

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
RUTLAND EXCHANGE No. 304
031 225 2595 Extn. 309

ADDITIONAL FEE

for Pursuer

in causa

ABS

KH

██████████ A.P. v. ██████████

EDINBURGH. 13th May 1993. The Auditor has been requested to fix the amount of the additional responsibility fee awarded to the solicitors for ██████████ by Interlocutor of 24th September 1992 in terms of Rule of Court 347(d) heads (1), (2), (3), and (5).

1. ██████████ raised an action of reduction in the Court of Session by Summons signetted on 10th October 1989. The action arose out of the First Defenders, ██████████, having obtained a decree for payment of £3,798.29 against ██████████ in March 1988. ██████████ was called as a defender in that action, it being averred that she held herself out as a partner of that firm.

2. A Charge was served in terms of the decree, of which Charge ██████████ averred she was unaware, and following on expiry of the days of Charge ██████████ received service of an Initial Writ seeking sequestration of the Ambassador Blind Company, ██████████ and her mother, ██████████, Third Defender in ██████████ action of reduction. ██████████ traded as ██████████. ██████████ undertook to sort out the mistake of her daughter, ██████████, being treated as a partner of the ██████████ ██████████, but she failed, or at least, delayed to do so, in consequence of which ██████████ estates were sequestrated. The permanent trustee in her sequestration was called as Second Defender in her action.

3. [REDACTED] sole asset value was her interest in her dwelling house at [REDACTED], Cambuslang, and if the decree sequestrating her estate was not reduced she would be rendered homeless.

4. [REDACTED], [REDACTED] mother, did not enter the action, nor seek to assist [REDACTED] in the pursuit of her action. [REDACTED] averred that she had only ever been an employee in her mother's business and this was confirmed by the accountant formerly employed by [REDACTED], who had for professional reasons, ceased to act for her. Considerable enquiry into the running of the [REDACTED] and its accounts had to be made by [REDACTED] solicitors to obtain all possible evidence in support of their client's assertion that she had never been a partner in the business nor ever held herself out to be so. The picture was more confused because the payments to [REDACTED] instead of being of a regular fixed weekly sum, varied as the income of the business increased or fell.

5. The action went to proof and after two days, [REDACTED] (because of evidence which was given by the former accountant) was advised that there was a serious risk of her mother being made the subject of criminal investigations. In consequence of that advice [REDACTED] entered into an agreement with the trustee in bankruptcy, which resulted, at considerable cost to her husband, in their being able to continue to live in their home. The action was thereafter abandoned.

6. The Auditor has considered the Process and the information given to him by [REDACTED] solicitors and on behalf of the Scottish Legal Aid Board, and is satisfied as to the considerable amount of investigatory work and responsibility undertaken by [REDACTED] solicitors in her action.

The Auditor fixes the additional responsibility fee payable to [REDACTED] solicitors at the sum of THREE THOUSAND ONE HUNDRED AND FIFTY POUNDS (£3,150.00).

WITNESS' CHARGES

At the diet of taxation the Auditor was asked to tax the expenses claimed by the Accountant, [REDACTED], BSc. C.A., who appeared as a witness for [REDACTED] on 22nd and 23rd January 1992. Certification of [REDACTED]

as an expert witness had not been sought since [REDACTED] had been called as a professional witness speaking to fact.

The Auditor notes that the relevant part of [REDACTED] claim is in the following terms:-

"Fee in connection with attendance by [REDACTED] at Court of Session, Edinburgh on 22nd and 23rd January 1992 ([REDACTED])

2 days of 8 hours @ £60/hour		£960.00
Expenses - Train Fares 2 @ £10.50	£ 21.00	
- Meals	<u>6.00</u>	27.00
		<hr/>
		£987.00
- VAT	17½%	172.72
		<hr/>
		£1,159.72
		<hr/>

The Table of Fees for Solicitors in the Court of Session contains a Section headed 'Witness Fees' which at the relevant time specified a fee for a professional witness absent from his practice to speak to matters of fact of £49.00 per half-day, (including travelling time) with in addition the sum of not more than £50.00 for perusing papers for the purpose of giving evidence.

It was submitted on behalf of the Board that no sums in excess of those prescribed in the Table of Fees were payable to the witness. It was submitted on behalf of the solicitor that the Auditor had a discretion to increase these sums since to the General Regulations forming part of the Act of Sederunt containing the Table of Fees provided for "reasonable expenses" being allowed for the proper conduct of a case. The Auditor notes that in the case of non-professional witnesses whose attendance entails loss of wages, the Act of Sederunt allowed payment of loss of wages as vouched to the Auditor, which provision consequently avoided penalisation of a witness, which would have resulted if his actual loss had been restricted to a maximum sum fixed some years before.

In recognition that the rates for professional witnesses as to fact were inadequate, an Act of Sederunt was promulgated, having effect from 24th August 1992, whereby inter alia the rate of £49.00 per half-day, fixed in 1985, was doubled to £98.00 per half-day, and the perusal fee of up to £50.00, fixed in 1983, was more than trebled to a maximum of £168.00.

On an incremental basis, over the relevant periods, the half-day rate would in January 1992 be approximately £94.00, and the maximum perusal fee approximately £159.00.

The Auditor therefore recommends that [REDACTED] Charges be paid as follows:

2 days at £188.00	£376.00
Perusal Fee	£100.00
Expenses	£ 27.00

	£503.00
VAT @ 17½%	88.03

	£591.56
	=====



AUDITOR OF THE COURT OF SESSION



Class	Ticket type	Adult	Child
STANDARD	ONE	ONE	NIL
Date		Number	
22.01.92		74056 18509517401	
From	Valid	Price	
EDINBURGH *	SEE RESTRICTIONS	£10.50M	
To	Route		
KILMARNOCK *		0655	

British Rail

Galt House, Bank Street, Irvine KA12 0AJ.

Telephone: 0294 76111

Fax No: 0294 71844

V.A.T.Reg.No.:293 2985 17

McBeth Currie & Co
Solicitors
13 Young Street
EDINBURGH
EH2 4HU

Advice No. I/ADV/92/0006
Reference. H526

Date.28th January 1992

Professional services rendered:-

For the attention of Miss Loudon

Fee in connection with attendance by [redacted]
at Court of Session, Edinburgh on 22nd and 23rd
January 1992 ([redacted])

*Speaking to matter of fact
Court of Session General Legislation
Chapter II*

2 days of 8 hours @ £60/hour
(normal charge-out rate)

£ 960.00 *max £49.20 per hour = 176.00*

Expenses - Train Fares 2 @ 10.50 £ 21.00

max out to be 21.00

Meals £ 6.00

max out to be 6.00

£ 27.00

£ 987.00

228.00

VAT 17.5%

172.72

24.20

1159.72

257.30

Less: Already paid

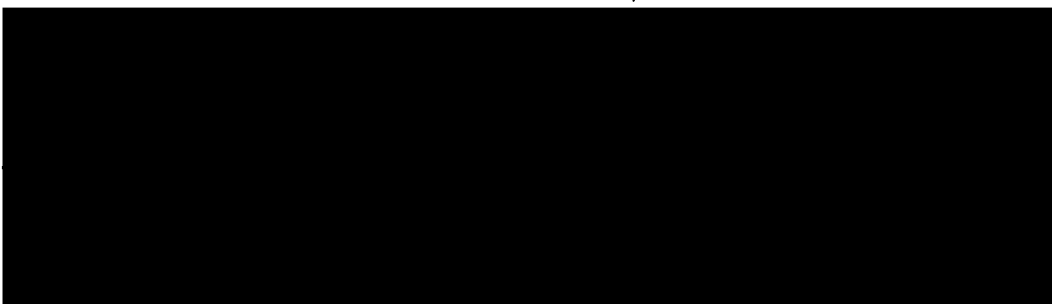
15.00

(15.00)

£ 1144.72

242.30

Please Note:- This is a request for payment
and does not constitute a formal invoice.
Upon receipt of your remittance in settlement
a formal invoice will be issued to enable
you to reclaim the Value Added Tax charge
on our fee.



of Session which are specified in column 2 of the above table in relation to the paragraphs specified in column 1 of that table shall continue to have effect in respect of work done before this Act of Sederunt comes into force.

J. A. D. HOPE, LORD PRESIDENT, *I.P.D.*

Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Witnesses' Fees) 1992

(S.I. 1992 No. 1906) [Edinburgh, 23 July 1992]

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 5 of the Court of Session Act 1988 (c. 36) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Witnesses' Fees) 1992 and shall come into force on 24th August 1992.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session shall be amended in accordance with the following sub-paragraphs.

(2) In the Table of Fees in rule 347 (taxation of accounts in judicial proceedings) for the provisions in Chapter II substitute the following provisions:

“WITNESSES’ FEES

Managers, executives and officers in HM Forces and merchant shipping

1. A person in managerial or like executive position, officer in Her Majesty's Forces or in a merchant ship who is cited to give evidence, maximum per half day (including travelling time)..... £140·00

Professional persons

2. A professional person who is a witness to matters of fact—
 (a) if cited to give evidence and in consequence—
 (i) requires to be absent from his practice
 maximum per half day (including travelling time)..... £ 98·00
 (ii) necessarily employs a locum or other substitute to act for him in his absence whom he requires to remunerate, maximum per half day £ 56·00
 (iii) examines papers for the purpose of giving evidence, maximum..... £168·00
 (b) if cited to give evidence but where the citation is cancelled—
 (i) more than 48 hours but less than 7 days before the date for which he has been cited, maximum £168·00
 (ii) less than 48 hours before that date, the sum he would have been paid under sub-paragraph 2 (a) above if he had been called to give evidence.

Other persons

3. A person not included in paragraphs 1 or 2 above who is cited to give evidence and in consequence incurs loss of wages or the payment of a substitute—
 (a) in respect of lost wages, maximum per half day £ 52·00
 (b) in respect of payment of a substitute, maximum per half day £ 29·00
 4. A person not included in paragraphs 1, 2 or 3 above who is cited to give evidence and attends at court, maximum per half day £ 14·00

Travelling allowance

5. A witness shall be allowed a travelling allowance being such sum as the Auditor may determine to have been necessarily incurred by the witness in travelling from and to his residence or place of business and the court.

Subsistence allowance -

6. A witness shall be allowed a subsistence allowance being such a sum as the Auditor may determine to have been reasonably incurred by the witness for the extra cost of subsistence during his absence from his home or place of business for the purpose of giving evidence, as the case may be, and where the witness is necessarily detained overnight for the cost of board and lodging,

- (a) where absence is not more than 4 hours, maximum..... £ 7.00
- (b) where absence is more than 4 hours, maximum £ 14.00
- (c) in addition where absence extends overnight, maximum per night £ 70.00

Receipts and vouchers

7. Receipts and detailed vouchers for all payments claimed in respect of a witness shall be produced to the party found liable in expenses, prior to the taxation of the Account of Expenses, and to the Auditor if required by him.

Witness present but not called

8. Charges for the attendance of a witness present at a proof or jury trial but not called nor held as concurring with another witness who has been called may be allowed provided that the court grants a motion to this effect at the close of the proof or jury trial and the witness's name is noted in the minute of proceedings.

Investigations by and attendance of skilled witness

9. Where it is necessary to employ a skilled person to make investigations prior to a proof or jury trial in order to qualify him to give evidence, charges therefor, and for attendance at such proof or jury trial, shall be allowed in addition to the ordinary witness fees of such person at such rate which the Auditor in his discretion shall determine is fair and reasonable provided that the court grants a motion to this effect not later than the time at which it awards expenses and the witness's name is recorded in the interlocutor.

Maritime witness

10. Where a witness who is a seaman or off-shore worker is detained ashore to give evidence, provided reasonable notice of intention to detain has been given to the party found liable in expenses, charges for no longer than 28 days' detention shall be allowed.

Account of witness's fees

11. The fees charged for a witness shall be stated in the Account of Expenses in a lump sum and the details of the charges shall be entered in a separate schedule appended to the account as follows:

Name and Designation	Where from	Days charged	Rate per Day	Travelling and Subsistence Allowance	Total	Taxed off

Value added tax

12. Where a witness is a taxable person in terms of the Value Added Tax Act 1983 the amount of value added tax may be added by him to his note of fee, and may be paid to him by the solicitor."

J. A. D. HOPE, LORD PRESIDENT, I.P.D.

THE SCOTTISH LEGAL AID BOARD

To: [REDACTED]
Assistant Manager, Civil Accounts

From: [REDACTED]
Board Solicitor
Room No. T10a
Ext No. 305

Date: 8 June 1993

ADDITIONAL FEE/TAXATION IN CASE OF
[REDACTED] 33/96/824519/88

I refer to your memo and to our subsequent discussion. I have since discussed the matter with [REDACTED]

The starting point seems to be that this was not a referral to the auditor in terms of the Civil Legal Aid (Scotland) Fees Regulations 1989, regulation 12. It seems to have been discussed in the context of, or ancillary to, procedure for an additional fee and, as far as I can see, both sides were simply using the auditor as a sort of arbiter.

This seems to be held out by the auditor's own usage of the word "recommends". Certainly, the Board's right to seek a Note of Objections is a statutory one arising out of the terms of regulation 12.

I tend to agree with you that the decision seems a little strange. I certainly cannot see any reference to the auditor being given a discretion as regards professional fees. I think, however, having agreed to refer the matter to the auditor, it would be appropriate to accept his decision in this instance. I think you have made it clear to the other side that you do not particularly agree with it!

I do not see any great matter of principle involved and, indeed, the auditor was only seeking to apply what is and will be the proper rate from July 1992.

I return herewith documentation.

[REDACTED]

JDH/YS

Enc

SCOTTISH LEGAL AID BOARD

MEMORANDUM

TO: [REDACTED]
BOARD SOLICITOR.

1 June 1993

FROM: [REDACTED], ASSISTANT MANAGER - CIVIL ACCOUNTS ASSESSMENT.
Room No.: F11
Ext. No.: 237

ADDITIONAL FEE/TAXATION IN CASE OF
[REDACTED] - 33/96/824519/88

Please find attached a photocopy of the auditor's report in the above case which I would be grateful if you would consider and let me have your views. In particular, I would like to draw your attention to the auditor's 'recommendation' on the witness' expenses payable to a chartered accountant who was called on the assisted person's behalf as a professional witness speaking to matters of fact.

The chartered accountant had originally claimed his normal charge at the rate of £60.00 per hour. As you will be aware there are no prescribed rates for witnesses in legal aid cases and, therefore, in Court of Session cases the Board has regard to the witnesses' fees contained in Chapter II of the Private Court Table of Fees.

At the additional fee hearing we duly informed the auditor that we had agreed the solicitors' account with the exception of the chartered accountants' charges and we invited the auditor to hear submission and to fix a fee.

The solicitors' representative suggested to the auditor that he had discretion 1) by virtue of past practice and 2) through the General Regulations forming part of the Table of Fees to increase the charge in question. We, for our part, referred the auditor to Chapter II of the Table of Fees and questioned whether the auditor had any discretionary powers.

You will see from the auditor's report that he has 'recommended' payment based on the fee contained in chapter II for a professional person who is a witness to matters of fact, however, he has rather curiously retrospectively applied, albeit on an incremental basis, an Act of Sederunt promulgated with effect from 24 August 1992.

The.../

[REDACTED]
1 June 1993

Additional fee/taxation in case
of [REDACTED] -
33/96/824519/88

The auditor does not indicate in his report where the discretionary powers exists enabling him to increase witness expenses but clearly he believes he possesses such power. I must confess that I am not convinced that the auditor has discretion to increase the charges in this manner although it could be argued that the approach adopted is not an unreasonable one. I would welcome any views you may care to express on the auditor's decision.

For information, please note that the hearing took place on 13 May 1993 and the undated report was received by us on 21 May 1993. That said, I do not know whether it would be possible to object to the auditor's decision, even if we wanted to, as the disputed charge was not presented to him by means of an appropriate motion/remit and I think his choice of the word "recommends" is not without significance.

[REDACTED].....
DA/AR

Enc.: Auditor's report, chartered accountants' invoice, Act of Sederunt (Rules of the Court of Session Amendment No. 7 (Witnesses' Fees) 1992.