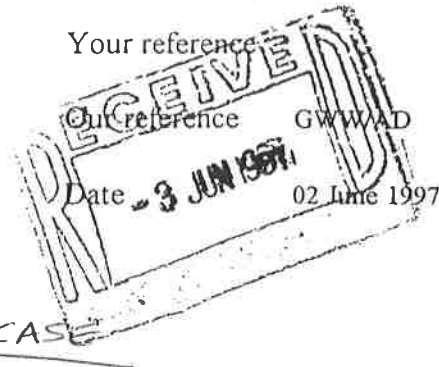




AUDITOR OF COURT
Sheriff Clerk's Office
Sheriff Court House
Wellington Square
Ayr KA7 1DR

[REDACTED]
The Scottish Legal Aid Board
DX ED250
Edinburgh



Dear [REDACTED]

TAXATION OF LEGAL AID FEES i.c. [REDACTED] v L & OTHERS

I enclose a copy of my decision and note in the above case in which Mr Jackson, QC and Mr Stewart, QC appeared at the hearing on 30 May 1997.

Yours sincerely

G W WADDELL
Auditor of Court

TAXATION OF LEGAL AID FEES

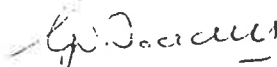
K

i.c.

██████████ v L & Others

AYR: 30 May 1997 Act: Jackson, QC Alt: Stewart QC

Having heard Counsel for Mr C D C Boag-Thomson, QC and Mr D H Browne, Advocate and Counsel for the Scottish Legal Aid Board on the question of expenses of the taxation held on 5 February 1996
Makes Avizandum.

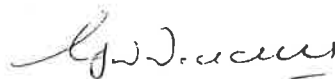


G W WADDELL

Auditor of Court

AYR: 2 June 1997

Having resumed consideration of the matter Finds Mr C D C Boag-Thomson QC and Mr D H Browne, Advocate liable to the Scottish Legal Aid Board for the expenses of the taxation held on 5 February 1996 and the expenses of the hearing on 30 May 1997.



G W WADDELL

Auditor of Court

NOTE:

Background

- 1 Reference is made to my note to the taxation dated 22 February 1996 at paragraphs 1 and 2 as to the previous history of this matter.
- 2 Following the taxation Counsel lodged notes of objections to the Auditor's Report which were dealt with by Sheriff Miller in his judgment of 25 April 1996. Apart from one small matter regarding two waiting days for Senior Counsel the Auditor's Report was adhered to by the Sheriff.
- 3 In my note to the taxation I reserved the question of expenses of the taxation. The matter now comes before me to deal with that question.

Representation

- 4 Mr Jackson QC appeared on behalf of Mr C D C Boag-Thomson QC and Mr D H Browne, Advocate (hereinafter referred to as Counsel) and Mr A Stewart QC appeared on behalf of the Scottish Legal Aid Board (hereinafter referred to as the Board)..

Argument for Counsel

- 5 Mr Jackson moved that the Board be found liable to Counsel for the expenses of taxation including the Auditor's Fee without any modification. He argued that the general position was that in party and

party cases the paying party was responsible for the expenses of the audit even if the taxed amount was less than that claimed or less or no more than that offered. In support of this proposition he cited the case of Gilmour's Tutor v Renfrew County Council and Others 1970 SLT (Notes) 47 where the Court held that in the matter of the taxation of expenses there was no equivalent of a judicial tender procedure but that the paying party was liable for the expenses of taxation even where they had offered prior to taxation an amount more than the sum found due on taxation.

6 He maintained that although there were differences in this current legally aided case the principle established in Gilmour applied to this case.

7 He thought it important to outline the normal practice in dealing with legal aid fees and contended that in 99% of cases Counsel will submit a fee to the Board and where as in this case multiple representation has taken place will agree with each other beforehand on what level of fees that should be based. Thereafter the Board would respond with a reduced offer in writing and after a degree of negotiation an agreed fee would be arrived at. It was very rarely that the matter would be referred to the Auditor for Taxation.

8 In this case fee notes had been submitted and Mr Boag-Thomson had been delegated to deal with the matter of negotiation over fees. There had however been no written offer from the Board with a result that after some time and in terms of [REDACTED] letter of 21 December 1995 the Board's position had been stated as "The only way to advance this matter would appear to be to refer the fees notes of Mr Boag-Thomson and Mr Browne to the Auditor for taxation." Counsel had accordingly referred the matter to the Auditor for taxation. Counsel had eventually paid the Auditor's fee on the instructions of the Dean of Faculty under reservation of their rights on the question of liability for

expenses. The taxation had therefore been at the insistence of the Board and they should be found liable in the expenses thereof.

9 If that contention failed he argued that Counsel had achieved a degree of success in the taxation process. During the taxation the Board had maintained that a daily fee of £750 inclusive of preparation and writing days should be allowed. The Auditor had taxed the account at a higher figure and allowed in addition waiting and preparation fees. What was awarded was therefore more than what was offered at the taxation. In the case of a judicial tender success is if you beat the tender. Success was therefore achieved in this case.

Argument for Board

9 In reply Mr Stewart firstly stated that the Board was moving for a finding that they were entitled to expenses of taxation including the Auditor's fee. He referred to the reservation of expenses made by me on joint motion of parties at the taxation and contained in paragraph 153 of my Note to the taxation. Parties were agreed with my competency in this regard and he referred to page 134 of expenses in the Supreme and Sheriff Courts of Scotland by James W Hastings, Greens 1989.

11 He referred to the statutory framework under which the taxation process had taken place, the fact that a unilateral reference could be made resulting in a binding finding. The finding of a reference by Counsel had already been established in my Note at paragraph 2 and this finding had not been challenged on the note of objection procedure and was therefore conclusive on that point for whatever relevance that may be.

12 He contended that the general rule was that the matter of expenses of taxation was wholly within the discretion of the Auditor. There was no general rule that the paying party should always pay. He referred to the case of Hogg v Balfour 1835 13S 451 a case where the paying party had only been found liable to half the Auditor's fee when there had been more than one fourth of the account struck off at taxation. There was therefore no general rule that the paying party should always pay. It may be possible to distinguish between cases involving party/party, agent/client and agent/client third party paying.

13 He then referred to the case of Meiklejohn v Moncrieff 1850 13D 303 which set out the practice of allowing the agent the expenses of the taxation against his client except where one fifth or more has been taxed off.

14 The case of Cameron v Chapman 1835 14S 24 was concerned with a party and party case where some £28 was taxed off an account for £72 and the successful party nevertheless had to pay one half of the Auditor's fee.

15 To sum up he stated that the matter of expenses of taxation were wholly within the Auditor's discretion, there was no general rule that the paying party always paid the expenses of taxation, in fact looking to the cases cited there was in fact a contrary rule. The statutory framework under which the taxation took place in no way fettered the Auditor's discretion in the matter.

16 He contended that the proper approach should be

- a) It was a matter for the Auditor's discretion.
- b) The reference had been made by Counsel.

- 6
- c) Counsel had overcharged by 70% in relation to Senior Counsel and 60% in relation to Junior.
 - d) If the Auditor's fee was based on what was claimed the Board should not be liable on any account for such an overcharged account.
 - e) If the test was whether the claim of each Counsel was upheld the answer was no.
 - f) On the substantial success test, although not a litigation, the test could be applied. The Board had been substantially successful therefore expenses should follow success. £1,500 and £1,000 daily rate had been reduced to £900 and £600. £750 had been put forward by the Board at taxation. This was nearer what was awarded than the sums claimed by Counsel.
 - g) Which party was responsible for the taxation could be looked at if the accounts had been put in at the taxed amounts.
 - h) It was not the invariable practice to make written offers when accounts were lodged with the Board. It was perhaps more usual to do so when scale fees were involved but this was not a case where scale fees were prescribed.
 - i) There had been no attempt by Counsel prior to taxation to justify the level of fees claimed other than claim that this was the private rate.
 - j) An offer from the Board would not have resulted in settlement.

17 The Board had statutory powers and a public duty to safeguard the public purse especially in a case such as this where the total level of fees was so high. The figures were highlighted at paragraph 42 of the Auditor's Note. The Board did not accept the responsibility for the need for taxation, the reason was the overcharging by Counsel. He urged me on the basis of the foregoing arguments that the matter was essentially caused by overcharging and on a just exercise of discretion I should find Counsel liable in expenses.

Reply for Counsel

18 Mr Jackson conceded that the reference to the Auditor had been made by Counsel but in light of the Board's view that the only way forward was by taxation, they had no choice but to refer the matter.

19 He contended that the cases cited by Mr Stewart were old and short and were to be considered in the context of the 19th century, not how matters are dealt with in practice in the modern day.

20 He disagreed with Mr Stewart on his approach to success. The £750 offered by the Board was to include preparation and waiting. Using such an approach would have resulted in a far lesser sum being awarded than was found due. He contended that what was claimed was nearer the sum found due than what would have been arrived at using the Board's approach to a daily all inclusive fee. The question of success however was not an approach he recommended.

21 He reiterated that the normal practice was for the Board to offer abatements to what was claimed. This did not happen in this case. It would be conjecture whether any offer made would have resulted in settlement. Following negotiation it may have resulted in settlement. As no offer had been made it resulted in taxation being necessary. This was not a matter of success. The decision should be based on how matters are normally dealt with.

Board's Reply

22 Mr Stewart stated the Board's position that Counsel were not interested in negotiation. The vast number of negotiated cases concerned scale fee cases.

Expenses

23 Both parties moved for the expenses of today's hearing on the basis of expenses following success.

Legal Aid Regulations

24 In considering the matters argued before me it is useful to focus on the statutory regulations under which the taxation took place. The matter was referred to me as Auditor under Regulation 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (S.I. 1989 No. 1490). As outlined in my Note to the taxation at paragraph 2 the matter had been referred by Counsel following a dispute with the Board as to the amount of fees allowable.

25 The basis of the taxation was solicitor and client, third party paying as prescribed by Regulation 9. (See paragraph 6 of my earlier Note). Counsel had submitted fee notes for payment by the Board which following taxation and objection procedure had been reduced from £367,775.00 to £217,853.46 in the case of Senior Counsel and from £227,850.13 to £139,591.06 in the case of Junior Counsel. These sums were inclusive of Value Added Tax in terms of Regulation 10(3).

26 Turning to Mr Jackson's arguments on behalf of Counsel, he referred to the case of Gilmour's Tutor cited *ut supra*. That was a case where in a party and party account (my emphasis) the defenders and third parties were found not to be entitled to the expenses of the taxation despite having offered an amount in settlement of the expenses more than that found due on taxation. From that case Mr

Jackson contended there was a general rule to the effect that the paying party must pay the expenses of taxation.

27 That case can be distinguished from the present case in that it concerned a party and party judicial account where presumably the defenders and third parties had been found liable to the pursuer in expenses and a remit had been made to the Auditor to tax the successful party's account. In this case the taxation took place under the Civil Legal Aid Regulations on a reference from Counsel and was based on a solicitor and client third party paying basis. I do not find Mr Jackson's argument persuasive that from the case of Gilmour a general rule applicable to the present case can be found.

28 Mr Jackson's outline of normal practice with regard to negotiations on Counsel's fees with the Board were interesting and informative. His contention that because "normal negotiations" had not taken place and taxation proceeded that the Board should therefore be liable for the expenses of taxation I did not find persuasive. No matter what is the normal or usual practice with regard to negotiations on fees it has to be noted that the Civil Legal Aid Regulations do prescribe a procedure for taxation of a disputed account. By Regulation 12(1) where "any question or dispute arises between the Board and Counsel as to the amount of fees allowable to Counsel the matter shall be referred for taxation by the Auditor". In terms of paragraph (2) of Regulation 12 the referral may be at the instance of Counsel or the Board.

29 In this case the referral was made by Counsel following the Board's intimation by [REDACTED] letter of 12 December 1995 that taxation was the only way to advance the matter. Counsel having referred the matter and lodged their accounts with the Auditor were liable in the first instance for the

Auditor's fee as an outlay in the taxation process, as is normal practice. That of course was without prejudice to any subsequent finding of expenses for the taxation process.

30 I must reject Mr Jackson's contention that because there were no negotiations prior to taxation procedure that the Board must be found liable in expenses for that procedure. The question of liability for expenses of taxation rests on the outcome of the taxation not on the preceding procedure. Indeed in the case of Gilmour cited by Mr Jackson in his earlier contention it is clear that the contention that earlier procedure re tendering a sum in settlement of expenses did not affect the outcome of the expenses of taxation itself. The Legal Aid Regulation prescribed a method of resolving disputes by taxation. By using that prescribed method a party by that fact alone should not be liable for the expenses of taxation no matter the outcome of the taxation. In this case Counsel used the prescribed method at the Board's suggestion but by that fact alone neither Counsel nor the Board should be liable for the taxation expenses without regard to the outcome of the taxation.

31 Mr Jackson's contention that Counsel had achieved a degree of success at the taxation in that they had been awarded a sum higher than that offered by the Board has to be measured against what is understood by success in taxations as set out in case law which I shall now come to.

32 Mr Stewart referred to a number of cases which illustrated the Court's approach when substantial amounts had been taxed off accounts.

33 In Hogg v Balfour cited *ut supra* one half of the Auditor's fee was charged against the paying party who had succeeded at the taxation in having over one quarter of the account taxed off. That appeared

to me from the reading of the case to be a party and party account when an unsuccessful pursuer had been found liable to the defender in expenses.

34 In Meiklejohn v Moncrieff (in a second Division decision) reference is made to the Auditor's practice of not allowing the agent the expense of the taxation when one fifth or more has been taxed off. That practice was given the sanction of the Court. That was a case relating to a solicitor and client taxation where the solicitor had utilised the provisions of the Act of Sederunt of 12 February 1806 to sue his client for his business accounts.

35 In Cameron v Chapman again a party and party case the successful pursuer had to pay half of the Auditor's fee when his judicial account was substantially reduced on taxation.

36 In this present case it should be stressed again that the basis for taxation was on a solicitor client, third party paying basis. Reference to my Note on the taxation gives an explanation of what that basis is. The cases cited by Mr Jackson and Mr Stewart with the exception of Meiklejohn all appear to be related to taxation of successful parties' judicial party and party accounts and can be distinguished from the present case in that regard.

37 The case of Moncrieff however is more akin to the present case in that the one fifth rule outlined therein is stated to apply as a universal practice "in applicants similar to the present, as well as in all extra judicial audits of accounts as between agent and client". That is that rule is dealing with solicitor client accounts. What is the effect of the rule however. It is that expenses of taxation are not awarded to solicitors when one fifth or more is taxed off their accounts.

38 In the present case as has been stated earlier the accounts were taxed on a solicitor client, third party paying basis. The Board was the third party and liable to pay the accounts after taxation. Applying the ratio of Moncrieff to the present case brings me to the conclusion that as more than one fifth has been taxed off each Counsel's account of expenses then the Board should not be found liable to Counsel in the expenses of the taxation procedure nor the Auditor's fee as part of those expenses. I therefore refuse Mr Jackson's motion for expenses of the taxation to be awarded in Counsel's favour.

39 Can I then go one step further and find Counsel liable to the Board in their expenses of the taxation procedure. Mr Stewart cited Hastings at page 134 for the authority that the matter of expenses of taxation including the Auditor's fee and the time and expenses of parties attending are wholly within the discretion of the Auditor. That passage is written in the context of taxation following a joint remit and not as here following a statutory procedure set out in the Civil Legal Aid Regulations.

40 Although not referred to me at the hearing there is reference in MacLaren on Expenses in the Supreme and Sheriff Court at page 516 to the case of Clyne v Spence 1827 6S 221, a case where the client was held entitled to expenses when the Auditor had taxed off about one fifth of his agent's account and there had been an offer to settle. £24-10/- had been struck off an account amounting to £120. The expenses to which he was found entitled were the expenses incurred by him in the process. These would have included the Auditor's fee and his agent's fee for attending the taxation.

41 It appears to me that if following the rule of practice set out in Moncrieff that I cannot award to Counsel the expenses of the taxation because the amounts taxed off their accounts exceed one fifth of the accounts as presented, (See paragraph 24 *ut supra*), I can go on to consider the Board's position.

42 The Board in the non payment of the original accounts has been vindicated on taxation and in the Sheriff's judgment on the Notes of Objections to the taxation. In equity then and having regard to the case of Clyne I conclude that the Board should be awarded its expenses of the taxation. The Auditor's fee having already been paid by Counsel should not be reimbursed to them by the Board.

43 I do not therefore find it necessary to deal with the other matters raised by Mr Stewart in his argumentation.

44 It follows from this conclusion that the Board have been successful at this hearing and I also find them entitled to the expenses of the hearing, expenses following success.



G W WADDELL

Auditor of Court

Ayr