

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

in causa

CH v PM

Pursuer

against

Defender

EDINBURGH. 10th June 2002

The Auditor has been asked to tax the fees claimed by H.H. Campbell, Esq., Q.C. and Preston Lloyd, Esq., Advocate.

The Auditor held a diet of taxation on 11th March 2002. In attendance were [REDACTED] [REDACTED] Solicitors, on behalf of the Scottish Legal Aid Board, and H.H. Campbell, Esq., Q.C. together with his Clerk, [REDACTED] and Preston Lloyd, Esq., Advocate, together with his Deputy Clerk, [REDACTED]

In this case there is a dispute between Senior and Junior Counsel and the Scottish Legal Aid Board on the level of Counsels' fees. Senior Counsel's fees are set out in a Note of Fee dated 11th October 2000. He seeks to recover £500.00 for a Consultation on Tender and £5250.00 for a six day Proof.

Junior Counsel's fees are set out in a Note of Fee dated 11th October 2000. He seeks to recover £500.00 for a Commission and £3300.00 for the six day Proof. In addition to dealing with *quantum* of Junior Counsel's fees, the Auditor has been asked to decide whether Junior Counsel is entitled to any payment for the Commission as the instructing Agents had failed to obtain the Board's prior authority in terms of 21(1)(e) of the Civil Legal Aid (Scotland) Regulations 1996.

Prior to the taxation, Senior Counsel prepared and lodged helpful Submissions. These set out the background to this dispute and reasons justifying the increase in fees over and above those set forth in Schedule 4 of paragraph 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (hereinafter referred to as the Regulations). Points 2, 3 and 4 detail the history of the adjustment of Judicial expenses and his agreement to an overall abatement to his fees of £250.00 plus VAT.

Point 5 sets out Senior Counsel's interpretation of Regulation 3(2) which he maintained precluded the Scottish Legal Aid Board from making any abatement to those fees which had been adjusted judicially and paid. Under this Regulation, the Scottish Legal Aid Board "must simply pay the sums agreed (or taxed) and paid to them."

Where a case is of a type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work for which no fee is prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the Table. This points to the terms of para. 3, namely that "because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work". Thus in such a situation the Auditor would be entitled under para. 2 to allow a higher fee than would have resulted from his allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3." That case dealt with fees under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 but the Court draws no distinction between Civil and Criminal Legal Aid. In these circumstances, the Auditor must deal with Senior Counsel's fees in terms of the Civil Legal Aid (Scotland) (Fees) Regulations 1989.

After the taxation, a letter from Senior Counsel to his Clerk, dated 21st March 2002, was sent to the Auditor with enclosures. At taxation, Senior Counsel had described the difficulties in this case. The Pursuer had an unfortunate family background. After an outburst during a Y.T.S. placement he had been branded "a bad lot" by his employers. The accident had caused severe physical injuries and brain damage and the main question facing his advisers was what would he (the pursuer) have done anyway? Full and detailed reports had been instructed from a Consultant Neurosurgeon, a Consultant Adolescent Psychiatrist, a Consultant Neuropsychologist and a Rehabilitation Consultant.

Voluminous Medical Records were recovered and considered in detail. Wages information was recovered from the pursuer's employers to help answer the question posed above. The case was defended on the merits with strong arguments for contributory negligence. The Note of 2nd October 1999 indicates the pursuer had intimated he did not wish to proceed with the action. Senior Counsel's view was that this would be "tragic" and fortunately for the pursuer that advice was accepted.

On the Thursday before the Proof a Consultation was held to discuss a Tender of £50,000.00. The Pursuer's conduct was described as "not stable" and he was persuaded not to accept it. Settlement was achieved on the latter part of the first day of the Proof at £100,000.00. Senior Counsel has produced his note of preparations and an "Order of Witnesses". There has clearly been a considerable amount of preparation.

The basis of taxation is set out in Regulation 9. "*Subject to the provisions of Regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying*". That standard is set out by Lord Kyllachy in *Hood v. Gordon 1896 23R.675*, "I see no reason to doubt that the principle which we must follow in this case is that established in the case of *Walker v. Waterlow*, and also in the case of the *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 identical 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 should be noted that Lord Kyllachy clearly envisages fees on this basis of taxation being greater than those recoverable on party and party basis.

Regulation 10 states that “*Counsel’s fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4.*” Chapter II of said Schedule does not specifically provide for preparation. Schedule 4 Section 2 states, “*Where the Table of Fees in this schedule does not prescribe a fee for any class of proceedings or any item of work, the Auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the said Table of Fees*” . The Lord Justice Clerk in *Uisdean McKay v. H.M.A.* (supra) deals with the Auditor’s powers to increase any fee set out in the Table of Fees and , in particular, states, “In short, on the footing that a fee set out in the Table of Fees is otherwise prescribed, there requires to be a reasonable relationship between that fee and any higher fee which the Auditor is minded to allow, having regard to the features of the case which he considers to justify that higher level.”

From his experience, the Auditor is satisfied that the fees sought by Senior Counsel in this case bear no relation to what he might reasonably expect to charge in an Agent and

Client fee paying case using the test set out by Lord McLaren in *Hood v. Gordon* (supra). He is further satisfied that the Table of Fees in Chapter II of Schedule 4 form the basis for Senior Counsel's fees here.

Applying "the prudent man of business" test the Auditor is satisfied that the fee of £500.00 for the Consultation is reasonable. This was an unusual and complex matter. The Pursuer was "not stable" and had to be dissuaded from accepting the Tender, which turned out to be 50% of the final settlement figure.

Turning to the fee for the six day Proof, the Board accepted that, in the circumstances, it was reasonable to allow three days to Counsel. The Notes produced by Senior Counsel indicate a significant level of preparation which Senior Counsel stated as being at least one day. Senior Counsel had already agreed an abatement of £250.00 to his fees on a party and party basis and the Auditor applies that concession to the fees of £5250.00 for the Proof. Again, applying "the prudent man of business" test, the Auditor is satisfied from the submissions and the detailed papers that the reduced fee of £5000.00 for the six day Proof is reasonable.

Accordingly, he taxes Senior Counsel's Note of Fee at £5500.00.

Junior Counsel lodged Submissions prior to the taxation. They concentrate on the disallowance of the fee for the Commission to take the Defenders' medical expert's evidence. The sum of £500.00 had been recovered judicially and paid to the Board.

██████████ for the Scottish Legal Aid Board argued this was work of an unusual nature or likely to involve unusually large expenditure and, as such, required the Board's prior authority in terms of Regulation 21(1)(e) of the Civil Legal Aid (Scotland) Regulations 1996. No such authority was granted and the Auditor had no powers to allow such a charge and any payment by the Board would be *ultra vires*.

Counsel's response is stated in Item 5 of his Submissions, as follows, "In relation to junior counsel's fee of £500.00 charged for the attendance at the commission to take evidence of the Consultant Neurologist, that fee was not challenged at all by the Agents for the Defender. It was paid (in full) to the Board. The Board refuse to pay not only the sum recovered but any fee in respect of Counsel's attendance at the Commission."

Mr. Lloyd submitted it was at the least unreasonable for the Board to refuse to make payment of a fee recovered judicially. Mr. Lloyd relied on Regulation 3(2) *supra*.

Was it Parliament's intention to deny Counsel fees which have been agreed and settled by a paying party? Was it reasonable that these fees should be "pocketed" by the Scottish Legal Aid Board?

██████████ relied on the Regulation which gave the Board no discretion. The Auditor should tax the items in the Note of Fee excluding the charges for the Commission. The

actions of the paying party in paying Counsel's fees for the Commission were irrelevant. They were not exercising the Scottish Legal Aid Board's function (Regulation 3(2) did not apply). Counsel cannot assume it is their money; it must go to the Board who will deal with it in terms of their Statutory powers and duties.

The Auditor is satisfied he has the power to deal with this matter. The Auditor had been asked by the Board to deal with Regulation 21(1)(e) in a taxation on 18th March 1999, *Leslie Christie (A.P.) v. W.A. Dawson Ltd. and Others*. This related to Solicitors charges for attendance as observers at a Trial in Wick Sheriff Court. Having accepted the Auditor's decision in that case, it is unreasonable to argue that the Auditor should have no "vires" to deal with this matter in this dispute.

Junior Counsel's fee was incurred in representing the pursuer's interests at the Commission to take the evidence of the defender's Consultant on Commission. Reference is made to the papers produced by Senior Counsel from which it is clear that the evidence of the Consultant Neurologist, instructed by the Defenders, would be crucial in this case. Had Counsel not attended the Commission, Agents and Counsel would have been in grave dereliction of their duty. It is the Auditor's experience that Open Commissions are not unusual. The step is carried out in enough processes which the Auditor sees to entitle him to come to this view. In this case the pursuer is responding to a motion from the defenders. He is not seeking an Open Commission as in *Venter v. Scottish Legal Aid Board 1993 SLT 147*. The Court's decision in *Venter* is set out on page 154 and deals with a case where an Assisted Person seeks to embark on a



course of action which is of an unusual nature or is likely to involve unusually large expenditure.

In this case, the pursuer's advisers were not in a position to assess alternative courses of action; they were reacting to the defender's motion.

██████████ produced and referred to editions of "The Recorder", the Scottish Legal Aid Board's quarterly publication where the Court's decision in *Venter* is echoed.

Similarly, the Scottish Legal Aid Board Handbooks of 1996, 1998 and 2000 but, again, they give instances of cases where the Assisted Person seeks the Open Commission.

Having determined the Auditor has "*vires*" to allow the charge, consideration must be given to its reasonableness in terms of Regulations 9 and 10. Chapter 1 of Schedule 4 does not specify a fee for an Open Commission but Section 2 of Schedule 4 gives the Auditor discretion to allow such a fee. The test which he must apply is that of "the prudent man of business" having satisfied himself that the fee is based on those set out in Chapter 1 of Schedule 4. The background and complications in this serious case would have placed considerable responsibility on Junior Counsel for preparation and attendance at the Commission. The Auditor is satisfied that the fee of £500.00 is an expense "which a prudent man of business, without special instructions from his client, would incur in the knowledge that his Account would be taxed."

Junior Counsel would have been involved in considerable preparation for the Proof. The Auditor has already dealt with the complexities and importance of this case in his summary of Senior Counsel's Submissions. The Auditor is satisfied that the fees charged by Junior Counsel bear no relation to what he might reasonably expect to charge in an Agent and Client fee paying case using the test set out by Lord McLaren in *Hood v. Gordon (supra)*. He is further satisfied that the Table of Fees in Chapter I of Schedule 4 form the basis for Junior Counsel's fees here.

The Pursuer's agents advise in their letter of 4th June 2001 to Senior Counsel's Clerk that Junior Counsel has agreed to abate his fees charged on a party and party basis by 5.73%. In the light of this concession, the Auditor taxes Junior Counsel's Note of Fee at £3585.00.

May. Lusk.