

OPINION OF COUNSEL

re

Counsel's Fees

in causa

AS

AND ANOTHER

v.

AND OTHERS

JM

I refer to the Memorandum prepared by Mr. Alex Quinn originally for the Opinion of the former Vice Dean. On the latter's appointment to the Bench, that Memorandum has been directed to me.

I understand that an issue arose as to the propriety of the manner in which the fees of both senior and junior counsel were submitted and as to the possible relevance of the decision of the First Division in Sim v. Scottish National Heritable Property Company Limited, (1889) 16 R. 583, and cited in MacLaren on "Expenses in the Supreme and Sheriff Courts" at p. 466. In my opinion there was nothing improper in counsel submitting "Notes of Proposed Fees" to their instructing agents and then withdrawing those Fee Notes and substituting fresh "Notes of Proposed Fees" at higher levels at a time before the original Fee Notes had been forwarded by their instructing agents to the Scottish Legal Aid Board. Counsel were free to change their minds as to the amount of their proposed fees at that time. Notes of Proposed Fees are just that. They indicate the level of fees which counsel is then proposing to charge. It is then open to the instructing agent to discuss with counsel's clerk whether the fee to be paid, or in this case to be submitted to SLAB, should be revised downwards or upwards. This is one of the reasons why HM Customs and Excise are prepared not to treat such Fee Notes as taxable invoices. The status of Notes of Proposed Fees is explained in paragraph 5 of the Scheme for Accounting for and Recovery of Counsel's Fees issued by the authority of the Faculty of Advocates and the Council of the Law

Society/

Society of Scotland in July 1987. Guidance is also to be found in paragraph 5 of the "Guide to the Professional Conduct of Advocates" published by the Faculty of Advocates in June 1988 and in particular in paragraphs 5.5 and 5.6.

I do not consider that the ability of counsel to change their mind as to the level of their proposed fees at the stage before those Fee Notes were forwarded to SLAF was in any way inhibited by what was said by Lord President Inglis in Sim. That case concerned what had been a partially speculative action. The practice at that time was that fees were tendered in cash when counsel were instructed. Up to the closing of the Record counsel's fees had been paid on that basis, but thereafter junior counsel acted speculatively. If his client was successful, he would receive whatever fee was recoverable from the other side. A problem arose because of the terms of General Regulation VI appended to the Act of Sederunt 15th July 1876, which provided: "a party shall not upon any account be allowed to pay or state higher or additional fees to counsel after he has been entitled to expenses than were actually paid at the time. But this rule does not apply either to cases on the Poors Roll or to such as have been conducted gratuitously by the agent and counsel, on account of the poverty of the party."

The wrong which that rule was intended to prevent was to prevent a counsel who had carried/work <sup>out</sup> at an agreed price, paid in advance, for his own client then seeking to obtain an additional fee payment from his client's opponent when his client was successful and obtained an award of expenses. As Lord <sup>President</sup> Inglis explained the principle in Sim (at p. 584): "Any fee sent at the time must be supposed to be adequate, and the winning party is not entitled to augment it afterwards at the expense of his opponent." That, in my opinion, <sup>is</sup> quite different from the present situation where counsel had not received payment of any fees and ~~he~~ had not even had their Notes of Proposed Fee submitted to SLAF, chose to withdraw one set of proposed Fee Notes and to substitute a fresh set seeking higher fees. Whatever Notes of

Proposed/

Proposed Fees are submitted by counsel in a Legal Aid case, they will fall to be tested, ultimately by the Auditor of the Court of Session, against Regulations 9 and 10 of, and Schedule 4 to, The Civil Legal Aid (Scotland)(Fees) Regulations 1989, in light of the guidance to be found in the Opinion of Lord Prosser in Geddes v. Lothian Health Board, 1993 G.W.D. 11-767.

Although the practice of paying fees at the time of instructing work has ceased, it is still possible to agree a fee for a piece of work before it is instructed and I remember seeing in my early years in practice letters of instruction which bore the amount of the fee which would be paid even for an unopposed motion. While I do not know precisely what advice the then Vice Dean gave to Mr. Quinn in relation to this case, I am able to say that I agree entirely with the account of that advice which is contained in paragraphs (4), (5) and (6) of the Memorandum.

THE OPINION OF

Advocates Library,  
Edinburgh.  
11th July 1995.

M E M O R A N D U M

In Causa

AS [REDACTED] & ANOTHER

against

JM [REDACTED] & OTHERS

(1) The writer, Alex Quinn, of Messrs Alex Quinn & Partners, Law Accountants, Edinburgh, is instructed by Catherine Shaw, Partner in the firm of Messrs Simpson & Marwick, WS, and also by Faculty Services Limited in regard to taxation of their respective charges where liability for payment is that of the Scottish Legal Aid Board.

(2) At a Taxation before the Auditor of the Court of Session on 2 March 1995 there was produced to the Auditor a Note of Observations prepared by the writer with same having been intimated to the Scottish Legal Aid Board. These Observations were provided in order to give the Auditor background information and hopefully to possibly reduce the matters in dispute. The Board following the Note of Observations provided Grounds of Objection in regard to the Account. The Note of Observations and Grounds of Objection are enclosed for the Vice-Dean's perusal.

(3) After lengthy debate at Taxation, it was quite clear that the only area in dispute surrounded Counsels' fees. Following conclusion of the case, both Senior and Junior Counsel submitted their fees in line with Legal Aid Guidelines. The Instructing Solicitor, Catherine Shaw, immediately contacted Counsels' Clerk to express horror at the low level of their fees as she was only too well aware the considerable amount of time both Senior and Junior had spent by way of preparation and in attendance at the Proof. Accordingly, certain fee notes were returned with the request that fresh invoices be rendered at a rate more applicable to the work done. It was noted at no time had the earlier invoices been submitted to the Board and they were not aware of their existence until they were advised of the circumstances by the Agents and the writer. By letter dated 20 July 1994, the Instructing Solicitors wrote to the Scottish Legal Aid Board advising that it would be the intention to seek increased fees for Counsel, who expended a vast amount of time and effort on the case which is not at all reflected by the fees charged at Legal Aid rate. By letter dated 27 July 1994, again to the Scottish Legal Aid Board, it was made clear of the intention to seek increased fees for Counsel. In particular, the Board were advised that all fee notes issued by Counsel at that time had been issued at Legal Aid rates. The Board were further advised that it was proposed to ask Counsel to submit fee notes representing the sum they would charge on a non-Legal Aid basis

/so as the correct level of charging could then be ascertained. By letter dated 29 August 1994, the Board were again alerted to the position in relation to Senior and Junior Counsel's fee notes. While there were one or two telephone calls from the Board, it should be noted that no correspondence was received by the Instructing Agents to any of these letters. The Auditor continued that Diet of Taxation requesting that the writer make up a file of correspondence which had passed between the Instructing Agents/Law Accountants/Scottish Legal Aid Board/Faculty Services. In addition, the Auditor also called for production of the initial invoices rendered so as he could compare the two and consider the matter. There was also raised at Taxation whether the manner in which Counsels' fees had been tackled amounted to impropriety. The Instructing Agent was shocked and horrified by such a suggestion. The writer submitted that such a view was without foundation and any further observations are best left unsaid. Copies of the correspondence between the Instructing Agents/Law Accountants/Scottish Legal Aid Board/Faculty Services is also enclosed for the Vice-Dean's perusal. A Continued Diet of Taxation was then fixed by the Auditor to take place on 11 April 1995. The Auditor, in calling the Continued Taxation, referred the writer to McLaren on "Expenses in the Supreme and Sheriff Courts" (1912) and in particular to the case of John Sim. Copies of the relevant pages from McLaren are enclosed for the Vice-Dean's consideration.

(4) Prior to the Continued Taxation, the writer had the opportunity of a telephone discussion with the Vice-Dean where the circumstances surrounding the question of Counsels' fees and how they had been charged was discussed. Following such discussion, the Vice-Dean indicated that as far as he could see, reference to the case of Sim was in respect of a very old system whereby the fee was sent with instructions. Counsel accepted that fee tendered by the Instructing Agent as being adequate for the work undertaken. If he did not, his Clerk would have contacted the Instructing Agent and negotiated a higher fee.

(5) It was further suggested by the Vice-Dean that what Counsel had done was simply ask for "x" but on further consideration, wished three times "x". The fee note had only been proposed by Counsel for payment. It was simply an indication of what Counsel would wish to charge. The initial fee was never rendered to the Board. If the writer's recollection serves him well, the Vice-Dean suggested that perhaps the matters the Auditor had to address were as follows:-

- (a) Is the amount of Counsels' fees claimed justified or not?
- (b) Is it reasonable or is there any reason for adopting the view that the fee sought is unreasonable?

(6) There was also general discussion that following upon the system operated at the time of the case of Sim, that being when the fee was sent with instructions, there followed a further system/

/system whereby Counsel's fee was simply noted on the letter of instructions and if such a fee were not acceptable that, too, would be negotiated with the Clerk.

(7) At Taxation, the writer made a variety of submissions based very much on what views had been expressed by the Vice-Dean. That was explained to the Auditor and simply to ensure that matters had been fairly stated, he commented that he would be obliged if the Vice-Dean could provide him with his written Opinion as opposed to the writer's paraphrasing. This, in particular, was considered essential so as the Scottish Legal Aid Board were aware of what had been considered.

(8) The Vice-Dean is respectfully requested to provide a written Opinion of his views on the manner adopted by Faculty Services in regard to Counsels' fees.

  
11/5/95