

Sheriffdom of South Strathclyde Dumfries and Galloway at Airdrie

Taxation of Advice and Assistance Account

LARN: C002890114 – [REDACTED] AU

The diet of taxation was held on 9 June 2016. Mr Marshall appeared on behalf of Moore Marshall, Solicitors, Falkirk and [REDACTED] Solicitor, appeared on behalf of the Scottish Legal Aid Board.

Mr Marshall had earlier lodged an account of expenses incurred by Mark McGraw, Solicitor/Reporting Officer in the action F35/14, [REDACTED] Bell. This account related to the costs incurred in preparing a Bar Report and I was advised that SLAB had refused to pay for this cost (£3372.17) and this was the matter in dispute.

On 8 June 2016, SLAB provided by e-mail, copies of the undernoted documents:

SLAB's Points of Objection, Copy of Part IV, Chapter 6 – Special Urgency HANDBOOK

The following Appendices were also attached:

Appendix 1 - Bar reporter's account

Appendix 2 - Solicitor's submissions

Appendix 3 - Online message exchange between solicitor and SLAB

Appendix 4 - [REDACTED] letter dated 25 March 2015 to solicitor

Appendix 5 - SLAB mailshot dated 18 March 2011 to all civil legal aid practitioners

Appendix 6 - Letter dated 24 March 2011 to Sheriffs Principal

Appendix 7 - Report by Auditor at Glasgow Sheriff Court in the account of Ms Lindsey Reynolds as safeguarder to [REDACTED]

Appendix 8 – Report by Auditor at Dundee Sheriff Court in the case of [REDACTED]
[REDACTED]

At the taxation diet, Mr Marshall lodged a written response to the points of objection from SLAB which are also attached. (Appendix 9).

SLAB's points of objection referred to above, contained reference to the nature of the case and the background to the dispute.

Narrated below is an excerpt from that document :

"The dispute that has arisen in this case relates to the cost of a Bar Report, which forms an outlay in the solicitor's account. We have not received the solicitor's final account.

The bar reporter's account indicates that the work commenced on 20 February 2014 (the day the reporter was appointed) and concluded on 7 March 2014 (all pre-legal aid as civil legal aid was not available until 23 May 2014) when the account was lodged in court. The value of the account lodged is in the sum of £3,372.17.

Procedurally the relevant legal aid aspects of the case progressed as follows (the "Civ sol" is the online civil application):-

Special urgency cover was certified on 16 January 2014 (SU4) and the Board advised the solicitor as follows-

"Granted to obtain an interim residence order only. Obtaining an interim interdict with power of arrest is covered under SU2. You may undertake this work so long as the SU2/CIV SOL are submitted within 28 days of the work being undertaken."

No further special urgency was sought

The action was raised on 31 January 2014

Court assigned a hearing on interim orders on 6 February 2014. Some orders appear to have been granted and a further hearing was assigned for 20 February 2014 to afford the defender the opportunity to seek legal advice.

The Sheriff allowed a NID to be lodged on 20 February 2014; continued the interim orders previously granted until further orders of court and thereafter ex proprio motu appoints Mr McGraw, solicitor as bar reporter. In line with normal practice the pursuer was found "responsible" for the cost of the preparation of the report in the first instance.

The CIV SOL was received on 21 February 2014 and was refused at first instance on 20 March 2014

The review application was lodged on 22 March 2014

Civil legal aid was granted with an effective date of 23 May 2014. Civil legal aid was granted to pursue proceedings in relation to interdict against removal of child/other,

interdict - family other, interdict non-molestation, Protection from Abuse (Scotland) Act 2001, power of arrest, residence. Residence is the primary category.

The bar reporter's outlay was submitted under the "reimbursement of outlays scheme" on 24 February 2015 and was rejected as no SU cover had been obtained which would allow us to make payment of this account,"

Mr Marshall submitted at today's diet that the issue was the interpretation and understanding of the Regulation 18(1) (a) and (b) of the Civil Legal Aid (Scotland) Regulations 2002 and not simply SLAB's policy on this matter.

At Appendix 2 – Mr Marshall's submissions to SLAB dated 24 February 2015. Narrated below is the final part of those submissions

"The main basis of my submission is as follows:

- 1 *Additional SU4 was not necessary as we already had SU4 cover for residence and a Bar Report was part of that work, or at least, the interim residence and the Bar Reporter's work were "collateral matters".*
- 2 *In any event we had already brought the fact that a Bar Report had been ordered to SLAB's attention and the estimated cost was included in our estimate.*
- 3 *SLAB granted Legal Aid with a case cost limit of what we had estimated so by implication SLAB was approving work done by the Bar Reporter.*
- 4 *Even if SU4 was "required" for the Bar Report, there is no basis under the Legal Aid regulations that an application has to be made on an SU4 form or online equivalent, or that special urgency has to be certified **before** work is commenced*
- 5 *Regulation 18(1) (b) (i) states "The Board may make legal aid available for specially urgent work **undertaken** before an application is determined, if it is satisfied that at the time such work **was** undertaken there **was** probabilis causa litigandi and it appears to the Board that it is reasonable in the particular circumstances of the case that the applicant should receive legal aid, in either of the following circumstances :-.....*
- 6 *(b) in any other circumstances where (i) the Board is satisfied **on application** that steps require to be taken as a matter of special urgency to protect the applicant's position....."*
- 7 *The use of the past tense "undertaken" and "was" implies that the Board can certify special urgency after the work has been carried out. The words "on application do not restrict the applicant to have to apply on an SU4 form.*
- 8 *Regulation 18, on any reasonable interpretation, implies that SLAB can retrospectively grant special urgency cover."*

(NB The words highlighted in bold above were done so by Mr Marshall)

Mr Marshall repeated the terms of the above submissions at the taxation diet and these were supported by the further written submissions lodged today.

Mr Marshall maintained his view that SLAB had the discretion to approve retrospectively work carried out under Section 18(1)(b).

He also referred to the SLAB Civil Legal Aid Handbook at Chapter IV, paragraph 6.11.

The heading for that paragraph is "Urgent work including collateral matters"

It states "*Where you undertake the work under regulation 18(1)(a) or (2), we will not object to you undertaking any necessary work at the same time even though it is not within the terms of regulation 18(2).*"

Mr Marshall's view was that SLAB were stating that it was using its discretion to allow solicitors to be paid for work not automatically covered under regulations 18(1) (a) and (2) even though the regulations do not specifically give SLAB that authority. Therefore, SLAB considered it did have the discretion to consider payment for work not approved prior to being carried out.

Mr Marshall submitted there was no logical basis to state that SLAB did not have the discretion to retrospectively approve necessary work carried out to protect the applicant's position. Nor was there any logical basis to approve payment for matters collateral to regulation 18(1)(a) work but refuse to pay for matters collateral to regulation 18(1)(b) work.

██████████ agreed that SLAB could retrospectively approve work undertaken after legal aid had been granted. However approval could not go beyond the list of steps undertaken as described in Regulation 18 (2) (a) to (v) inclusive. He went on to explain that Regulation 18(2) (p) had not been applicable since 2011 following the introduction of The Advice and Assistance and Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011.

Regulation 18 (2) (p) related to obtaining reports on residence orders or contact orders within the meaning of section 11(2)(c) and (d) of the 1995 Act.

██████████ referred to Appendices 5 and 6 - the SLAB mailshot dated 18 March 2011 to all civil legal aid practitioners and the letter dated 24 March 2011 to Sheriffs Principal. He advised this information contained guidance of the necessity to obtain prior authority from SLAB with regard to the provision of reports.

With regard to the submissions by Mr Marshall relating to collateral matters, ██████████ ██████████ advised they were irrelevant. The point was that the SU4 was necessary, no request had been made and no authority was given to obtain the report.

Mr Marshall submitted that it was evident from the interlocutor pronounced by the sheriff on 20 February 2014 that the court wished to consider matters of residence. It could therefore be interpreted that the bar report was collateral to the residence order.

Auditor's decision

Having considered the written and oral submissions, I do not agree with Mr Marshall's submissions that Regulation 18(1) can be interpreted that SLAB does have discretion to retrospectively approve work outwith the steps narrated in 18(2).

As mentioned earlier, Regulation 18 (2) (p) is no longer in force. Specific guidance had been issued to agents and Sheriffs Principal to advise of the procedures to be adopted where a bar report was required.

Given this background, I am not clear as to how the existing legislation could be interpreted to allow such retrospective work when earlier legislation had been introduced to specifically remove Regulation 18(2) (p).

In my view, the proper approach would have been to submit an additional SU4 application for the provision of the bar report.

Accordingly, I have rejected the account of expenses submitted in its entirety.

I would wish to record my apologies to the parties for the undue delay in the issue of this Report.



J Hamilton

Depute Auditor of Court, Airdrie

31 March 2017

SOLICITOR REFERRAL – DIET OF TAXATION

Assisted Persons Name _____ : [REDACTED]

LA Reference _____ : C002890114

Solicitors Name _____ : Moore Marshall Ltd

Date & Location of taxation: No diet fixed yet Airdrie Sheriff Court

Type of Case : Civil Legal Aid

1. Nature of the case:

Legal aid was granted to pursue proceedings in relation Interdict against removal of Child/Other, Interdict - Family Other, Interdict Non-Molestation, Protection From Abuse (Scotland) Act 2001, Power of Arrest, Residence. Residence is the primary category.

- Legal aid was granted with an effective date of 23 May 2014.
- Special urgency cover was certified on 16 January 2014 (SU4) and SLAB advised the agent as follows - *Granted to obtain an interim residence order only. Obtaining an interim interdict with power of arrest is covered under SU2. You may undertake this work so long as the SU2/Civsol are submitted within 28 days of the work being undertaken.*
- No further cover was sought.
- The civ sol was received on 21 February 2014 and was refused at first instance on 20 March 2014. The review application was registered on 22 March 2014 and ultimately granted on 23 May 2014.

2. Outlays allowable to solicitors:

The dispute that has arisen in this case relates to a Bar Reporters outlay. We have not, as yet, received any solicitors “final” account so I remain unclear whether the case is still ongoing.

The account will therefore be lodged with the joint auditor of Edinburgh Sheriff Court Taxation of fees and outlays in terms of regulation 12(1) of the Civil Legal Aid (Scotland)(Fees) Regulations 1989.

12. (1) If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund under these Regulations, other than regulation 11 above, the matter shall be referred for taxation by the auditor.

3. Nature of dispute:

The dispute here in many respects is quite straightforward. The dispute is one that really revolves around the special urgency cover which is in place.

Our view is that the solicitor has not obtained the distinct SU4 (Regulation 18(1)(b)) cover which would be required before we can make payment of the Bar Reporters account.

The solicitor does not believe this position is correct. His view is that the SU4 cover which was obtained on 16 January 2014 “*to obtain an interim residence order only*” covers the Bar Reporters outlay. This work and the interim residence order are effectively interlinked and can be read as “collateral matters”. The solicitor also believes that they had brought to Slabs attention that a bar report had been ordered (in the body of the civil sol). He believes that there is “no basis under Legal Aid regulations that an application (special urgency) has to be made on an SU4 for or online equivalent, or that special urgency has to be certified **before** work is commenced”. He also believes that the regulations imply SLAB have the power to grant regulation 18 retrospectively.

The solicitor's submissions are very helpfully set out in a separate note (**Appendix 1**). Prior to this the solicitor had exchanged online messages with [REDACTED] (**Appendix 2**). Wendy's final letter to the solicitor and response to the solicitor's submissions sets out the legal aid cover which was in place here and why we do not believe that they have cover for the bar report (**Appendix 3**). *Note: Wendy only has a draft version of the letter still on file but she has confirmed this was sent.*

4. Background to the dispute:

Procedurally the case progressed as follows:-

- 6 February 2014 – Court assigned a hearing on interim orders. Some orders appear to have been granted and a further hearing was assigned for 20 February 2014 to afford the defender the opportunity to seek legal advice;
- 20 February 2014 – The Sheriff allowed a NID to be lodged; continued the interim orders previously granted until further orders of the court and thereafter *ex proprio motu* appoints Mr. McGraw, solicitor as bar report. In line with normal practice the pursuer was found “responsible for the cost of the preparation of reporting in the first instance.
- 24 February 2015 - The bar reporters outlay was submitted under the “reimbursement of outlays scheme” and was rejected as no SU4 cover had been obtained which would allow us to make payment.
- The bar reporters account indicates work commenced on 20 February 2014 (the day he was appointed) and concluded on 7 March 2014 when the account was

lodged in court. The value of the account was lodged in the sum of £3,372.17.
Copy attached at **Appendix 4**.

The correspondence referred to in Appendixes 1-3 covers the agents reasons why payment should be made and Slabs reasons why we are unable to make payment. For completeness sake a copy of the Slab mailshot 18 March 2011 advising the profession of the note of the changes that would come into force on 1 April 2011 (and specifically the removal of Regulation 18(2)(p) - obtaining reports on residence orders or contact orders within the meaning of section 11(2)(c) and (d) of the 1995 Act when the court so orders.
Appendix 5.

Two additional points that may be worth mentioning.

1. In the solicitors online message 3 December 2014 (Appendix 2) she writes “*Whilst I appreciate that an SU4 should have been submitted the issue of a bar Report at the very early stage of the case was brought to SLAB`s attention*”. There is therefore an acceptance that an SU4 should have been submitted albeit they than adopt a quite different position in their submissions at point 1 (Appendix 1).
2. In the agents submissions they suggest (point 4) that “there is no basis under the Legal Aid regulations that an application has to be submittedor that special urgency has to be certified before work is commenced”. This appears to completely ignore Regulation 18(1)(b)(i) which reads “in any other circumstances where (i)the Board is satisfied on application that steps **require to be taken** (emphasis added) as a matter of special urgency to protect the applicant`s position”. That is clearly prospective in nature and if any work, other than for the steps listed in Regulation 18(2) require to be undertaken it is clear that prior authority is required.

5. Similar Taxations

Although not 100% identical two fairly recent taxations are analogous dealing with issues where the Board were arguing that we could not pay for “reporters” costs (in part or in full) due to work not being covered by the certificate. In the Boland case that was an issue of regulation 18 cover not in place but the circumstances are slightly different.

- **Appendix 6** - Report by auditor Glasgow sheriff court in the account of Ms Lindsey Reynolds as safeguarder to [REDACTED] (dated 22 May 2012 – [REDACTED] I don’t sem to have his original decision or the decision of the sheriff); and
- **Appendix 7** - Report of auditor Dundee sheriff court in case of [REDACTED]
[REDACTED]

5. Appendixes

- Appendix 1 – Solicitors submissions;
- Appendix 2 – Online message exchange between solicitor and SLAB
- Appendix 3 – [REDACTED] letter 24 March 2015 (*Note draft version only retained*)
- Appendix 4 – Bar reports account;
- Appendix 5 – Slab mailshot 18 March 2011;
- Appendix 6 – Report by auditor Glasgow sheriff court in the account of Ms Lindsey Reynolds as safeguarder to [REDACTED]
- Appendix 7 – Report of auditor Dundee sheriff court in case of [REDACTED] v [REDACTED]

Referred by: [REDACTED] **Date:** 23.06.2015.