OUTER HOUSE, COURT OF SESSION

OPINION OF T. G. CO S Q.C.

SITTING AS A TEMPOR JUDGE

in Hearing on Note of Objectio to

Report by Audit

In the cause

THOMAS LAMB CROOKS (AP)

Pur r;

against

LAWFORD KIDD W.S. and OTHERS

Defenders:

Pursuers: Logan; Robsons, W.S.

Defenders: No appearance for Defenders; Dundas & Wilson for 1st, 2nd, 3rd Defenders; Simpson & Marwick, W.S. for 4 18th Defenders

For Scottish Legal Aid Board; Cullen, Q.C.; P R Shearer

5 April 2002

[1] At the stage this litigation had reached before it appeared before me there were issues between the pursuer's solicitor acting under a legal aid certificate and the Scottish Legal Aid Board in relation to certain fees which had been allowed by the Auditor. However, the only matter which remained in issue at the hearing was the disallowance by the Auditor of a sum claimed as an outlay in relation to the production of prints of a closed record. The outlay claimed was £3 , the cost which would have been incurred if the work had been done by a duplicating agency. The Auditor refused allow that charge and after requesting the Board o ti nate what offer of fee they would make for that work he accepted that their offer of £108.88 was reasonable and allowed it.

[2] The solicitor objected to the Auditor's report and contended by way of Note of Objections.

"The account submitted to the Scottish Legal Aid Board ("the Board") included a fee for the printing of a record in the sum of £306.00. In paragraph A of the Auditor's report the Auditor r rds tat he upheld the objection of the Board in respect of that entry and substituted a figure of £1 38 together with VAT at 17.5%. It is believed that the basis of the latter fee was 30 minutes for co ion of the record, copying and revisal charge. In concluding that the appropriate basis of charge a fee on the above rather than an outlay the Auditor followed the previous Auditor's decision o lvia *McMonagle or Loan* v *Robert Munro and another*. It is submitted that the decision of the Auditor in that case and in any other decisions on the same basis is wrong for the following reasons:

a. It was decided in *Loan* that an outlay incurred to McNeill & Cadzow was a

proper charge and that it was appropriate that that work should be rewarded at the rate approved for duplication by the Lord President from time to time. The responsibility of preparing the record quickly and to the high standards required by the Court justified such rates.

b. If a solicitor carries out such work internally within his firm he is required

to meet the same standards and time limits that are applicable to a professio printer. He should therefore receive payment on the same basis and at the same rate. In present case the outlay incurred in respect of printing was recorded in an invoice from his firm Robsons WS, SSC addressed to the Pursuer. The charge is at the same rates as would have been charged by a professional printer.

c. In providing such a service the solicitor's firm is working as a printer and

not providing a legal service. The publication of documents is assessed as zero-rated for VAT purposes. In describing the provision of the record as a legal service VAT s being wrongly applied. The invoice raised by Robsons did not include payment of VAT at the standard rate. As the printing is not a legal service it should not be categorised as a fee. It mu therefore be categorised as an outlay. In categorising the provision of printing as a fee the auditor misdirected himself.

d. In their Guidelines published in 1994 the Board indicated that a fee

calculated on the basis set out in paragraph 1 above would be allowable (paragr h 2.5). It is believed that this guideline has influenced the Auditor on this matter. The guid ine does not have the force of law. In any event it at best gives a solicitor for an assisted person to charge for the provision of a closed record on that basis should he wish to do so. It does not exclude charging on an alternative basis. In the present case Mr Robson elected to charge the printing by his firm as an outlay. The preparation of the record was complex involving several hours work. The basis suggested by the Board did not provide adequate remuneratior e was entitled to opt to charge on the basis that he did."

[3] The Auditor had considered the matter in the following way:

"Printing of Closed Record. This matter has already been considered by the Auditor in the case of *Sylvia McMonagle or Loan* v *Robert Munro and Another* and reference is made to the al paragraph thereof. This is work which was done inhouse by Messrs. Robsons and it is no reasonable to allow the charges a firm of duplicators might levy. In these circumstances, the Auditor disallows the outlay of £306.00. Scottish Legal Aid Board have offered the sum of £101.88 as set out in a fax of 5th December 2001 and the Auditor adds that figure to the Solicitor's fees."

He amplified that consideration in the minute which he was ordained to provide to the Court as follows:

"The Auditor respectfull reports to the Court that his reasons for the decision in the ta o of the Pursuer's Account of Exp ses to which objections are taken are that after considering information given and submissions made to him at the diet of taxation, the Auditor wa e opinion that the charges, as allowed, were reasonable and proper."

and in his annexed note he referred to what he said was the relevant part of a previous decision of his own, *Loan* v *Munro* dated 21 January 2000. In that case he had drawn a distinction between an outlay incurred to a duplicating firm and printing done "in house" by the solicitor in the following terms:

> "The appropriate test in this matter is set out in the civil Legal Aid (Scotland) (Fees) Regulations 1989 Regulation 4 which states:- '*... a Solicitor shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner, as between Solicitor and client, third party paying.*' There are two separate issues involved in the 'outlays' incurred in this case and the Auditor deals with them as follows.'
>
> A. <u>Duplicating Charges for Printing Appeal</u>
>
> This 'outlay' is referred to on page 6 of Messrs. Digby Brown's Account. The Auditor is of the opinion that in this case the charge shown as 'Paid duplicators charges for printing Appeal now incorporating the Sheriff's Note' was incorrect. It was not an outlay actually incurred to an outside body and therefore must be paid in line with the Civil Legal Aid (Scotland) (Fees) Regulations Schedule 3.
>
> The Auditor therefore allows:
>
> 30 minutes collation for printing the Appeal (Schedule 3 Part 2 (a) or (b).
>
> Copying the Appeal (Schedule 3 Part 6).
>
> Revising the Appeal (Schedule 3 part 5b).
>
> B. <u>Duplicating Charges for printing Appeal (incurred to NcNeill & Cadzow)</u>
>
> This is an outlay incurred by the Assisted Person's agents to a firm of Law and Commercial copiers. Again, the test is set out in Regulation 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. The judicial standard is set out as, 'Only expenses which the prudent man of business, without special instructions from his client, would incur in the knowledge that this account would be taxed can be allowed.'
>
> The Auditor concurs with this. However, it is interesting to note that expenses on a Party and Party basis are, 'All expenses which are necessary to enable the party to conduct the litigation and no more'. The fee used by the duplicating agency of £7.40 per sheet is a fee regularly seen in Party and Party taxations. As this fee is allowed on a Party and Party basis it seems only fair and proper to allow it on an Agent and Client, third party paying basis, as the latter scale of taxation is 'slacker' than the first. Therefore, the Auditor allows the outlay incurred to Messrs. NcNeill & Cadzow."

[4] The Auditor correctly directed himself to the statutory provisions which apply to this matter as found in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and in particular Regulation 4. That provides that a solicitor shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner as between solicitor and client, third party paying. In the whole of the Regulations the distinction between fees and outlays is maintained. A solicitor is entitled to charge fees in terms of Schedule E of those Regulations.

<u>Argument for Solicitor</u>

[5] It was argued for the solicitor on the lines of the above Note of Objections that since a solicitor is not in business as a printer, he would not be entitled to charge a professional fee to a client for that work. If he does printing work he can charge it out as an outlay. That proposition was illustrated in *Neill* v *South East Lancashire Insurance Co* 1931 S.C. 600. There the Auditor had allowed as reasonable charges two items which were described in the account as "instructing printer" and "revising proof" in circumstances where a printer had not been instructed and the solicitor had undertaken the printing work himself. The Court refused to interfere with the Auditor's discretion which had been exercised on the basis that the unsuccessful party was not being asked to pay more than the usual amount allowed by the table of fees or the Act of Sederunt in respect of the production of such documents.

[6] Counsel repeated the assertion that such printing work would be zero-rated for VAT purposes whereas a

professional fee would attract VAT. I have some reservations about the proposition that the work w...h was undertaken by the solicitor in this case in reproducing a record invoiced to himself would be zero-ra...d for VAT purposes but that does not yet arise in the present case.

[7] In *Morse* the then Auditor (Tait) had stressed that the charge for duplication in that case was not vouched. In the case at present before the Court a real distinction could be made in that the matter had been vouched and further it was reasonable, equitable and fair that provided that no more was charged than the Court would have allowed from a duplicating firm the charge should be allowed.

Argued for S.L.A.B.

[8] It was argued for SLAB that the entire dispute was governed by the regulations. Those regulations maintained throughout a distinction between fees and outlays and the charge to be appropriate must be one or the other. A solicitor is only entitled to the fees in Schedule E of the Regulations and the Auditor had re...ded the work as appropriately attracting a fee. He requested from SLAB an indication of the fee they would b... prepared to offer and accepted it. That fee was, perhaps, more than might strictly have been due.

[9] There was no st...tory provision for such activities as printing by a solicitor to be regarded as a... outlay. The activities of the sol...itor could only attract a fee and the only fees to which he was entitled were tho... in the Regulations.

Decision

[10] It must first be stressed that the entire dispute in this hearing is ruled by statutory provisi...ns. T... Auditor in *Neill* was not so constrained. However, and in any event, the present Auditor, correctly in my view, distinguished between an actual disbursement to a third party and work done by the solicitor or his firm. Whether the rate proposed by SLAB and accepted by the Auditor is appropriate would depend on all the circumstances. In the present case no issue was raised on the matter of the amount of the fee, the issue was solely whether the solicitor could claim as an outlay the cost he would have incurred to a duplicating agent if he had done the duplicating agent's work himself.

[11 In my judgment there is no justification for describing something which has not been outlayed as an "outlay". A solicitor is entitled to the appropriate charge for any work which he does and these in terms of the Regulations are fees. If printing is paid for it is an outlay. If the production of documents is done by the solicitor he gets a fee for that purpose. I observe that Auditor Tait in *Morse* recognised this when he said in his Note in that case: "In the absence of a vouched outlay *to a duplicating agency* (my emphasis) the disbursement (claimed printing costs) must be disallowed."

[12] The Scottish Legal Aid Board have issued guidelines in relation to his matter. It was in relation to those guidelines that they had proposed a fee which the Auditor had accepted. It should be stressed that th...e are just guidelines and have no statutory force. the Auditor may follow or disregard them as he chooses but it is thought he would be bound to have regard to the component parts of any charge for the production of printed documents for the Court beyond the mere charge *per* page which, I was informed, was the way in which a duplicating agency billed.

[13] On the whole matter I consider the contentions of the solicitor to be unsound and I refuse the Note. The sum at issue was not a large one. Both parties stressed that the case was one in which points of prin...ple arose and both parties had departed from other contentions on the day of the hearing. In all these circumsta...s I find no expenses due to or by either party in relation to the Notes of Objection.

Eileen

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THOMAS CROOKS (A.P.) V. LAWFORD KIDD, W.S., AND OTHERS

EDINBURGH. 10th January 2002.

At the taxation on 3rd December 2001, the Auditor was required to consider three matters:

A. Printing of Closed Record. This matter has already been considered by the Auditor in the case of *Sylvia McMonagle or Loan v. Robert Munro and Another* and reference is made to the final paragraph thereof. This is work which was done inhouse by Messrs. Robsons and it is not reasonable to allow the charges a firm of duplicators might levy. In these circumstances, the Auditor disallows the outlay of £306.00. Scottish Legal Aid Board have offered the sum of £101.88 as set out in a fax of 5th December 2001 and the Auditor adds that figure to the Solicitor's fees.

B. Travel. The fees allowable are prescribed by the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (the "Civil Fees Regulations") regulation 4 which provides that "a solicitor shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying." The Auditor refers to Lord Kylachy in *Hood v. Gordon 1896 23R.675*: "I see no reason to doubt that the principle which we must/

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

must follow in this case is that established in the case of *Walker v. Waterlow*, and also in the case of *Wigtown Burghs*. That principle is, that while the taxation as prescribed by the statute be as between agent and client, yet as the expenses in a case like this have to be paid not by the client but by a third party, the principle of taxation, though not indeed indentical with that between party and party, must yet be different from that applied in the ordinary case of agent and client." Then Lord McLaren's opinion states, "when a statute authorises the taxation of expenses, as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed." It is the Auditor's experience that in detailed party and party accounts no objection is taken by the Paying Party to charges for travelling incurred by the opponent. The standard of taxation here and in Agent and Client Accounts is less strict and it follows, therefore, that agents are, in general terms, accepting travelling expenses as those "which the prudent man of business, without special instructions from his client, would incur in the knowledge that this account would be taxed." In these circumstances, the Auditor is prepared to allow the travelling expenses incurred in this case.

C. Additional Fee. The Additional Fee was awarded by the Court in terms of the Interlocutor of 28th April 2000. This is dealt with in a separate Report annexed hereto.

AUDITOR OF THE COURT OF SESSION