

Attendance note – 18 May 1999

Attendance at hearing on Note of Objections – Banff Sheriff Court

0935 to 1300 – Travel to Banff
1300 to 1415 – Lunch
1415 to 1420 – Waiting
1420 to 1435 – Engaged at hearing
1435 to 1525 – Court adjourned
1525 to 1722 – Engaged at hearing
1800 to 2125 – Return to Edinburgh

Outlays

[REDACTED]

Hearing on Note of Objections before Sheriff McLernan
Act - Mrs Hughes, Advocate

[REDACTED]

The sheriff asked Mrs Hughes whether she was still insisting on arguing that the Auditor's decision was *ultra vires*. Mrs Hughes said that she was not, and her primary points were numbers 4, 5 and 6 in the Note of Objections. The sheriff observed that if it was now said that the Auditor's decision was *intra vires*, that completely contradicted item 1 in the Note of Objections. Mrs Hughes stated that her primary point was exclusively the £991 abated by the Auditor. The sheriff said that he needed to hear Mrs Hughes on the issues of which she had given notice. It now appeared that part 1 of the Note of Objections was departed from, and accordingly the note was wrongly stated, since it was now said to be *intra vires*. It followed there was no note from the Auditor on the other matters, because the Auditor had only reported on the *vires* issue. The sheriff wondered why the objectors had not invited the Auditor to complete her report if they were accepting that her decision was *intra vires*. The sheriff felt that Mrs Hughes should discuss the position with the Sheriff Clerk and Mr Shearer. The court adjourned at 1435.

After discussions between Mrs Hughes, PS and the Auditor, it was agreed that matters could be disposed of today, and that the Auditor would write a supplementary note. The Auditor issued her supplementary note to parties, and the court re-commenced at 1525.

Mrs Hughes then advised the court that she was no longer insisting on the *ultra vires* issue, and I asked the court to delete objections 1 and 2, and 6(b). Thereafter, the court heard full submissions from Mrs Hughes and PS, and Mrs Hughes briefly in reply. Mrs Hughes then tendered apologies to the court for the prior failure to intimate the departure from objections 1 and 2.

Having fully heard parties, Sheriff McLernan then stated that as he was directed to deal with notes of objections in a summary manner, he would issue his immediate decision. It seemed to the sheriff that the whole matter has to some extent got off on the wrong foot by the way the Note of Objections was phrased. Counsel has quite rightly departed from elements 1 and 2 of the Note of..!

of Objections. It is clear from the supplementary note that the issue before the sheriff was whether the Auditor was correct in considering that regulation 14 imposed upon her an obligation to exclude those items from the account. It was open to the Auditor to avoid the issue completely and say that there was a fundamental point of principle which it was not appropriate for her to deal with. That point was not taken at the taxation. That being so, there was remitted to the Auditor the power to determine whether regulation 14 applied and should be applied in the way she interpreted it. It is clear from the supplementary note that there was an interpretation which was allowed by both parties, and on which the Auditor reached her conclusion. The sheriff agreed with Mr Shearer that the court required to see if the Auditor had exercised her discretion properly. He further agreed with Mr Shearer that the principal issue before the court was what the Auditor had done wrong. It was, in the Wednesbury sense, the question of whether the Auditor had reached so unreasonable a decision that no reasonable Auditor could have reached it. The sheriff could see why the Auditor felt she was bound to reach the decision she did. To that extent, the argument on the reasonableness of Bruce Short's action at the time did not arise. The sheriff fully appreciated the urgency of the situation would affect matters. There was not much time to prepare, and work was undertaken at some distance from Banff Sheriff Court. The work required a lot of organisation. However, the sheriff understood that all that information was before the Auditor. If the matter had been presented the way it had been today, a different view might have been taken, and the issue of whether there is a fundamental issue between Regulation 14 of the Criminal Legal Aid (Scotland) Regulations 1996 and regulations 7 and 8 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 might have been got round in a different way. It seemed to the sheriff that the Auditor, not surprisingly, took the view that the work was of an unusual nature. The fact that it did not appear so to Bruce Short was irrelevant, or irrelevant at this stage. Given that regulation 14 of the Criminal Legal Aid (Scotland) Regulations 1996 specifically provides for seeking the prior approval from the Board for work of an unusual nature, the question of the interpretation of "an unusual nature" is bound to arise. The Board provide a commentary in its Handbook, and Taxation Guidelines. In the commentary, which is a more discursive document, there is a curious expression in paragraph 3 of paragraph 4.6.7 on page A78 of the Scottish Legal Aid Board Handbook. It is difficult to know what the reference to a distinction between the High Court and the District Court means, apart from the employment of counsel in the High Court. One might organise a consultation with counsel without prior approval in the High Court, but perhaps this would be necessary in the District Court. For example a racially motivated breach of the peace case in the District Court in which counsel was involved might be regarded as unusual. More importantly, however, was the Board's guidance in paragraph 5 of paragraph 4.6.7 on page A79 of the Scottish Legal Aid Board Handbook. It is stated there that any application for the court's authority to commence work of an unusual nature would be delayed until the prior approval of the Board has been sought. In the present case, the application for precognition on oath could only be sanctioned by the court. If the solicitors proceed in defiance of the commentary in the Handbook, they proceed at their peril. The commentary makes it clear that the Board will take a certain view, which is emphasised by the final paragraph, which states that no retrospective authority can be granted. That is obviously correct, because regulation 14 provides that retrospective approval is restricted to counsel. In the Board's Taxation Guidelines, a precognition on oath is specifically referred to as an item of work requiring the Board's prior authority. The argument by the objector is that because the solicitor exercises his professional judgement in the interpretation of what is unusual, he can substitute his judgement for that of the Board. That is an unusual proposition. It may be that in some circumstances that would arise. For that point to arise in a Note of Objections it gets nowhere. Regulation 14 specifically says that.../

that the prior approval of the Board shall be required. The respondent is correct to say that the objector requires to show that the Board did not have prior authority which overrides the solicitor's professional judgement. The exercise of professional judgement is not to be prayed in aid in relation to work of an unusual nature. The exercise of professional judgement is expected of every solicitor and every counsel. It is circumscribed by the requirement to obtain prior approval in terms of regulation 14 for work of an unusual nature. The Board is effectively barred from sanctioning expenses if they have not given their prior approval. There was some force in Mr Shearer's submission that the exercise of professional judgement is when, not whether, to apply for approval. The sheriff considered that the *Venter* case is easily distinguishable for a number of grounds, and he did not find it really very helpful in dealing with the issue before him today. The *Venter* case was however more relevant in the argument before the Auditor, and the sheriff could see how it would be of persuasive effect at the taxation. The sheriff stated that he found it impossible to reach the conclusion that the Auditor reached a decision which no reasonable Auditor could have reached. Whilst there was a possibility of reaching another conclusion, that is what discretion is all about. The sheriff was not persuaded that the Auditor had got it wrong, and therefore repelled the Note of Objections.

Thereafter, PS moved for expenses. Mrs Hughes stated she would leave it to the sheriff. The sheriff asked her for her views on the Board's motion, and Mrs Hughes stated that she had nothing to say.

The sheriff therefore awarded expenses in the Board's favour.

PS invited the court to certify that the procedure was suitable for the employment of a principal agent from the Board, as opposed to a local correspondent. The sheriff wondered if this was not really a matter for the Auditor. PS advised that the issue had been raised in the Civil Practice Bulletin, but was quite content to leave matters to the Auditor. The sheriff did however observe that he could see that in circumstances where a fundamental point of objection had been deleted and not previously notified, it might be more appropriate to have a principal solicitor present. PS agreed to leave the matter to the Auditor.

The court rose at 1722.

PS/SM
24 May 1999

SUPPLEMENTARY NOTE

in relation to

NOTE OF OBJECTION

to

TAXATION - 

At the conclusion of the Taxation Diet on 3 February 1999 and having heard parties submissions I came to the view that I could not get past the terms of Regulation 14(1)(d) of the Criminal Legal Aid (Scotland) Regulations 1996 in that prior approval from the Legal Aid Board should be sought for work of an unusual nature. The Legal Aid Board Guidelines clearly state that a Precognition on Oath is considered to be work of an unusual nature and that as such sanction should be sought, even in situations where there is limited time to do so. While I was aware that the overall work in the case might have been lessened by the Application, I did not feel in a position to make any allowance for that and accordingly taxed off the sum of NINE HUNDRED AND NINETY ONE POUNDS AND FIFTY FIVE PENCE (£991.55) from the account submitted. No other objection was taken to the Account and I accordingly taxed it in the sum of SIXTEEN THOUSAND EIGHT HUNDRED AND SIXTY NINE POUNDS AND FIFTY NINE PENCE (£16,869.59).

Frances MacPherson

Auditor of Court
Sheriff Court
Banff
18 May 1999