

THE LAW SOCIETY OF SCOTLAND  
LEGAL AID MEMORANDUM

From Keith J. Marshall, Deputy Secretary

To D.W. Anderson, Civil Taxation  
Department.

CIVIL TAXATION PRACTICE

I think we should try to catalogue in some systematic way decisions handed down by the Auditor on points of Taxation detail, both in our own interests, and also with a view maybe, to making these available to the Profession at a later date. I think this would assist us, again, in as much as when we start to apply some of these Taxation points to accounts rendered by other Solicitors, who will not have heard of them, they are bound to query them and if they were in some systematic form we could refer the Solicitors to them.

For example, at the Taxation I attended last week with [REDACTED] there were several such small points; e.g, if the Edinburgh Solicitor has to frame the Legal Aid papers, he is not allowed a charge for perusing the Precognitions received from his Correspondent, as the perusal charge is included in the fee for framing. This was a new one on me, entirely.

I obviously dont want people taking time out to try and remember all the points which have arisen to date, but may I suggest that if any of the existing points which have already been decided arises in an account with which you are dealing, you might take a note to let me have a memo, such as this, briefly stating the point. Similarly, could the rest of the Staff, and yourselves, note to let me have a short memo on any point which has arisen, and been decided, at a Taxation you or they have attended.

That, I think, is probably the best way of trying to keep in touch with these things, and I will keep the memoranda on a file here.

*KJM*

*Law Society separate body.*

*Cause/opinion regarding  
objections*

JA v. TA

v.

This was a taxation between the Law Society of Scotland and Messrs. Balfour & Manson mainly in connection with entries in the Solicitors' Account of Expenses concerning a Minute of Election and arises out of what construction was to be put upon the terms of Part IIA Undefended Consistorial Actions: Affidavit procedure appearing in the Table of Fees for the Court of Session as amended by Act of Sederunt (Rules of Court Amendment No. 6) (Solicitors' Fees) 1979.

In Table c of the said Part IIA it is provided that an additional sum of £43 of expenses shall be allowed if in the action to which the charge relates there is a conclusion relating to an ancillary matter. It was submitted that it was not clear whether the additional charge was to be £43 no matter how many ancillary conclusions there were or whether there was to be only one additional charge where there was a plurality of ancillary conclusions.

The matter was raised before the Court, and after two By Order Roll hearings Lord Ross delivered a Judgment in which he held that only one additional fee was to be allowed no matter how many ancillary conclusions there were.

The Minute of Election claimed more than one additional fee of £43.

At the taxation the Law Society was represented as were the Solicitors.

The matter was raised, as it were, in the interests of Solicitors generally /

generally to clear up an ambiguity in the Table of Fees. It was not raised in the interests of or at the instruction of the client who was an Assisted Person.

The Law Society contended as follows:-

The entries objected to were not good charges against the Legal Aid Fund standing the provisions of para. 5 of the second Schedule of the Legal Aid (Scotland) Act 1967 which provides that expenses shall be taxed according to the ordinary rules as between Solicitor and client. These charges could not be good against a client let alone a case where a Third Party was paying because the basis of dispute was a matter only affecting the Solicitors' fees. Further if this matter had gone in favour of the Solicitors it would have benefited the Solicitors and not the client so that it was not a matter payable by the Fund. The Law Society pointed out that the Judge had made no order about the expenses of the hearing. The Law Society produced a copy of Lord Ross' Judgment and this is appended to this Note.

The Solicitors on the other hand contended as follows:-

"In order that the matter may be considered further perhaps some history of the background is appropriate. By the introduction of Act of Sederunt (Rules of Court Amendment Number 6) (Solicitors' Fees) 1979 (S.I. 1979 Number 1438) Solicitors were entitled to charge alternative fees in cases which proceeded by way of Affidavit Procedure. In particular it was necessary to decide the applicability of the Table of Fees to ancillary conclusions. By arrangement and at the specific request of the Deputy Principal Clerk of Session, Mr. J. Watson it was considered that this action would be a suitable one to use as a test case

In particular a Minute of Election was prepared to draw the attention of the Court to the ambiguities. In that connection reference was made to /

"to paragraphs 3(a) and (b) of the Act of Sederunt which is the part of the Act which introduces the concept "a conclusion relating to an ancillary matter". It is the interpretation of these words which are the crux of the matter. It was considered that the Act was clearly ambiguous, the difficulty being whether one should interpret the fee of £43.00 for ancillary conclusions as a representation of a fee to cover all ancillary conclusions in the Summons or whether the interpretation was that a Solicitor should be paid an additional £43.00 for each conclusion including expenses. The latter means of charging would have resulted in very large fees being paid to the Solicitors in undefended Consistorial Actions and it was that ambiguity which the Agents wished clarified not only for the profession but also for the Legal Aid Authorities and the public at large.

The Action was accordingly put out by the Court for By-Order and at the initial Hearing His Lordship requested the Legal Aid Central Committee of the Law Society to be represented as His Lordship was well aware that any decision reached would set a precedent for future cases. In fact the implications for the Law Society were of considerable importance and the Agents welcomed the Law Society being represented as it was clearly of assistance to the Court that all interested parties be called to solve the various ambiguities. A further Hearing thereof took place which resulted in the Cause being taken to avizandum. His Lordship decided that only one ancillary fee could be charged no matter the number of conclusions.

In the Solicitors' submissions the Law Society must assume responsibility for the expenses incurred in this test case. It is specifically noted that the matter was called By Order of the Court and the subsequent Hearings also at the request of the Court. The matter being /



being considered was one of interpretation of Table C in view of the ambiguities arising in the Act of Sederunt. It could be said that the Agents partly encouraged by Court Officials were attempting to clarify issues which were the result of indifferent drafting of the Act of Sederunt and reference is made to page 4 paragraphs 2 and 3 of His Lordship's Opinion which, in our view, fully justifies the Agents' attempts to have the matter clarified.

In that the matter was considered at a fairly early stage in the new procedure one would have thought that the Agents should be congratulated for having the matter clarified which clearly ended once and for all the question of charging for separate ancillary conclusion. In our submissions the steps taken by the Solicitors saved considerable expense and difficulties none more so than to the Objectors of these particular charges."

In the light of these contentions therefore, the Auditor must decide the matter.

The point at issue was really raised by the Court ex proprio motu because the matter was doubtful and the Act of Sederunt ambiguous. While it was a matter reflecting the method of charging fees for solicitors and would not normally be chargeable against the client in the circumstances here in the absence of a finding for expenses from the Lord Ordinary the Auditor is of the opinion that the Legal Aid Certificate should cover the expenses incurred by the Solicitors in answering to the Court on the matter.

The Auditor takes the view that a point of this nature which affects many many cases should be able to be decided by the parties on being backed financially by the Law Society who represent the general body of Solicitors.



"W. RUFUS SMITH."