# Devine and Laverty v. Welsh Ministers

St John's
CHAMBERS

**Leslie Blohm QC comments...**

The case is an interesting example of the difficulty in attributing mistakes as mistakes of fact (which are not generally appealable in judicial review) or as mistakes of law (which are). Logical failures to treat evidence properly would appear to amount to a mistake of law.

The case also raised a point of some difficulty which in the end although decided against the Appellants was not conclusive of the appeal. The Appellants argued that in a case such as the present, where a tribunal is considering whether a fact is proven or not (here, whether the route had been blocked off by fencing during the relevant 20 year period), the Tribunal is legally obliged to consider all admissible, relevant and probative evidence that is presented to it in coming to its conclusion. Beatson J. agreed with this proposition. The next step in the argument was that if evidence was admissible, relevant and probative, then it must have some weight (whether great or small or even tiny) in deciding whether the fact was proven or not. Therefore if the Inspector gave such evidence 'no weight', he was necessarily making a mistake of law. Beatson J. disagreed with this approach, holding that it was a matter for the tribunal of fact whether he gave such evidence any weight at all. He reasoned that the Civil Evidence Act 1968 demonstrated the correctness of this approach as it expressly provided that, where hearsay evidence is received in civil proceedings, the Court may give it no weight. Therefore it was a matter for the Court whether to give evidence any weight at all. In the event the Appeal succeeded on other grounds, but the reasoning on this point is (it is respectfully submitted) uncertain.

1) The Civil Evidence Act 1968 deals with the admissibility of evidence, and renders hearsay evidence admissible that would otherwise be inadmissible. In these circumstances where a judge is obliged to receive evidence that would otherwise not be admissible, he may conclude that the evidence is not probative - for example, where the manner in which it is reported to the Court is unreliable. In those circumstances it is obvious that evidence should not be given any weight. The Act does not appear to be a proper analogy to the position that arose in this inquiry.

2) If evidence is admissible, relevant and probative, then by definition it is of 'some weight'. If there were no other evidence at all, then the issue would be determined by receiving the probative evidence. As a matter of logic, which is always a dangerous tool when considering the law, to describe probative evidence as being 'of no weight' is simply inconsistent.
3) It may be that when a court describes evidence as being 'of no weight' it really means 'of so little weight that it does not materially affect the result'. But if that is what the court means, then it should say so. If it does not it runs the risk of being held to its wording.
4) Cautious lawyers considering an appeal always tend to the view that the weight of a piece of evidence is a matter for the trial judge, although as a proposition this is not universally true - see Assicurazioni Generali SpA v. Arab Insurance Group [2003] 1 WLR 577. However as Seddon Properties indicates, a stricter rule applies in challenges brought by way of judicial review. But I would suggest that the issue as to whether evidence has any weight is different from the question of how much weight to attribute to such evidence; it depends on the legal characterisation of the evidence. It is suggested that the correct position is that once the tribunal has considered that the evidence is relevant, admissible and probative then the tribunal has necessarily concluded that it has weight as evidence; and a subsequent finding that it has no weight is legally inconsistent, and open to challenge.

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