Glasgow Sheriff Court

**SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW**

**Report on Taxation – dated 8th June 2018**

**By**

**K. Carter, Auditor of Court**

**From**

**Remit for Taxation at Glasgow**

**Based on written submissions only from Parties**

**in**

**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 Cases of:**

DM & Others [redacted] DM & Others

***Note: Case No.6*** [redacted] *originally lodged for taxation was later withdrawn by Ormiston's from this taxation exercise but some references were made in parties' submissions and are referred to in this Report.*

**This being a reference to the Auditor to decide upon the matter of fees payable for several items in all of the above cases in terms of:**

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

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## PART A: INTRODUCTION AND CHRONOLOGY OF EVENTS AT TAXATION

The parties in this taxation agreed that they have been liaising with each other for no less than 11 years (to 2017), so 12 years now, over a plethora of disputed issues. It was only after that exceptionally long period of ultimately unsuccessful endeavours to resolve matters between themselves that Ormiston's reached the stage of insisting upon taxation in accord with their entitlement to do so in terms of:

**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".*

To put into perspective the present five accounts remitted to me for taxation, have been alluded to by Ormiston's as "test-cases" which could be used in future fees disputes with SLAB as reference points and as "precedents" for some aspects of their long running fees disputes. SLAB do not concede that these five accounts are to be treated as test-cases or as precedents. There are apparently 1,900 or more disputed accounts for Ormiston's mental health client cases which remain outstanding and unresolved in relation to some items in dispute within those "backlogged" accounts. The non-disputed items in all of those 1,900 and accounts however have already been paid by SLAB. The importance of this taxation report to both parties is apparent from those stark numbers alone which has given rise to the voluminous written submissions I have had to consider in this taxation exercise along with the five accounts and the five related case files from Ormiston's each of which contained between a further 40 to 50 pages of information for my consideration also.

An example of the importance to parties of the potential impact of this taxation report on other cases was that their submissions were at times exceptionally lengthy and necessarily extremely specific to the extent that several pages of submissions ( around 12 pages ) were devoted to single account entries valued at £2.90 , but I know the reason for that is the backlogged 1,900 accounts still to be resolved.

This taxation exercise was unusual ( for me anyway) firstly in respect that I had only written submissions before me ,as there was never a formal taxation hearing fixed with parties attending. Both parties were content with that procedural method of taxation. In retrospect that was probably the best course of action ( although perhaps not the quickest) and in view of the several hundred pages of written materials I have now had to consider, I can only guess at how many days a formal

taxation hearing may have taken ( and how many professionals would have been present to make oral submissions). Even if I had opted for oral submissions , I now know that there is so much to consider that it is almost certain that I would have had to seek follow – up written submissions additionally , so possibly there was one time – saving factor there.

There have been many unusual aspects to this Taxation which have exercised my mind to the extent that I have formed some opinions leading to several (also unusual I think ) observations on miscellaneous subjects which I am conscious go beyond the routine scope of an auditors usual role in taking financial decisions on account entries and providing a report with usually short explanations for the reasons for any abatement, or allowances or disallowance of fees or for upholding or the submissions of either party.

Parties in their respective submissions expressed some views, although to differing degrees, that it may be helpful in any future negotiations between them if I could include some clarifications or comments in this report which might subsequently assist parties' negotiations if they were to have the benefit of some independent reference points from the perspective of an independent Auditor of Court.

When combining all of this with the other materials I have researched myself and also perused, it is fair to say there has been a great deal of information for me to consider so much so that I think it would be wasteful (of my current knowledge of the issues and accounts in dispute) and of some wider issues at stake, not to accede to Parties' wish that I provide observations which may be helpful to them in future. All the more so having considered several hundred pages of submissions and the finest of detail within all five accounts now taxed as well as the additional reading material I have now considered during this taxation exercise. Hopefully this report and Appendices with several "Auditors Observations" notes added provides parties with sufficient Auditor's relevant observations and comments to assist parties' discussions on the still outstanding and substantial task of resolving the 1,900 outstanding accounts with still unpaid disputed items.

My final Introductory comment is by way of an explanation and apology as I am aware that there is not a particularly pleasing or easy to follow flow when reading this report. That perhaps reflects my own experience when considering the many separate "instalments" of parties' submissions as and when they reached me over a time – span of 13 months all told from the first to the last and perhaps the "format " of my report has been influenced by that. I am conscious also that there is much repetition within this report, again possibly emanating from the nature of the written submissions and protracted period of receiving them but I thought on balance that it best to include items twice ( or even more ) times than to risk that they be omitted completely , so whilst I regret the final format , I am content that I have covered everything necessary in the taxation exercise ( and more ).

**Chronology:**

This is abbreviated to the main milestones leading to this taxation exercise:

29.03.17 – Ormiston's lodge first submissions, this being a blue ring – binder folder containing a total of 71 pages along with the 6 files and related accounts for taxation. Within that folder in addition to the submissions there were 6 appendices lodged.

27.04.17 – Ormiston's withdrew a file from the taxation exercise, namely the account of [redacted]

11.05.17 – K Carter, after preliminary perusals, informed Ormiston's that the next step would be to seek SLAB's written submissions in response.

19.05.17 – Ormiston's uplifted the 6 taxation files previously lodged to enable them to be lodged with SLAB for perusal and to enable SLAB to complete their first response submissions in the taxation.

23.06.17 – SLAB lodge their first tranche of submissions (NB superseded on 29 August 2017), this included two appendices. The total number of pages for SLAB's submissions and appendices here being 47 pages.

28.06.17 – Ormiston's delivered their further submissions (26 pages). NB these submissions being updates from their original submissions but with additional material added in view of SLAB's first response submissions.

11.07.17 – 5 files for taxation delivered back to Auditor from SLAB.

29.08.17 – SLAB [redacted] email their final submissions (total of 61 pages). These submissions updated their original submissions with additional material added responding to Ormiston's latest submissions. A further 3 appendices were included within these 61 pages.

11.09.17 – Ormiston's further and final submissions lodged (54 pages). These submissions were updating their previous submissions in response to the latest batch of submissions from SLAB.

11.09.17 – KC acknowledged Ormiston's last submissions and asked parties to confirm that this was the "last word" in submissions from all parties. At that time it was, but see entry under date 19.4.18 below.

26.01.18 – KC gave parties a progress update on taxation exercise and the drafting of his report and sought copies from them of the "Agreement" and "Undertaking" referred to in submissions and sought some clarification relating to some detail in page 1 of the "Undertaking" regarding Section 50 Appeals (these being related to Section 44 STDCs).

19.04.18 – K Carter emailed both parties with an update on the taxation procedure and his ongoing work on the drafting of his report and sought electronic versions of all 5 accounts (excel spreadsheets) to enable these to be included as appendices to the final report. In this email I referred to the fact that there are around 1,900+ other "disputed accounts" awaiting my taxation report/decision. That email then triggered

another 15 pages of emailed submissions from both parties over the next few days. There is brief reference to these in this report, however put briefly the main point SLAB wanted to make then was that these 5 accounts for taxation as they said *"cannot be treated as a benchmark or precedent capable of resolving 1900 accounts incurred over many years...Nor have we ever suggested or agreed that the five cases that Messrs Ormiston's (not the Board) selected for taxation were in any sense 'test cases', nor anything other than individual cases to be assessed on their circumstances.*

*That said, we (SLAB) recognise that there may well be aspects of the decisions made by you (K Carter) in the context of these accounts that may have some wider application in appropriate circumstances, which can only be helpful."*

April / May 2018 – K Carter continued to work through all submissions and all accounts and **issued this Report on 8th June 2018 to all parties.**

## PART B: BACKGROUND

During the extensive 11 year timespan of parties' negotiations, there has been a good deal more involved than simply written exchanges between them and in fact there were several meetings between them which led to various developments. They first of all produced a joint **"Agreement" dated 15 July 2008**. This is a 5 page letter from SLAB to Ormiston's, 3 pages of which was a copy of internal SLAB guidance to their fee assessment staff about how to deal with various commonly disputed account entries from Ormiston's.

Another major development occurred when in **April 2010 SLAB published General Guidance** for all Solicitors (not just for Ormiston's). That detailed General Guidance clarified SLAB's practice and position in relation to the (SLAB) standard of taxation applying to accounts and commonly claimed for items of work. There then followed a gradual and evolving process of continued account entry disputes due to some disparities between the Ormiston's only "Agreement" and SLAB's 2010 General Guidance issued for reference and intended to apply to all Solicitors firms in Scotland. SLAB then decided that the "Agreement" of 15 July 2008 was "no longer useful" (their words) and on 13 June 2013 (and again on 19 June 2013) their Accounts Verification Unit Team Leader intimated in writing to Ormiston's that the 2008 "Agreement" had been terminated with effect from 13 June 2013. Ormiston's' position on this is that they consider that SLAB arbitrarily withdrew from that "Agreement".

The next milestone emanating from the parties' continuing dialogue was a formal written document between them which was entitled the **"Understanding" dated 14 July 2016**. This is a 4 page spreadsheet sent by SLAB to Ormiston's dealing with correspondence/letter issues only for all the most common procedures and activities undertaken by Ormiston's under the Mental Health Act 2003, namely Sections 50; 63; 100; 164; 192 and 264. I noticed when considering this "Understanding" that there was no reference within it to Section 44 short-term detention certificates (STDCs) and that puzzled me as this taxation has three Section 44 procedure disputed accounts, however it became apparent subsequently that these Section 50 references in the "Understanding" are related to Appeals against Section 44 STDC decisions and that this appeal procedure is very common.

This "Understanding" was created after several meetings between SLAB's [redacted] and solicitor [redacted] and Ormiston's' Office Manager, [redacted] (and perhaps some others unknown to me). Those meetings took place between February 2016 and July 2016 resulting in production of that document which is certainly an important reference point in all five of the accounts for taxation here.

**Auditor's Observation** : Later in this report I have included some information and comments about some of the communications between these Parties but at the outset I think it is fair to acknowledge and record SLABs position in submissions when they say that they have gone to considerable lengths (exceptional in SLABs words) to communicate with and negotiate with Ormiston's (*perhaps to a greater degree than any other firm in the field of mental health law? KC's speculative comment ).* I think the best example of this being the 12 year span of communications between them including several meetings which led *interalia* firstly to the 2008 "Agreement " and secondly to the 2016 "Understanding " relating mainly to supposedly "harmonised" positions about fees to be paid for letters for a wide range of work items and procedural steps under M H legislation.

I wish to emphasise in these background comments that the protracted historical negotiations between the parties make it difficult to find a total solution to the many issues on which the parties remain polarised. Ormiston's' submissions repeatedly sought to persuade me that my taxation report should provide something akin to some fee "policy decisions" but SLAB were of the opposing view.

I consider that every taxation exercise is subjective to the accounts and individual fees in question and not general to the extent of enabling an Auditor to create any "policy". The nearest any Auditor could get to that is by creating a precedent which might be followed in subsequent similar accounts or individual entries in those accounts.

I have been subjective in relation to the five accounts before me and for that reason I doubt whether this report will be the "panacea" which is sought, certainly by Ormiston's but perhaps to a lesser extent by SLAB. Having said that, I hope that the decisions made on the individual account entries in these five accounts, when combined with the several observations and comments throughout my report but particularly in Column (j) of the five taxed accounts, can at least reduce the areas of dispute in the 1,900 "backlogged" accounts still to be resolved between these two parties.

## PART C:

### STATUTES, REGULATIONS, OTHER AUTHORITIES AND REFERENCES

[14] I have considered the Scottish Legal Aid Board **(SLAB) Civil Legal Assistance Handbook** as parties referred me to this in in their submissions.

In particular I perused the contents of:

> Part 3 – Advice and Assistance - Chapter 3 ABWOR in civil proceedings
>
> Part 5 -Advice and assistance accounts - Chapter 1 Introduction to Civil A&A and ABWOR fees
>
> **Part 5 Chapter 1: particularly 1.3 Basis of Payment of fees and outlays (Standard of Taxation)** *See copy below for ease of reference***.
>
> Part 5 – Advice and assistance accounts – Chapter 6 – The Account – Fees
>
> Part 5 – Advice and assistance accounts – Chapter 9 – ABWOR
>
> Part 5 – Advice and assistance accounts – Chapter 10 – Travel

****SLAB's Handbook *Part 5 Chapter 1.3***

***Basis of payment of fees and outlays (standard of taxation)***

*The standard of taxation applicable to the assessment of legal assistance accounts is agent and client, third party paying. This standard of taxation is quite different from the standard applicable when you carry out work*

- *on an agent and client, client paying basis, where the only test is whether the work is actually done and providing it was done on the client's instructions; or*
- *on a judicial basis, as between party and party, where the only test is whether the work done is reasonable.*

*Section 4 of the 1986 Act provides that only such sums as are due in respect of fees and outlays properly incurred by a solicitor or counsel, by virtue of the Act or regulations, can be paid out of the Fund. The regulations prescribe Tables of Fees and generally regulate the fees and outlays allowable to solicitors from the Fund for both advice and assistance and ABWOR under the Act.*

*Regulation 17 of the regulations provides that fees and outlays allowable upon assessment by us (the Board), or taxation by the Auditor, can only be for work actually, necessarily and reasonably done and outlays actually, necessarily and reasonably incurred in connection with the subject matter of the advice and assistance, due regard being had to economy. The test, including a test of "necessity", applies to both fees and outlays incurred.*

**THE ADVICE AND ASSISTANCE (SCOTLAND) REGULATIONS 1996**

**S.I. 1996 No. 2447(S.192)**

**Fees and outlays of solicitors**

17(1) Subject to paragraph (2) below, **fees and outlays allowable** to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance **shall, and shall only, be –**

(a) **fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy,** calculated, in the case of assistance by way of representation, in accordance with the table of fees in Part I of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3; and

(b) outlays actually, necessarily and reasonably incurred in connection with that matter, due regard being had to economy, provided that, without prejudice to any other claims for outlays, there shall not be allowed to a solicitor outlays representing posts and incidents.

(2) The fees and outlays allowable to the solicitor under paragraph (1) above shall not exceed the limit applicable under section 10 of the Act as read with regulation 12.

**Assessment and taxation of fees and outlays**

18(1) **Where the solicitor considers that the fees and outlays properly chargeable for the advice or assistance** exceed any contribution payable by the client under the provisions of section 11 of the Act together with any expenses or property recovered or preserved under the provisions of section 12 of the Act as read with regulation 16, he shall, **within one year of the date when the giving of advice and assistance was completed, submit an account to the Board:**

(3) Where the **Board receives an account in accordance with paragraph (1) above, it shall assess the fees and outlays allowable** to the solicitor for the advice and assistance **in accordance with regulation 17** and shall determine accordingly any sum payable out of the Fund and pay it to the solicitor.

(4) **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.

**Expenses in the Supreme and Sheriffs Courts of Scotland by James Hastings**

A crucial point of reference for the auditor in this taxation exercise is based on Expenses in the Supreme and Sheriffs Courts of Scotland by James Hastings. At pages 111 to 113 within part 2, chapter 7 the author describes every basis of taxation available. Of interest to me and the parties in this taxation is the guidance he provides to auditors in relation to **the legal aid category of taxations**. On page 112 at paragraph 4(c) "solicitor and client, when third party is a fund". **At 4(c) where the legal aid fund is paying:**

> *"The basis is the same as (b) above except that **the benefit of any doubt is given to the paying party** and not the receiving party and any unusual expenses which might not be recovered on a party and party basis, must be sanctioned by the paying authority.*

It is important that I have referred to this Hastings extract to explain the overarching Benchmark which I have sought to apply consistently in this taxation exercise in relation to all 5 accounts before me. The crucial phrase which has assisted me

when endeavouring to balance all the submissions is “except that the benefit of any doubt is given to the paying party”, ie SLAB (to state the obvious).

It is that “benefit of the doubt” test which I have endeavoured to apply to many of the decisions I have made in relation to parties’ respective submissions in this taxation exercise. In my opinion this gives auditors clear guidance as to how he should decide on any particular issue if there is any doubt in his mind. It is important to make a distinction here though that it would not be necessary to apply that (Hastings – benefit of the doubt) benchmark test at all, if an auditor was not in any doubt about a decision on any specific account item in dispute assuming he was sufficiently persuaded of the validity of a claim on the legal aid fund having given consideration to both parties submissions on that account item**.**

**Lord Eassie’s reported decision: Nicholas Dingley (AP) v The Chief Constable of Strathclyde Police: dated 9 October 2002**

Another reference I was given in SLAB’s submissions which was lodged as Appendix 5 to their submissions was Lord Eassie’s reported decision in *Nicholas Dingley (AP*) v *The Chief constable of Strathclyde Police* dated 9 October 2002*:*

At paragraph 13 on page 6 the following is stated:

> *“No further specification was provided by the auditor as to the basis upon which he arrived at those figures…”*
>
> *“In particular there is no attempt by the auditor to indicate the way in which he allowed £13,000 for court appearances or how that allowance was distributed between the appearances in question. His pronouncement on fees in respect of junior counsel does not attempt any breakdown or sub-division whatever. Plainly the recipients of his decision and his minute and the court are left in ignorance of how the auditor in a contested matter has actually reached his determination…In McKay v HM Advocate 1999 SCCR 679, the court stressed the need for the auditor to give reasons for his decision in contested matters…”*

At paragraphs 23 to 27, Lord Eassie has given auditors a further “steer” as to how approach taxation exercises such as this.

At paragraph 23 on page 9 his Lordship states:

> *“I regret to have to say at the outset that the terms of the Auditor’s report and his minute are unsatisfactory if only in the respect that the*

*Auditor makes little or no endeavour to break down or explain the amount which he has allowed in respect of fees…"*

His Lordship goes on in a subsequent paragraph to say that the Auditor:

*"was required to adjudicate between the parties and he had a general duty to give reasons, at least by the stage of his minute. Fairness required that the parties, especially the losing party, should be left in no doubt why they had won or lost. Without reasons the losing party would not know whether he has a case to pursue on appeal. We would add that where there are substantial matters in dispute between the parties to a taxation, it is appropriate, as well as helpful to them, if the Auditor's reasons for his decisions on those matters are set out in his report…"*

His Lordship continues with another phrase:

*"In the present case it is impossible to know what amounts have been allowed for particular categories or actings of work."*

**THE LAW SOCIETY OF SCOTLAND PRACTICE RULES 2011**

The following Consolidated Law Society Practice Rules 2011: which at Section B1 regulates relations between solicitors and their duty to the Court,** (including** Auditor of Court) **specifically Rules B1.2 and B1.13.1 and 1.14.1** the precise terms of which I have considered carefully and which were another crucial reference point in the decisions I have taken. I found these Rules relating to professional Standards of Conduct "ethos" to be helpful in deciding all of the time – based claims in all 5 of the accounts before me for taxation. The Rules I considered to be crucial are reproduced below:

NB – Elsewhere in this report and in the five account spreadsheets I have **abbreviated reference to these Rules as: LSSPR – 2011 - SOC**

***THE LAW SOCIETY OF SCOTLAND PRACTICE RULES 2011***

These rules shall come into operation on 1 November 2011.

**Failure to Comply**

4. Failure to comply with these rules may be treated as professional misconduct or unsatisfactory professional conduct.

**Rule B1: Standards of Conduct**

**Application**

1.1 Save when and to the extent engaged in cross-border practice you shall comply with the standards of conduct set out in this rule 1.

**Trust and personal integrity**

**1.2** You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.

**Independence**

1.3 You must give independent advice free from external influences or personal interests which are inconsistent with these standards. It is your duty not to allow your independence to be impaired irrespective of the nature of the matter in which you are acting.

**Relations with the courts**

**1.13.1** You must never knowingly give false or misleading information to the court**. You must maintain due respect and courtesy towards the court while honourably pursuing the interests of your clients.

**1.13.5** In rule 1.13 references to the "court" include tribunals and other bodies or persons exercising judicial or determinative functions**.

*( **Note added by K Carter – this includes Auditors of Court who are appointed by Sheriffs Principal to adjudicate in taxations including fee disputes between Solicitors and SLAB)*

**Relations between regulated persons**

**1.14.1** You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or where you have given your word, go back on it.

**SLAB Accounts: Certifications by nominated Solicitors**

I consider that the following extract from a SLAB Account Certification by a nominated Solicitor is a crucial factor in my decisions relating to all of the time-based decisions and this is inextricably linked to the Law Society of Scotland Practice Rules 2011 I have referred to immediately above:

- ***I certify to the best of my knowledge and belief, the information given is correct and items charged in the account are accurate and represent a true and complete record of all the work done;*** *that all the work was carried out by the solicitor unless otherwise stated in the account and that the person carrying out the work was not engaged in*

*any other business at the time and place except as apportioned in the account.*

- *I confirm that any opinion expressed represents my professional opinion as of this date. I consent to the disclosure of this Report, associated documentation and client case file for quality assurance purposes, including peer review, at any stage during or after the proceedings.*

**Officer of Court** (description from Legal Dictionary Law.Com)

I considered that the following **definition of Officer of Court** is an additional factor in support of my decisions on all the time based "certified" account entries and is also inextricably linked to the "ethos" issues referred to by me and to Standards of Conduct references to LSSPR – 2011-SoC.

> *"Any person who has an obligation to promote justice and effective operation of the judicial system, including judges, the attorneys who appear in court, bailiffs, clerks and other personnel. As officers of the court lawyers have an absolute ethical duty to tell judges the truth, including avoiding dishonesty or evasion about reasons the attorney or his/her client is not appearing, the location of documents and other matters related to conduct of the courts."*

**Other Glasgow Auditor of Court decisions in SLAB Taxations.**

Additional to the parties' submissions and their appendices, I also researched and considered other sources and materials to assist me. Unsurprisingly that includes some of my own decisions as Glasgow Auditor of Court relating to Scottish Legal Aid Board cases. There are three in particular which I wish to refer to in this report and I have quoted from these three decisions of mine in the paragraphs below.

**(A)** *Report by interim Auditor of Court K Carter in taxation at Glasgow in* ***HMA v [redacted] decision issued 8 August 2013: (re SLAB fees dispute)***

This included at paragraph 5 the following passage including at the start the phrase quoting the solicitor involved:

> *"that it would be unconscionable that there be no fee whatsoever for preparation for a solemn deferred sentence. I have to say that I found that opinion hard to disagree with, given that the client could be facing up to 5 years' imprisonment when sentenced, so good and thorough preparation for such solemn sentence deferred diets would be necessary and expected by the client and the court."*

The parts underlined by me for reference are for the purposes of emphasis and relevance to me in this taxation. This is simply a supportive generalisation about the need for thorough preparation in every case, all the more so when a client's liberty is at stake .I thought this to be helpful relating to my decisions about preparation times in general in the 5 Accounts in this taxation, given that Ormiston's' clients are also facing a loss of their liberty under detention orders under Mental Health legislation.

***(B)*** *The second case is Glasgow Auditor's report dated* ***20 June 2014 in dispute between Bilkus & Boyle Solicitors, Glasgow and Scottish Legal Aid Board*** *(relating to immigration accounts/visits to Dungavel Immigration Remand Centre).*

Some interesting parallels can be drawn between that Bilkus & Boyle taxation to the current Ormiston's' taxation in respect that Bilkus & Boyle initiated a taxation procedure by stating that SLAB had not been adhering to an "Agreement" with that firm which dated back to around December 2011. There was then a further apparent "Agreement" entered into between both parties flowing from a taxation diet fixed by K Carter at Glasgow on 10 December 2012 and that adjusted "Agreement" then became the source of a dispute which came before me again for taxation on 15 August 2013 and then again at an adjourned diet on 14 November 2013. Within that report at paragraph 3 there is an important and relevant reference to the current Ormistons taxation as follows :

> *"I ( being [redacted] of SLAB ) do not believe that taxation is the appropriate forum to revisit and dissect an "Agreement" or to seek to enforce the Board's understanding of such an "Agreement…In my opinion, (K Carter's) DH's comment was well-founded and, as I have said before to both parties, I do not think it is a primary function of an auditor to interpret a form of words which parties may have agreed upon and then apply that to an account in dispute. An auditor's function is usually to apply fees Regulations and interpret and apply those to accounts lodged for taxation…"*

At paragraph 4 of the same report there is reference to an item in dispute as " *reasonable travel claims to and from Dungavel IRC."*

In paragraph 6 of the same report: Auditor K Carter states:

> *"I therefore find myself almost in the position of 'doing the job' of the SLAB assessors and therefore have to substitute my own knowledge and experience as auditor of court of taxing various categories of accounts and applying what I consider to be fair and reasonable judgements in all accounts.*
>
> *Applying that experience and crucially also applying the general principles of fairness in taxation of accounts by allowing expenses which are proper and reasonable, I have found that every point of*

*objection raised by SLAB has been answered systemically in the 15 pages of Bilkus & Boyle's written submissions, in which they detail a satisfactory explanation (to me at least) by way of their written explanations from a solicitor which enables me to rule in B & B's favour in all of the points on all ten accounts. I also find it difficult on the basis of what I heard coupled with written submissions to disagree with a solicitor's assessment [a solicitor being an officer of court] of the degree of urgency they consider appropriate relating to their own clients."*

Within paragraph 7 of the same report the following phrase:

*"I do not propose to take the taxation exercise to the next step of detailing precisely how much each account is to be taxed at after the abatements proposed by SLAB are all restored to the ten accounts. I will leave the detail of that task to those at SLAB and Bilkus & Boyle who deal with that routinely."*

In paragraph 8 relating to the subject of travel to and from Dungavel, I stated the following phrase:

*"However in the circumstances of this remit to me for taxation there is a very important additional and complicating element namely the purported "Agreement" between SLAB and Bilkus & Boyle which was apparently reached around December 2011 and was then discussed and apparently "adjusted" between them again in the Glasgow auditor's room on 10.12.12".* (That was at the abortive diet of taxation of 10 December 2012).

In paragraph 9 of the same report relating to the purported "Agreement" referred to above I also said:

*"I was being asked to decide on these accounts on the basis of that purported "Agreement". I consider that it would be inconsistent of me to accept B & B's submissions (explanations effectively) relating to the abated entries described in paras 6 and 7 above in their 15 page submissions and then not to accept their submissions on their apparent understanding of that purported "Agreement" and on how they applied that understanding and interpreted that relating to their subsequent travel claims. Bilkus & Boyle repeatedly emphasised that their accounts were submitted "in good faith" and in accord not only with the terms of the "Agreement" but in the spirit of that "Agreement"."*

At paragraph 11 of the same taxation report I stated:

> *"I emphasise that the purported "Agreement" appears to have confused and complicated the issue of SLAB's usual strict interpretation of their own Regulations. I believe SLAB have assumed a different 'starting point' for multiple client visits than Bilkus & Boyle have."*

**(C)** The third Glasgow taxation report I refer to is ***dated 9 October 2015 relating to a taxation between Messrs Thompson & Brown, Solicitors, Glasgow against the Scottish Legal Aid Board.*** This related to legal advice and assistance cases relating to 5 cases for taxation.

That taxation related precognitions and a contentious issue in it was about a perceived lack of communication by SLAB relating to procedural and staff changes within SLAB relating to their analysis and abatement of fees payable for precognitions.

At page 3 para 4, I have stated:

> *"He (Mr Thompson, the solicitor who initiated the diet of taxation) asked how can solicitors deal with that change without knowing (a) about any change in SLAB procedures and standards in assessing precognition fees and (b) what precisely is being abated and disallowed from precognitions, i.e. which words and phrases were being abated to justify the lower fees? He gave examples of SLAB formerly until recently refusing to deal with applications due to insufficient information in supporting statements (and perhaps in precognitions) having been provided and compared that to the recent SLAB change in approach which seemed to be going the opposite way by virtue of their harsh approach of refusing to allow precognitions due to far too much information. He considered that there were mixed messages emanating from SLAB's fees assessors and they were effectively creating two tier system for deciding on precognition fees which was fundamentally unfair. He emphasised that all the information in Thompson & Brown's precognitions are exactly what he as a qualified solicitor would expect to 'ask in court'."*

In paragraph 5 which contains my comments on [redacted] (DH) submissions on behalf of SLAB, at page 6, the following was included by me:

> *"To support that, he (DH) sought to give me some points of reference (and comparators) relating to other firms' precognitions in similar circumstances and provided some percentage statistical information relating to Thompson & Brown's….SLAB accounts and as DH put it*

*'when set against the profession generally'. I have opted not to include that last point of information in my decision making process which in my opinion should be governed by what is fair and reasonable in all the circumstances of the accounts and matters to be decided by me in this taxation exercise. My interpretation of the phrase fair and reasonable of course means that this applies to both (or sometimes all) parties."*

In paragraph 10 in the same report which is also referring to DH's submissions on behalf of SLAB, including post – taxation Diet emailed further submissions including the following from SLAB themselves as follows:

*"Our policy is whenever possible to allow solicitors access to the same guidance which SLAB officers use for assessment so that the profession can at least understand our approach even if they won't necessarily agree with that."*

Within the same report at paragraph 13, on pages 7 and 8, the following phrase:

*"The fact that this 'sea change' where one might say 'moving the goalposts' has never been intimated to solicitors generally it does not seem fair to me (auditor KC) and I therefore have opted to allow all of the Thomspon & Brown precognitions as presented on the basis of overall fairness and due to a lack of notice given of the SLAB changes."*

## PART D: DECISIONS IN TAXATION

The table here sets out the briefest of information to enable Parties to see "at a glance" the eight main categories of disputed items in the accounts remitted for taxation and shows which Party I have supported in those decisions.

| **Main Taxation Issue** | **Auditor decided in favour of** | **Comments/Main reason but see full Report for details** |
|---|---|---|
| Travel time and mileage claims | **Ormiston's** | Law Society of Scotland Practice Rules 2011 Rule B1. (abbreviated to **LSSPR 2011 SoC**) |
| Meeting times | **Ormiston's** | LSSPR 2011 SoC |
| Correspondence | **Split decision/** both parties/ divided success | Various decisions in favour of either Party – see 5 account spreadsheets for individual account decisions |
| Perusal of Independent Reports (Psychiatrist's) | **Ormiston's** | LSSPR 2011 SoC |
| Preparation for Tribunals | **Ormiston's** | LSSPR 2011 SoC |
| Meeting time before Tribunals | **Ormiston's** | LSSPR 2011 SoC |
| Advocacy (letters to Advocacy workers) | **SLAB** | Expenses in the Supreme and Sheriffs Courts of Scotland by James Hastings - Benefit of the doubt to SLAB (as paying party). |
| Letters of Appeal to MHTS | **Split decision/** both parties/ divided success | Decision to allow 2 sheets of 250 words at £14.50 + a £2.90 formal letter to MHTS total = £17.40 (disallow 4 page bespoke letters) |

Additional to the details in this report explaining the reasons for all decisions, it is important to note that the report must be read in conjunction with the five accounts lodged for taxation.

These are Appendices (1) to (5) and are attached to the report. They are five Excel spreadsheets which are versions of the electronic accounts lodged by Ormiston's with SLAB. Their respective negotiations on the disputed entries in the accounts are shown in column "H", that column's heading is entitled *"Negotiations" with **entries from SLAB shown in blue font** and those of Ormiston's **in black font***. Those are historical electronic exchanges which took place prior to the taxation exercise, so it is less important to have regard to column "H", now other than to give more context and background to what later transpired in the taxation submissions and the issuing of this report now.

Please note that there have now been two more columns added to these spreadsheets namely column **(i) Sum Allowed or Taxed Off and column (j) Auditors comments.** Those two columns are crucial to the overall content of this report and there is frequent cross-referencing by me from the report to the spreadsheets and vice-versa. There is also much cross – referencing within each account in Column (j) to other similar account entries within that account and also to some of the other accounts being taxed here.

What I have endeavoured to achieve in this report are fair and reasonable decisions, on the balance of the submissions made giving due consideration to : (i) the tests to be applied in this taxation exercise by an auditor, and the overarching (ii) the principles of the governing Legal Aid Regulations and (iii) of all of the other Rules and authorities to which I have I referred in this report at Part C (Statutes, Regulations and other authorities and references).

Regarding the various Regulations considered, I want to refer here to two of these specifically and to emphasise that although one set of Regulations supports SLAB's submissions and one supports Ormiston's', I have NOT treated them as two sets of Regulations to choose between when making some of my decisions but rather I have opted to read them in conjunction with each other. I consider that can reasonably be done here and in so doing I also consider that I have achieved fair and reasonable decisions. It might be construed by others that there is an apparent disharmony between these two Regulations ( copied below at the foot of this paragraph) in the context of a taxation exercise but I do not. By agreeing with the terms of one Regulation this does not, in my opinion, necessarily preclude me from accepting that the other Regulation can also apply.

***These 2 Regulations are:***

***(i) The Advice and Assistance (Scotland) Regulations 1996 Regulation 17: detailing the taxation standard applicable for A & A and ABWOR Accounts.***

***(ii) Law Society of Scotland Practice Rules 2011,Rule B1: Standards of Conduct***

My own aspiration in the entirety of this taxation exercise was to achieve consistency in my decisions across all five accounts, subject to the particular intricacies and peculiarities of each individual account entry and the submissions made on each them. I have endeavoured to do so in my decisions and I also believe that I have achieved consistency within the contents of this report.

I noted with interest SLAB's submissions, at page 26 in their submissions document (revised version of 29 August 2017). When commenting on the taxation of the Accounts of [redacted] the following phrase is used by SLAB : *"The Auditor is invited to assess the account entries (relating to [redacted] for preparation anew on all the information available on the face of the account, and in the file which is now produced (and was not available to the Board)".*

I agree with SLAB that I should re-assess all account entries "anew" as suggested by them given that in any taxation procedure it is open for an Auditor to review every account entry which is before him. Although the submissions of parties were somewhat restricted in relation to the [redacted] (No 4) and [redacted] (No 5) files I have opted to carry out a full taxation exercise in relation to all entries in both of those accounts. It follows therefore that I have "revisited" some entries within these two accounts which may have been accepted or agreed by the parties. I have also to a lesser extent done that in relation the other three accounts and the details of this can be seen in the item by item comments in columns (i) and (j) within the all five account spreadsheets including those numbered: (1) for [redacted] (2) for [redacted] and (3) for [redacted]

In view of the foregoing paragraph I think it apposite at this point that I refer again to **Hastings, Expenses in the Supreme Court & Sheriff Court,** page 3, paragraph 4:

> *"It is the duty of the auditor not only to tax off items as excessive or unnecessary but to make additions should he see fit."*
>
> *"It is for the auditor to give effect to all the procedure which has taken place and only to audit the charges."*

## PART E: SUMMARY OF SOME OF THE SUBMISSIONS BY PARTIES

*NB: This part of the Report should where practical be read in conjunction the contents of part F of the Report (Specific items in dispute) as there is much commonality between these two parts.*

**General comment by Auditor**: I have used the following extracts from Parties extensive submissions in this section of the report as just some examples of what I considered to be helpful information in my decisions, these extracts are brief compared to the full submissions I received. There is no particular order of priority to the comments in this part of the report but I hope that does not make it any less comprehensible.

I emphasise that if any particular subject of submissions is not mentioned in this part of the report, it is not to be assumed that I did not consider them in my deliberations.

Ormiston's submissions include an introductory comment that they consider the auditor's examination of **past (SLAB) "policies" in identical accounts** and issues over a period of almost 12 years is in their view perfectly reasonable and pertinent to (me) making a determination as it strikes at the credibility of the Board's position that items which were once routinely assessed by the Board as being payable and meeting taxation standard are now no longer being deemed so, despite the fact that nothing has changed regarding the type of work they do or the legislation in the Mental Health Care and Treatment (Scotland) Act 2003. They say that **the 2008 "Agreement"** was created in conjunction with three SLAB staff by way of them assessing what was of "taxation standard" and applying it to Ormiston's accounts. For 5 full years Ormiston's had stood by that "Agreement" and charged according to it with no difficulties whatsoever. Their description of events regarding the "Agreement" was that on 13 June 2013 it was then unilaterally withdrawn by SLAB.

There were some further meetings and negotiations between the parties between February 2016 and July 2016 resulting in a new document called **the "Understanding" dated 11 July 2016.** This "Understanding" related to letters only and it was again drafted by the Board (Ormiston's say by [redacted] himself). A copy of this was lodged as part of SLAB's Appendix No 2. When looking at the detail of this I noticed some arithmetical errors in that version but a **corrected version of that is shown at Appendix 6 to this Report**, with the corrected parts highlighted by me in yellow. The corrections are due to transposed figures within columns 4, 5 and 6 within page I at the Section 63 Table in this document. The first copy I received as part (i) of SLAB's Appendix 2 with their submissions on 23.6.17 ( re. Section 63 letters) part of that Table didn't make sense arithmetically.

**NB:** I have not been able to identify in this Taxation exercise whether those particular transposed/inaccurate entries have been a root cause of some of the

disputed letter fees between the parties. If that is so, it may be that some categories of disputed letter fees will be reduced or eliminated in future account negotiations.

For avoidance of doubt, in this taxation exercise in these five accounts I decided on every disputed fee for letters in every account on its own merits, taking into account all submissions made, and on the basis of each letter's contents relating to the particular stage of procedure the client's case had reached and not by simply referring to the either version of the Understanding.

Mr Ormiston's submissions included an abbreviated career and experience history which amounted to a brief "CV" of himself. Impressive as that is in the field of mental health, this does not confer any different or special status on him or his firm's accounts nor could it infer any different treatment (certainly not in a taxation) of Ormiston's' accounts to those of any other firm working in the field of mental health.

The only caveat I would add to this is that possibly by the very existence of the high volume of accounts submitted and of fees generated by Ormiston's (I assume one of the highest in Scotland in this field of work having noted from *SLABs published Tables of legal assistance paid to firms that the firm were in the top 10 for years 2015 -2016 and for 2016 – 2017* ), that it could be said that they have had a degree of different treatment by SLAB and perhaps some "additional service" by virtue of the considerable commitment of resources SLAB have applied to Ormiston's (SLAB's words which were included in their submissions), with the intended benefits (to both parties admittedly) of the "Agreement" and the "Understanding" with SLAB.

**Four Counsels' Opinions**: These were provided in support of Ormiston's' submissions and show that the three separate Counsel who provided them (there were two from David Leighton) are experienced in mental health work. They provide (mainly) supportive background material to Ormiston's' principle submissions and I can say that whilst I have considered all four of them I emphasise that I do not necessarily attach any more weight to those Opinions than I do to SLAB's nor Ormiston's' main submission documents, although I have "quoted" from them and made reference to some parts of them within my report when I thought it helpful to do so.

**Travel time:** Ormiston's' main submissions (at page 4 on the subject of travel time claims) refer to SLAB's submissions having made a factual misinterpretation reference to some statistical information about Ormiston's' fees being + 30% higher than other firms' claims for MHT work (between June 2013 and January 2017). Ormiston's countered this by making reference to SLAB's own 2009 Best Value Review of Mental Health Work where they found support for their own firms' position, that higher costs were incurred by some firms (presumably including Ormiston's) due to travel time incurred by covering clients across the whole of Scotland as opposed to a majority of other firms who do not. I emphasise that having read that historical

background with interest, I have disregarded that information in the taxation of travel time entries in the five accounts which I have decided on in this taxation exercise.

**Travel mileage:** at pages 4/5 of Ormiston's' submissions regarding Ormiston's' purportedly charging 5 or 10 miles greater than the mileage to various locations. They say that distance from their office to various hospitals is fixed and does not change and that they further state they use the route planner on every occasion to get the exact mileage to and from destinations and that "if there was a mistake it would be one of an administrative error". This is an example of why I consider that every entry and every account claim should be taken as the authenticated and "certified as correct " distance/mileage claim. If Ormiston's are using a web based route planner (in the same way as SLAB who are using Google and perhaps other web based desktop assessment methods) I have to ask the question, why are they routinely doing so? As a neutral observer surely the simplest and most accurate method of recording mileage for any particular journey is for the driver/claimant solicitor to take a precise note of the mileage involved in any particular journey as the claimants make these journeys probably dozens of times over a year. It may vary by a few miles for a variety of reasons from day to day or week to week depending on traffic and road diversions, weather etc. To my mind there is a straightforward answer to this. The claimant notes the mileage and claims it and the Legal Aid Board take it at face value and pay for the mileage of that particular journey despite some inevitable although perhaps small variations from journey to journey and day to day for valid reasons.

**Auditors Observation**: A longer distance journey could often take a shorter time thus creating a potential overall saving from SLAB's publicly funded (although non cash-limited "budget").

**Additional observations, comments and guidance from the Auditor**

Interestingly SLAB agree with the following statement from Ormiston's submissions. Ormiston's suggested to the Auditor that in addition to applying the taxation standard to these accounts, further comments could be of assistance in relation to guiding them and the Legal Aid Board going forward in relation to the remainder of the 1,900+ pending disputed accounts. Ormiston's *"simply wish for some clarification if at all possible so that the Board and Ormiston's can move forward with matters and gain some external guidance from the Auditor"*. SLAB's reaction to that was in principle that they agreed with that general "sentiment" (ie their wish for some clarification) although I will not repeat their submissions on that subject word for word here.

It is my own aspiration that comments throughout the report but particularly in Part G entitled Auditor's general observations, comments and suggestions will assist parties in future.

**SLAB's revised Submissions:** These were dated of 29 August 2017 and superseded their first version of 23 June 2017.They consisted of their 28 page revised Submissions document; a 12 page further submissions document and three more Appendices amounting to a further 44 pages.

SLAB in their submissions do not consider that the Ormiston's "Agreement" of 15 July 2008 is an Agreement in the normal sense of that word but is better described as Guidance for Staff (working in SLAB) for assessment of Ormiston's accounts. This Guidance was discussed between parties , was then recorded in writing and was then shared with Ormiston's, SLAB say it was informal and a compromise to expedite processing of their accounts. SLAB also submit that over a period of 10 years mental health work became a growth area for many firms and SLAB entered into dialogue with others and with solicitors firms including Ormiston's and therefore in **April 2010 they published General Guidance** (for everyone not just for this firm) on commonly claimed items of work. Ormiston's were referred to this SLAB Guidance on numerous occasions and also were reminded on numerous occasions that SLAB have to, and do, treat all firms the same.

It became apparent to SLAB that the 2008 "Agreement" effectively was superseded by that 2010 Guidance in respect that the "Agreement" was failing to reflect the SLAB standard of taxation applied and SLAB expressly stated to the firm that the "Agreement" was superseded and no longer useful on 13 June 2013. Two SLAB letters dated 13th and 19th June 2013, telling Ormiston's of this formal withdrawal of their position were produced to me.

SLAB emphasised that this "Agreement" has no bearing on the five accounts before me for taxation other than by way of background information, as it was expressly superseded on 13 June 2013. For avoidance of doubt it did not influence any of my decisions in this report.

SLAB say that the inaccuracy of some of Ormiston's submissions are exemplified at Para 9 of their first submissions document regarding the "Areas of Change" where the firm have inaccurately expressed the "Agreement" terms. (This was on the subject of **letters to Advocacy workers**). The "Agreement" actually stated: "Confirmatory letters following a meeting/tribunal would not be allowed. However we agreed to allow those letters imparting relevant material information affecting the client". ie there was a restriction on which letters would be allowed as referred to in that "Agreement".

**The "Understanding" of July 2016**: This is actually simply a spreadsheet of 4 pages as reproduced in appendix 2.1 of SLAB's submissions. This was sent to Ormiston's on 14 July 2016 and is restricted to letters only and still allows the Board discretion in SLAB's opinion, beyond the terms of the shared "Understanding". The phrase "SLAB reserves position" repeatedly appears in this document's last column, so their position is that even for letters subject to this "Understanding" they are still

subject to normal taxation standards and practices; the only departure from how SLAB would normally assess an account is *SLAB's commitment to pay pro-forma content up to the maximum specified sheetage per page. SLAB will honour that commitment in relation to accounts affected by the "Understanding"* (this includes all 5 accounts in this taxation. (See SLABS amended main subs at bottom of page 2)

**Observation**: I am afraid I have not been able to determine a precise interpretation of that last phrase( *which has been italicised by me)* to the extent that it would help me make any decisions in this taxation and I have thus applied my own decision making process to every proforma letter in this taxation exercise – see taxed Accounts at Appendices 1 to 5 and my comments in column "J" for each one.

For an example of this please see in taxed Account No 1 at letter entry No 24 of (this being on line 27 of the spreadsheet) which was a multi-page proforma letter fee decision by me, for client [redacted] My column "J" comments are:

*The "Understanding" of July 2016 refers to this under section 50 procedures, line 6 of that says "client information letter" £2.90 - accepted and agreed by parties apparently.*

*Ormiston's submissions on this category of "client information letter" relating to the "Understanding" creates scope for some doubt in my mind about parties' different interpretations of the "Understanding" on this point. SLAB appear to be saying letters of this nature justify one formal letter fee of £2.90 for the whole "proforma" letter style but Ormiston's say that such letters should be £2.90 per page of 125 words - in this case coming to 6 pages therefore £17.40 claimed. I have carefully read the contents of this letter to client dated 11 August 2016 and in my opinion it is all proforma and all that is required to change is the patient's name and hospital details at the head of these letters. I therefore consider it fair that the £2.90 is allowed in accord with the parties' agreement within the terms of the "Understanding".* ***Decision based on - Hastings-Benefit of the doubt to SLAB."***

At page 6 – SLAB said that "*the overriding issue common to virtually everything relating to Ormiston's is the application of a standardised approach in instances where that is not appropriate*." My interpretation generated by the example they have mentioned in submissions there and also due to various other submissions is that there may exist an impression formed by SLAB's staff who deal with Ormiston's that the firm routinely approach completion of account claims on a formulaic basis.

**Correspondence:** Pages 7/8 – SLAB say the need (at all) for some letters and also the length of some letters has been an abiding issue in dispute between the parties. SLAB always assess letters on necessary content. "*It is not the length of the letter that counts but the necessary content which counts.* ***See chapters 6.18 and 6.22 of the Advice and Assistance Accounts Guidance*.**"

"SLAB do not pay for unnecessary content or for wordiness or for repetition. It is the purpose of the letter which is all important and that is the test applied by SLAB assessors. The normal taxation standard is now applied by SLAB as applied to all other solicitors' account".

**Auditor's observation**: I have perused all of that relevant material within Civil (SLAB) Civil legal Assistance Handbook

**Perusal of independent reports**: Page 8: SLAB say/ask - why include the work activity of cross-referring these to other reports etc? This is extraneous work and supports SLAB's abatements as usually 8-10 pages for these reports so 15 minutes is reasonable to read an 8-10 page document.

**Preparation for tribunals**: Page 8: SLAB need to see a narrative of what was done as evidence to support the timeframe claimed.

**Meeting time before tribunals**: Page 8: SLAB say the issue is not whether they were there before the tribunal start time but what was actually done necessarily and reasonably. This is not waiting time as it is before commencement of a tribunal hearing, nor is it about how long before the commencement time that a solicitor should be present SLAB say that any pre-tribunal discussions are not "meetings" as such. Ormiston's supporting evidence and their submissions state what might happen in this period of time but this is not subjective to what actually did happen.

**Short-term detention certificate (STDC)**: Page 9: NB this brief note included for reference by parties in future as the STDC was not ultimately a contentious issue in these account Taxations)

SLAB contended that there need not be a meeting specifically to go over the STDC but that this could be done (within a reasonably short period) during any meeting for another purpose and that would be allowable. SLAB's position seems to be that they will not allow a meeting for the sole purpose of discussing a STDC with their client. They also say that it is not essential to have a meeting immediately after the issue of the STDC but they could have one shortly thereafter when meeting clients on other matters. My interpretation of that being that if the firm are visiting either that client or another of the firms' clients in the same hospital imminently, then that would be the economical and sensible time to deal with the STDC discussion thus saving public funds on a specific meeting to discuss it, but always bearing in mind any time constraints applicable.

Mr Ormiston made extensive submissions on this STDC issue and referred to 140 other similarly disputed "backlogged" cases, however in his final submissions of 11 September 2017, it seems that the issue has been resolved between parties – certainly relating to the accounts before me for taxation (eg see Account No 1 for client [redacted] entries Nos 38/39/40/42 all related to a **STDC visit** – all initially

refused by SLAB but all then re-instated during the submissions period in this taxation.

**Letters to Mental Welfare Commission (MWC):** Page 9: SLAB say Ormiston's must state why it is necessary at all to write to these individuals/bodies.

**NB**: **MWC letters:** The issue does not arise in any of the cases in these five accounts for taxation.

**Letters to Advocacy workers:** NB entitled in report elsewhere **"Advocacy"**

SLAB submitted a full 6 pages of separate supplementary submission as Appendix 3 to their main submission document on the subject of Communication with Advocacy which is perhaps an indicator of the particular importance ( to both parties) of this matter.

An important point made was that these letters are not provision of advice to clients and are thus not allowable

Ormiston's view was that it would be useful for the auditor to provide a "policy decision" on this issue.

Accordingly I direct parties to my decisions in Part D of my report (which may set a precedent for other cases?). I have disallowed all Advocacy letters in the accounts in this taxation, I also refer to my full comments on advocacy letters in this report at Part G: (Auditors general observations comments and suggestions).

**Time based entries**: page 10: SLAB refer to Ormiston's accounts which do not state the actual time but are rounded up to the nearest 15 minutes (which is of course allowed in the Regulations). They continue that these entries are "not transparent in the context of payment from publicly funded legal services." The file notes do not show actual start and finish times.

**Auditor's observation**: In this taxation exercise K Carter checked every time based claim in the file notes.

**Proforma appeal form for mental health tribunals:** SLAB's submissions at pages 14 to 17 include information that these proforma appeal forms are apparently available on MHTS's website for every type of appeal. SLAB say Ormiston's should use it – Ormiston's say it is "not fit for purpose" and it is not compulsory to do so, see Ormiston's submissions at page 26.

## PART (F) SPECIFIC ITEMS IN THIS FEES DISPUTE

*NB: This part of the Report should where practical be read in conjunction the contents of part E of Report (Summary of Submissions) as there is commonality between these two parts.*

**General comment by Auditor**: I have included the following information and my own observations about specific disputed account items. One reason for including Part F within the report is in the hope that this information will be helpful to parties in their future discussions and negotiations on similar if not identical items within the 1,900 backlogged accounts still to be resolved. Once again there is no particular order of priority to the subject matter or my comments in this part of the report but I hope that does not make the contents any less useful to parties.

**Correspondence with mental health Advocacy workers.**

One highly contentious issue in all five accounts before me for taxation is the issue of claims by Ormiston's for liaison (mainly correspondence) with mental health advocacy workers. In addition to the overarching principle in my decision-making process which I have already frequently referred to *(Hastings re benefit of the doubt to SLAB as the paying party),* I have taken account of another precedent and reference point of my own which I have applied as Auditor of Court in hundreds of judicial taxations dealing with civil court actions on a party-party expenses basis. Where "update/progress" letters are sent, I consider that such correspondence whilst courteous or "nice to do" is not essential to do and thus they are not chargeable against the paying party. I consider that correspondence to advocacy workers is very similar to that scenario and this is another factor in support of my decision to **disallow** all correspondence with mental health advocacy workers.

It is worth noting though that this is subject to some exceptions conceded by SLAB themselves, as they have said in submissions that there may be occasions when something which occurs in the particular circumstances of a case which would justify Ormiston's writing to a mental health advocacy worker and legitimately charging a fee to SLAB for that. Also worth noting is their formal recognition of this as Advocacy letters are formally "recorded " as a letter category in the last line of the last page of the "Understanding" but with SLAB's comment "accepted but position reserved".

I considered all of SLAB's and Ormiston's submissions on advocacy very carefully indeed before deciding in favour of SLAB (on basis of Hastings etc, see above) and this was a finely balanced issue here. For example, if a client instructs Ormiston's to write to advocacy are Ormiston's entitled to say no because they do not get paid by SLAB? There is a real tension here between SLAB's submissions on this point and the Law Society's Code of Conduct on Mental Health Tribunals, ie on the issue of "advancing the case for a client".

In their concluding submissions Ormiston's again asked the auditor to create in the abstract in my opinion a "policy decision" fixing a compromise fee at what would be reasonable. To me that is not the point of taxation and I should not be creating some "nebulous average" fictional fee falling somewhere between fees proposed by the parties. (although Nil was the fee proposed by SLAB in these accounts for taxation).

**Travel time:**

I do not agree that it is an auditor's function to give a third opinion on what is reasonable when compared to (i) SLAB's desktop (theoretical) web-based assessments (Google Maps etc) and national speed limit references; (ii) competing with Ormiston's actual claims and comments in the dialogue boxes of account negotiations relating to road works and temporary speed limits etc. SLAB have their desktop "opinion" of how long a journey should take. Ormiston's have their "certified as correct" authenticated claims of how long the journeys actually took. I do not see the value of me adding a third opinion in the abstract somewhere in the middle in order that all future claims can be made at what I may decide is the middle ground. That does not add value to the taxation exercise nor does it authenticate the opinion of either side. I do not see this as suitable matter for an average or a compromise. I emphasise again the crucial factor to me is **the Law Society of Scotland Practice Rules 2011 Rule B1 Standards of Conduct** stating *inter alia* that:

> "….*you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful…"*
>
> *"…free from external influences or personal interests which are inconsistent with these standards…"*
>
> *"...You must never knowingly give false or misleading information…"*

**Travel time example** (see Page 6 of appendix 2 of SLAB's submissions):

A sample of travel time for [redacted] file is taken (see appendix 1 to this report account entries Nos (1) and (27) and (36) all 3 journeys claimed at £44.66 and all 3 abated by SLAB by 15 mins thus by £6.38. offering £38.28 on 3 occasions.

SLAB are using Google's time of 1 hour and 12 minutes plus 15 minutes walking to the ward = 1 hour 27 minutes thus rounded up to 1 hour and 30 minutes allowed by SLAB (hence their "justification" for abating £6.38).

Ormiston's have claimed 1 hour 45 minutes of travel time including the 15 minutes to walk to the ward.

There is a difference of 18 minutes in the overall time actually claimed when compared to the theoretical SLAB/Google "formula" time when one uses SLAB's theoretical timing method and Ormiston's actual times method. Therefore the dispute here is over 18 minutes (but only 15 minutes of fees) and I have ruled in favour of Ormiston's in view of their actual claim being based on the Standards of Conduct rules etc referred to repeatedly elsewhere **LSSPR-2011-SoC.**

**Auditor's Observation/Question:** SLAB have continuously said ( in a critical way ) that Ormiston's are claiming travel times in account entries completed to a "formula". My reaction to that assertion is this **Question: is SLAB's Google method not also akin to a formula? using virtual (formulaic in fact) factors as opposed to actual (and inevitably variable) factors?**

What I have to say **in summary about travel time** is that only the Ormiston's solicitor who made any journey knows exactly how long it took from office or home to hospitals and back, and then exactly how many minutes' walk it was from either a quiet or very busy hospital car park to the hospital ward. I therefore support Ormiston's submissions in view the standards of conduct practice rules **LSSPR-2011-SoC.**

**Auditor's Observation**: I found it a little surprising and perhaps an unfair expectation that an auditor was being asked to create a compromise or average travel time including walking time from a car park to a hospital ward. I took an usual step in this taxation and personally drove to three Glasgow hospital car parks which were mentioned in the accounts for taxation: (a) Gartnavel Royal Hospital, Glasgow - Rutherford Ward; (b) Stobhill Hospital, Glasgow – Juror Ward and (c) Leverndale Hospital, Glasgow – Ward 4B, to see for myself how long it could take to get from those three car parks to the three wards mentioned in three of the accounts.

Each of the three took me around 5 minutes (one – way only, so double that to include "travel-time " when including the post – visit walk back ). Those visits by me however were at the quietest possible times of the day (for my own personal convenience) at around 6 a.m. and around 7p.m. so this was not a true comparison with the busy times of solicitors visits. My visits were only from the car park to the entrance- doors to the particular Wards ( ie beyond the front doors of the buildings they are located in) , so additional time would have to be added of several minutes perhaps for solicitors to undertake any identification/security checks and signing-in procedures, then to get to the interview room to see the patient/client. If SLAB have "conceded" that they will now allow a block fee of £6.38 for 15 minutes added travel – time for walking time from car park to Wards ( and back), then my opinion is that 15 minutes MAY be sufficient sometimes but it WILL NOT cover that legitimate additional travel /"walking time" claims on other occasions.

The correct solution as I have repeatedly said in this report is for the claimant solicitor to record precisely how long every step of travel time takes, they Certify that the Account is correct and in my opinion SLAB have to take the overall claimed time at face value and pay for exactly that and not seek to compromise by offering 15 minutes less.

**Perusal of Independent Reports**

SLAB submit that this should not be done on a formulaic approach and I agree with the report/decision by the Auditor of Court at Dundee, Mr C Donald and his contextual note in the case of *PF, Dundee* v [redacted] dated 20 July 2015 to the extent that Ormiston's in future should state the precise time for such perusals

and depart from the block time rounded practice they have apparently historically used. In other words there should be no formula for any work activity such as reading and perusal of independent psychiatric reports.

Ormiston's submissions at pages 11 and 12 consider that it is appropriate to read these Psychiatrists reports through twice very carefully and put very briefly they do not agree that SLABs contention that just 15 minutes should usually be enough (paraphrasing here by me) and their time claim for this is usually 15-30 minutes. All of that is academic in my view and I refer to my principle reference point once again in deciding in favour of Ormiston's and I allow all account entries at the actual times claimed in the accounts as authenticated by their solicitor's Certification when lodging the account claim. My position here again is an assumption that this has been claimed in good faith and in accord with the Standards of Conduct Rules. **LSSPR-2011-SOC**

**Correspondence in general:** See Ormiston's submissions at page 10:

I have looked at all five accounts with the supporting evidence/vouchers and checked the content of the letters and have made decisions in each individual entry in accord with the five accounts annexed hereto. These show my comments allowing or disallowing certain fees and showing the number of pages I consider to be reasonable and necessary (and fair to both parties) and in accord with the **Advice and Assistance Regulations 1996, Regulation 17**: repeated again here for ease of reference with my underlining as emphasis:

*Fees and outlays of solicitors*

*17(1) Subject to paragraph (2) below, fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance shall, and shall only, be –*

(a) *fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated, in the case of assistance by way of representation, in accordance with the table of fees in Part I of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3; and etc (b) n/a here.*

**Preparation for Tribunal:** Page 14/15 of Ormiston's submissions.

I support Ormiston's submissions as these are time based claims on the basis of what I am assuming to be claimed in good faith as genuine , honest and

accurate true time based claims and I refer to my comments repeatedly elsewhere in this report with reference to standards of conduct rules.

One other matter covered by Ormiston's in their submission at page 15 is a general comparison of the "importance to the client" relating to the potential outcomes of mental health tribunals (ie to paraphrase - of an individual client's liberty being at stake), and thus the onus this places on the firm to prepare diligently (paraphrasing by me). I also refer again to my own Glasgow Auditor's decision in *Bilkus & Boyle* v *SLAB*, 19 June 2014 at paragraph 6 on page 3, the last few lines where I found it difficult to disagree with a solicitor's assessment (a solicitor being an *Officer of Court*** - see extract from this report at Part C of this report ) of the degree of urgency they considered appropriate relating to their own clients.

> *"As **officers of the court lawyers have an absolute ethical duty to tell… the truth...including avoiding dishonesty..."*

**To my mind that ethical duty to tell the truth and avoid dishonesty extends to written submissions in a taxation exercise when one takes into account the precise terms of the LSSPR-2011-SOC at Rule B1: Standards of Conduct - copied again below:**

***B1.13.1***

*You must never knowingly give false or misleading information to **the court** etc.*

***B1.13.5***

*In rule 1.13 references to the **"court" include** tribunals and other bodies or persons exercising judicial or determinative functions…(**this includes Auditors of Court**).*

**Meeting time before tribunals***:* See page 15 of Ormiston's submissions:

This falls into a slightly different category although still time based and thus assumed by me to be correctly claimed in terms of the standards of conduct rules. This "meeting time" category moved into a less definite area during my deliberations but I have considered both parties' submissions carefully on this and balanced these on one particular issue, whether the interaction between Ormiston's Solicitors and various parties including Tribunal clerks/officials just prior to the commencement of a mental health tribunal hearing can be described as "meetings" in the true formal sense of the word.

For these account entries though the decision for me comes down to one thing: whether the times are claimed in good faith as stated in the file entries irrespective of how the activities are described. I agree that "meetings" may not be the most accurate way to describe these pre-tribunal preparations. All file entries have been scrutinised by me and whilst I consider that that no conscientious solicitor would surely deliberately choose to arrive just minutes before the commencement time of any formal hearing or tribunal, it is accepted by all solicitors without argument that

their SLAB fees payment for court/ tribunal time ( almost always if not actually always ) starts at the commencement time of that hearing.

SLAB say that Ormiston's ( for their pre-tribunal work activity - described in claims as meetings) "always claim 30 minutes without exception -but that there are no file notes of what was actually being done - and that Ormiston's file notes claim detailed submissions with the clerk before tribunal and court discussions with other interested parties". I have looked closely at all file notes for all pre tribunal meetings / work activities in the relevant accounts and my decision is to allow the time as claimed as in my opinion the firm should be recompensed for all of their "last minute(s)" preparation in accord with the file notes although the activity is probably inaccurately described as "meetings". The description of the type of work activity is less important than the fact that 30 minutes work was undertaken and was certified as correct by the claimant.

**Auditors Observation**: My experience in party-party judicial taxations when a Chapter 3 account is lodged, ie with "block" fees similar (other than remuneration rates) to legal aid Fees Tables, is that solicitors do often, but not always, show actual times engaged in work activities, e.g. "preparation for proof" and "client meetings obtaining instructions". These may for example show a 47 minute meeting which is then (justifiably and correctly) charged and paid at the rounded up fee for one hour. My experience in dealing with that category of taxation seems to be in accord with SLAB's assessors when they are dealing with ABWOR accounts for other firms as emphasised by SLAB in their submissions in this taxation, so here we have another indicator of why in future Ormiston's file notes should state precise start and finish times and provide the fullest possible detail of the work activities undertaken. Surely by taking a few minutes to do so initially should save a greater time investment for them and others subsequently in negotiations and potentially taxations with SLAB.

I refer here also to the taxation report by the auditor at Dundee, Mr Craig Donald, in the case of *Procurator Fiscal, Dundee v* [redacted] *20 July 2015* and his Contextual Note on another matter raised then. The auditor at Dundee included the following comments: *"that whilst this did not become an issue in this taxation"* (here he was referring to the issue of formula charging) he made it clear that he did not approve of such a practice. He indicated in his note, that **the only basis of a charge should be the actual time taken to perform the work.** (My **bold** emphasis - KC).

In my report I therefor find reassurance that my Dundee colleague auditor also states that the only basis of charge should be on **the actual time taken** to perform the work. This affirms with my decisions to allow all time based claims in the five accounts before me for taxation as my assumption is that these have all been completed in good faith with the time periods and start/finish time correctly shown by Messrs Ormiston's.

**Auditors Observation:** Such claims by Ormiston's though are frequently (usually in fact) shown in blocks of precisely 15 minutes as opposed to rounded up to 15 minutes, I assume to harmonise with the fee for payment. I repeat that my decisions have been based on the Standards of Conduct Practice Rules coupled with Ormiston's accounts being certified and authenticated by the claiming solicitor. I also comment again on another related aspect relating to account claim details, that in my opinion it is not of the uppermost importance how the work activity is described but whether work activity was carried out for the time being claimed.

**Letter of appeal / bespoke elements:** Submissions Page 13 SLAB:

I agree with SLAB submissions and in particular I find it difficult to see from a neutral perspective why Ormiston's with such a high number of mental health clients do not opt for the (supposed) efficiency of using the generic appeal form produced by the Mental Health Tribunals administrators. I fully accept as do SLAB that it is optional to use this form and Ormiston's habit and preference is to dictate a bespoke letter for every client appeal as they do not think the form is fit for purpose (their words). I should point out however that the form itself states the following **"*This form will assist with prompt scheduling your application*".**

Not only would using that MHT form be in accord with due regard to economy (SLAB's repeated submissions) but the MHTS seem to be suggesting that this the more efficient procedure to follow ( perhaps not just for MHTS themselves) but also for all solicitors as the form seems to encourage solicitors to use it with a view to improving scheduling times for firms and their clients. Whilst it is Ormiston's own choice to create bespoke appeal letters in every case I do not consider it fair or reasonable, that they are paid (more) for doing so from public funds. I have checked the Appeal letters from the files in which they feature and I have restricted the fees as detailed within the individual accounts which are Appendices to this report. In the files before me either 3 or 4 pages of bespoke letters have been sought by Ormiston's at £7.25 per page. (So £21.75 or £29 claimed by them).

My decision is that I have allowed 2 x 250 word sheets at £7.25 for 3 of these + a £2.90 proforma letter to MHTS.

If using this as Benchmark /precedent decision: I consider a maximum payment is fair at £17.40 as a reasonable fee. As an aside Ormiston's state that the form is not fit for purpose however the form is just a form and there is scope within it to provide further information beyond completion of the fields within that form, however if continuing with bespoke letters in future is Ormistons decision that should not be at the higher cost to public funds. There is more detail elsewhere in this report on my reasons for allowing sheets at 250 words for a fee of £7.25 as opposed to letters at 125 words for the same £7.25.

## PART G

## AUDITORS GENERAL OBSERVATIONS, COMMENTS AND SUGGESTIONS

### Historical dialogue and communications between the Parties

Despite having received the supposedly final submissions from parties in September 2017 there was a further tranche of emailed material (perhaps not strictly speaking submissions) from both parties on 23, 24 and 25 April 2018. To be fair though, this was triggered by an email from me to them with a simple administrative request. For avoidance of doubt, I have not ignored that final batch of emailed information but have not taken much cognisance of anything that was said in in those exchanges. It amounted to a further 15 pages including copies of historical correspondence between SLAB and Ormiston's, as it did not add anything useful to me in my considerations of the five taxations before me. It dealt more with the potential impact this report may have on the backlogged 1900 cases and any future negotiations the parties may have on those 1900 accounts. I feel I must refer to the existence of those 15 pages of April 2018 emailed information/submissions in this report though, to ensure parties are clear that I have considered it all, as I am conscious that there is no objection procedure to a Sheriff or any other forum from this taxation procedure in terms of the Legal Aid Regulations which govern this taxation procedure. I am conscious that the only method of challenge open to either party is by Judicial Review to the Court of Session. Described as follows:

> *"Judicial Review is the procedure whereby the exercise of a delegated discretionary decision-making power is examined by a Court so as to ensure that the power has been properly exercised for its lawful purpose. In general terms the Court will intervene when a person or body which has been given the power fails to act when it is required to or when it makes a decision it ought not to have made when acting properly within the terms of the mandate given to them."*

### Communications by SLAB to the legal profession of any change

Regarding Ormiston's submissions that SLAB arbitrarily withdrew from the parties' (joint) "Agreement" of 2008, it is not strictly correct (of Ormiston's) to say that "*SLAB did not intimate changes of standards of assessment or "policy" on assessing accounts and in particular specific items within them"* as SLAB had intimated to a far wider audience than just Ormiston's their revised General Guidance in April 2010 (presumably to all Solicitors and perhaps via the Law Society – I do not know?).

Taking a broader view on the issue of communication of changes one could say that solicitors' firms could be categorised as "customers" of SLAB (a public Body). As regular ***users** [see footnote below]* of SLAB's Account Claims and fee payments "services", arguably Ormiston's are one of their biggest "users" in the field of mental health account claims and therefore it could be said, that this is all the more reason, although perhaps not strictly an obligation , for SLAB in fairness and in the spirit of their own published Objectives , to intimate to Ormiston's, any significant changes in their fee assessment methods which would directly impact on that firm and any other firm when submitting their accounts. In support of my opinion I refer again to my *Glasgow Auditor's report of 20 June 2014 in Bilkus & Boyle v SLAB* where there was similar issue relating to their "Agreements" with SLAB. What was discussed in that report was the unfairness of SLAB not intimating changes to the users of their services or to their representative body, the Law Society of Scotland. I also agree with Counsel's Opinion (David Leighton's) where he says the same thing about the desirability of SLAB intimating changes to the legal profession.

***NB* footnote re **user firms of SLAB's services***: On the issue of whether solicitors firms are SLABs "users" and why can they be so described, I believe they can when one considers the extracts from SLABs own website shown in more detail a few paragraphs below which shows as published objectives support for my belief that they should be intimating changes to all user firms before the commencement date of such changes, SLAB themselves state as 2 of their Objectives.

- *To deliver improvements to legal aid processes that increase efficiency and improve the experience of system users and customers*
- *.To build and maintain effective and collaborative relationships with the legal and advice sector and*

**Travel- time from hospital car parks and the walk to the wards**

Another taxation issue in the dispute over travel time which is referred to in the report is the time taken for solicitors to park their car at hospital car parks and walk to the wards , then to be subjected to the usual (lengthy in Ormiston's opinion) access entry security protocols before they actually sit down with their client. I take the same view on that category of walking "travel time" as I do on driving time. The point is every claim should be for a precise time and not the subject of a negotiation or averaging out between solicitor firms and SLAB to an agreed formula.

I support Ormiston's claims for all the travelling time as claimed and emphasise that I do so against the backdrop of the professional necessity for them to claim in accord with the Standard of Conduct Rules. I mention again here that, in view of the potential impact of the taxation decisions within this report, (when one extrapolates the individual account entries and multiplies that by the 1900 other pending accounts

which I assume have similar if not identical disputed items - the fees for which in total could come to disputed items amounting to several hundred thousand pounds of unpaid claims).

As referred to elsewhere in this report, I decided to personally visit three Glasgow hospitals myself. That is an extremely unusual, unique in fact, "taxation method" activity for me (and probably for any auditor) to undertake. I opted to do that given the potentially very high value of disputed entries if this report and its decisions are to be taken as some form of precedent for the remaining disputed account between the parties. I hope that the information and decisions in this report can be used in any future discussions at least relating to travel times, which has been decided within this report.

On that basis I was reassured that my decision to treat Ormiston's solicitors' travel time claims (although admittedly claimed in block times of quarter hours) is fair and I am further reassured that I can apply the same reasoning to their car journey travel time claims, although I do agree with SLAB that in future Ormiston's should show precise actual travel times on every occasion rather than as SLAB assert "fitting claims to the nearest rounded up quarter hour" to "fit" that payment criteria.

Another reason I opted to take that unusual (hospital visits) course was due to some criticisms by Lord Eassie about an Auditor's report not providing sufficient information to the litigants.

That is contained within the Opinion of Lord Eassie in *Note of Objections to a Report by the Auditor of the Court of Session in the case of Nicholas Dingley (AP)* v *The Chief Constable of Strathclyde Police (Outer House, Court of Session A448/93 dated 9th October 2002.* The criticisms are frequently mentioned in that Opinion but particularly at paragraph 23: See Part D of this report for the full information on that.

***Extracts from SLABs website** (any underlined emphasis is by K Carter)***

From SLAB's website "homepage" under "what we do" –

*SLAB are a non-departmental public body responsible to the Scottish Government.*

*The "purpose of legal aid" Statement contains the following phrases:*

*"The purpose of legal in Scotland is to provide access to legal assistance and representation for those people who are unable to pay for it on their own.*

*"Legal aid in Scotland provides a vital service to people, many of them vulnerable, who would not otherwise be able to pursue or defend their rights, or fund their defence."*

*Our purpose*

*"To manage and improve continuously publicly funded legal assistance and to advise Scottish Ministers on its strategic development for the benefit of society."*

*Strategic Objectives: Our strategic objectives are:*

- *To deliver improvements to legal aid processes that increase efficiency and improve the experience of system users and customers*
- *.*
- *To ensure that our organisation has the culture and capability to be responsive to our customers, the justice system and developments in legal and advice services*
- *To build and maintain effective and collaborative relationships with the legal and advice sector and our public sector partners as we seek to achieve our Purpose and contribute to wider Scottish Government aims*

The Scottish Legal Aid Board's Annual Audit Report 2016-2017 includes the following information:

At part 2 financial management, paragraph 24, the main financial objective for SLAB is to ensure that the financial outturn for the year is within the budget allocated by Scottish Ministers.

> *"26. The Scottish Legal Aid fund is non-cash limited fund. This means that Scottish Government has a statutory obligation to provide funding for any amounts due to be paid to any solicitor or counsel out of the fund. Therefore, while the Scottish Government sets an annual budget which it monitors throughout the year, there is no limit on what will be due for payment during the year.*

*Prevention and detection of fraud and Irregularities*

> *34. SLAB have two internal investigation teams which are responsible for carrying out investigations of solicitors registered to provide legal aid and the claimants of legal aid to ensure that payments are made in line with the legal aid regulations."*

**Observation by Auditor**: The "internal investigation team" was alluded to in DH's/SLAB's submissions at page 4, paragraph 3 in the context of informing me that Messrs Ormiston's had been the subject of some scrutiny from this team regarding the firm's travel practices. Irrespective of their findings, which are unknown to me, I mention this in the context of my comments elsewhere in this report about an Auditor

of Court Taxation not in my opinion being the forum to deal with any suspicion about validity of some items within solicitors certified account claims. To illustrate what I refer to here I give (again) the following example:

SLAB say that Ormiston's almost always claim 60 minutes for meeting times. SLAB believe that Ormiston's position of one hour is unsupportable as almost invariably insufficient vouching (ie within their file attendance note) is provided to support a meeting lasting one hour. To support my decision I refer again to the Standards of Conduct Practice Rules **LSSPR-2011-SoC** on the basis of an authenticated and certified claim being signed by solicitors who are members of the Law Society and are subject to all of the professional ethics and high standards thus required of them.

In my view the Law Society's Conduct Rules are a more appropriate way to deal with any suspicion of inaccuracies in any Legal Aid Account claims and if any doubt arises as to the accuracy of account entries that is the framework to use. **For avoidance of doubt I do not suggest that is appropriate for any of the five accounts and files I have carefully perused in this taxation exercise.**

I refer again to the *Glasgow Auditor's report in Bilkus & Boyle v SLAB dated 20 June 2014* in which a similar scenario arose relating to Bilkus & Boyle's claims in several of their accounts regarding an issue not specifically of travel time claims but of the need to travel at all. I supported Bilkus & Boyle's submissions and their claims on the basis that I considered that their claims were certified and authenticated by a solicitor and that they (B&B) could not be "disbelieved" by an auditor simply on the basis of SLAB's submissions that some of these journeys may not have been necessary at all.

On that basis I was reassured that my decision to treat Ormiston's solicitors' travel time claims (although admittedly claimed in block times of quarter hours) is fair and I am further reassured that I can apply the same reasoning to their car journey travel time claims, although I do agree with SLAB that in future Ormiston's should show precise actual travel times on every occasion rather than as SLAB assert "fitting claims to the nearest rounded up quarter hour" to "fit" that payment criteria.

## Miscellaneous and general Auditors Observations

The contentious nature of this Ormiston's v SLAB taxation and my own aspiration to strike the correct balance due to the "tensions" between the Benchmark set for Auditors of Court by Hastings whereby the paying party/SLAB should be given the benefit of the doubt, when compared to the duty of all solicitors to adhere to the Standards of Conduct Practice Rules 2011, which I have assumed Ormiston's staff have adhered to for every account entry, led me to take the unusual steps of making so many Auditors Observations.

Ormiston's state that they are experts in the specialised field of mental health law, which is not disputed by SLAB but SLAB's observation (as is mine) is that this does not entitle them to any special treatment or different consideration of their claims

simply by virtue of their very high volume of ABWOR and Advice and Assistance accounts.

It could be said that Ormiston's do achieve savings to SLAB's/Public Funds by their "economies of scale" (my words) as they do have such a high number of clients located at various mental health establishments across the country thus their account claims spread the cost of certainly for travel claims between two or more client accounts. There is therefore a "hidden" saving to the public purse which is a principle tenet of SLAB's submissions throughout, which whilst not directly impacting on my decision-making process in these taxations is worthy of mention in this report.

Referring to SLAB's submissions, their Appendix 1 dated 23 June 2017 – at pages 5 and 6 of SLAB's conclusion – "Communications with advocacy workers" are not (an) ABWOR activity. SLAB's submissions state emphatically that this issue is not a decision not for an Auditor of Court but for SLAB to decide. They say that the auditor decides if the claim is reasonable but not the principle of whether it is ABWOR work. This reconciles with my own reference to Hastings on Sheriff Court Expenses at page 3, paragraph 4, ie the following phrase "It is for the auditor to give effect to all the procedure which has taken place and only to audit the charges".

SLAB say that solicitors might be able to justify advocacy correspondence if they themselves are unable to fulfil a role without interacting with advocacy but that is not applicable in the accounts being taxed here. SLAB again used their common reference benchmark that this is not done by other firms.

Re page 11 of SLAB's submissions at Appendix 2 :Dundee auditor's report of 20 July 2015 [redacted] v *PF, Dundee* (re showing actual times for every work activity).

I agree in principle with the Dundee auditor's opinion and I agree it is certainly a best practice to <u>show actual times for every work activity</u>.

I also found in this taxation that a practical and meaningful point of comparison is with Judicial taxations in Party & Party accounts which I deal with regularly where chapter 3 of Fees Tables allow for various work activity fees in 15 minute "units" (always rounded up in the same way as SLAB fees). That Fees Table also has fixed fees for letters and phone calls etc so again it is very similar to SLABs Fees Tables ( other than remuneration rates which are markedly lower in legal aid fee tables). However Chapter 2 Table of Fees in party-party accounts allows for "block fees" for specific work items and for procedural steps, eg preparation for proof at £780. Prior to most taxation diets, solicitors or law accountants for the party who is awarded the taxed expenses, have a clear choice to make about the basis upon which to frame accounts. This is based on various factors such as what they consider to be the overall the higher remunerative rate and/or on what type of account would be most convenient for them to draft and lodge, ie deciding on the time and effort spent by them drafting an account on either a chapter 2 or chapter 3 basis and the anticipated

time and effort any taxation diet may take depending on which chapter basis their account is drawn on.

With SLAB's ABWOR or A & A accounts however there is no choice as there is only one appropriate legal aid Fee Table to claim under. Therefore it is all the more important to be specific on start and finish times (and not to apply a formula for example for preparation time for a hearing) in claims for time based activities rather than "fit a claim" to units of quarter of an hour of time.

I speculate now that some software IT programme mechanisms may exist for completion of SLAB Fees claims (I don't know?) to automatically claim in quarter hour time blocks for payments by SLAB? BUT that is not what SLAB want to see when assessing accounts from firms. It is therefore incumbent on the claimant's firm to endeavour to satisfy the paying party SLAB given their statutory duty to pay only fees from public funds which are properly incurred in connection with provision, in accordance with the Legal Aid (Scotland) Act 1986) and the related Regulation 17 as detailed elsewhere in this report.

I have ignored the submissions relating to R A M Tracking Information in the Ormiston's submissions in the same way as I have opted not to rely on Google Maps and Route Planner etc referred to elsewhere in this report, due to my decisions on all time related claims these all became redundant in my considerations.

**Comment on the four Counsels' Opinions as Appendices to Ormiston's submissions**

I have considered all of these and have not ignored them on one hand but on the other hand I have taken account of SLAB's submissions that these Opinions are not to be treated in the same way as some other Counsel Opinions for advice to clients or firms for example (my interpretation of what SLAB are saying here is that in other circumstances Counsel's Opinions are for a more specific purpose (often litigation related) and might be of more importance to it's recipients as the decision-makers when weighing up their options on a proposed course of action). My view of SLAB's comment here is that they consider that I should not be unduly influenced simply by the very fact of the existence of 3 separate Counsels' Opinions within four (often corroborating) Opinions which support Ormiston's submissions.

David Leighton's first opinion on 9 July 2015 at page 3 speaking of "specialisms" states that: *"Trevor Ormiston (TO) himself is accredited as a mental health practitioner and if it is his (TO's) opinion that it is reasonable and necessary for* ***preparation times*** *etc. then an auditor should be careful before discounting that view..."*

However as I have said, In my view I have to decide on Ormiston's time based claims such as preparation by balancing the Standards of Conduct Rules and the linked "officer of court philosophy" against SLAB staff's opinions and decisions using their "desktop" theoretical exercises via Google planner etc albeit that SLAB do also have the benefit of comparison with other firms' claims. That I assume is information Ormiston's would not have, unless Ormiston's themselves liaise with other firms in the mental health expertise field - perhaps to compare the extent of SLAB's abatements to their respective MHT accounts?

**I agree with Mr Leighton, Counsel, see his Opinion at page 5, that if SLAB change their position, ie abating claims which they did not used to abate, they should intimate the changes and the date from which such changes are effective from.** (This issue was discussed also in the *Bilkus & Boyle v SLAB*, Glasgow taxation referred to elsewhere in this report). Again I refer to SLABs own philosophy and aspirations as published on their own website and objectives relating to user communications and what might be categorised as "customer care" issues.

Mr Leighton also in his second opinion of 23 August 2016 at page 5 says that *"mental health tribunal preparation 'takes as long as it takes' be that long or short…"* This supports my own opinion that Ormiston's solicitors are duty bound to make honest and truthful claims for actual time expended in their accounts and that trying to "average out" preparation times is not the correct way to go about assessing account claims.

**Law Society's Code of Conduct for Mental Health Tribunals:**

In the submissions and in this report reference is made to this Code of Conduct and I considered that to be an important reference point for my own report as this contained some important principles to be applied not only by MHT practising Solicitors but by myself in this taxation exercise. Importantly in my view this document also at **article 4** refers to: *"other rules of professional conduct demanding that solicitors comply with good professional practice and the ethics of the solicitors' profession as set out in practice rules, other codes of conduct and textbooks on professional ethics."*

**Article 4** expands into further guidance regarding professional ethics etc. including the phrase *"Solicitors have a duty…to approach their work in a manner consistent with the principles of good ethical practice. A solicitor acting outwith the terms of this code may be called upon to justify his conduct."*

The few Article 4 lines I have quoted above provide further reassurance to me as this Code of Conduct adds additional supports to my reasoning and decision to prefer

Ormiston's submissions to those of SLAB in relation to all time based claims in the accounts. Again I emphasise that it would be difficult for any auditor to decide on the basis of being faced with certified and authenticated claims for specific times, eg travel, preparation and meetings, that the time claimed was too much and to substitute an average of what the auditor thinks would be reasonable for these activities. The onus is on the solicitor to make an honest claim and I consider that thereafter the onus is on SLAB to pay for what is claimed and certified as correct. If there is any suspicion relating to ethical issues I emphasise again I do not think the forum to resolve that is a taxation exercise.

**Advocacy Letters and interaction with Advocacy organisations by Ormiston's**

Ormiston's specialise in Mental Health Law and the Scottish Law Directory 2017 reveals that they deal with very few other categories of legal work (according to the SLD and Ormiston's own website which I have also looked at). I consider it therefor very probable that this goes a long way to explaining a very different perspective from SLAB , who do have the benefit of comparison of Ormiston's accounts with the widest possible scope of other firms in mental health law. SLAB also have the broadest possible comparisons perspective in the sense that they are processing "all of Scotland" firms accounts relating to almost every aspect of Scots law across civil; criminal; children's referrals (another vulnerable and special category of client base); and various miscellaneous categories of work. By comparison to SLABs global oversight of accounts and anomalies and fee disputes, it is my view that, whilst one cannot discount their expertise in the (narrow) field of mental health, that the overall perspective of some of Ormiston's arguments in their submissions may therefore potentially be somewhat diluted by their lack of that broader perspective and by an absence of any comparison to other categories of work.

**Auditors Observation:** In this report I have disallowed all advocacy worker letters but added a caveat to that and an example of that was given in Ormiston's submissions page 22 and I am paraphrasing here, in the scenario when a client instructs an advocacy statement and asks Ormiston's to contact the advocacy worker about this then Ormiston's ( justifiable in my view ) question is: surely that letter is chargeable ? Ormiston's then say such letters are sent with the best intentions to assist the tribunal decision makers and that this is done to avoid the pitfalls of the Law Society's code of conduct for mental health tribunals by effectively ignoring a client's instructions. In view of the fact that even SLAB have conceded that there may be occasions when they would pay for Advocacy letters, I have included this paragraph in the hope that it may assist with any future discussions between the parties on this issue when deciding what does and what does not " advance the case for the client" which seems to be the crucial issue in dispute.

## PART H: TAXATION FEES AND APPORTIONMENT BETWEEN PARTIES.

The taxation fees here are as follows:

(i) Account lodging fees at £43 x 5 accounts = £215.

(ii) Taxation fees based on total fees claimed in the five accounts in dispute, ie of £9,274.33 @ 5% taxation fee = £463.72p – rounded up to £465.

(iii) Total taxation fees therefor = £680.

(iv) Add VAT of £136.

**(v) TOTAL TAXATION FEES OF £816.**

(vi) Apportioned equally between the Parties at 50% each.

**(vii) £408 due by both parties to Auditor of Court.**

Note : In view of the fact that parties' submissions were broadly equal in length and also in view of the fact that there has been to an extent divided success across the taxation exercise, Fee liability has been split at 50-50% thus £408 from both parties as shown above.

## APPENDICES 1 - 6

6. Corrected version of the July 2016 "Understanding" between parties.

***K Carter***
***Auditor of Court***
***Glasgow Sheriff Court***
***Date of issue of Report and Appendices to Parties: 8th June 2018***