court to withdraw.

Requests to the Official Solicitor or CAF/CASS

11.

A request for an advocate to the court may be made to the Official Solicitor or the Children and Family Court Advisory and Support Service (CAF/CASS) (legal services and special casework) where the issue is one in which their experience of representing children and adults under disability gives rise to special experience.

The division of responsibility between them is outlined in practice notes reported at [2001] 2 FLR 151 and [2001] 2 FLR 155.

12.

The procedure and circumstances for requesting an advocate to the court to be appointed by the Official Solicitor or CAF/CASS are the same as those applying to requests to the Attorney-General.

In cases of extreme urgency, telephone requests may be made.

In some cases, the Official Solicitor himself will be appointed as advocate to the court.

He may be given directions by the court authorising him to obtain documents, conduct investigations and enquiries and to advise the court.

He may appear by counsel or an in-house advocate.

Requests for an advocate to the court should be addressed to: The Legal Secretary, the Legal Secretariat to the Law Officers, Attorney-General's Chambers, 9 Buckingham Gate, London SW1E 6JP; tel: 020 7271 2417 020 7271 2417 (criminal); 020 7271 2413 (civil); Fax: 020 7271 2434.

Correction

For a copy of the Solicitors' Publicity (Amendment) Rules 2001, contact the Law Society's professional ethics department on: 0870 606 2577 0870 606 2577 rather than the number stated in [2002] Gazette, 24 January, 35.

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The Law Society

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