

COURT OF SESSION, SCOTLAND

R E P O R T

by

AUDITOR OF THE COURT OF SESSION

in the cause

PM

against

HER MAJESTYS ADVOCATE

EDINBURGH. 23rd March 2005

1. This matter arose out of a dispute between the Scottish Legal Aid Board and Mungo Bovey, Esq. Q.C., in relation to fees claimed by counsel for representing [REDACTED] in an Appeal to the Justice Committee of the Privy Council.

2. On the 9 February 2005 there was a hearing before the Auditor on the competency of Taxation. The Board were represented by [REDACTED] Solicitors. Mr. Bovey, Q.C. attended with his Clerk, [REDACTED]

1. Background

The background to this matter arises from the interpretation of the Criminal Legal Aid (Scotland) Regulations in conjunction with the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

Counsel represented [REDACTED] in an Appeal to the Judicial Committee of the Privy Council. He subsequently submitted his fee notes to SLAB for the work in connection with these proceedings. An offer of payment was made but this was not acceptable to Mr. Bovey. Thereafter, he approached SLAB proposing a joint submission to have the matter of his fees remitted to the Privy Council or the Auditor of the Court of Session for Taxation. His proposal was rejected on the basis that there was no provision within the scope of the Board's Regulations for Taxation in Appeals to the Privy Council. Mr. Bovey's Clerk then wrote to Mr. Watherson, the Registrar of the Privy Council explaining the position, but was advised that he could not intervene as he did not have the authority to Tax counsel's fees, which was outwith his jurisdiction.

The matter was then referred to the Auditor of the Court of Session who fixed a Hearing on the Competency of Taxation.

4. At the Hearing the Auditor heard submissions from [REDACTED] and Mr. Bovey. (The Auditor will not go into these in any great detail for the purpose of this report, but sets out each party's position in brief).

Mr. Bovey set out the basis for his argument that his fees should be considered having regard to his interpretation of Regulation 11 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, "If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session" the relevant wording being "including appeals". Mr. Bovey also referred to Regulation 7 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (as amended by S.I. 1999 No. 1042) and Schedule 1, which allows remuneration to Solicitors in the Judicial Committee of the Privy Council. Mr. Bovey urged the Auditor to adopt the approach that it was

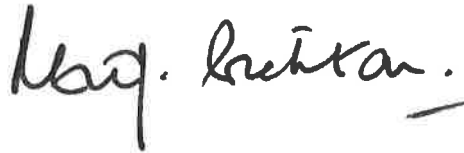
reasonable to infer that if the regulations allowed for appeals to the Privy Council then it was logical that Counsel should have a right to Taxation on a strained construction of Regulation 11, (a) to avoid anomaly or absurdity; and (b) to read the provision in a manner compatible with any Convention Rights.

Mr. Bovey referred to the letter from SLAB dated October 2004, which included an admission that in the drawing of the regulations there had been a “drafting oversight”. Mr. Bovey raised the question of ‘what did Parliament really intend?’ inferring that it was unlikely that Parliament would have deliberately denied him the right to taxation of his fees. Mr. Bovey then referred to Section 33 of the Legal Aid (Scotland) Act 1986 “any solicitor or counsel shall be paid out of the Fund” and contended that this gave him a Statutory right. He referred to ECHR legislation and how this should be applied in determining his right to taxation in this matter.

██████████ submitted that there was no right to taxation, as the regulations did not make provision for Taxation of counsel’s fees in Privy Council proceedings. He advised that the Board had made its position clear and that Counsel was aware that Appeals to the Privy Council are specifically excluded. The Scottish Executive did not amend the regulations pertaining to counsel’s fees for JCPC proceedings. Mr. ██████████ referred to Regulation 11 “If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session”. ██████████ contended that it is the Board’s interpretation of the regulation that the right to taxation does not extend beyond the High Court to the Privy Council and if the Auditor was to decide that it was competent to tax counsel’s fees the ‘Board’ would not participate in taxation on the basis that it would be *ultra vires* and, therefore, unlawful.

4. The Auditor, having given careful consideration to the submissions made by each party, is not persuaded that he has the power to 'tax' counsel's fees in this matter and must be guided by the principles set out by the Lord Justice Clerk in *Uisdean McKay v. H.M.A. Ref S.C.C.R. 679*. On page 10, the Lord Justice Clerk states, "it is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case as that set out in Schedule 2. This rule binds 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...."

Whilst the Auditor has sympathy for Mr. Bovey, no such remit exists within the provision of the Board's Regulations and, therefore, this must remain a matter for the relevant bodies to resolve.

A handwritten signature in black ink, appearing to read "Mr. B. B. B. B. B." with a horizontal line under the final letter.

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