

Sheriffdom of South Strathclyde Dumfries and Galloway at Hamilton

Taxation of Advice & Assistance Account SG

Assisted Person: [REDACTED] LAA Reference No: AA/5525690515

Note by the Depute Auditor of Court

This diet of taxation called before me on 28 July 2017.

Mr Buttery, Solicitor, appeared on behalf of Freelands, Solicitors, Motherwell and [REDACTED]
[REDACTED] Solicitor, appeared on behalf of the Scottish Legal Aid Board.

The dispute in this matter focused on the outlay incurred by Freelands in obtaining a medical negligence report.

Mr Buttery provided copy correspondence from 16 December 2015 onwards when he contacted Medical Case Notes Assessment Ltd (MCNA) with regard to obtaining a nursing negligence opinion from a suitably qualified and experienced nurse. These copies are attached hereto at Appendix A.

He then went on to outline the series of events in obtaining the report, correspondence with SLAB and subsequent lodging of accounts for payment by SLAB.

MCNA advised they had sourced an appropriate person to provide a report and the cost of same would be £3470.00 + VAT. Mr Buttery advised the cost was excessive and that SLAB would not agree to the cost of same.

Thereafter, MCNA advised that another expert was available at a cost of between £1880.00 and £2330.00 + VAT.

Mr Buttery then contacted SLAB to request an increase in authorised expenditure to £3546.00. This was initially refused with a sum of £3046.00 being allowed. However after some further discussion, SLAB acknowledged an error in their calculations and the original increase sought was approved.

In due course the report was provided and MCNA invoiced Freelands for payment for the sum of £2796.00 including VAT which was duly paid by them.

Thereafter Mr Buttery submitted his firms accounts to SLAB for payment. Upon receipt of same SLAB requested a breakdown of the invoice submitted by MCNA. After enquiry by Mr Buttery, MCNA advised that the expert's fee was calculated at the rate of £150.00 per hour. A total of 12 hours was charged for the compilation of the report which equated to £1800 + VAT and the remainder of the fee charged included the cost of the assistance provided by MCNA. That assistance was clarified by MCNA advising

"In relation to our fees, we do not keep a time as such but our fees consist of:

Time spent reviewing the notes

Time spent sourcing the appropriate Expert

Correspondence between MCNA and yourselves also, MCNA to the Expert

Postage costs".

The information was relayed to SLAB who in their letter of 27 April 2017 to Freelands advised " I have reinstated £1800 + VAT for the expert outlay on the basis that the additional fee charged by Medical Case Notes for assistance is not chargeable as it is an administration fee."

Mr Buttery advised that when MCNA emailed him on 25 January 2017 with the breakdown of their invoice, this was the first notification he had been made aware of an administration fee charged by them. Mr Buttery referred to the written points of objections prepared and lodged by SLAB in this matter which are attached hereto at Appendix B.

At the bottom of page 1 of same, reference was made to regulation 12 of the Advice and Assistance (Scotland) Regulations 1996. "12 (1) Where at anytime it appears to the solicitor that the cost of giving the advice and assistance is likely to exceed the limit applicable under section 10 of the Act or under paragraph (2) below, he shall apply to the Board for its approval to an increased limit, stating the reasons for the excess, the likely amount, and giving such other information as may enable the Board to consider and determine that application."

Mr Buttery submitted this was what he had done and that it had been looked at by 2 Board solicitors. His view was that the increase had been granted to cover the full cost of the report. The work had been undertaken in good faith, there was nothing in MCNA's terms of business letter to indicate they would seek a fee. The outlay was properly incurred upon the information he had before him and it was not reasonable for it not to be met by the Board.

██████████ submitted that Mr Buttery thought that he was instructing a medical report only and so did the Board. He acknowledged that 2 solicitors from the Board had looked at the aforementioned request for approval to increase the limit but there had been nothing for the Board to consider other than the expert report. The Board had been asked to grant the increase to obtain the report. They didn't know about a 3rd party fee, no-one did. The Board had approved a figure that they thought was to be paid to an expert, not partly to a 3rd party.

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██████████ then suggested that if a private client was involved in such a scenario, the client would have queried the cost and following investigation it would no doubt have come to light there was an administration fee.

██████████ also referred to the MCNA website where they advised what they did and from that information there was perhaps an inference that the question whether they charged a fee should have been posed to them.

██████████ repeated his point that the increase in funds was approved for the provision of the report. The Board did not authorise a 3rd party fee and they were not obliged to pay such a fee.

██████████ then went on to refer to the list of experts provided by the Law Society. He was unaware generally of any problems in sourcing an expert and he was unsure why MCNA had been approached.

He then referred to the account of expenses submitted by Freelands to the Board for payment. It was clear there had been a meeting with the client on 10 September 2015, thereafter a letter was sent to the client on 21 September 2015 and on the following day a letter was sent to MCNA to enquire if they could provide an expert to prepare the report. In May 2016, some 8 months later, the Board has been asked to increase the funds. ██████████ submitted that at any time during those 8 months, Mr Buttery had time to source another expert.

██████████ also commented there was an opportunity when the issue of a 3rd party fee could have been identified. MCNA submitted the invoice to Freelands for payment and had they enquired from MCNA a breakdown of the fee at that time, they would have seen the administration fee which could have been identified prior to payment.

██████████ was of the view there was a responsibility upon the solicitor so to do. The solicitor instructed the report, he paid the invoice and then submitted his account to the Board for payment.

I enquired from ██████████ that had Mr Buttery advised the Board of the existence of such an administration fee whether the Board would have paid the fee. He indicated that it would have depended on other matters such as the triennium.

At this stage Mr Buttery advised that the triennium had been due to expire in October 2014.

Mr Buttery also commented that he had noted ██████████ had mentioned earlier in his submissions that the Board had been aware of some organisations who had charged an administration fee. Although I had not recorded that comment in my notes, it did not appear to be disputed. Mr Buttery went on to suggest that if it was within the Board's knowledge of such a matter and there had been 2 solicitors from the Board dealing with the request for an increase then they should have raised the matter although they had probably been operating on the same premise as himself.

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Auditor's decision

Having heard the submissions, I advised parties that whilst I had sympathy for Mr Buttery in this matter, I rejected his view that the Board should pay that part of the outlay relating to MCNA's administration fee of £ 636.00.

I fully accept that Mr Buttery acted in good faith, he was mindful of costs and indeed he had advised MCNA that the fee quoted for the first expert was excessive and would not be allowed by the Board. Nonetheless, in my opinion, it was the responsibility of the agent to ensure that the fee sought from MCNA was only for the provision of the report. Mr Buttery had commented earlier that he had never used this firm previously and when using other experts through another company - I think he mentioned they were called Resolve Group- he advised that the invoice was received directly from the expert himself.

The invoice submitted by MCNA to Freelands contained the briefest of information. A copy is contained within the aforementioned Appendix A. It simply stated the provision of Medico – Legal Report, the estimated amount at 2330.00 and the actual amount at 2330.00 with VAT. There was no mention of the time spent in preparing the report nor any hourly rate. That information only became apparent after a breakdown of the fee was sought.

I also noted in [REDACTED] written points of objection at page 4, where it related to Board guidance: The final paragraph of that page states:

".....ensure that the witness is aware of the need to lodge, where appropriate, a detailed fee note of the work done, the chargeable hours and the hourly rate. A fee note quoting a global fee "for all work done" is not acceptable even if it falls within the limit of authorised expenditure. We still have to be satisfied at the payment stage that the fees the expert has charged, as with your fees, are reasonable."

In my view that guidance makes it clear there is a responsibility upon the agent to satisfy himself and ultimately the Board, to ensure that information has been obtained. It also confirms that irrespective of the fact that the fee sought is within the authorised limit, the Board require to be satisfied that the fees are reasonable.

At page 5 of the written points of objection, there is a further comment:

"In a banner headline on the face of the guidance it states;

The authorised increase is simply an upper limit of authorised expenditure within which you can proceed. It is not a guarantee that we will pay a claim to that level you still have to justify the expenditure in your account."

This information again confirms the Board's position that even where the fees sought by the solicitor are within the upper limit, they still require to be justified.

I do not know how common this situation is but it might be helpful if agents could be made aware of such administration costs in these matters. I will leave that subject to others to decide if and how it should be taken forward.

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

J Hamilton

Depute Auditor of Court

4 August 2017