

REPORT

by

CG

F.M. McCONNELL
Joint Auditor
12 Drumsheugh Gardens
Edinburgh EH3 7QG

in relation to
the Account of Expenses
submitted by

BELL,
Solicitors
Bellshill

to

THE SCOTTISH LEGAL AID
BOARD

EDINBURGH

15th
21st JUNE 2006

The Auditor taxes the fees as detailed in the Solicitors Account produced herewith at TWENTY THOUSAND THREE HUNDRED AND TWENTY TWO POUNDS AND SEVENTY NINE PENCE (£20,322.79) with outlays of ONE THOUSAND FOUR HUNDRED AND SIXTY TWO POUNDS AND TWENTY FOUR PENCE (£1,462.24) and the Audit fee as apportioned in the Note annexed herewith.


JOINT AUDITOR

NOTE:

BACKGROUND


A formal diet of taxation was assigned. [REDACTED] appeared on behalf of the Scottish Legal Aid Board. Mr. J.M. O'Dowd of Bell, Solicitors, Bellshill appeared for [REDACTED] and Steven Hughes, Advocate on his own behalf.



By way of background I was advised that papers were served under the Proceeds of Crime Act. Heritable property owned by [REDACTED] had been the subject of a transfer of title. Mr. [REDACTED] owned a one half *pro indiviso* share and this share was conveyed to Mrs. Gough. It was averred that that transfer of title should be reduced; that it was done to defeat the rights of the Crown to seize the share under the above Act. For [REDACTED] it was argued ^{that} ~~that~~ there were good and justifiable reasons for the transfer. [REDACTED] who had been convicted and sentenced to six years in prison for the supplying of drugs was an inveterate gambler. [REDACTED] had been charged alongside her husband but her plea of not guilty to the libel was accepted.

Upon being served with the papers she consulted Mr. O'Dowd. He had to apply for ABWOR. He discussed the application with [REDACTED] and was given a great deal of assistance and advice from him particularly in relation to the need to make further applications for increases in expenditure as the matter progressed through the Courts.

These were High Court proceedings and Mr. O'Dowd instructed Steven Hughes to represent Mrs. [REDACTED]. Mr. O'Dowd, I am told, made applications at every stage in the proceedings and would set out the justification for so doing. These applications were carefully scrutinised and considered by SLAB. It was not uncommon for them to query the need, request further information and seek further justification for the pending application. Mr. O'Dowd submitted that at every stage in proceedings the Board were made fully aware as to what was happening and the extent thereof. It was not unusual for the applications, on occasion, to be referred to the Board's Solicitor for consideration. In the event the proceedings were settled on an extra-judicial basis. [REDACTED] who had two young children, (one with special needs) kept the house. Monies were apparently located in [REDACTED] name and a deal was done.



SUBMISSIONS ON BEHALF OF SLAB

For the Board, [REDACTED] advised that great efforts had been made to negotiate a settlement with the Solicitors and counsel and although a "substantial" offer had been made this had been rejected. Under the scheme SLAB have to have regard to a cost ceiling. It is incumbent upon them to carefully scrutinise claims for payment. A number of tests must be satisfied:-

1. is the claim within the authorised limit
2. was the work necessary
3. did the work fall within the ambit of the statutory provisions
4. was the work done by the Solicitor reasonable in all the circumstances
5. did the Solicitor have proper regard to ensure the work was done with due economy

[REDACTED] advised that having taken all these elements into account they stand back and look at the whole transaction and exercise their judgement on the fairness and reasonableness of fees. He advised that different tables of fees applied to Advice and Assistance and ABWOR.

In this case matters were latterly regulated by ABWOR which required the Board's prior authorisation at each stage. The initial proceedings were under Advice & Assistance. From the time when the Board authorised representation in the Court proceedings the charging basis is ABWOR. In this case the line was crossed on 16th October 2001. [REDACTED] was in receipt of the Prosecutor's statement following upon the conviction of her husband and up to that stage the charges were regulated under the Advice & Assistance table. Thereafter the Solicitors were authorised to provide representation. [REDACTED] submitted that one of the most important differences in this account was the way in which precognitions were dealt with. Under Advice and Assistance agents are allowed a prescribed fee whereas under ABWOR the charge is calculated having regard to time spent and sheetage.

He then turned to the broader headings of dispute and said this:-

1. there were detailed some 27 meetings with the client during these proceedings totalling 48.5 hours. In his estimate this was grossly excessive and could not be justified. He based his objection on his own considerable experience in dealing with similar kinds of claims.
2. with regard to consultations with Counsel it was noticed that these did not always involve the presence of the client. Some of the consultations appeared very informal in so far as they did not follow a letter of instruction. The consultations shared a pattern of almost weekly meetings. It was argued that these charges were grossly excessive in relation a) to the number of consultations and b) the need for them.
3. concern was expressed at the time charged in examining documents – 20 hours had been claimed. This was in addition to charging for 11 hours in proof preparation in a case conducted by counsel. Having regard to the nature and extent of the case documentation the time spent could not be justified and could not be considered reasonable.
4. objection was also taken to counsel's fees for "notional" diets at the High Court. It was conceded that the concept of "notional" diets was somewhat obscure but that they are a daily feature of High Court life. [REDACTED] understanding was that the element of preparation for such diets would be minimal; there was never any arguments or evidence led; it was simply procedural to keep the proceedings going until there could be a proof. Accordingly he was concerned at the level of fees charged.
5. [REDACTED] had touched on the issue of precognitions and questioned whether these had been charged on the proper basis. He also questioned whether they were all justified, e.g. they precognosed their client's minister – how could that be justified.

6. there was evidence of double charging – see entries of 16th November 2001 and 11th January 2002 where Edinburgh correspondents were involved. It was submitted that only one Solicitor was needed or could be justified
7. attention was drawn to the entry of 14th May 2002 which calculates the charge on the wrong basis, i.e. based on time when it should be sheetage.

SUBMISSIONS ON BEHALF OF THE SOLICITORS

In response Mr. O'Dowd conceded that where the wrong table had been operated (see his letter to SLAB of 10th November 2004) their entry may have to be abated. He added that when submitting his claims he would send supporting documentation which was never returned and he assumed had been lost or mislaid by the Board.

With regard to the purported “double claim” of 16th November he pointed out that no such claim had been made.

With regard to the consultations he accepts these were not always proceeded with a formal letter of instruction but they did take place and were necessary in a fast changing situation. He accepted it was incumbent on him to proceed always with due economy. He kept the Board fully informed at each stage and they exercised a continuing supervisory role over his actings. On occasion some of his applications were refused. He had to operate within very tight constraints. On occasion he was required to produce and submit up-to-date interim accounts.

With regard to the other objections he was content to leave it to my judgement. His position is that the work charged for was necessary to defend a claim of considerable importance to [REDACTED] that it was conducted at all times with due economy and what he charged was manifestly reasonable.

SUBMISSIONS ON BEHALF OF STEVEN HUGHES, ADVOCATE

Mr. Hughes, Advocate, concluded the taxation by making these observations:-

1. the proceedings were carefully supervised, not only by the Board but by Court. He had to be in a position to assist Mr. O'Dowd to make the applications to the Board and discuss and articulate reasons/justifications for them.
2. over and above what has been charged, there were a number of meetings and telephone calls not charged to the Board.
3. he advised that the Crown had served different schedules at different times varying the amounts sought. In such cases it was not unusual for the Crown to pitch the claims at the top level and leave it to the defence to argue on *quantum*. In essence one was dealing with a forensic accounting exercise based on national averages. The whole matter under review required a great deal of co-operation from the client which was not always forthcoming, e.g. they needed to know the origin or source of monies in particular bank accounts. This was a painstaking exercise.

Turning to Notional diets he argued that the procedure was "front loaded". The Crown provided them with copy statements at an early stage. These had to be investigated and considered to enable a plea to be made at the preliminary diet. The "Notional" diets were an important procedural mechanism to enable the Court to exercise a strict supervisory role and generally ensure that the proceedings did not drift and be subject to inordinate delay. It followed, therefore, that these were not simply formal diets. The Court expected to be told the stage at which parties were at and generally keep the Court advised of progress. In the course of these proceedings Mr. Hughes mentioned that he had to examine two conveyancing transactions leading to the purchase of the

family home. The transfer of the title raised a number of technical conveyancing difficulties. In an effort to broker a settlement counsel had at least three meetings at the Crown office.

The client [REDACTED] was in a highly vulnerable position. She had two young children and her husband was in jail. The whole family background had to be investigated and established. There were policies of insurance written in favour of [REDACTED] and her children. Her father-in-law had been as generous as his own finances had permitted providing subsistence to his daughter-in-law and his grandchildren. His role, in proceedings such as these, had to be carefully considered and analysed.

Finally I was provided with a copy of a letter dated 10th November 2004 from the Solicitor to the Board which set out at great length their position. This is produced and referred to herein *brevitatis causa*.

DISCUSSION

In terms of the Regulations a Solicitor is only allowed fees for work "actually, necessarily and reasonably done with due regard being had to economy". These concepts of necessity, reasonableness and economy are not susceptible to any precise definition as would give them utility as practical tests; they are convenient labels and the best an Auditor can do is, pragmatically, apply his own experience and judgement to any particular circumstance.

In this instance I accept the account before me has to be judged on the particular circumstances of the case. There is little doubt that this was a matter of great importance to the client; *inter alia* she risked losing her house with the consequential effects this would have on her dependent children. A great deal of money was at stake and it is apparent that the claim by the authorities rested on certain assumptions as to the lifestyle enjoyed by [REDACTED]. I have no doubt in my mind that it was necessary for the Solicitors to carry out wide ranging investigations to begin to challenge the

assumptions implicit in the Crown's petition. It is noteworthy that having made a full investigation the Solicitors instructed Chartered Accountants to carry out a forensic analysis on the spending patterns and the asset base of the Goughs. The accountants prepared a full report and charged out 16 hours preparation. Their fee was not subject to any challenge and is indicative of the complexities of this case. In the result settlement terms were agreed which were favourable to Mrs. [REDACTED] who kept the house. It is against this background that I turn to the specific objections to this account.

TIME SPENT ON MEETINGS/CONSULTATIONS

It will be seen that I have abated some individual entries. That is not to say that the Solicitor's file entries did not accurately reflect the time spent. But taking the whole proceedings into account, what issues were involved and the statutory constraints referred to above I considered that the total time claimed should be cutback.

COUNSEL'S FEES

I do not think the objections made by SLAB in relation to the "notional" diets have any merit. These diets are important and vital steps in the proceedings enabling the Court to exercise a measure of supervisory control ensuring that cases are not allowed to drift through inactivity. I have, however, abated some of Counsel's fees. Counsel in this case was involved from the start. He was very familiar with the case and the issues raised. I considered that there would not be a great deal of preparation for the "notional" diets to enable Counsel to inform the Court as to the current state of play. In addition I had regard to the tests of reasonableness and economy.

EXPENSES OF TAXATION

This is a matter within my discretion. The fees claimed in this case totalled £27,215.39. I have taxed off £6,392.60. I considered equity would be served were I to apportion the Audit fee between the parties with the result that SLAB pay £896.00 excluding VAT and the Solicitors £256.00 excluding VAT.