

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

RUTLAND EXCHANGE No. 304

031 225 2595 Extn. 306

The Scottish Legal Aid Board,  
44 Drumsheugh Gardens,  
EDINBURGH.

For the attention of [REDACTED]

7th December, 1988.

Dear Sirs,

AL

MC

[REDACTED] and [REDACTED]  
Reff. 63/01/758116/87 - 63/03/882373/88

The Auditor sends a copy of his Report on the taxation of these two accounts, the principal having been sent to the agents on whose remit the taxation proceeded.

A copy of the Auditor's Note is also sent.

Yours faithfully,

*Janet P. Buck*

Principal Clerk

The Auditor     Evan H. Weir, W.S.  
Principal Clerk     Janet P. Buck

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*Copy*

At the request of Messrs. Shepherd & Wedderburn W.S. in terms of Regulation 17(3) of The Advice and Assistance (Scotland) Regulations 1987, the Auditor has considered the Business Accounts submitted to The Scottish Legal Aid Board in the cases of [REDACTED] (Ref. No. 63/01/758116/87) and [REDACTED] (Ref. No. 63/03/882373/88) and at a diet of taxation he has heard representations by the solicitors and on behalf of the Board. It being agreed that the fees and outlays in the said Accounts are correctly stated and in accordance with the provisions of Regulation 16(1) of the said Regulations, the Auditor taxes the accounts at the sums of NINETY TWO POUNDS AND TWENTY EIGHT PENCE (£92.28) in the case of [REDACTED] and of ONE HUNDRED AND TWENTY POUNDS (£120.00) (being the restricted amount in terms of Regulation 16(2)) in the case of [REDACTED]. To each of the said sums, there will fall to be added Value Added Tax.

EDINBURGH.

7th December, 1988.

*"EVAN H. WEIR"*

The Auditor Evan H. Weir, W.S.

Principal Clerk Janet P. Buck

Note by the Auditor of the Court of Session on questions arising on Section 10 of the Legal Aid (Scotland) Act 1986 and Regulation 11 of The Advice and Assistance (Scotland) Regulations 1987.

A firm of solicitors acted for client A who qualified for advice and assistance under Part II of the Legal Aid (Scotland) Act 1986. The period of their actings, 29th June 1987 to 16th October 1987 (when the client consulted other agents), was covered by The Advice and Assistance (Scotland) Regulations 1987. The financial limit authorised by the Scottish Legal Aid Board was £150, increase to that figure being granted in response to the solicitors' application for an increase to £200. The solicitors submitted an account for £92.28 covering the whole of their work for the client. The Board offered £58.62 being the whole amount of the charges sought under exception only of all charges for work carried out between the point in time at which the charges amounted to a total of £50 until the point in time at which the Board increased the limit to £150. The solicitors sought taxation of their account in terms of Regulation 17(3). The Board declined to associate itself with the reference to the Auditor.

The solicitors also acted for client B, in his case bringing the matter to a satisfactory conclusion. The increase in limit authorised was to £120. The account submitted set out proper charges for their whole work: it amounted to £196.58 but that figure was shown to be restricted to £120, of which sum the solicitors requested payment. The Board offered £83.70 being the amount of the account under exception of all charges for work carried out (as in the case of client A) between the moment at which £50 of charges had accrued to the time when the Board authorised the increase in the limit to £120. The solicitors sought taxation.

For the Board it was contended at the diet of taxation by their representative [REDACTED] that the authority for the disallowance of the charges in question lay in Section 10 of the Legal Aid (Scotland) Act 1986 which provides, by subsection (1)(b):

(The solicitor) "shall not give (advice and assistance)... so as to exceed the limit except with the approval of the Board".

The limit referred to is, by subsection 2, the initial limit there set at £50. Regulation 11 of The Advice and Assistance (Scotland) Regulations 1987 sets out the machinery for obtaining approval for an increased limit.

The Board takes the view, and has always in practice proceeded upon the view that subsection 10(1)(b) of the act required that work involved in giving advice and assistance to a value in excess of £50 did not qualify for payment if it was carried out before an increase in the limit had been approved by the Board. Although the Board's view would have been reinforced if the word "approval" in the Section had been preceded by the word "prior", no other interpretation of the legislation was tenable given that the subsection addressed itself in terms to the doing of work by the solicitor and not to his qualifying thereby for remuneration from the Legal Aid Fund. Furthermore, Mr Anderson submitted, nowhere was there any indication that approval could have retrospective effect.

Mention/

Mention was made of the earlier provisions in this same matter which had in terms required prior approval of those then responsible for the administration of the Fund, the Legal Aid Central Committee of the Law Society of Scotland (see The Advice and Assistance (Scotland) Regulations 1972, Regulation 5(5)). Mr Anderson also pointed to the publication by the Board in the journal of the Law Society (issue of September 1987) of its view and its intended application of that view.

For the solicitors, Mr D.I.K. MacLeod, W.S., submitted that as matter of statutory interpretation, it was not legitimate so to read a provision made by the legislature as if it contained a word accepted to be essential for the precise meaning sought to be put upon it, when that word could readily have been added by the legislature itself. If that cardinal proposition required any buttressing (which Mr MacLeod maintained that it did not), such support was readily available: he pointed to the stipulation of expressly prior approval in regulations made under this same Act - Regulation 14(1) of the Criminal Legal Aid (Scotland) Regulations 1987; Regulation 21(1) of The Civil Legal Aid (Scotland) Regulations 1987; and Regulation 12(1) of these same Advice and Assistance Regulations 1987. The position of the Board in this matter was weakened rather than strengthened by the specification of "prior approval" in the 1972 Regulations referred to: what was significant was that in the present Regulation the "prior" qualification had been departed from. For such relevance as it might have, it was to be noted that, as conceded by [REDACTED] and as was indeed general knowledge in the legal profession, the Central Committee itself had not in practice insisted on such prior approval, although it was accepted on both sides that the Board is not bound at all by the practice of its predecessors.

Mr. MacLeod further contended that if the Board's interpretation of the subsection were correct, it led to consequences which were totally unacceptable to the Law of Scotland and in political terms inconceivable. If the Board was correct, Parliament required a solicitor providing advice and assistance to his client in terms of the Act, to stop short as soon as that charging clock struck £50, to lay down his pen, to break off the interview or the telephone call, reporting to his client that as his funding had ceased, he the solicitor was forbidden to do any further work for him meanwhile until the Board should feed the meter with further financial authority. In the meantime his duty as solicitor to take reasonable care for his client's interest was statutorily discontinued as Sections 10 and 11 of the Act, taken together, had the effect of preventing him from acting further in the matter on the normal professional basis. However ludicrous that scenario might be as matter of general law, Mr MacLeod submitted, it was also in direct conflict with Section 31 of the Act which provided by subsection (7)

"Except in so far as expressly provided under this Act, the fact that the services of counsel or a solicitor are given by way of legal aid or advice and assistance shall not affect the relationship between or the respective rights in that connection of counsel, solicitor and client."

As it happened, the cases before the Auditor were not ones in which action had been critically necessary for the clients at the moment when the work for them had brought the charges over the limit, but in each it could fairly be said that continuing work immediately beyond that point had been desirable from the client's point-of-view/

point-of-view and reasonable as seen by the solicitor.

This consideration was referred to [REDACTED] who explained that at the present time the Board was managing to process expeditiously applications for increased authority (and in this respect, significantly improving its performance record). But he agreed that the Board was not in a position to undertake that applications for increases in authorised expenditure would always be so processed as to eliminate the possibility of prejudice to the client's interests if solicitors were forbidden to act at all while an application was under consideration.

The solicitors submitted that Section 10 fell to be read as relating rather to the qualifications of solicitors for remuneration for their services than to the performance of service for the client in accordance with their recognised legal duty; and that "shall not give (advice and assistance) so as to exceed that limit..." is properly to be read as "shall not carry out work so as to qualify for payment in excess of that limit..." In the present cases, they had qualified for payment which was not in excess of the limit as approved in each case and in one of them had demonstrated the acceptance of restriction of their remuneration to that limit notwithstanding their performance of work to which greater charges could properly be attached.

The Auditor is of opinion that the Scottish Legal Aid Board has misdirected itself in interpreting Section 10(1)(b) as if the word "prior" appeared before "approval". If a solicitor has carried out work for a client within the period in which the client is in receipt of advice and assistance in pursuance of Part II of the Act, he is entitled to recover such fees therefor and such outlays as are appropriate and in accordance with Section 10(3) up to the amount of, but not exceeding, the limit authorised by the Board notwithstanding that part of the work shall have been done prior to the solicitor's receipt of advice from the Board of such authority. While the terms in which Section 10(1)(b) is couched are in the Auditor's opinion quite peculiarly infelicitous, he is not prepared to follow the Board in an interpretation from which it necessarily follows that pending the Board's approval of an increase in authorised expenditure, the solicitor is relieved of his duty under the Law to his client and the client is cut off from the protection afforded him by his engagement of a solicitor. The preferred interpretation does not require the importation of a significant feature presently not expressed; it leaves intact the solicitor's duty to the accepted client (which has never depended upon any certainty of remuneration) and the protection of the client sought to be assured by Section 31(7); it secures for the public funds administered by the Board the restriction to the limits of cost which the Board has itself set; and it reins the solicitor back from excessive work during the period of the Board's consideration of his application for an increase in funds by making payment for any work done then dependent on the success of the application. Further the preferred interpretation does not involve any element of retrospectivity. In Subsection 10(1)(b) "approval" can only be read as/

as relating to "advice and assistance". But the Board does not approve of solicitors' work: if it were doing so, subsequent approval would indeed require to be retrospective to validate work done earlier. But as the Regulations make clear, what the Board approves of is a solicitor's application for an increase in the limit: if the Board does approve of the application, its act is to increase the limit, or perhaps to authorise an increase in the limit. An increased limit, or an authorised increase in the limit, defines a quantity: it does not require to be a retrospective increase or a retrospective authority to allow the quantity to embrace past work as well as future: work done in giving advice and assistance falls within the permitted quantity without any necessary relationship in time between the doing and the defining of the quantity.

The two accounts are accordingly taxed at £92.28 and £120.00 respectively, the said sums being exclusive of VAT.

" E. H. W. "

THE SCOTTISH LEGAL AID BOARD  
ADVICE AND ASSISTANCE (CIVIL)

FOR OFFICIAL USE  
DATE OF RECEIPT: .....

NOTE: On initial completion, this form to be submitted IN DUPLICATE to the Board within fourteen days.  
When submitted with Account, or on no-claim being made, the reverse to be completed as appropriate.

Solicitor's Name and Address (complete within box)  
**Messrs Shepherd & Wedderburn WS**  
**17 Charlotte Square**  
**Edinburgh**  
LEGAL AID CODE NUMBER: 01244  
Solicitor's Reference: AMS

PART I: DETAILS OF APPLICANT (Use block capitals)  
Surname: Mr/Mrs/Miss/... XXXXX  
Forename(s): .....  
Address: .....  
Subject Matter: (Full details of all matters arising to be given)  
**ACCESS**

PART II: DETERMINATION OF MEANS  
Does the Applicant receive Supplementary Benefit or Family Income Supplement? YES  NO  (If YES, complete Capital only)

NET CAPITAL (to nearest pound)	Allowance for -	WEEKLY INCOME (less Income Tax and National Insurance Contribution) £-	Allowance for: Spouse
Applicant	Spouse	Applicant	Child aged .....
House	Other dependants (specify)	Spouse	Child aged .....
A	B	Child Benefit	Child aged .....
SPOSABLE CAPITAL (A minus B)		C	Other dependants (specify)
			Maintenance payments made
			D
CONTRIBUTION		DISPOSABLE INCOME (C minus D)	

PART III: DETAILS OF OTHER RELEVANT LEGAL AID (Reference Number or full information to be given, on a separate sheet if necessary)  
Has the Applicant previously received Advice and assistance on this matter? NO  
Has the Applicant applied for or received Legal Aid on this matter? NO  
Does the Applicant have the same interest in this matter with any other person or body? NO  
Does the Applicant have liabilities for assistance (such as through Trade Union, Motoring Organisation, or Insurance) Ansd. NO

RECEIVED  
A & A ACCOUNTS  
- 4 NOV 1987

PART IV: D  
I undertake to pay a Contribution of £ NIL in connection with this matter may be subject to a deduction in respect of my Solicitor's charges. I declare that the information on this form, particularly in PARTS II and III, is correct to the best of my knowledge and belief and I understand that there are criminal penalties for false declarations.  
Signature of Applicant: [Signature] Address of authorised person: .....  
Date of signature (and commencement) 29th June 1987

PART V: CERTIFICATE (for completion by Solicitor, but see NOTE)  
I hereby grant the foregoing Application under the Legal Aid (Scotland) Act 1986, on the understanding that the information provided by the Applicant in Parts II and III is correct.  
30th June 1987  
Signature of Solicitor: [Signature]

NOTE: Where an Applicant has had previous Advice and Assistance on the matter under the Scheme, the Solicitor may not grant the Application prior to receiving the consent of the Board (Regulation 11, Advice and Assistance (Scotland) Regulations 1987.)

FOR OFFICIAL USE: AUTHORIZED BY: MB  
REFERENCE NUMBER: B.3/01/758116/87

[Handwritten signature]

STATEMENT BY SOLICITOR ON COMPLETION

This part of the form must be completed, and sent to the Board as soon as the work is finished. No covering letter is required. If no claim is being made, Section A should be completed. Otherwise, the questions should be answered and the Certificate signed in Section B. Full details should be given where applicable. If a claim is being made, the following documentation should be submitted as appropriate:

- (a) a copy of any statement or recognition claimed for;
- (b) voucher(s) for any outlays;
- (c) a copy of any Correspondent's Account;
- (d) any Faculty Services Fee Note(s);
- (e) any authorisation(s) by the Board of an increase in expenditure;
- (f) any Application to the Board under Reg.14(2).

(Complete where no claim is to be made)

I make no claim in respect of this Certificate

Date ..... Signature of Solicitor .....

(Complete where claim is made)

1. Was any money or property, or were expenses recovered or preserved?  
.....
2. If not, was the subject matter of the Advice and Assistance likely to lead to a settlement being achieved? (If so, the full reasons for submitting the Account at this stage must be given):  
.....
3. Has the subject matter proceeded, or is the subject matter likely to proceed to an Application for Civil Legal Aid?  
 YES  NO

**CERTIFICATE**

Having made the necessary enquiries, I certify that the items charged in the Account are accurate and represent a complete record of the work done, and further that these items have not been charged in any other Account.

Signature of Solicitor .....

Part VII: Final limit of authorised expenditure (if basic leave blank)

150

Part VIII: For completion by Central Committee

VAT RATE	STANDARD		EXEMPT		PREVIOUS	
Solicitors FEES	56	46				
OUTLAYS	2	16				
POSTS						
CO(unsels) FEES						
FACULTY						
Grand TOTAL	58.62					

(M)ale  (F)emale

Contribution  NIL



ADVICE AND ASSISTANCE (SCOTLAND) CIVIL  
Request for an increase in authorised expenditure

RECEIVED  
10 AUG 1987

Part A to be completed by Solicitor in duplicate. Both copies to be submitted to the Board. (No covering letter required. One copy will be returned to Solicitor with Board's decision thereon).

PART A

Messrs Shepherd & Wedderburn WS  
17 Charlotte Square  
Edinburgh

Solicitor's name and address. (Complete in typescript within box above.)

\*Reference No: 63/01/758116/87

\*Form AA/1 attached

Applicant's Name: [REDACTED]

Solicitor's Ref: AMS

Date of Request: 7th August

Total authorised expenditure sought: £200

\*Delete as appropriate

Please state here reasons for request (continue on reverse if necessary).

We have been consulted by [REDACTED] in connection with a problem regarding access to his two children. He was divorced in July 1986 and his wife was awarded custody of the two children of their marriage. Since then his wife has refused to allow him to exercise access to the children although an agreement to this effect was reached between the solicitors at the time of the divorce. We require to proceed with an application to the Court for an award of access and we require to obtain Statements from witnesses supporting the application.

Signed [Signature]

PART B

DECISION OF BOARD ON ABOVE REQUEST

Authorised expenditure increased to: £150

~~Request for an increase in authorised expenditure refused~~

Date: 13 August 1987

Signed [Signature]  
for and on behalf of the Board

to

Messrs Shepherd & Wedderburn WS Edinburgh

Legal Aid Code 01244

1987					
June	29	Attendance meeting with you when you arrived without an appointment and we discussed with you the question of access to your children. Eng. ½ hr.		£ 14	80
June	30	Writing Messrs Stenhouse Husband and Irvine your ex wife's agents on the question of access and discussing the exercising of same.		3	50
		Writing you reporting steps we have taken.		3	50
July	8	Writing your ex wife's agents acknowledging their letter and noting what they say; advising that if this matter cannot be agreed on a voluntary basis we shall proceed to raise the appropriate action in Court.		3	50
		Writing Messrs Maurice Kidd and Co your former agents outlining relevant details and requesting papers relating to the earlier divorce.		3	50
		Writing you reporting developments and enclosing copy letter we have received from your ex wife's agents.		3	50
		Making copy same.		0	49
July	12	Attendance at telephone with you arranging appointment (you did not subsequently appear).		2	30
July	15	Attendance at telephone with you arranging a further appointment when you also failed to appear.		2	30
July	21	Attendance meeting with you when you advised that you wished to proceed with your access claim and discussing. Engaged 15 minutes.		8	88
July	30	Attendance meeting with you when we advised that your former agents would release the paper on payment of an earlier advice and assistance contribution; when you gave us details of your current employment and when you advised you had now changed your address; discussing the question of access. Eng. 20 minutes.		8	88
July	31	Agency completing mandate.		2	96
		Carried Forward		£ 58	11

Brought Forward

£ 58. 11

31 Writing Maurice Kidd & Co your former agents therewith.

2 30

Writing you reporting steps we have taken and stressing the importance of you paying the Legal Advice and Assistance contribution incurred to your former agents to enable them to release the papers to us so that we can proceed with your claim for access to the children.

3 50

(N.B. the £34 Advice and Assistance contribution in fact relates to a criminal matter in which the former agents were acting).

Aug. 7 Writing your former agents acknowledging the papers in relation to your action of divorce.

2 30

Writing you advising we have now received the papers and discussing your claim for access.

3 50

Perusing papers received engaged 10 mins.

5 92

Writing the Advice and Assistance Department for an increase in the authorised expenditure and outlining reasons why this is necessary.

3 50

1-43 Aug. 7 Writing you a reminder to our previous letter.

2 30

*Restricted to £500 & so increase not relevant*

Sept. 23 Attendance when you called in to the office without an appointment and a further appointment was arranged - you again failed to turn up.

2 96

Oct. 16 Writing Messrs Coutts and Palfrey noting you have now instructed them, advising them of the position and passing over papers which we hold.

3 50

Allowance for postages and incidental expenses.

4 39

*VERIFIED*  
92. 28  
£ 981. 11

*OVER*

*Fees 56-46*

*posts 2-16*