

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

n the cause

KL



Pursuer

against

GMG CONTRACTORS LTD & ORS

Defenders

EDINBURGH. 30 June 2004

The Auditor has been asked to tax the fees claimed by James A Peoples QC.

The Auditor held a diet of taxation on the 14 June 2004. In attendance was [REDACTED]  
[REDACTED] Solicitor, on behalf of the Scottish Legal Aid Board, and James A Peoples, QC.

In this case there is a dispute between Senior Counsel and the Scottish Legal Aid Board on the level of Senior Counsel's fees. Senior Counsel's fees are set out in a Note of Fee dated 24 October 2001. He seeks to recover £750.00 for a Consultation with a Health & Safety Expert, including revising answers to a Minute of Amendment prepared by Junior Counsel, £1000.00 for a Consultation on Tender and £9000.00 for an eight day Proof, which settled on the first day.

Prior to the taxation, Senior Counsel prepared and lodged submissions. These set out the background to this dispute and the 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 1, 2 & 3 set out the background history to the pursuer's accident. Points 4, 5, 6, 7, 8, 9 & 10 set out the history of the litigation and the complexities. Points 11, 12, 13, 14, 15 & 16 detail the history of the adjustment of the Judicial Expenses and subsequent negotiations with the Scottish Legal Aid Board.

Points 17 & 18 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. Referring to "Regulation 3 (2) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 [the 1989 Regulations]" states expressly that the 1989 Regulations do not apply to the fees of Counsel recoverable by virtue of an award of expenses in favour of the assisted person. The 1989 Regulations apply only to the fees of Counsel other than fees which are recoverable by virtue of an award of, or agreement as to, expenses in favour of the assisted person. That is the clearest indication that there are fees payable to counsel which are outwith the scope of the 1989 Regulations. Regulation 3 (2) expressly recognises that nothing in the 1986 Act – including the provisions of Section 33 and any regulations made thereunder – shall affect anything that is recoverable by virtue of an award of, or agreement as to, expenses: see Section 43 of the 1986 Act".

"The 1986 Act, properly construed and understood, imposes a statutory obligation to pay out of the Fund such sums as are due to counsel in respect of fees properly incurred: see section 4(2)(a) of the 1986 Act. Fees for services of counsel which are "recoverable" by virtue of an award of, or agreement as to, expenses fall to be treated as fees properly incurred which it is the obligation of the Fund to pay.

Otherwise, an item in an Account of Expenses which is taxed and found to be an expense properly incurred by the assisted person which the party liable in expenses must pay would, if SLAB's argument is correct, be an item which, by virtue of the 1989 Regulations, is liable to subsequent reduction because it is a fee to which, notwithstanding Regulation 3 (2), the 1989 Regulations apply. If SLAB is correct, the fee must be characterised as not being a fee recoverable by virtue of an award of, or agreement as to, expenses in favour of the assisted person. That is a nonsense where the fee is one which has been (or in the absence of agreement is liable to be) taxed in order to determine whether it has been properly incurred. On SLAB's view, all fees of Counsel are fees to which the 1989 Regulations apply. Plainly having regard to Regulation 3 (2) – which echoes section 43 of the 1986 Act – that cannot be right. By virtue of Regulation 3, read as a whole, there are fees of counsel which are regulated by the 1989 Regulations and fees of counsel to which the 1989 Regulations do not apply. The real question is whether the particular fee is, or is not, a fee recoverable by virtue of an award of, or agreement as to, expenses in favour of the assisted person. Where, as in this case, the fee has in fact been recovered by virtue of an award of expenses (whether as a result of agreement to avoid the necessity of taxation or as a result of a taxation), the fee in question is, it is submitted, one to which the 1989 Regulations do not apply. In practical terms, what that means is that neither SLAB nor the auditor, if the taxation is a referral under Regulation 12, can lawfully interfere with the amount of the fee. It also means that, for the purposes of section 4 (2)(a) of the 1986 Act, the sum agreed or, which failing, the sum taxed is a fee properly incurred which, by virtue of the 1986 Act, must be paid out of the Fund to counsel.'

██████████ on behalf of the Scottish Legal Aid Board lodged Points of Objection prior to the diet of taxation under the following headings:

*Payments into the Fund*

It is understood that judicial expenses in the global sum of £38,500 were agreed, recovered and paid into the Fund. Section 4 (3)(b) of the Legal Aid (Scotland) Act 1986 (the "Act") provides that *there shall be paid into the Fund ... any sum recovered under an award of a court or an agreement as to expenses in any proceedings in favour of any party who is in receipt of civil legal aid.*

#### *Payments out of the Fund*

Section 4 (2)(a) of the Act provides that there shall be paid out of the Fund *such sums as are, by virtue of this Act or any regulations made thereunder, due out of the Fund to any solicitor or counsel in respect of fees and outlays properly incurred ... in connection with the provision, in accordance with this Act, of legal aid or advice and assistance.*

The nominated solicitor lodged a legal aid account in terms of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. ("Civil Fees Regulations"). Regulation 3 (1) provides that *these regulations shall regulate the fees and outlays allowable to solicitors, and the fees allowable to counsel, from the Fund in respect of legal aid under the Legal Aid (Scotland) Act 1986, other than criminal legal aid, upon any taxation in accordance with regulation 12.*

Counsel's fees are equally, governed by the Civil Fees Regulations. Regulation 9 provides that *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.*

Regulation 10(1) provides that *counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4.*

Schedule 4 sets out a Table of Fees for the remuneration of counsel providing criminal legal aid.



Section 32 of the Act provides that *where legal aid is available to a person in connection with any proceedings (whether legal aid is available in connection with all or only part of the proceedings).*

- a) *The solicitor and counsel providing legal aid shall not take any payment in respect of any advice given or anything done in connection with such proceedings during any period when legal aid was so available except for such payment as may be made, in accordance with this Act.*

The narrative contained within counsel's fee note does not support a fee of £10,000 as brought down in the fee note and, in the Board's opinion, is not clearly referable to the level of fees prescribed in the Table of Fees which the Board requires to apply in line with the observations set out in *Uisdean McKay – v- HMA 1999 SCCR 679*.

In dealing with Points 17 & 18 the Auditor is not persuaded by Senior Counsel that he does not have the power to deal with counsel's fees in the circumstances outlined to him. The Auditor in coming to this conclusion is satisfied that the terms of the Regulations gives him the Statutory power to increase or reduce the levels of fees at taxation, notwithstanding these circumstances.

The Auditor accepts that the purpose of Regulation 3 (2) is to put the assisted person in the same position as a successful party who was not in receipt of Legal Aid. There is nothing in this section which removes the right to taxation on counsel's fees. Although *Uisdean McKay –v- HMA 1999 SCCR 679*, is concerned with criminal legal aid fees the court's general direction in that the auditor is required to tax counsel's fees within a "statutory framework"... "The rules bind the auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them". The Statutory Framework 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 principle which we must follow in this case is that established in the case of *Walker v. Walker*, 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, "where 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 the basis of taxation being greater than those recoverable on party and party basis.

Regulation 10 states that "*counsel's fee 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 remuneration for the work with regard to all the circumstances, including the general levels of fees in the said Table of Fees*".

In 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. In applying "the prudent man of business" test the Auditor having considered the particular circumstances of this case is satisfied as to the complexities. The action was of great importance to the pursuer who suffered catastrophic injuries having fallen some 15 ft from scaffolding in the course of his

employment. On the day of the accident, he was working as a roughcast plasterer harling houses that had been constructed. The pursuer was performing his job on the scaffolding erected by the third defenders. Originally the action had been raised against the third defender also, but following legal advice was abandoned. Ultimately, the action proceeded against two defenders with many issues requiring investigation. The issues were factually complex and difficult. They involved both common law and various statutory regulations concerning the employment status of the pursuer, i.e. whether he was an employee of the first defenders or an independent contractor with responsibility in general for his own safety and welfare. There was the issue as to the existence and extent of any duty at common law, or by virtue of statute or statutory regulations, owed to the pursuer, whatever his status, by the second defender's as main contractors or by any other defender. There was also an issue as to whether there had, in the circumstances of the particular case, been any negligence or breach of statutory duty on the part of the defenders, including who had the responsibility at common law or by virtue of statutory regulations for ensuring that the scaffolding was in a safe condition at the time it was used by the pursuer. The sums sued for were substantial at £1.5 million. Following extensive negotiations settlement was ultimately agreed on the first day of the proof at £650,000.

The Auditor therefore allows counsel's fees for the consultations held on the 17 March 1999 and the 5 October 2001, at the amounts rendered of £750 and £1000 respectively. The fee for the Consultation of the 5 October 2001 includes an element of preparation for the forthcoming proof.

Turning to the fee claimed for the proof, the Auditor found Senior Counsel's submissions (points 1-10) and accompanying information produced at the diet of taxation helpful. The Auditor in applying "the prudent man of business" test is satisfied that reasonable remuneration for the work undertaken by Senior Counsel in connection with the proof, and preparation for it is two and half days at £2250.00 for the hearing, and two days preparation at £1500.00 per day.

Accordingly the Auditor taxes Senior Counsel's fees at £10,375.00.

The Auditor has given consideration to Senior Counsel's request for the expenses of his attendance at taxation. As his primary submission has been rejected, the Auditor is satisfied that each party should bear their own expenses.

*Henry. Lichten*

AUDITOR OF THE COURT OF SESSION