

SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN.

GENERAL
10 MAR 1989

MILNE MACKINNON & PETERKINS

against

THE SCOTTISH LEGAL AID BOARD

B2/12/87

ABERDEEN, 7 March 1989. The Sheriff having resumed consideration of the cause Repels the Objections and Approves the Account of the Objectors as taxed at SIX HUNDRED AND FIFTY POUNDS - 47p STERLING (£650.47).

David Kelbert

NOTE

This dispute arises out of the granting of Legal Aid to a natural mother who opposed an application by Grampian Regional Council for a freeing for adoption order in respect of her child. Those proceedings have been concluded and neither she nor Grampian Regional Council are interested in the current dispute. The dispute is between her nominated solicitors (the Objectors) and the Scottish Legal Aid Board (the Board).

Regulation 9 of the Civil Legal Aid (Scotland)(Fees) Regulations 1987 provides:-

"(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, the matter shall be referred for taxation by the Auditor.

.....
"(3) The Board and any other party to a reference to the Auditor under paragraph (1) above shall have the right to state written objections to the Court in relation to the Auditor's Report within 14 days of the issue of that report, and may be heard thereon;"

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There being a dispute between the solicitors and the Board in this case, the account has been referred for taxation. At the taxation, the Auditor deducted fees amounting to £92.06 claimed by the Objectors for work/ ^{done} between 13 April and 8 May 1987. This work related to preliminary work, such as the obtaining of precognitions and reports and the preparation and submission of the Legal Aid Application. The Application was submitted on 8 May 1987 and granted on 11 May, although the Certificate was not, in fact, issued until 13 October 1987, by which time the freeing order had been granted and the proceedings in respect of which it had been granted were at an end. The Certificate, as issued, bears to state "Effective Date of Certificate: 11/5/87".

It is a matter of agreement that the fees which have been taxed off would have been paid, even though the work was done prior to the effective date of the Certificate, under the old system of Legal Aid which pertained prior to the Legal Aid (Scotland) Act 1986. The Auditor's Note in explanation of his refusal to allow the fees simply states:-

"At the diet of taxation the law agents objected to the refusal by the Legal Aid Board to pay for work prior to the effective date when the Board had decided to make legal aid available under the Regulations in the Act. The representatives from the Legal Aid Board advised me that they had presented a Memorial to Senior Counsel and the Secretary of the Board made available to me a copy of his Opinion under a pledge of confidentiality. They made it clear to me that they would accept only a judicial determination and in the circumstances I have taxed off certain items and the Law Agents have the opportunity to proceed as accords".

In his submissions, Counsel for the Objectors referred me to the old system. In the Legal Aid (Scotland) Act 1967, Section 1 provided:-

"(5) Legal Aid shall consist of representation, on the terms provided for by the Act -

(a) by a solicitor and so far as necessary by Counsel (including all such assistance as is usually given by Solicitor or Counsel in the steps preliminary or incidental to any proceedings

(6) A person shall not be given Legal Aid in connection with civil proceedings unless he shows that he has a probabilis causa litigandi and may also be refused Legal Aid in any such proceedings as aforesaid

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if it appears unreasonable that he should receive^{it} / in the particular circumstances of the case".

In the Legal Aid (Scotland) Scheme 1958, Article 14(1) provided:-

"A person shall not be entitled to Legal Aid until he has obtained a Legal Aid Certificate in accordance with the provisions of the Scheme or an emergency Certificate under the Regulations".

Regulation 16(2) provided:-

"Subject to the provisions of the Regulations, the Supreme Court Committee or Local Committee, as the case may be, shall issue a Legal Aid Certificate and determine the date as from which it shall have effect:

Provided that -

(a) the effective date of a Legal Aid Certificate shall be the date of receipt of the Application for Legal Aid by the Committee concerned or such later date as the Committee shall think fit having regard to all the circumstances of the Application;"

Thus, at paragraph 6-04 of the Second Edition of his book on "Legal Aid in Scotland", Charles N. Stoddart (now Sheriff Stoddart) states as a general principle that:-

"any work done by the Solicitor before a Legal Aid Certificate (of whatever type) is granted is generally not work done under Legal Aid"

Counsel for the Objectors, however, referred me to that passage and the first qualification to the general principle stated in paragraph 6-04. That is that:-

"(a) If the applicant is in receipt of legal advice and assistance, all the preparatory work necessary for amassing the information needed to support and complete a Section 1 Application may be done under the Legal Advice and Assistance Scheme; but even if the Applicant is not so assisted, the cost of obtaining precognitions to establish a probabilis causa litigandi, provided they are used subsequently in the proceedings, and the cost of submitting the Application will be borne by the fund if Legal Aid is granted."

Counsel sought to found on that qualification, arguing that it still applied. The authority for the qualification, according to his submission, was the definition of "Legal Aid" in Section 1(5) of the 1967 Act (supra). If Legal Aid were granted, he

argued, then it covered "all such assistance as is usually given by a Solicitor in the steps preliminary or incidental to any proceedings." In the 1986 Act, the definition of "Civil Legal Aid" is in broadly similar terms, to be found in Section 13(2):-

"In this Act, "Civil Legal Aid" means representation by a Solicitor and (so far as is necessary) by Counsel in any proceedings mentioned in Part I of Schedule 2 to this Act, on the terms provided for in this Act, and includes all such assistance as is usually given by Solicitor or Counsel in the steps preliminary to or incidental to proceedings"

Just as before, if Civil Legal Aid is granted it must include "all such assistance as is usually given by a Solicitor or Counsel in the steps preliminary to or incidental to proceedings" Thus the qualification to the general principle referred to by Sheriff Stoddart still applies.

The submission fails, however, as I do not consider Section 1(5) of the 1967 Act ever to have been the authority for the qualification to the general principle. It did not state what must be covered by Legal Aid but what might be covered. Even if no authority could be found for the qualification elsewhere I would not have been persuaded that Section 1(5) was any authority for it. The qualification can, however, be explained without reference to that Section. In the first place, it is to be noted that the qualification is limited to the cost of two items, viz., (1) the cost of obtaining precognitions to establish a probabilis causa litigandi, provided they are used subsequently in the proceedings and (2) the cost of submitting the application if Legal Aid is granted. It is important to note the proviso to the first of these items. It is the fact that the precognitions are used subsequently in the proceedings which justifies payments, presumably on the basis that if they are used then they ought to be paid for. In any event, if the submission of Counsel for the Objectors was correct, there would have no such proviso.

In relation to the second item, Counsel for the Objectors referred me to Section 6(5) of the 1967 Act which provided:-

"Where, on an Application for Legal Aid under Section 1 of this Act in connection with any proceedings, the

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appropriate authority decide that the Applicant is (subject to the issue and acceptance of a Legal Aid Certificate) entitled to Legal Aid for the purpose of those proceedings, any solicitor who has acted for the Applicant in preparing and submitting the Application shall, for the purposes of the last foregoing sub-section, be deemed, when so acting, to have been acting for a person receiving Legal Aid, notwithstanding that a Legal Aid Certificate is not issued and accepted."

This, he submitted, was a saving provision for a Solicitor whose client was offered Legal Aid but who did not accept it. He would be paid, ^{notwithstanding} that a Legal Aid Certificate is not issued and accepted".

This pre-supposed ^a right to the Solicitor of a client, who had accepted, to be paid and the only authority for that was Section 1(5). In my view, however, Section 6(5) is authority for payment both to the Solicitor whose client has accepted the offer and to the Solicitor whose client has not. The sub-section indeed, makes perfect sense without the last clause. It is that last clause which is the saving provision for the Solicitor whose client has not accepted, giving him the right given in the preceding part of the sub-section to the Solicitor whose client has accepted.

Indeed, the use of the word "deemed" indicates clearly that a Solicitor preparing and submitting an Application could not be regarded in reality as acting under Legal Aid.

It was accepted by Counsel for the Objectors that there are no provisions equivalent to Section 6(5) in the new Legal Aid provisions.

Accordingly, of the two items referred to by Sheriff Stoddart as qualifications to the general principle, which was really what was being founded upon by the Objectors, the second item was vouched by a Statutory Provision which has not been repeated and the first involved a proviso, use of the precognition in the subsequent proceedings, which was not put to me as having occurred in the present case. Accordingly, I cannot hold that the Scottish Legal Aid Board were bound to pay the disputed fees in this case on the same basis as they would have been paid under the old system.

That need not end the matter, however, as it might be that the disputed fees fall to be paid in terms of the new provisions, and I heard argument on their interpretation. I have quoted the definition of "Civil Legal Aid" in Section 13(2) of the 1986

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Act above. Section 14 of that Act provides:-

"(1) Subject to Section 15 of this Act and to sub-section (2) below Civil Legal Aid shall be available to a person if, on an application made to the Board

(a) the Board is satisfied that he has a probabilis causa litigandi; and

(b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive Legal Aid.

(2) The Board may require a person receiving Civil Legal Aid to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive Civil Legal Aid".

Section 15 deals with financial conditions for Legal Aid. There is no equivalent to Articles 14(1) and 16(2) of the 1958 Scheme. Section 36 gives a power to the Secretary of State to make regulations. In particular, sub-section 2(h) gives him power to:-

"modify any provision of this Act so far as appears to the Secretary of State necessary to meet any of the special circumstances mentioned in sub-section (3) below".

Sub-section (3) includes among such circumstances, the situation where a person:-

"(f) begins to receive Legal Aid or advice and assistance after having consulted a solicitor in the ordinary way with respect to the same proceedings, or ceases to receive Legal Aid or advice and assistance before the proceedings in question are finally settled;"

The Secretary of State has exercised that power by enacting Regulation 18A of the Civil Legal Aid (Scotland) Regulations 1987 which provides:-

"(1) Where in relation to any proceedings -

(a) any step mentioned in paragraph (2) below has required to be taken (as a matter of urgency in order to protect the applicant's position in those proceedings) before an Application for Legal Aid is determined by the Board; and

(b) the Application is granted by the Board,

the Legal Aid made available shall include Legal

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Aid in relation to any such step.

(2) The steps to which paragraph (1) above applies are -

(a) entering appearance or lodging Notice of Intention to Defend or appear;

(b) moving that the action be sisted to enable an Application for Legal Aid to be determined by the Board; and

(c) where the Court requires it, lodging Defences."

According to Counsel for the objectors, Section 14(1) means that, subject to sub-section (2) and Section 15, a person is entitled to Legal Aid at any time when he has probabilis causa litigandi and it is reasonable for him to get Legal Aid, always provided that he makes an Application to the Board and the Board is satisfied as to these points. The Board's error was to equate the word "if", which simply introduced a clause of condition with the word "when", which imported a condition as to time. Indeed, the Board's Answers to the Note of Objections states their view that:-

"Civil Legal Aid as defined in Section 13 is available to a person in terms of said Section 14(1) only when the Board is satisfied that he has a probabilis causa litigandi and that it is reasonable that he should receive Legal Aid."

Indeed, the Answers for the Board simply stand by that interpretation of Section 14(1), adopting the stance that the Board did not grant Legal Aid for anything done earlier than 11 May 1987 because it was only on 11 May 1987 that the Board became satisfied as to probabilis causa litigandi and reasonableness, and there was no power to make Legal Aid available for work done at an earlier date.

The former provisions do not assist the construction of Section 14(1). Section 6(1) of the 1967 Act (supra) provided that Legal Aid "shall not be given" to a person "unless he shows" probabilis causa. I think there would have been nothing to stop Legal Aid being "given" retrospectively, but Article 16(2) of the 1958 Scheme limited that. Counsel for the Board argued that the power given to the Secretary of State in Section 36(2)(h) to cover the "special circumstances" in sub-section (3)(f) demonstrated that the "special circumstances" otherwise

fell outwith the terms of the 1986 Act. He submitted that the Act envisages blocks of time when a person may be legally aided and others when he is not, which indicates that it is anticipated that Legal Aid will not cover the preliminary steps. I am unconvinced by that. Firstly, the fact that "circumstances" are described as "special" does not mean that they are not circumstances which are covered by the Act and, secondly, there may be any number of reasons why a person may have Legal Aid available at one time and not at another. It is not uncommon for a litigant's financial situation to vary, depending on whether or not he is earning. Even if the Board has power to make Legal Aid available retrospectively, they need not do so if they are not satisfied that it is reasonable.

Counsel further argued that if the Board had power to grant Legal Aid to cover a period prior to its being satisfied as to probabilis causa and reasonableness there would have been no need for Regulation 18A. The Regulations form part of the frame-work within which the Act is intended to operate and the Act must be construed accordingly. Again I am not persuaded by this submission. In the first place, the regulations do not form the frame-work for the Act. The Act forms the frame-work for the regulations. The regulations did not exist when Parliament passed the Act. It is, unfortunately, not at all unheard ^{of} for a Minister promulgating regulations to mis-construe the governing Act. But in any event, Regulation 18A is perfectly consistent with either interpretation of Section 14(1). The Regulation makes for certainty in providing for what "shall" be included in the grant of Legal Aid, without derogating from the possibility that the Board might have a discretion to grant it anyway.

In the end of the day, it appears to me that there is not very much outside the terms of ^{the} sub-section itself to indicate the meaning of Section 14(1). On a consideration of the words of the sub-section themselves I find the matter not without difficulty. The question to be asked at any given time is - "Is Legal Aid available to this person?". The Board's view is that that question cannot be asked before

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the Board has considered the application so that the question of the Board being satisfied or not has to come first. The Board is only entitled to be satisfied about the present situation. The objector's view seems to be that the question "Is Legal Aid available to this person?" can be asked at any time, whether or not the Board have considered it, and, in particular, may be asked at the time that work is being done by solicitor or counsel. It is the Act and not the Board which makes Legal Aid available. The word "if" introduces an conditional clause that, on an application made to the Board, the Board has to be "satisfied". The present tense of "is satisfied" and "it appears" refers to the time when the application is made. The words "shall be available" are dependent upon the fulfilment of the condition but not upon the time the condition is fulfilled. The Board may have to be satisfied that he "has a probabilis causa litigandi" at the time they consider the question. It has to appear that it "is reasonable" that he "should receive" Legal Aid.

While "is reasonable" may refer to the time it "appears", "should receive" can equally well refer to the time when work was done and the question asked.

I find that I prefer the latter interpretation as sensible and reasonable although the grammatical analysis is not immediately obvious. Legal Aid is not "given" or "granted" by the Board.

It "shall be available" in terms of the Act. That depends upon a condition introduced by the word "if". The word "when" is not synonymous with "if". If a client consults a solicitor and asks "Is Legal Aid available to me?" the solicitor, on checking the financial conditions, may properly answer "Yes it is, if, on an application made to the Board, the Board is satisfied that you have a probabilis causa litigandi and it appears to the Board that it is reasonable in the particular circumstances of the case that you should receive Legal Aid." If the solicitor then does work which falls within the definition of "Civil Legal Aid" and applies to the Board, there appears to me no reason in terms of Section 14(1) why the Board should not issue a Certificate and pay for the work, if it appears reasonable. Obviously the Board would not do so if not satisfied that there was a probabilis causa litigandi. The question of reasonableness would be wide enough to encompass

the lateness of the application in relation to the work done.

This interpretation of the Act would also explain why the very sensible provisions of Section 6(5) of the 1967 Act have not been re-enacted. There is no need for such provisions if the terms of Section 14(1) are already wide enough to cover the tendering of the application itself. On the other hand, I find it hard to believe that Parliament could have intended that such work, reasonably undertaken, should not be paid for.

In my view, therefore, the terms of Section 14(1) are wide enough to permit of the Board issuing a certificate to cover a period when work falling within the definition of "Civil Legal Aid" was provided for a person at a date prior to its being satisfied as to probabilis causa and reasonableness, always provided that an application has been made and that the Board is satisfied that there is a probabilis causa litigandi and that it appears reasonable that the person should receive Legal Aid. In relation to this case, it was, in my view, open to the Board to grant a certificate with an effective date earlier than 11 May 1987.

That, however, does not greatly assist the objectors in this case. Counsel for the objectors accepted that this interpretation of Section 14(1) had nothing do with the limited qualification to the general principle which applied under the old system. If section 14(1) is wide enough to permit a back-dated certificate to cover work done even before the application, that would apply to any work which satisfied the definition of "Civil Legal Aid" and the application could be submitted long after the litigation was commenced. He conceded that, in these circumstances, the Board would be perfectly entitled to fix a date after which it was reasonable that the applicant should receive Legal Aid and before which it was not. The Court would be bound by the Board's decision as to the appropriate date.

In the present case, it would appear that the Board, erroneously in my view, did not think it had power to issue a Certificate to cover a period earlier than 11 May 1987. I do not know what decision would have been made if the Board had considered

doing so. I do not sit, in these proceedings, with an appellate function in relation to a refusal to grant a certificate. This is a hearing on a taxation of an account in terms of the certificate which has been issued. The effective date of the certificate which has been granted is 11 May 1987. Since the items in dispute relate to work done before that date the Auditor was correct to refuse them. Accordingly I repel the objections and approve the amount as taxed.

David Kelbra