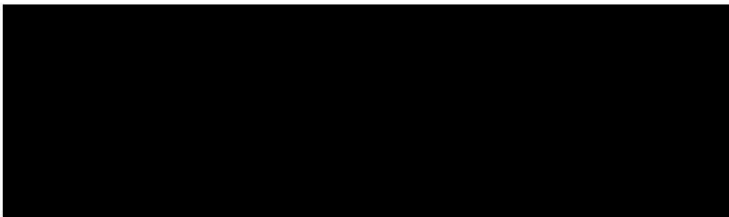


Sheriffdom of South Strathclyde Dumfries and Galloway at Airdrie

Taxation of Advice and Assistance Accounts:



JC; EB & KD

The diet of taxation was held on 16 March 2018. Ms Grant and Ms Connor, Solicitors, appeared on behalf of Thompson Family Law, Solicitors, Glasgow and [REDACTED] Solicitor, appeared on behalf of the Scottish Legal Aid Board.

On 15 March 2018, SLAB provided by e-mail, copies of the undernoted attachments:

SLAB's points of objections in relation to all 3 matters

Appendix 1 - Copy of Legal Aid Handbook, Part 4: Civil Legal Aid Chapter 3 – Assessing probable cause and reasonableness

Appendix 2 - Copy letter dated 3 October 2017 from Thompson Family Law to [REDACTED]  
[REDACTED]

Appendix 3 - Copy of Legal Aid Handbook – Precognitions, 6.26 Precognitions

Appendix 4 - Copy precognition of [REDACTED] Prepared by Thompson Family Law

[REDACTED] : 7948336017

Ms Grant/Ms Connor advised that the client had informed them that all possibilities of mediation had been exhausted and there was no prospect of resolution. The client had been in touch with the mother of the child regarding contact and this had been rejected. It was the client's position that since the parties had separated in 2016, contact with the child had been sporadic and had been dictated by the child's mother. Up until the separation the client had been involved in the child's life.

A handwritten signature in black ink, appearing to be 'OM' or similar, with a long horizontal stroke extending to the right.

A meeting with the client had taken place on 21 September 2017 to discuss mediation/ a minute of agreement to regulate contact. Thompson Family Law had written to the child of the mother on 3 October 2017. At that point, the client advised that the mother would not respond to the letter. Thompson Family Law's advice to him was that the best way to regulate contact was to obtain a court order.

Following the initial meeting, the letter of 3 October and the application for legal aid made the following day; on 19 December 2017, a further letter was sent to the mother of the child. The letter advised that if no response was received, then court proceedings would be raised. Since that time, no further instructions had been received from the client and no contact had taken place.

The legal aid application had been made on the basis that it had been the only way to safeguard contact. Given that it had been over 12 months following the separation of the parties and there being no formal arrangements for contact, it was appropriate to obtain a court order.

██████████ referred to the written points of objection which have been mentioned earlier.

The Board's objection was twofold.

- (a) the application for legal aid and consequently the framing of the precognitions was premature
- (b) in the event that the auditor did not accept the first point of objection, the precognitions contained significant repetition and should be abated.

██████████ submitted that from the beginning, it appeared the advice offered was that litigation was the only way forward. The basis for such an approach was that the mother of the child had disregarded any approach for contact arrangements.

However, the precognition of ██████████ indicated that parties had been talking to each other up until 5 weeks prior to taking the precognition.

██████████ referred to **Appendix 2 – Part 4: Civil legal aid, Chapter 3 – Assessing probable cause and reasonableness, 3.5 The application is premature**

He posed the question that if a private client had been involved in such a matter, would they "jump in" to litigation straight away? In this matter, the agent had written to the mother of child on 3 October 2017 (see **Appendix 1**) this letter was sent the day before an application for legal aid was submitted. It was SLAB's view that to write one letter and then proceed to litigation was not reasonable. SLAB required evidence that negotiations had been attempted and failed.



Ms Grant submitted that when initially instructed by the client, advice was given on options available, the agents acted in the best interests of the client. His instructions were that the mother of the child would ignore all correspondence and that is what happened. She had not responded to either letter sent. Ms Grant added that in her experience, she found legal aid applications can take between 6-8 weeks to be granted. The application was made upon the client's instructions to safeguard his position and to prevent any delay.

██████████ then turned to the matter of the length of the precognitions and rehearsed the comments in the written points of objections. This also included reference to **Appendix 3, Legal Aid Handbook – Precognitions 6.26 Precognitions.**

The Board's view was that the precognitions were unnecessarily discursive and the manner in which they had been framed lead to significant repetition and therefore length. ██████████ then advised that after reading the precognition for ██████████ (2100 words) he redrafted the precognition and invited me to consider this document as to what was fair and reasonable. That revised precognition contained 989 words. ██████████ indicated it was this style of precognition that the Board would expect to see provided.

Ms Grant/Ms Connor referred to the decision by the auditor of court at Glasgow dated 9 October 2015 in which the same issues ( the length/content of precognitions) before me now had been raised before the auditor at Glasgow. That report had found in favour of the solicitors who are in fact the same solicitors in this matter. A copy of that decision was provided at the taxation diet.

The agents further submitted that some four months after the Board had given their decision on the current matters, this model style of precognition was now provided by ██████████. The Board did not advise the reason they were not prepared to pay the full fee sought, simply that the fee had been restricted. It was only today, now that the revised precognition has been provided, the agents were aware of the Board's expectations in that regard.

#### Auditor's decision

Having considered the written and oral submissions, I am of the view that the application for legal aid and the precognitions were premature. The guidelines referred to by ██████████ at Appendix 2 are, in my view, quite clear. Evidence must be shown

that negotiations had been attempted and failed. Given the letter to the mother of the child was sent only one day before the application for legal aid was submitted, it cannot, in my opinion, satisfy the requirements of the Board. I also noted in the submissions that [REDACTED] had suggested that a review of the legal aid decision could have been submitted but that had not been done. I had enquired from Ms Grant/ Ms Connor if they had been in touch with the client to discuss such a proposal; and as I understand the position, the agents do not re-engage with a client unless the client makes contact with them.

Given my decision to uphold the first point of objection by the Board, I do not require to deal with their second point of objection. However, since that objection applies directly to the other two matters before me, namely the accounts for [REDACTED] I think it is proper that I record my views at this time.

The report by the auditor of court at Glasgow – 14 April 2018

As mentioned above, the auditor at Glasgow supported the submissions of the agent and made no abatements to any of their accounts. The final paragraphs 13, 14 and 15 of the auditor's report states:

*"13. Whilst there could be scope for me to go through all four accounts precognitions and in particular analysing their detail and possibly reduce some of them by a page or two here and there, I do not think that the minutiae of such an exercise is as important as (i) the principal objections by Thompson & Brown regarding the guidelines relating to precognitions and the interpretation and application thereof; and (ii) the "sea change" brought about by SLAB's internal procedural changes which apparently meant that staffing allocations changed around November 2013 whereby, as I understand it, a small number of staff, maybe at times just one individual, are involved in the decision-making process in fee assessments in relation to all precognitions. The fact that this "sea change" or one might say "moving the goal posts has never been intimated to solicitors generally does not seem fair to me and I have therefore opted to allow all of the Thompson & Brown precognitions as presented on the overall fairness and due to the lack of notice given of the SLAB changes.*

*14. In the context of the details DH went into relating to the 4 cases and the AA stage these four were at, it is feasible that I could agree with the thrust of his submissions by analysing the minutiae of all precognitions in all four cases and perhaps deleting a page or two here or there, but when set against the backdrop in these taxations, i.e. in my view the far more important issue which in relation to MT.s submissions, that the point of today's taxations was not for DH to persuade the auditor of his (DH's) view of what was relevant and substitute DH's view for that of the first SLAB assessor. I agree with MT that there is a fundamental issue to decide upon in these taxations as opposed to looking at the minutiae of the precognitions being discussed.*



*15. I therefor await with interest any developments or information SLAB, as to if, and when, any revised guidance or intimation of changes relating to allowable fees for precognitions emanates from them which might clarify the issue of precognition fees."*

The issues which I believe that I now require to consider are:

- (1) Did SLAB provide any further guidance to agents regarding these matters?
- (2) If the "sea change" referred to by the auditor at Glasgow, took place around November 2013, and we are now dealing with precognitions taken in late 2017, are paragraphs 13 -15 of the auditor's report referred to above as relevant today?

- (1) In his submissions, [REDACTED] confirmed that SLAB's guidelines had not in fact changed since the issue of the auditor at Glasgow's report. He also commented that in spite of what he had to say to Thompson Family Law at taxations, they continued to provide these lengthy precognitions. He did not elaborate and nor did I enquire when these other matters took place or their outcome.

As narrated earlier, [REDACTED] provided a revised precognition which, in his opinion, was of a style and content which met the Board's requirements. Also, as mentioned earlier, Ms Grant and Ms Connor advised that SLAB had not provided any reason why they were not prepared to pay the full fee sought and it was only at the taxation diet that [REDACTED] revised style of precognition had been provided.

It might have been fruitful if, at an earlier stage prior to any diet of taxation being required, that such a style could have been prepared and sent to the agents. Whilst I appreciate that even if that had been done, there would be no guarantee that it would have been accepted nor the matter resolved. It would hopefully, however, have been a starting point for a constructive discussion on the matter.

Whilst it was helpful that [REDACTED] had prepared a revised precognition which he thought should be accepted, this had not been published by SLAB as guidelines and there was nothing before me to suggest that this was (a) accepted or (b) adopted in terms of guidelines by SLAB. In the circumstances what I have to consider are whether the precognition content and length complies with the published guidelines provided at the taxation and that are currently available to agents.

- (2) In my opinion, it is proper that I take into account the passage of time since the decision by the auditor at Glasgow. Whilst I accept that no formal guidance has been issued by SLAB; Thompson Family Law have been aware of the "sea change" since these issues had been raised at the diet of taxation at Glasgow in April 2015. That leads me to the view that in the absence of any revised guidelines, I would consider the precognition content based on the existing guidelines. I require to decide what is fair and reasonable, however the difficulty I find is how can the auditor decide what is relevant in content?

At the taxation diet I was asked to consider the original precognition for [REDACTED] against [REDACTED] version. Each precognition is different in terms of its content I believe that SLAB should have been clear on what specific entries had been found to be irrelevant etc. I think that approach should have been applied in relation to all of the precognitions submitted for taxation.

If, as advised by Ms Grant/Ms Connor, SLAB do not advise agents of the detail and specific nature of abatements to precognitions then I find it difficult to see how the agent can fully understand the precise nature of that decision making. In my opinion, what the auditor is being asked to do at these types of taxations is to give his opinion on what constitutes a properly constructed precognition containing relevant information. With respect, I do not think that is the auditor's function. There may be entries in a precognition which the agent is of the view that they are necessary. If SLAB are not of that view and they abated the precognition fee with little communication of what entries/information had been abated and the reasons for doing so then how can the auditor properly deal with the matter?

Accordingly, I have decided that in the first instance, where I allow a precognition, I should then peruse its content. I have limited any abatement to where I have found any evidence of repetition. During the submissions by parties at the taxation diet, there was comment regarding what was/was not perceived to be elements of hearsay within certain precognitions and whether that should be allowed. I have not considered these matters as I do not believe I am properly equipped to decide on such matters.





██████████ 7956475617

██████████ submissions are referred to in his written points of objections which have been mentioned earlier.

My notes taken at the time of the taxation indicate that submissions focused on the content of the precognitions taken from the applicant and the third party. ██████████ repeated his view that the precognitions were repetitive and invited me to abate both of them. Further discussion ensued between parties regarding parts of the precognitions which were hearsay and whether these would or would not be admissible in evidence.

#### Auditor's decision

I am of the view that in the first instance both precognitions should be allowed. I have perused both of the precognitions and in my view, I am satisfied that there is little or no repetition and consequently I have allowed the fees sought for same in full. I have also made reference earlier regarding the submissions in relation to hearsay. In my opinion, if the guidelines provided clear instruction as to what precognitions should and should not contain in terms of content, then such matters would perhaps not require to be dealt with at taxation.

██████████ 7956873217

As before, ██████████ submissions are referred to in his written points of objections. SLAB had refused payment of the precognitions firstly on the basis that the agent had failed to establish jurisdiction prior to framing the precognitions and submitting an application for legal aid on behalf of the client and secondly on the grounds of their length.

Following the taxation diet, I requested further information from the agent for the applicant and they subsequently advised that it had been imperative to get proceedings raised in Scotland for the client's sake. To prove that point, the applicant's husband overtook them by having the original case in England re-opened and they had seized jurisdiction. It was the agent's submission that any competent family practitioner would have made every effort to get the action raised locally. The client had advised the agents that there "had been" an action in England and had been successful in obtaining an order for residence and then subsequently moved to Scotland. The jurisdiction test had been emergency jurisdiction and habitual residence which had been Scotland on both points.

Auditor's decision

I am of the view that the action taken by the agents had been reasonable and accordingly, in the first instance, I have allowed the precognitions. Turning to the content, after perusing the applicant's precognition, I have found a degree of repetition and I have abated 4 sheets. The third party precognition was not provided at the taxation diet but since it consisted of 1 sheet, I have allowed same.

A handwritten signature in black ink, appearing to read 'J Hamilton', with a stylized, cursive script.

J Hamilton

Depute Auditor of Court, Airdrie

25 July 2018