C/ 4613/29-1/94

COURT OF SESSION, SCOTLAND

13th April 1999 Lord: Abernethy

The Lord Ordinary, on the Pursuer's motion, allows Note of Objections to be received and marked No. 33 of Process and ordains the Auditor to state by Minute, within 14 days after intimation of a copy of this Interlocutor, the reasons for his decision in relation to the terms to which objection is taken in the Note; appoints the Pursuer to intimate a copy of this Interlocutor to the Auditor of Court forthwith.

"W.A. Dunn" DCS

Unusual item of expenditure

MINUTE

by the

AUDITOR OF COURT

in answer to

NOTE OF OBJECTIONS

FOR PURSUER

In causa

[redacted]

Pursuer

against

LC v WAD & HS

[redacted]

Defenders

The Auditor respectfully reports to the Court that his reasons for the decision in the taxation of the Pursuer's Account of Expenses to which objections are taken are that, after consider the information given and submissions made to him at the diet of taxation, the Auditor was of the opinion that the charges, as allowed, were reasonable and proper.

IN RESPECT WHEREOF

EDINBURGH
4th May 1999

NOTE: The Auditor respectfully responds to the Note of Objections No. 33 of Process as follows:-

The taxation took place on 18th March 1999. The Pursuer was represented by Mr. ████ of Messrs. Alex. Quinn & Partners and the Scottish Legal Aid Board by ████

The Pursuer, ████ had been granted a Legal Aid Certificate to pursue an action for reparation against two Defenders. The action was settled with a payment of £125,000.00, with judicial expenses. The Judicial Account was adjusted between the parties and the taxation concerned itself purely with an Agent and Client Account rendered to the Legal Aid Board on behalf of Messrs. Munro & Noble, Solicitors, Inverness, the Pursuer's local agents. The Legal Aid Board took exception to those items set out on pages 3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 17 which are highlighted. These entries concern the Pursuer's agent's attendance at a Trial of the Defenders at

Wick Sheriff Court, which lasted some eleven days. This gave the agents the opportunity to listen to witnesses, many of whom would have been material to the civil action, give evidence under oath.

The Scottish Legal Aid Board objected to these items which they said were fundamentally incompetent. They referred to the Legal Aid (Scotland) Act 1986 Section 4(2)(a).

" 4 (2) There shall be paid out of the Fund:-

(a) such sums as are, by virtue of this Act or any regulations made thereunder, due out of the Fund to any Solicitor or Counsel in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33(3A) of this Act, in connection with the provision, in accordance with this Act, of legal aid or advice and assistance."

The Board had to satisfy themselves that these charges were "properly incurred". To satisfy that test the charges had to be set against Regulation 21(1) of the Civil Legal Aid (Scotland) Regulations 1996.

"21 (1) Subject to paragraph (2) below, the prior approval of the Board shall be required:-

(a) for the employment in the House of Lords of Counsel and other than Scottish Counsel;

(b) for the employment in the Court of Session of Senior Counsel or of more than one Junior Counsel;

(c) for the employment of Counsel in the Sheriff Court, the Scottish Land Court, the Lands Tribunal for Scotland or the Employment Appeal Tribunal;

(d) for the employment of any expert witness; and

(e) for work for an unusual nature or likely to involve unusually large expenditure.

(2) Paragraph (1) above shall not apply where the Board, on an application made to it for retrospective appeal for the employment of Counsel or, as the case may be, of an expert witness, considers that that employment would have been approved by them and that there was special reason why prior approval was not applied for."

Paragraph 2 of that Regulation allows the Board to grant retrospective sanction only for the employment of Counsel or an expert. Reference was then made to Venter v. SLAB 1993 SLT 147 and in particular to page 154 d – f. The Board has full discretion in matters under paragraph 21(1) and the Auditor has no right to interfere with that decision. Any remedy against a Board's decision must be by Judicial Review.

Following the case of Venter the 1994 "The Recorder", S.L.A.B.'s quarterly publication which is distributed to the profession, reminded agents that the Board's authority had to be obtained prior to carrying out any work which might fall within the definition of Regulation 21(1)(e).

The Scottish Legal Aid Handbooks of 1996 and 1998 set out some examples of work which should be regarded as being of an unusual nature or likely to involve unusually large expenditure. "Keeping a watching brief on some other proceedings" is given as

a specific example. Reference is also made to this Regulation in "The Law & Practice of Legal Aid in Scotland" on pages 174 to 175.

In summary, the Legal Aid Board's position was as follows.

A. It was clear from the amount involved in the Account that this was "work of an unusual nature or likely to involve unusually large expenditure".

B. The Agents should have been aware of the Regulations and should have applied for the Board's approval.

C. The Auditor had no power to create or allow work where only the Board has discretion. The Auditor only has an interest if authority has been granted and the Auditor is asked to deal with the reasonableness of the items in the Account.

[redacted] accepted the contents of the Regulations and agreed that if the agents accepted Legal Aid work they were bound by the Regulations. The items in the Account were not "of an unusual nature". It was common practice for Solicitors to carry out a watching brief where there was a prosecution after a personal injury. On originally contacting the Procurator Fiscal, in this case, the agents were told that the case would last no longer than one day and, at the worst, two days. The Solicitor went to precognosce the witnesses at the Trial where they would be giving evidence under oath. This would have resulted in substantial savings as they would not have required to travel to see the witnesses. If they had not attended at the Trial they might have been accused by their client of not trying. Nine witnesses were lead and their evidence recorded and also that of the Factory Inspector. The Trial lasted

eleven days. The Board cannot hide behind its own Regulations. The Auditor should not wear blinkers. The work charged in the Account was the equivalent of taking Precognitions and was essential to the preparation of the case and its eventual successful conclusion. Precognitions were taken and not simply a resume of the evidence. The work done was in room and place of taking Statements and not a watching brief. In the Judicial Account the sheetage of the Precognitions was recovered but not the attendance at the Trial. Very fairly, [redacted] accepted that in the context of this case, the entries objected to formed' unusually large expenditure'.

The Auditor has considerable sympathy for the position the Pursuer's agents find themselves in. Noting the witnesses' evidence given under oath would help Counsel frame the Summons and conduct the case to a successful conclusion. The fee for precognosing the witnesses was recovered in the Judicial Account, but excluded in the Agent and Client Account because the cost of obtaining them is by concession "unusually large expenditure' and no proper approval was sought from the Board. However, inequitable it may be the Auditor is bound by the Legal Aid (Regulations) and the Court's decision in Venter. In the absence of prior approval from the Board for what turned out to be "unusually large expenditure' those charges fall to be abated from the Legal Aid Accounts.