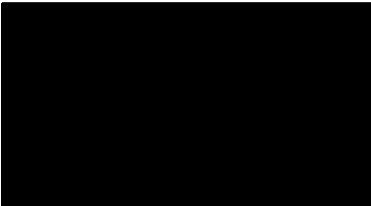


COURT OF SESSION, SCOTLAND



R E P O R T

by

AUDITOR OF THE COURT OF SCOTLAND

in causa

CR






Pursuer

against

SOUTH LANARKSHIRE COUNCIL

Defenders

EDINBURGH. 10th June 2002.

In attendance at the diet of taxation on 22nd April 2002 were , Solicitor, on behalf of the Scottish Legal Aid Board, and 
 of Messrs. Alex, Quinn & Partners, Law Accountants, and Miss Katy Wilkins, Solicitor, of Messrs. Blacklock Thorley, Solicitors for the Pursuer.

The purpose of this taxation was for the Auditor to determine whether the agents and Counsel should be paid for the work in connection with an Open Commission in East Kilbride in or about December 1998. The Points of Objection lodged by the Scottish

Legal Aid Board also set out the background and, in particular, the agents' failure to seek prior authority in terms of Regulation 21(1)(e) of the Civil Legal Aid (Scotland) Regulations 1996. Mr. Shearer referred to the case of *Venter v. The Scottish Legal Aid Board 1993 SLT 147 page 154*, "Now reg 21(1)(e) does not in terms require the prior approval of the board before a motion for an open commission may be enrolled. Nor is there any provision to that effect in the Rules of Court. Nevertheless we are in no doubt that the proper procedure, in all legally aided cases where the court is to be asked to authorise a course of action which is of an unusual nature or is likely to involve unusually large expenditure, is for the party who is in receipt of legal aid to seek the prior approval of the board before that course of action is proposed to the court." The Court's decision had been brought to the profession's attention in subsequent issues of "The Recorder" and in the "Published Notes for Guidance – Civil Legal Aid". The agents should have known that it was their duty to seek the Board's authority before incurring the expense of the Commission and having failed to do so the Board had no powers to grant such sanction retrospectively.

██████████ argued that as sanction for Senior Counsel had already been obtained by the agents for the whole of the proceedings, the Board had been put on notice that this was a case which was out of the ordinary. He then sought to persuade the Auditor that the holding of a Commission was not work of an unusual nature. In his experience, witnesses' evidence was taken on Commission in such a number of cases as to make Commissions no longer unusual. Agents take the pragmatic view that following such a course might shorten a Proof. It avoids inconvenience to lay witnesses. At the time

this work was done, the agents did not think it was necessary to make a separate application. Had they been aware of the Regulation, they would not have considered it necessary to apply for sanction. However, on adjustment of the Account they made application for retrospective sanction. He further argued that the expenditure here was not unusually large. The fees total £591.71 and the outlays total £4177.55. As the cost is under £5000.00 it cannot be said that the commission involved unusual expenditure.

██████████ argued that Regulation 21(1)(e), *Venter v. The Scottish Legal Aid Board 1993 SLT 147* and the Published Notes for Guidance – Civil Legal Aid made the position crystal clear. When an agent was contemplating taking the evidence of a witness in an Open Commission sanction required to be obtained from the Board. This was not done and the Board had no powers to grant such sanction retrospectively. The items should be disallowed.

The Auditor has some sympathy for ██████████ clients' position but he is not prepared to allow the charges referred to. The Auditor is not persuaded that the taking of evidence on Commission is not unusual. In the Auditor's experience, the use of an Open Commission, although increasing, is still so infrequent as to render it of an unusual nature. The fact that the agents applied for retrospective sanction during the course of the adjustment of the Account persuades the Auditor that they may have overlooked the application for sanction at the appropriate time. In the Auditor's

opinion, the cost of the Commission forms a significant percentage of the total fees and must be considered as unusual expenditure.

In conclusion, the Auditor disallows the fees for the Commission in or about December 1998.

Lesq. Sultan.

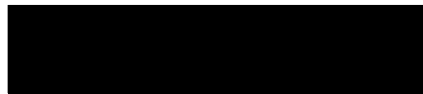
COURT OF SESSION, SCOTLAND

REPORT

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