

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

in the cause

[REDACTED]

PURSUER

ID

Against

LAW HOSPITAL NHS TRUST

DEFENDERS

EDINBURGH. 24th January 2003.

A dispute between the Scottish Legal Aid Board (hereinafter referred to as "the Board") and the Solicitor has been referred to the Auditor of the Court of Session in terms of Regulation 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (hereinafter referred to as "the Regulation").

In attendance at the diet of taxation on 16th December 2002 were Miss Karen Bruce Lockhart of Messrs. Brodies, Solicitors, and [REDACTED] Solicitor, on behalf of the Scottish Legal Aid Board.

The purpose of the taxation was twofold.

- A. For the Auditor to fix an Additional Fee in terms of Lord Nimmo Smith's Interlocutor of 27th September 2001. This has been done by way of a separate Report.
- B. To consider the charges on page 61 of the Edinburgh agents' Account being the first two entries on 16th August 2000 and the charge in Messrs. Keegan Walker's Account on page 38, 17th August 2000. The Board had lodged Points of Objection.

The basis of taxation is set out in Regulation 4 of the said Regulations and states, " a Solicitor shall be allowed such fees and outlays as are reasonable for conducting, in a proper manner, as between Solicitors and client, third party paying." That standard of taxation is defined 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.” Lord Eassie’s Opinion in the case of *Nicholas Dingley (A.P.) v. The Chief Constable of Strathclyde Police* was on the list of papers attached to the Points of Objection but was not referred to.

██████████ argued that a Consultation with Senior Counsel had taken place on 14th August 2000 and charges for attendance for the local and Edinburgh agents at this Consultation had been allowed. The Board objected to the charge by the Edinburgh agents for framing Notes on Consultation and sending said notes to the local agent. Objection was taken in the local agents’ Account to perusal of said notes. She referred to the Legal Aid Fees and Taxation Guidelines issued in 1994 page A/34 paragraph 2.4.1 which states, “A file note is not a separately chargeable item (either as a framing charge or as a time charge) in addition to or as part of the claim for the interview or telephone call. A file note which records the details discussed is included within the charge for that meeting or telephone call.” The Board’s objections are clearly set out in the first three paragraphs of page 2 of the Points of Objection. A Consultation attendance note is considered to be a file note and should not be charged separately. Both agents had been at the Consultation and their attendance had been allowed. The framing of the Note on Consultation should be included in the fee charged by the agents for attendance at the Consultation. ██████████ accepted that this was a complicated medical negligence case. These were not reasonable charges under the standard of taxation set out *supra*

Miss Bruce Lockhart argued that the Note on Consultation had been prepared for the benefit of Counsel. This was a complicated medical negligence case of considerable

importance to the client as is borne out by the factors allowed by Lord Nimmo Smith in his said Interlocutor. It was vital that a clear Note of the Consultation was taken in case there were changes of agents or, particularly, Counsel, a not uncommon occurrence. Counsel would require to refresh his memory as the case progressed and clear notes would avoid the additional expense of a further Consultation or Notes from Counsel seeking clarification. She argued that in these circumstances it was reasonable to frame a Note on Consultation and that this work meets Lord MacLaren's test set out in *Hood v. Gordon*. She conceded that it was not reasonable for the correspondents to consider these Notes on Consultation as they had been at the Consultation and the Auditor has disallowed the letter to Messrs. Keegan Walker of 16th August 2000 and the perusal of the Notes on Consultation on 17th August 2000.

Miss Bruce Lockhart provided the Auditor with a copy of the Notes on Consultation, which the Auditor has perused. Following Miss Bruce Lockhart's concession, this leaves only the question of whether in the circumstances of this case it is reasonable, bearing in mind the standard of taxation, to allow a fee for framing the Note on Consultation. In the Auditor's opinion, it is. The Legal Aid Fees and Taxation Guidelines referred to *supra* are only guidelines. The Auditor must determine whether this is an expense 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." In the Auditor's experience of cases of this complexity and importance being taxed on a judicial basis, charges are made for preparation of Consultation attendance notes. In some cases no objection is taken to such a charge and where an objection is

taken, it is the Auditor's practice, depending on the circumstances, to allow such a Note judicially. If it is reasonable to allow these charges judicially, it is reasonable to allow them on the standard set out in Regulation 4. The Board will be aware that in this Account and in particular on page 12 of Messrs. Brodies' Account, they have allowed the charge on 12th April for framing a Note on Consultation.

For these reasons, the Auditor allows the charge of £74.40 incurred by Messrs. Brodies on 16th August 2000 as set out on page 61 of their Account.

Mary Burton