

JULY, 1989
J. HALSDALE J.B.S.
J.I. AUDITOR
SHERIFF COURT

NOTE : RE [REDACTED]

MC

The foregoing advice and assistance account was submitted to me for taxation in terms of Regulation 17(3) of The Advice and Assistance (Scotland) Regulations 1987 and is to be taxed in accordance with Regulation 16 which provides in paragraph (2) "the fees and outlays allowable to the solicitor under paragraph (1) above shall not exceed the limit applicable under Section 10 of the Act as read with Regulation 11".

"The Act" means the Legal Aid (Scotland) Act 1986, Section 10 of which provides;

(1) Where at any time (whether before or after advice and assistance has begun to be provided to a client) it appears to the solicitor that the cost of giving it is likely to exceed the limit applicable under this section -

(a) the solicitor shall determine to what extent that advice and assistance can be provided without exceeding that limit; and

(b) shall not give it (or, as the case may be, not instruct counsel to provide it) so as to exceed that limit except with the approval of the Board.

(2) The limit applicable under this section is £50.00.

Regulation 11 provides :

(1) Where at any time it appears to the solicitor that the cost of giving the advice/

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.

(2) The Board, if it approves an application made under paragraph (1) above:-

- (a) shall authorise such increased limit as it thinks fit; and
- (b) may require that the advice and assistance be subject to such conditions, and limited to such subject matter, or, in the case of assistance by way of representation, such proceedings (or stages of proceedings), as it thinks fit.

(3) The Board shall inform the solicitor of its decision in regard to an application under paragraph (1) above.

(In the instant case advice and assistance commenced on 14th December 1987. and it was conceded that the initial limit was exhausted by 6th January 1988.

On 18th January 1988 an application for an increased limit was submitted and granted on 22nd February 1988.

Advice continued to be given throughout the period from 6th January 1988 to 6th March 1988 when advice ceased to be given.

When:

When the account was submitted to the Scottish Legal Aid Board for payment its taxation department proposed to abate the account by taxing off all charges for work done between 6th January 1988 when the amount of the initial limit between was exhausted and 22nd February 1988 when the Board approved the application and authorised an increased limit of £120.00.

Mr D.I.K. MacLeod, WS. of Messrs Shepherd and Wedderburn WS appeared for the solicitor and Mr Keith Marshall, solicitor, appeared for the Scottish Legal Aid Board.

Mr MacLeod submitted that on a proper construction of Section 10 of the Act read together with Section 31 (7) of this Act the solicitor was entitled to be remunerated by the Board under the advice and assistance certificate up to the amount of the increased limit irrespective of whether notification of such increase was given before or after the lower limit had been exceeded.

Section 31(7) states:

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.

In support of that submission Mr McLeod pointed out that in the comparable Regulation 5(5) under Section 3 of the Legal Advice and Assistance Act 1972 the word "prior" appeared before the word "authority" to exceed the limit. It was/

was agreed that Section 10 of the 1986 Act echoes the wording of Section 3 of the 1972 Act. Mr MacLeod further submitted that the effect of Section 31 (7) of the 1986 Act was to preserve the relationship between solicitor and client which was not to be prejudiced by the granting of advice and assistance, and, that the relationship would be prejudiced if the solicitor had arbitrarily to stop doing further work for the client as soon as the permitted limit was exhausted, irrespective of whether or not the necessary work in hand had been completed. Mr MacLeod also drew attention to a number of other Regulations made under the 1986 Act, relating to other matters, in which the word "prior" appeared, namely :

1. Regulation 12 of the Advice and Assistance (Scotland) Regulation 1987, and
2. Regulations 14, 21 and 22 of the Civil Legal Aid (Scotland) Regulations 1987

and he concluded that in consequence of the absence of the word "prior" in Regulation 11 of the 1986 Act, which had been present in the analagous Regulation 5(5) made under the 1972 Act, it followed that the obtaining of prior approval of increased expenditure was not necessary before carrying out further work.

Mr Marshall in response relied on the terms of Section 10 of the Act which he said were clear and unambiguous and did not require recourse to any other statutory provisions for their construction.

Mr Marshall further submitted that the word "prior" in Regulation under the 1972 Act had been superfluous and therefore no inference could be drawn from its,

its absence in the present Regulation.

Section 10 provides "where at any time (whether before or after advice and assistance has begun to be provided it appears to the solicitor that the cost is likely to exceed the limit applicable under the Section 10(1)(a) the solicitor is to determine to what extent the cost of giving the advice and assistance is likely to exceed that limit applicable under the Section; and (b) shall not give it (...) so as to exceed that limit without approval of the Board" - (emphasis mine).

A In my opinion on a literal construction of Section 10 the prior approval of the Board is required, because to construe the Section otherwise would render meaningless the specific injunction not to give advice so as to exceed that limit except with the approval of the Board. That can only mean that prior approval is necessary otherwise giving such advice given beforehand would breach the mandatory instruction not to give it.

I do not consider that this interpretation results in a conflict with the safeguard contained in Section 31 (7) of the Act, because the relationship between the solicitor and client is not affected by the requirement that the former previously obtains from the Board approval of an increased limit before giving further advice and assistance, since no prudent solicitor would, having been authorised by his client to spend only £50, exceed that sum without having informed the client of the likely further costs involved and obtained his permission to incur these. B

On first consideration it may appear that there can be no harm or loss to Legal Aid.

aid Fund if at the end of the day a solicitor is paid to the amount of the ultimately approved limit even if some of the work was done in the period when a lesser limit had been exhausted and authorisation of an increased limit was awaited.

However, as has been said by Lord Morris of Borth-y-Gest "The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision". Shop and Store Developments Ltd. -v- I.R.C (1976) A.C. 472.

The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient.

Gwynne -v- Burnell (1840) 7 CL & F 572.

It is not for me to opine why Parliament chose the procedure which it did, suffice to say it so chose and in my opinion it would be tautologous to insert the word "prior" before "approval" in Regulation 11.

It has also to be noted that in terms of Regulation 11 (2) the Board, if it grants approval to an increased limit, may require the advice and assistance to be subject to such conditions, and limited to such subject matter ... as it thinks fit. Such control must be regarded as prospective and not retrospective in effect and is a further reason for rejecting the submission which I do.

I have therefore taxed the account having disallowed the charges for work done in the hiatus between the exhaustion of the initial limit and the authorisation of the increase.

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