

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

REPORT ON TAXATION DATED 29 AUGUST 2019

BY

A Crombie, Auditor of Court

From

Remit for Taxation at Glasgow

Fees Dispute between: Messrs Ormiston's Mental Health Law Practice, Glenrothes

and

Scottish Legal Aid Board (SLAB)

In Legal Aid Advice and Assistance and ABWOR Case of :

Applicant- [REDACTED]

This being a reference to the Auditor to decide upon the matter of fees payable for a range of items in the case in terms of :

Legal Aid (Scotland) Act 1986 section 4(2)(a); and The Advice and Assistance (Scotland) Regulations 1996: Regulations 17 and 18.

BACKGROUND

The parties in this taxation have for a considerable number of years been liaising with each other in relation to disputes on fees relative to services provided by Ormiston's in the field of Mental Health and the representation provided by them in serving Mental Health clients throughout Scotland. Ormiston's appear to be the largest firm in Scotland providing this 'specialist' representation where other firms now appear to be withdrawing

from engaging in providing a service to clients seeking representation. Over the years parties have been involved in a range of taxations before colleague Auditors of Court taken under:

The Advice and Assistance (Scotland) Regulations 1996: Regulation 18(4) as follows:

“ If the solicitor is dissatisfied with any assessment of fees and outlays by the Board under paragraph (3) above, he may require taxation of his account by the auditor ; the auditor shall tax the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17 ,and such taxation shall be conclusive of the fees and outlays so allowable”.

The present account presented to me for taxation can be described as a ‘fresh’ case which is not remitted subject to any of the previous agreements and understandings which parties have agreed previously or signed up to in the past. Parties will be aware of in particular the “ Agreement” dated 15 July 2008 between parties agreeing guidance for fee assessment staff in dealing with commonly disputed account entries in relation to Ormiston’s accounts submitted.

They then followed General Guidance to all solicitors in Scotland issued by SLAB in April 2010 detailing and clarifying SLAB’s practice and position in relation to the standard of taxation applicable to accounts being submitted and commonly claimed items of work. The resultant evolving process then created disparities between the agreement aforementioned and the General Guidance issued resulting in the Agreement being terminated on or about June 2013.

After a number of meetings and continued dialogue parties reached an “ Understanding” dated 14 July 2016. This document was in effect a spreadsheet sent by SLAB to Ormiston’s dealing with a range of common procedures /activities under the Mental Health Act 2003 and in particular correspondence and letter issues.

It is easily acknowledged by me within these background comments that parties have negotiated over a considerable number of years and remain apart in seeking a mutually agreeable solution. This has resulted in a range of

taxation exercises before a number of Auditor's resulting in a range of decisions being issued by colleague auditors.

My understanding of this latest taxation exercise is a hope by Ormiston's which should prove to result in a move to a 'policy ' being achieved. For my part I would consider that the taxing exercise is wholly subjective to the relevant account and file entries applicable and at best might create a precedent in similar accounts or individual entries therein.

At this stage I would confirm that I will not be taking any cognisance of the previously mentioned " Agreement" and "Understanding". These documents were applicable and relevant in an earlier taxation exercise undertaken by my colleague Auditor Mr K Carter which resulted in his decision being issued on 8 June 2018.

Taxation Diets

The formal hearing dates in this taxation spanned a number of days commencing on 12 November 2018 and continuing on 22 November 2018 , 6 December 2018.

Representation:-

Ormistons- Mr Trevor Ormiston, Solicitor and [REDACTED]

SLAB- [REDACTED]
[REDACTED]

In relation to the account in dispute No. 8203814418 [REDACTED] it was noted that 15 entries remained in dispute between parties namely entries 2,10,12,14,16,17,22,26,29,30,37,39,41,46,and 49.

At the taxation diet I was also provided with an extensive range of material by parties to aid my consideration of the issues relevant to the exercise. This material consisted of :-

Ormiston's business file in relation to [REDACTED] ref.G9716

SLAB-Guidance to solicitors- issued March 2010

Excerpts from Civil Bill Assessment Manual

Excerpts from Law Society of Scotland – Code of Conduct for Mental Health Tribunal Work.

Practice Note- Excerpts from Representation before mental health tribunals.- Updated at 22 January 2015.

Legal Aid Agency- Improving Your Quality in Mental Health.

Opinion of Counsel- Grant D Markie- 16 September 2016

Note by Counsel –Allan McKay – June 2015

Decisions by Auditors- ██████████ Aberdeen, ██████████ Glasgow, Mowat Dean & Co- Edinburgh, ██████████ ██████████ Glasgow.

I was also provided at the commencement of the taxation with a written note detailing the points of objection by the Scottish Legal Aid Board .

During the currency of the formal taxation hearing I was also provided with various written submissions ,responses thereto and comments thereto by the respective parties.

BASIS OF TAXATION

It was agreed early in taxation hearing by parties that the disputed entries in this account would all fall to be taxed on the basis of the four tests prescribed at Regulation 17, and binding on the auditor in terms of Regulation 18(4)

Regulation 17- refers to fees and outlays being allowable on assessment . We can only allow a charge where it meets the Standard of Taxation, and is calculated in accordance with the relevant Table of Fees.

The purpose of this taxation was to identify what is a reasonable charge(using the term broadly in a way that includes the four aspects of the third party paying standard).

It would not be helpful nor appropriate to make reference to previous communications, alleged practice or past agreements nor the Understanding. This applies to both parties.

I would state that given the oral submissions made supplemented by further written submissions confirming parties respective stances and understandings of the disputed issues at the oral taxation diet I eventually had gathered a voluminous collection of written material to consider to aid me in my decision.

Comment was made also in relation to the SLAB assessment team and the methods taken in undertaking the scrutiny of ABWOR accounts to assess charged fees and allow or abate claimed fees. Criticism was made in relation to the exercise now being a 'cost cutting' exercise to reduce where possible fees to practitioners in this field. There was also comment in relation to the 'in house' training of the assessors carrying out the task and a perceived lack of 'insight' into relevant areas and in particular Equality Act and ECHR Article 5 related matters. Further comment was made in relation to the 'vulnerable' status of clients requiring solicitor input under the Mental Health legislation .

Comment was also made in relation to the lack of 'transparency' should an outside organisation require to test the 'robustness' of the assessors and the training provided to them and the accountability relating thereto. The Opinions of Counsel as noted above also portray a need to observe legislation and provide a suitable and professional service from solicitors to those deemed as 'vulnerable' which would apply in the Mental Health arena within which Ormiston's are one of the few still undertaking this area of work and in which they could be regarded as specialists.

The 15 entries for consideration by me relate to Telephone calls, formal letters, non formal and mixed letters, Perusal time, Travel Time, Preparation Time and Meetings. I would propose to deal with the items as follows :-

Telephone calls- Entries 2,30,and 49

Submissions made in relation to each of the above were considered. Basically SLAB were suggesting that these calls were of an 'Administrative nature' and could and should be carried out by non qualified member of the office staff. Ormiston's suggest that the calls by the solicitor were both necessary and reasonable. These calls were all claimed at £2.90 with the SLAB assessment thereof being that they should be abated in full. I agree with the SLAB position that this is an administrative task and this type of call is not a charge which should be allowed.

Entry No.10- Letter(Formal) Claimed at £11.60 and offered by SLAB at Nil.

Having closely considered the submissions I am content that the figure to be applied should in effect be that of a suitable pro forma letter at £2.90. Letters and styles used by Ormiston's which may have been acceptable in the past now require to be scrutinised and adapted to reduce the content and in particular to take out repeated reference to legislation. It would require to be mentioned only in the header.

Entry No.12- Letter (Formal)- Claimed at £5.80 and offered by SLAB at Nil

In this entry I take the view that this should be read in conjunction with item 13 which was allowed at the claimed value by SLAB. Further in relation to comments made in entry NO 10 above I would allow only £2.90 to apply as a consistent decision.

Entry No.14 - Letter(Formal)- Claimed at £8.70 and offered by SLAB at £2.90

I this entry I take the view and agree with SLAB that this letter achieves a value at £2.90. This again is consistent with my comments as noted earlier at entry No.10.

Entry No. 16 - Letter(Non formal- bespoke)- Claimed at £21.75 and offered by SLAB at £14.50

I agree with the method adopted by the Board in the assessment of the above letter and agree that a 2 page letter should be allowed being 2 x £7.25. I would therefore confirm that the £14.50 offered. It is noted that it would be preferable that an indicator of the reasoning behind suggested abatements should where possible be provided by SLAB.

Entry No.17 - Letter (Formal) Claimed at £11.60 and offered by SLAB at Nil.

Having closely considered the submission made I agree that a letter should be sent but feel that the letter can effectively be met with a stylised response achievable at a value of £2.90- Allow a charge of £2.90.

Entry No.22- Perusal- Claimed at £12.75 and offered by SLAB at Nil.

By my notes I record that SLB now accepted the entry at the full value of £12.75 and I note said was agreed on 22 November 2018.

Entry NO.26- Travel- Claimed at £44.66 and offered by SLAB at £38.25

This item touches on the decision made by my colleague auditor in his decision dated 8 June 2019 describing the method in calculation thereof. SLAB repeat that no formulaic attitude to travel is applied and that 'reasonableness' is their test. There are instances where normal progress is interrupted no matter the method of travel whether it be by car, train etc. I accept that the best judge of same would be the solicitor travelling subject to adding notes where the time taken has been interrupted by reason of weather, traffic delay or otherwise to assist the assessor in making an allowance for such an event when it occurs. I do see merit in the passage within the Decision by Mr Carter dated 8 June 2018 concerning the device to calculate travel time.

It now appears to be accepted by SLAB that they will concede this entry and I allow the full claimed figure at £44.66.

Entry No.29- Perusal- Claimed at £25.50 and offered by SLAB at £12.75

Having considered the submissions in relation to this entry and in noting that the work claimed for in this account happened within a fairly short period of time between 9 and 23 July 2018. I am persuaded that the charge is 'reasonable' and should be applied in full at £25.50.

Entry No.37- Court/Tribunal- Preparation- Claimed at £51.00 and offered by SLAB at £25.50

Having considered the submissions made I am content that the 4 tests set out in Regulation 17 have been met in relation to vouching, time taken, reasonableness and with due regard to economy. It is crucially important that the solicitor notes within the file notes sufficient detail to vouch the fee claimed to assist the assessor. It is also extremely important that the person assessing same is aware of the procedures, processes undertaken by the solicitor in this area of work. Should be applied at £51.00

Entry No.39 – Meeting before the Tribunal- Claimed at £25.50 and offered by SLAB at £12.75

AS in the above entry I am content having considered the submissions that the 4 tests have been met and should be applied at £25.50 as claimed.

Entry No.41- Travel- Claimed at £10.63 and offered by SLAB at £8.51

Having considered the submissions I allow the claim at full value of £10.63 with the added rider that it is necessary for the solicitor claiming same to note delays in travel due to traffic ,weather or other relevant incident to assist the assessor in gauging reasons for charge claimed. The solicitor should be the best placed to assess the journey. I allow the charge at £10.63.

Entry N0.46 – Meeting to go over decision- Claimed at £31.88 and offered by SLAB at £12.75

Having considered this entry I am content that the claimed value is chargeable and would relate to earlier comments relative to the ‘vulnerable’ nature of the client and needs to meet the criteria within the Equality Act and ECHR Article 5. This may be an area where SLAB staff could be further informed in assessment of same if a ‘coal face’ type event could be organised although I appreciate the ‘sensitivities and confidential ‘ nature which may interrupt the merits of trying to pursue this type of event.

Conclusion

I take this opportunity to thank all attendees for their assistance on the lead up to the various diets of taxation, oral input received, backed up by various written submissions along with the papers referred to earlier in this decision. It is clear that the history between SLAB and Messrs Ormiston’s has proved to be difficult at times which has resulted in many meetings, agreements and understandings being brought into effect for periods. In this background there has also been a number of accounts referred to various auditors for taxation given the abatements noted within the account. I am also aware of meetings between parties to discuss protocols etc which may or may not aid the assessment and management of the large number of pending accounts. For my part I would suggest that the best people to resolve issues would be those involved without remit to taxation. It may be that SLAB require to approach the accounts from a new angle and perspective which may mean different

people coming on board to look at the issues, guidance, communication, accountability in training of the assessors to break the ongoing cycle between parties that has endured for a long time creating a backlog in assessment of outstanding accounts.

Given the inordinate length of time it has taken me to reach this decision due to requiring to secure sufficient reading time I am not levying any fees relative to the taxation exercise. I do hope that the foregoing proves of benefit in moving forward.

A Crombie

Auditor of Court

29 August 2019