

Taxation Report

22nd August 2000



Gerry Sweeney

Fixed Fee

Supply of Information

SCOTTISH LEGAL AID BOARD
MEMORANDUM

To:



Date: 18 September 2000

From:

Ref: JDH/SMcS

[REDACTED] - SCOTTISH LEGAL AID BOARD

I enclose three copies of the Auditor's decision in the [REDACTED] case. The report, of course, does not deal with the substantive issues but is very helpful indeed in the question of the provision of information to the Board (not only in fixed payment cases but in all cases). I think we could send a copy of the Auditor's report to another Auditor where a taxation has been fixed prematurely with a view to having the taxation called off until such time as information is provided to the Board.

Can you pass a copy to [REDACTED] and to the Team Leaders. I know that [REDACTED] both have cases where a solicitor is refusing to provide information.

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SCOTTISH COURT SERVICE
Sheriffdom of Tayside Central and Fife
Sheriff Clerk's Office
Sheriff Court
Viewfield Place
Stirling
FK8 1NH

[REDACTED]
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh
EH3 7SW

Your reference:

Our reference: GMcK/SJD

Date: 6 September 2000

DX ED555250 Edinburgh 30

Dear [REDACTED] WM

TAXATION - [REDACTED] v SCOTTISH LEGAL AID BOARD

I refer to the above and now enclose herewith a copy of my decision with note annexed thereto.

Yours *Sincerely*


Glynis McKeand
Sheriff Clerk

Taxation – [REDACTED] – V – SCOTTISH LEGAL AID BOARD.

SRIRLING: 22 AUGUST, 2000.

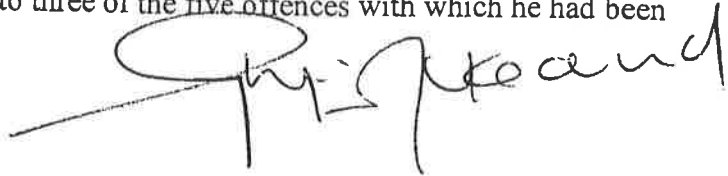
ACT: SWEENEY [REDACTED]

The auditor having heard parties procurators on the disputed account makes avizandum.



STIRLING: 6th SEPTEMBER, 2000

The auditor having resumed consideration of the disputed account, Finds that, in order to consider the appropriateness of the fixed fees claimed at paragraph B of part A of the Account Synopsis for "Conduct of Trial/Proof in mitigation", in respect of 5th May and 15 September 1999 the Scottish Legal Aid Board were entitled to ask for further information in circumstances where the solicitor making the claim had indicated that he had "conducted the trial" for 40 minutes and 45 minutes on these dates respectively while in Part B of the form had stated that no evidence had been led but, that the accused had been found not guilty in relation to three of the five offences with which he had been charged.



Note:

This matter has been referred to me under regulation 11.1 of the Criminal Legal Aid (Fees) Regulations 1989

On 13 April, 2000 Mr Sweeney wrote to me advising he had been "unable to agree with the Scottish Legal Aid Board concerning the fees due to us, in relation to our representation of [REDACTED] We would be pleased therefore if a taxation debate could be set in relation to this matter, in order that the auditor of court can determine the issue of our claim".

No further information was contained in his letter. I responded by letter of 17th April advising that he had not enclosed the Legal Aid Account to which he referred in his letter of 13th April, asking for sight of same and for an outline of the points at issue between himself and the Board.

On 20th April I received a copy of the Account Synopsis together with correspondence between Mr Sweeney and the board dated 11 February, 29th February, 8th March and 17th March. From this correspondence it was clear that the Board had been asking for further information in support of Mr Sweeney's claim but that he considered he was not required to give any further such information. In his letter to me of 20 April he advised that "In



our opinion , the Board are seeking additional information, other than that required under the Account Synopsis form, by way of "free accounting". For our part, we are happy to render full written details of court procedure etc., if the Board accept that we should be remunerated for this, as additional to "free accounting".

At this stage I fixed a diet of taxation and requested parties to bring to the diet any authorities they might have on the matter at issue.

The diet of taxation required to be discharged and fixed of new on two occasions for reasons it is not necessary to state herein.

On 21 June Mr Sweeney confirmed he had intimated the first of the new diets of taxation to the Legal Aid Board and, (as had been agreed in earlier discussions with me) that it was his "intention to place written submissions before " me at the diet of taxation.

It being necessary to discharge the further diet of taxation, having spoken to both parties, I wrote to them on 1 August. In my letter to Mr Sweeney I stated "It would be helpful to have your written submissions approximately a week before the diet of taxation. Likewise, I have asked the Legal Aid Board for their submissions. It may be of assistance to you if you each exchange submission in order that we can all be clear where parties are coming from."

In my letter to the Scottish Legal Aid Board I intimated "I have asked Mr Sweeney to lodge written submissions with me one week prior to the diet of taxation. I have also indicated to him that I would make the same request of you and that it would possibly be advantageous if parties could exchange submissions in order that all present at the diet of taxation are aware where parties are coming from."

In response to my letters of 1 August, I received a letter from the Board dated 8th August in which they state that on receipt of Mr Sweeney's written submissions the writer may be able to narrow the areas on which he would require to address me. They produced written material now forming no 2 process. I did not receive any further written communication from Mr Sweeney.

At the diet of taxation on 21 August, Mr Sweeney produced the papers now forming no 3 of process. In addressing me he advised that fixed payments had been designed to streamline the system for claiming Legal Aid. The Account Synopsis form had been introduced and this was the only form that should be submitted in making a claim, other than vouchers in support of outlays.

There was no scope within the form to provide more information, nor was it indicated within it that the claimant could be required to provide additional information.

He referred me to the question that had been written in pencil at paragraph B of Part A of the form, "Please clarify why court ran into second day, as no evidence was led". He

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submitted that this question was irrelevant. There was no scope within the form to require such information and to require it was oppressive.

At this stage I questioned whether or not [REDACTED] for the Board should be entitled to respond to this issue which I thought was the nub of the matter but Mr Sweeney proceeded to address me on the changes in the law on when a trial is deemed to commence referring me to *Handley v Pirie* and *Mitchell v Vannet* and the effect these cases had on his claim within the Account Synopsis. He also referred me to the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 which came into effect on 1 October, 1999 and inserted into the regulations a paragraph which reads "For the purposes of these Regulations, a trial shall be taken to commence when the first witness is sworn".

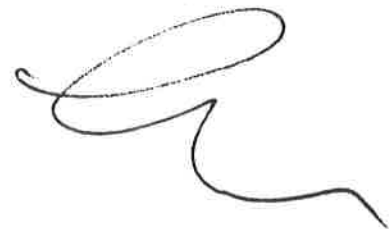
Mr Sweeney then submitted, what in effect was a second issue, to the effect that interpretation of the word "trial" where it appeared in paragraph B of Part A of the Account Synopsis depended on the High Court decisions that were current at the particular time and that the definition contained in the amendment referred to above was not effective in relation to this particular case and could not be so unless the statute had been made retrospective.

In concluding he submitted that he did not refuse to supply the Scottish Legal Aid Board with the information they had requested but had offered to sell them it. He was a sole practitioner and would incur expense in responding to them. This point I found difficult to reconcile with his earlier contention that the Board were not entitled to request the information.

In response [REDACTED] for the Scottish Legal Aid Board submitted that the Board had a right to ask questions of claimants. As holders of the public purse they couldn't pay out a thousand pounds of public money without first satisfying themselves that the claim was correct. The Chief Executive of the Board was responsible and could be questioned by the Public Accounts Committee for the boards handling of the funds.

The Account Synopsis form was merely an administrative document designed as a medium for gathering information. On receipt of the document the board asks questions, if necessary, to satisfy its officers that, claims are correct. The Recorder of March 1999 had stated that in normal circumstances the form would be sufficient.

My attention was then again drawn to that part of the Account Synopsis which dealt with the claim for "conduct of Trial/proof in mitigation" namely paragraph B of part A thereof and to the terms of the Criminal Legal Aid (Scotland) (Fees) Regulations 1998 and the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. [REDACTED] then submitted that even if it was accepted that a trial commences when the accused pleads solicitors should, in terms of these Statutory Instruments only be paid for "conducting" the trial, i.e. advocacy time and not for waiting time. The Board was still not aware how the time claimed had been spent.



In support of his argument that he was entitled to ask for further information Mr [REDACTED] referred me to paragraph 4.5.4.1 of the Code of Practice in relation to Criminal Legal Assistance (1998) wherein it is stated that "Accounts shall be clearly, accurately and logically presented in a form which enables the Board to assess them" and to Paragraph 3 of the Code of Conduct for Criminal Work chapter of the Law Society of Scotland Codes of Conduct wherein it is stated that "Where requested, files and information should be provided to SLAB".

He submitted that the Board had requested information and in accordance with the above they were entitled to it; Mr Sweeney had offered to sell the information to the Board. The Board were, he submitted effectively in a position where this account related to an agent and client, with a third party paying. The Board was the third party. In these circumstances the Board should only be required to pay what was reasonable. To date the Board had not been able to assess the account presented, in fact. Only once it was known what happened in fact, in Court, on the days in question, will the Board be able to assess whether it is reasonable that it meet the fees claimed and if necessary consider its position in regard to the legal points made by Mr Sweeney with regard to when a trial is deemed to commence and when one is "conducting a trial".

Mr Sweeney argued that the 1989 Regulations do not necessarily apply to fixed fees cases under the 1999 Regulations and that [REDACTED] references to advocacy time and waiting time were irrelevant as these were concepts that did not apply to the Fixed Payment Regulations. The only circumstances in which the Board were entitled to call for additional information was in cases referred to the High Court on a devolution issue. In these circumstances the Board had indicated that they would meet a reasonable account drawn on a time and line basis. Devolution issues became potential issues on and after 20 May 2000. The Regulations had not taken the possibility of the expense involved in a devolution issue into account and required to be amended during the month of May.

At this stage Mr Sweeney accepted that there exists a "preliminary point" for consideration by the auditor but argued that the Board "could not lead him a merry dance" by requiring him to supply them with information in circumstances of "free accounting" where, in accordance with the Synopsis Form drawn by them, such information is not required.

He then addressed what "conducting a trial or proof in mitigation" means and submitted that it means "representing a client at a trial from when it starts until it concludes".

Turning to the Codes of Conduct referred to by [REDACTED] Mr Sweeney again argued that he had given the Board all the information required of them in their form.

[REDACTED] sought to respond further and again submitted that the board on the strength of the information contained in the form completed by Mr Sweeney were "dancing around in a vacuum". The Board don't yet know what they are being asked to pay for as they don't have the facts. What happened in the 45 minutes of the morning of 5th May?



Was Mr Sweeney "conducting a trial"? It was the board's contention that the 1989 Regulations applied in respect that, in accordance with Paragraph 6 of the 1999 Regulations, the 1989 Regulations were subject to their terms. The 1989 Regulations still apply to vouching for outlays and they are the authority for bringing this case before the auditor today!

The formulation of the law addressed in *Hanley v Pirie*, *Mitchell v Vannet* and the most recent case of *Ruxton v Borland* were irrelevant. What the Board is looking at is whether or not Mr Sweeney was "conducting" a trial on the days in question. They were entitled to ask for further information. The Chief Executive could be called before the Public Accounts Committee to answer why he was paying money out to parties who may not be entitled to it.

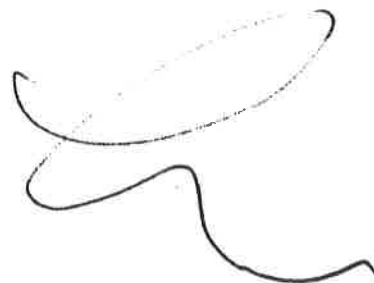
In my view the Account Synopsis is merely a medium for gathering information, like a jurors payment form or an income tax return. The Board, like a Sheriff Clerk in the case of a jurors claim and a Tax Inspector in the case of a tax return is entitled to ask for supplementary information. The Codes of practice referred to during argument support this view

It seems to me that anyone required to meet a claim for expenses has a right to further information. Through my experience as an auditor, I am familiar with the terms of the Law Society of Scotland General Regulations and, in particular, Chapter 2 thereof wherein it is stated that "The form in which a Solicitor presents his charges to his client is a matter for the Solicitors personal preference but if the client (or the person liable to pay the charges) requires to be provided with details, the solicitor is obliged to give a narrative or summary which will indicate the nature and extent of the professional services afforded. It is recommended that, in addition, the client be given such helpful information as can readily be derived from the solicitors record, such as the total recorded time spent, the number and length of meetings, the number of letters passing and telephone calls made."

In legally aided cases the Board, being the paying body, has specified the form of the account however this is no bar to them seeking further information in accordance with the principals set out above.

In coming to this conclusion, I consider that this is the preliminary point at issue between the parties to the taxation and that I need not address the case any further at this stage as the Board has not reached an informed view of how they should remunerate Mr Sweeney for time he was occupied on the two days in question.

I was not addressed on the question of the expense of the taxation at this stage and therefore have made no finding meantime.

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