

2.7 Deputy M.R. Higgins of the Attorney General regarding the cost estimate of the recent Low Value Consignment Relief court case:

Will H.M. Attorney General explain to Members how the cost estimate of the recent Low Value Consignment Relief court case was arrived at, whether the firm chosen to act for Jersey under-budgeted the costs when quoting for the work and why his department did not take up the *pro bono* offer made by legal costs consultant Jim Diamond to cost the exercise properly?

Mr. T.J. Le Cocq Q.C., H.M. Attorney General:

The Law Officers' Department asked PwC Legal to produce a cost estimate up to the High Court hearing which they duly did on 13th December 2011. This figure was an estimate inclusive of predicted counsel and court fees, application preparation, a possible interim relief hearing and the substantive judicial review hearing. In the estimate, each of these main stages to the proceedings was also broken down further to detail the preparation, review and service of documents required, correspondence and court attendance. In my opinion, on the basis of the information known to them at the time the estimate was given, PwC Legal did not under-budget. The estimate was, however, superseded when a better understanding of the case, its complexities, evidence required and the potential legal arguments developed. There were also a number of unforeseen developments in the case that materially affected the costs. Mr. Diamond's offer to consider the budget arrived on 25th January 2012. At that stage the case had been in progress for 2 months and Jersey had, on the strength of the documentation prepared and filed, already received from the High Court both leave to bring the application for judicial review and an expedited hearing. The case was, and continued to be, in a state of urgent preparation. We had already received revised estimates from PwC Legal. There would, in my view, have been no practical benefit at that stage to engage Mr. Diamond's services as there was by then less than 7 weeks before the High Court hearing and to do so would have risked disrupting case preparation. At that point we were, and continue to be, satisfied with the professional advice of PwC Legal.

2.7.1 Deputy M.R. Higgins:

When did the Attorney General find out that the costs were going to go from £360,000 to £656,000 and even higher? Because, as we know now, with the £85,000 also being contributed by the fulfilment industry, it has taken it to £741,000 already. When were you aware that the costs were going up like an escalator?

The Attorney General:

There was no specific moment where the original estimated sum and the final sum was translated from one to the other. There was an ongoing discussion and an evolution as to understanding with costs by the middle to late January 2012, as I recall it, and I had already received significant further information relating to potential costs from PwC Legal. There was ongoing discussion between my office and PwC Legal, both as to the rates and the amount of time being spent and our understanding of the likely end costs evolved over time and with that discussion, so there was no precise moment. Equally, with regard to the contribution from industry, that was a matter that developed over time. There was not a fixed amount at the beginning. It was a matter, as I understand it, for ongoing discussion but that was not something that involved my department.

2.7.2 Deputy R.G. Le Hérissier:

Would the Attorney General advise the House, in looking at this escalating cost situation, was he advised politically that this case was to be pursued at all costs or was an assessment made of the percentage likelihood of success or failure? If so, what was that percentage?

The Attorney General:

It would not be appropriate for me to discuss the instructions that I may have been given or the advice that I gave in detail but I certainly can say that there was at no point any suggestion that a case is pursued at any cost and at all costs. That is certainly not something I can recall in any way at all. As to the percentage for success, I do not think a percentage was given. We were advised by specialist counsel in the areas that we had a good prospect of success and that advice did not change at any stage during the preparation. In fact, when our evidence was prepared and our understanding of the strengths of our evidentiary arguments evolved, if anything, our feelings of optimism would have strengthened over that period rather than otherwise.

2.7.3 Deputy R.G. Le Hérissier:

I wonder if the Attorney General could outline why his optimism was so cruelly dashed. At what point did this assessment of risk get turned on its head?

The Attorney General:

I felt that there was every possible prospect that we would succeed in our argument until probably halfway through the judge delivering his judgment. [Laughter]

2.7.4 Deputy J.H. Young:

Could the Attorney General confirm whether or not the figure quoted by Deputy Higgins of £741,000 is correct and could he advise whether or not that is our own costs and whether or not there are costs awarded against us still to come? Could he also undertake to publish a breakdown of local costs, U.K. chambers' costs and other parties' costs in view of the public interest of the very high amount that has been incurred here?

The Attorney General:

I cannot confirm that the costs figure is accurate; I have not worked that out myself. I can say that there are further costs to come. Jersey and Guernsey were ordered to pay each 25 per cent of H.M.R.C.'s costs and those costs are yet to be quantified. Incidentally, any negotiational discussion with regard to those costs, we will be represented by PwC Legal who have agreed to conduct that representation *pro bono*. As for the publication, I do not see any difficulty in making specific figures relating to solicitors' costs and barristers' costs as a headline amount to publish that information; that I think is the appropriate level of detail.

2.7.5 Deputy J.A. Martin:

I have every faith in the Attorney General's office to scrutinise these accounts and bills and I look forward to seeing them but on the other end, would the Attorney General not agree that he said this case was not taken at any cost. In my opinion, it should have been taken at any cost. We did lose and I think there would be a lot of people in this House today who would not be asking these questions if we had won the case. It was worth every penny and what about the hundreds of people who are now unemployed? We had to take on the U.K. Government; sadly, we lost and there was going to be a cost. Would the Attorney General not agree that we had nowhere else to go and this is the way we had to take them on? To take on the U.K. Government as we are is not going to be cheap. Unfortunately, we lost. Thank you.

The Attorney General:

In my view, it was absolutely essential that to advance its case Jersey had the best possible legal representation. That best possible legal representation, in my view, is precisely what we achieved and had. As a result of the work that was done, as a result of the evidence that was prepared, we were in a position to secure leave on the papers, in other words, without a hearing. We were further in a position to get an expedited hearing so that a legal determination could be made at an early stage with all of the importance that that had for the Island at the time and indeed before legislation in draft was lodged before the United Kingdom House of Commons. That, to my mind, was extremely important. Jersey's approach in this seems to me to be

vindicated by the fact that when we filed our papers, we received that leave and had expedited hearing on the papers alone without a hearing. When Guernsey lodged its application, it did not get leave to conduct the case. It was given the opportunity of a hearing to determine whether the case would go ahead at all. It was only when Jersey obtained its leave that Guernsey was able to join with the Jersey proceedings and take advantage of the expedited hearing. I think it was essential at the time that we got precisely the kind of representation that we did.

2.7.6 Senator S.C. Ferguson:

If Guernsey was joined as a party to Jersey, does that mean they will fall to take up some of our expenses? **[Laughter]** I agree with Deputy Martin and the Chief Minister that we should have done this but Mr. Attorney General has also said that bills of the various parties should not be revealed. Well, that is my money he is spending. It is taxpayers' money. In this era of transparency and accountability, does he not think that perhaps these amounts of taxpayers' money should be listed and given to the public?

The Attorney General:

I do not anticipate any contribution from our sister Island in connection with Jersey's legal fees. It is absolutely essential of course that a proper scrutiny of the legal costs that we have incurred takes place; that we check them. That is, in my view, best done by my department and that is what has been done.

[10:30]

I do not see any difficulty, as I mentioned earlier, with publicising the headline figures: the amounts charged by counsel in general terms; the amounts charged by solicitors. But it seems to me that the legal advisers to the States are the appropriate people to scrutinise legal costs submitted to the States.

2.7.7 Deputy T.M. Pitman:

Obviously a complicated subject, but could the Attorney General advise if Guernsey had the same problems that are referred to with R.A.V.A.S. and Her Majesty's Royal Mail?

The Attorney General:

Clearly at the time that R.A.V.A.S. became involved and the Royal Mail made the allegations related to confidentiality that it did, the Guernsey course had been linked to the Jersey course inasmuch as leave had been given and we were proceeding to the same hearing, so to an extent they were involved in that. They did not, however, have the same involvement because the R.A.V.A.S.' case was based very much on R.A.V.A.S.' evidentiary interpretation of the industry and what was happening. It was only Jersey, in my view, who was in a position to counter that because we had the evidence and we had the means to procure further evidence. Guernsey was not as heavily involved in the R.A.V.A.S.' argument as Jersey was.

2.7.8 Deputy M.R. Higgins:

Just a comment first just so Members are aware. The written answer that the Attorney General gave me this morning has become garbled and he has very kindly sent me a note saying that there were parts missing or have been mis-transcribed and so on. I would ask the Attorney General if he would circulate that as soon as possible, not only to Members but also to the media who have an interest in this. The other thing I would say is that in my questioning last week, I asked whether the firms concerned did submit itemised bills and we were told they did not. I did ask that question; that was the answer that was given. I would ask that the Attorney General makes sure that we get itemised bills in future from the people who represent not only the States in the same way I would like to see the legal profession give itemised bills, which they should do. Would the Attorney General give an assurance to the States that in future there will be

itemised bills provided for services drilling right down into what they are doing and that they should be scrutinised by an independent body as well as his own department?

The Attorney General:

It may be if I said that no itemised bills had been provided last time, I had misunderstood the thrust of the question. When bills are provided for payment we require that they are broken down. We do not require they are broken down necessarily into a line by line: “Mr. X looked at this letter on such and such a day and it took 5 minutes” but we need to satisfy ourselves that in general the time spent is an appropriate amount to spend on a particular activity and that the right level of expertise is devoted to that: neither too great, which would of course be more costly, or too low which would be not necessarily appropriate. We certainly do scrutinise it. We do not simply take it as a headline amount and we do ask for it to be broken down and we compare it of course to the detailed estimates that we are provided with at the start and as they change as our understanding increases. It is not therefore the case that we simply get a bill with an amount and we look at it and say: “Yes, that should be paid.” We do scrutinise it and we do give it consideration and satisfy ourselves that it is reasonable.

2.7.9 Deputy M.R. Higgins:

The second part of my question was: do you think that lawyers generally should be giving itemised bills?

The Attorney General:

If I may say so, I think that is perhaps outside the ambit of the question and it calls for an expression of an opinion on my part. Lawyers do provide entirely itemised bills when they are making adverse costs claims to be scrutinised by the court for payment. Those are, as I recall it from my days in private practice, provided on a line by line basis. As to what information lawyers provide to their own clients that, it seems to me, is a matter between the client and the lawyer themselves.