Auditor of the Court of Session

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Scottish Legal Aid Board,
LP 2
EDINBURGH 7

[redacted]

31st December 2003

TM

Dear Sir,

[redacted] v. North Lanarkshire Council

I refer to the above and enclose, for your information, the Auditor's Report.

Yours faithfully,

Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

in the cause

[redacted]

Pursuer

against

NORTH LANARKSHIRE COUNCIL

Defenders

EDINBURGH. 31st December 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 Regulations 12(1) and 4 of the Civil Legal Aid (Scotland) Fees Regulations 1989 ("the Civil Fees Regulations").

In attendance at the diet of taxation on 3rd November 2003 were Messrs. [redacted] and [redacted] Law Accountants, on behalf of Messrs. Balfour & Manson, Solicitors, Edinburgh, and [redacted] Solicitor, on behalf of the Scottish Legal Aid Board.

SLAB SUBMISSIONS:

Points of Objection and a Summary of Submissions were before the Auditor at taxation. [redacted] addressed the Auditor as follows. The matter in dispute in this case had already been determined by the Auditor in two previous cases: [redacted] *v. Lawford Kidd, W.S., and Others* and [redacted] *(A.P.)* However, the Auditor's reasonings in these cases included an element of sophistry and a specious element. The Court had not been asked to consider the charges for travel in these two cases. The Board is currently unaware of any judicial taxation in which the Auditor has allowed travelling by agents, whose place of business is in Edinburgh, for travel to the Court of Session in a situation where it has been challenged. Historically, agents had not charged for travel to their local Sheriff Court. [redacted] produced a memo dated 18th March, 2002 from one of his colleagues, which summarises information provided by the Sheriff Court Auditor in Edinburgh. This indicates that, in his experience, charging for travel to the Court of Session started in 1994 and that currently the Sheriff Court Auditor sees charges for travel to and from the Court in 50% of detailed Sheriff Court judicial accounts. There is no objection to these charges. The Auditor of the Court of Session has not been required to determine the reasonableness of these charges in terms of Rule of Court 42.10-(1) because objection is not taken to those charges. SLAB are concerned that that has been carried over to Legal Aid taxations. It has not been considered by the Lord President's Advisory Committee on Court fees. The last occasion the Auditor was required to determine this matter was in the case of *Fulton v. Lothian Health Board* in 1993 where the Auditor made no award in respect of travelling time. [redacted] also drew attention to the Opinion of the Sheriff Principal of Grampian Highlands and Islands

in the case of *Brims Henderson v. William Horne Henderson.* The test adopted in the Regulation is that set out by Lord Maclaren in *Hood v. Gordon 1896 23R 675* (and Maclaren on Expenses in the Supreme and Sheriff Court p. 509) "when a statute authorises the taxation as between agent and client, what is given is expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed." On the face of it the Auditor's approach in [redacted] (supra) is attractive but is specious. He quoted the case of *King v. Patrick 1845 7D 536.* This was an action of divorce where large travelling expenses had been incurred with a view to ruining the husband. At p. 536 the then Auditor refers to the case of *Sir W. Cunninghame Fairlie, Bart v. Barbara de la Motte* as follows, "Indeed the system pursued in conducting the defence seemed manifestly to be, to throw every obstacle which the forms of law would admit of in the way of the pursuer's obtaining his divorce, and to accumulate expenses in such a way as either to induce him to desist from the action, or to ruin him – the unfortunate husband having to pay both sides of the litigation." In referring to this case, Maclaren at page 510 writes, "The Auditor applied the principle which he stated had received the sanction of the Court on many occasions that the expenses to be allowed to the wife should only be such as are necessary and properly incurred in defending an action of divorce according to the circumstances of the case." [redacted] referred to Maclaren at page 509 where there is a general comparison of the three bases of taxation. The Auditor goes too far in applying travel to a statutory scheme. SLAB have never knowingly allowed travel. What a Solicitor charges in a judicial account does not make it reasonable on other bases of taxation. The Legal Aid Fund has an interest in the case and the Board does not consider travel to be reasonable. The last set of Guidelines issued by SLAB was in 1994. The allowance of

travelling time has not been challenged and this is not the basis to transfer what is in judicial accounts to Legal Aid accounts. The Board would have to know the firm's arrangements for travel and the day for which it is charged. Issues of apportionment might arise if the travel encompasses attending to other work.

SUBMISSIONS BY [redacted]

In his considerable experience he had never seen charges for travelling challenged in a detailed judicial account. Charges for travel are allowed judicially in the Sheriff Court as is evidenced by the memorandum of the discussion with the Sheriff Court Auditor. He disputed [redacted] assertion that SLAB had never allowed travel and referred to the case of [redacted] (supra) dealt with travel on a judicial basis. [redacted] was issued ten years ago and practice had changed. The absence of challenge to the inclusion of travel time in Court of Session and Sheriff Court detailed accounts meant that parties' agents were satisfied they met the test in Rule of Court 42.10-(1) and Regulation 8 of the Sheriff Court Regulations. He accepted that the paying party requires to be protected. He disputed the relevance of [redacted] *v. The Chief Constable of Strathclyde Police* which deals with Counsel's fees but he agrees that as far as Counsel's fees are concerned, fees should be closer to judicial fees than agent and client fees.

[redacted] RESPONSE:

He did not think that *Dingley* should be dismissed in this matter. It gives a full study of all the relevant authorities. This was a practical issue and SLAB must come to its own view on what may be relevant.

CONCLUSION:

It is the Auditor's experience that in detailed judicial accounts, charges are made for travel to and from Court. These are not objected to and accordingly the Auditor has never been required to consider whether such charges form a reasonable judicial recovery in terms of Rule of Court 42(10)1. Mr. Balfour noted this to be the case in 1994. It appears no information on this matter was sought from this Auditor's predecessor. The Auditor is a member of the Lord President's Advisory Committee on Court fees. The question of charges for travelling time has been discussed by the Committee after representation from the Law Society of Scotland seeking to add a charge for travelling time to the fees set out in Part V of the Table which covers Block Fees. The most recent discussion took place on Monday, 15th December 2003. It is accepted by the Law Society of Scotland and the Committee that the recovery of charges for travel in detailed accounts is reasonable. Mr. [redacted] seeks to rely on the case of *Fulton* (supra) which was issued over ten years ago and is contradicted by the Sheriff Court Auditor in the Memorandum. *King v. Patrick* (supra) does not assist. The test in that case is of expenses "necessarily and properly incurred" which is materially different to the test in Regulation 4. The test in that Regulation is simple. "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." *Brims Henderson v William Horne Henderson* (supra) dealt with the reasonableness of allowing charges for travel between Thurso and Wick for conducting the case in a proper manner on a judicil basis. The Sheriff Principal upheld the disallowance of travel but states, "In each case, whether or not to allow travelling expenses is a discretionary question for the Auditor. In this case, no material has been

laid before me which would entitle me to hold that the Auditor did not properly exercise that discretion."

In this dispute on the matter of travelling time the Auditor is satisfied that a prudent man of business will know that charges for travelling are accepted as reasonable charges judicially in terms of Rule of Court 42.10(1). He may, therefore, without special instructions from his client, incur these in the knowledge that his account would be taxed. That is the single and simple test the Auditor must apply. Regulation 4 gives no special dispensation because Legal Aid may be involved. Nothing in Mr. Haggarty's written or verbal submissions has persuaded the Auditor to change the views he has expressed in *Crooks* and *Donofrio.*

The items of charge in dispute are:

22nd February 2002 for By Order Hearing:	£21.80
1st March 2002 for Hearing:	£21.80
12th April 2002 for By Order Hearing:	£21.80
26th April 2002 for Hearing:	£21.80

Mr. Traynor conceded that travel on 22nd February 2002 was shared with another matter and should be halved. The Auditor taxes these items in dispute at £76.30.

Finally,/

Finally, by e-mail of 3rd November 2003, [redacted] intimated a fee of £285.00 plus VAT. That e-mail was copied to [redacted] but no response has been received. In the absence of a response, the Auditor finds Mr. Traynor entitled to a fee and fixes it at £250.00 plus VAT.

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