

N O T E

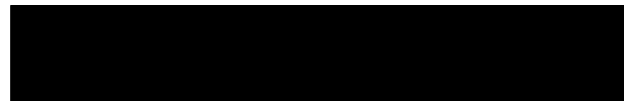
by

THE AUDITOR OF THE COURT OF SESSION

THE LAW SOCIETY LEGAL AID SECTION
against (1) MESSRS. BALFOUR & MANSON
and (2) MESSRS. BRODIES

Undefended Divorces

E v E; G v G; Y v. Y



The taxation of the Pursuers' Accounts of Expenses against the Law Society took place at one hearing as the point in issue was common to each of these cases. In each account the Solicitor has opted for an inclusive fee and has also charged for the work applicable to obtaining a Legal Aid Certificate.

The Law Society contended that Part IIA of Chapter III of the Table of Fees in the Court of Session allows inclusive fees at the option of the Solicitor but if such fee is charged it is truly inclusive and would therefore include any work done in obtaining Legal Aid. In Table A of the said Part they argue that e.g. para. 1 which covers "All work to and including calling of the Summons" using the ordinary meaning of the word "inclusive" must include the application for Legal Aid. They referred to the old Chapter V now revoked which was an inclusive charge and if selected avoided the fees for Legal Aid work being separately charged. The new inclusive fees were of the same nature and accordingly the same construction should be applied to them. They therefore asked the Auditor to tax off the entries relating to Legal Aid.

The Solicitors contended the reverse on the grounds that "All work" meant /

meant in this context the normal work done by a Solicitor to reach the scope of the entry in Table A. They founded on the fact that these inclusive fees were not on the same basis as the old Chapter V inclusive charge but now came under the general terms of Chapter III. This they submitted was a deliberate change and was intended to put these fees on the same basis as the others in Chapter III. They pointed out that Chapter V only applied to Legal Aid cases whereas this Act of Sederunt applies both to Legal Aid cases and non-Legal Aid cases. In addition they argued that a person having a finding for expenses could recover the whole of these fees from the person liable but could not recover the costs of obtaining Legal Aid. Accordingly they maintained that it must be inferred that the Legal Aid charges are not included in the Part IIA fees.

The Auditor has considered the matter and is of the opinion that the Solicitors' views should prevail. He will accordingly allow the fees for Legal Aid work against the Law Society. The reasons for his taking this view are:-

1. The new fees were enacted in the ordinary way as for all solicitors' fees and are not a truly inclusive charge like the inclusive charge now removed from Chapter V which makes them available to Solicitors whether acting for a private client or a legally assisted one. This results in the whole fee being chargeable against a private client when obviously the additional Legal Aid work is not necessary.

2. Similarly these fees can be recovered from another party against whom there is a finding for expenses. Again this implies that it was not considered that a deduction should be made for Legal Aid work.

3. /

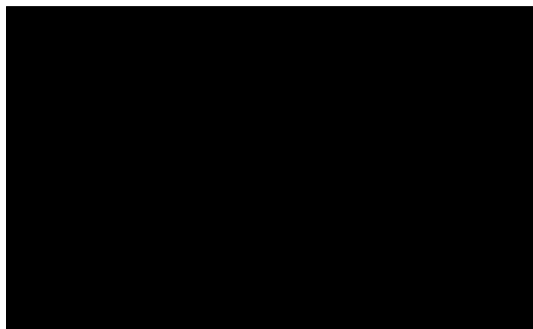


3. The narrative referring to work in the Table provides for "All work" in connection with whatever part of the procedure is being charged for. The Auditor construes this as only including work in the litigation and not work done to acquire a Legal Aid Certificate.



W.C. Rogers Smith

OPINION of COUNSEL
for
LAW SOCIETY OF SCOTLAND



In my opinion the Notes of Objections taken in the above three cases are perfectly arguable, and in my opinion have reasonable prospects of success. I think that the Law Society's argument is perfectly simple. It is that "all work" means all work. It seems to me that the argument is as simple as that.

*** In the whole circumstances, however, I would advise that these Notes of Objections be not insisted in. I do so for the following reasons:-

1. Notes of Objections against auditors reports are very seldom insisted in by the Law Society of Scotland. I consider that unless there is going to be a change of policy, so that objections against auditors reports will become commonplace, there should probably be a very crisp, important issue raised in the Notes of Objections. I do not so regard the issues raised in the above cases.
2. I consider that there is considerable force in the argument against the Law Society. Accordingly my view is that this issue which has been raised by the Notes of Objections is one which could easily go either way. There are answers to the arguments advanced against the Law Society. In particular it can be said ^{against the Law Society} that the fact that fees for legal aid work should not be charged against the opponent is a reason for construing "all work" as excluding legal aid work. It can be said ^{in answer} that when one is dealing with block fees it is not appropriate to consider

and work is included in that block fee. Nevertheless, I consider that point to have some validity. Equally, I consider that there is some validity in the argument that the old chapter 5 inclusive fees only applied to legal aid cases, whereas the 1979 Act of *Sederunt* applied both to legal aid cases and non legal aid cases. I gathered at the consultation that the phrase "all work" in parts 1, 2, 4 and 5 of chapter 3 is in practice construed as not covering legal aid work, which can be charged separately. If this is not true of all of the parts of chapter 3 which I have referred to it was certainly true of some of them. If so, the argument against the Law Society would be that there is no reason to suppose that part 3 is in any different category. I gathered at consultation that the reaction of the Law Society would be that they would be delighted if parts 1, 2, 4 and 5 were construed in the same way as they have been construing part 3, so that charges for legal aid work would in the future be disallowed in respect of all work charged under chapter 3 block fees. I will return to this point later. On the whole matter, however, I consider that there is force in the view adopted by the auditor, and that the Law Society would be far from certain of success in the Court of Session.

3. The sums involved in these Notes of Objections is relatively small, albeit I accept that because of the number of cases involved the global sums may be considerable

4. The problem raised by these Notes of Objections is or at least may be a diminishing one, since the operative part of the 1979 Act of *Sederunt* has now been revoked, I would understand that what the auditor has effectively done in the three cases ^{with} which we are presently concerned is to allow block fees under chapter 3 and also detailed fees for legal aid work under chapter 1. The amendment to Rule of Court 347(e) contained in the 1981 Act of *Sederunt* makes it incompetent to charge partly on one basis and partly on the other. This may make it impossible to charge for legal aid work in addition to block fees. If not, at least the issues are likely to be different from those existing under the 1979 Act of *Sederunt*.

5. I consider that in the present cases the Law Society ^{argued} would be prejudiced by the fact that the block fees under parts 1,2,4 and 5 of chapter 3 have in practice been interpreted as not covering legal aid work, which can be charged separately. It would be difficult to maintain a position whereby the Law Society were construing identical or similar phrases contained in the same chapter quite differently. The answer which I gleaned at consultation was that the officials of the Central Committee would be delighted if the construction for which they were contending in part 3 could be applied to other parts of chapter 3. This would reduce the burden on the fund. I doubt whether this is the correct approach. I do not consider that it is any part of the function of the Law Society of Scotland to reduce the burden on public funds by making payments to solicitors as low as possible. I would consider that it is for the Law Society to apply their minds to the appropriate statutory provisions and to pay solicitors on the basis of what they consider these statutory provisions to mean. As I understand it the officials of the Central Committee have been construing the phrase "all work" in other parts of chapter 3 as not being apt to exclude a claim for legal aid work. In these circumstances I consider that it would be invidious for the Law Society to contend for this particular meaning in part 3 when they have been accepting that it means something else in other parts of the chapter.

6. Lastly, I am not entirely sure that the correct procedure has been followed. The procedure in the present case has not precisely followed the procedure set out in Rule of Court 349. The main reason for this was ^{that} the auditor gave his report before the Notes of Objections were lodged. I do not lay any great weight on the procedural difficulties in these cases, but it is another factor tending towards the conclusion that these Notes of Objections should not be insisted in.

THE OPINION OF

W. A. J. R. [Signature]