

Auditor of the Court of Session

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JY

HMA v. [REDACTED]
Lewis K. Kennedy, Advocate
Legal Aid Reference No. SM/08/71313797/07

EDINBURGH. 19 May 2009. At the diet of taxation on 9 March 2009 the Auditor heard representations by Lewis K. Kennedy, Advocate, and [REDACTED] Esq., on behalf of the Scottish Legal Aid Board in respect of the fee of £132.00 claimed by Lewis K. Kennedy, Advocate, as part of his fee note dated 9 September 2008. Having considered the business papers and files submitted to him, the Auditor now taxes the said fee at NIL (£00.00).

In the particular circumstances of this case, it is not the Auditor's intention to charge a fee.

AUDITOR OF THE COURT OF SESSION

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs. Cynthia Cameron

[REDACTED] v PF(Glasgow Sh Ct)

3

From: [REDACTED]@aol.co.uk
To: cairdvaughan@btconnect.com
Subject: [REDACTED] v PF(Glasgow Sh Ct)
Date: Wed, 27 Aug 2008 11:35
Attachments: bill_suspension_part-heard_bias.docx (29K)

K18 - LEWIS KENNEDY
CO20/YA080008/01

FAO John Hall

John,

Bill of Suspension is now attached. Please carefully scrutinise - that it is sufficiently comprehensive and accurate.

My instinct is that it might be premature to incorporate averments dealing with the Sheriff's treatment of certain aspects of the evidence, since he has not as yet reached a final determination.

Please insert details of your Edinburgh correspondents.

It might be an idea for you to prepare an affidavit as to what exactly the Sheriff said in court.

You may also wish to obtain sanction that I might draft a "devolution issue" minute. In so doing, you should emphasise to SLAB that this will be for the purposes of appeal proceedings.

Let me know when you have (full) legal aid funding that we might consult and tidy up some loose ends - and that I might then produce a more considered opinion.

For example, there may be an imperative to adjust/amend upon reviewing the joint minute addressing the mental health issues of the complainer/accused.

Furthermore, is this a relevant charge - it fails to identify a complainer? Clearly, any such "preliminary" plea could only be taken at the close of the Crown case, at the earliest.

Enjoy Hols,

Lewis

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RECEIVED
03 SEP 2008

Auditor of the Court of Session

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Our Ref: 50594

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[REDACTED]
LP 2
GLASGOW 14

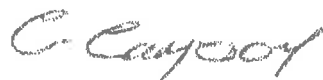
19 May 2009

Dear Sir,

HMA v. [REDACTED]

I refer to the above action and to the diet of taxation which took place on 9 March and enclose, for your information, a copy of the Auditor's Report.

Yours faithfully,



Principal Clerk
Enc.

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs. Cynthia Cameron

[REDACTED]

[REDACTED]

This particular matter has been referred for my attention and perhaps I can attempt to resolve matters or, at the very least, make clear our position in advance of any future taxation proceedings.

Our position generally is that there is no provision within the current Schedule 2 Table of Fees for a revisal of the Bill of Suspension by junior counsel. The only provision which exists for such work is under Chapter 2 of Part 2 of Schedule 2 which provides a fee for senior counsel revising a Bill of Suspension. Significantly, while there is a fee for junior counsel drafting a Bill of Suspension, there is no such fee for a revisal. In my view, this suggests that while it is reasonable and appropriate for junior to draft the bill and for senior to revise it, it also supports the position that counsel does not get paid for revising his/her own written work.

In terms of what any proposed new Table of Fees may include, it is perhaps somewhat irrelevant to enter into conjecture on what may be payable in the future.

I note your reference to Note 2 of the Notes on Operation and while I accept that particular provision allows us to provide a fee where no such fee is prescribed, it also suggests it is reasonable to do so when it "...appears appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Table of Fees." In any event, having regard to this matter and having considered both versions of the Bill of Suspension, I can confirm I am prepared to allow the revisal charge sought by counsel of £60.

Turning now to certain comments contained within counsel's e-mail to you of 4 February 2009 when Mr Kennedy makes an observation on "communication" with the solicitor. I assume he is referring to the fee claimed by him as an opinion of 28 August 2008. By dint of the fact that counsel has referred to "communication", I would assume he is no longer asserting an opinion has been provided.

[REDACTED] e-mail of 2 February 2009 specifically asked for confirmation, to avoid any doubt, that the opinion charged on 28 August 2008 was in fact the e-mail to the solicitor of 27 August 2008 which also included the Bill of Suspension as an attachment. To date it has not been confirmed by counsel that this is the opinion referred to but I can only assume that it is, as there is no other documentation attached which could be remotely considered as an opinion. For the avoidance of doubt, and as has been stated in previous cases, such communication is not considered payable as a "necessary note" and certainly not an "opinion".

However, for the sake of clarity, it would be of assistance if you or counsel could confirm the following:

- Is the e-mail of 27 August 2008 is in fact the "opinion" charged for?
- If it is the opinion in question, please clarify where the opinion actually lies within the body of the e-mail of 27 August 2008.
- Further, perhaps counsel could clarify how, in his view, it justifies the maximum fee payable for an opinion.

I also note with some surprise and, indeed, concern that counsel appears to be of the view that, in the event the sums payable are "capped at unrealistic levels" that "there should be provision for an element of cross-subsidy elsewhere on other written work". If I am interpreting this statement correctly, counsel appears to be suggesting

that if, in his view, the fee payable and as prescribed within the Criminal Legal Aid (Scotland)(Fees) Regulations 1989 is " unrealistic " then he should be entitled to charge against other written work in such a way which allows him to be remunerated overall at a level he feels is more " realistic ".

Is my reading of counsel's comments correct? If so, can you please clarify the following:

- Has he adopted this approach in this particular case?
- If so, where has counsel elected to cross-subsidise his fees?
- For example, is this the reason he has charged the maximum fee for an opinion, as charged 28 August 2008?
- Is this counsel's view generally and has he adopted this approach in other legally aided cases?

In conclusion, if counsel can confirm his "opinion" of 28 August 2008 (as charged on the fee note) is in fact his e-mail to the agents Caird Vaughan of 27 August 2008, then I can advise we have absolutely no hesitation in this matter proceeding to taxation.

I trust this confirms our position and look forward to hearing from you in due course.

Regards

[REDACTED]

[REDACTED]

Further to this matter, having reviewed the Regulations again and spoken to [REDACTED], I am of the view that note (1)2 of the Regulations applies to this written work (drafting revised Bill of Suspension).

For the avoidance of doubt, I am referring to the note which starts "Where the Table of Fees does not prescribe a fee for any item of work etc...."

In addition to this, I am told by my colleague in Edinburgh that she has seen Junior counsel being paid for this type of written work under the parameters of note (1)2 of the Regulations. She has also intimated to me that in the new draft regulations, which SLAB have had input on, there is specific allowance for this type of written work.

Does this therefore allow you to pay for this piece of written work and avoid the need for the Taxation?

I look forward to hearing from you.

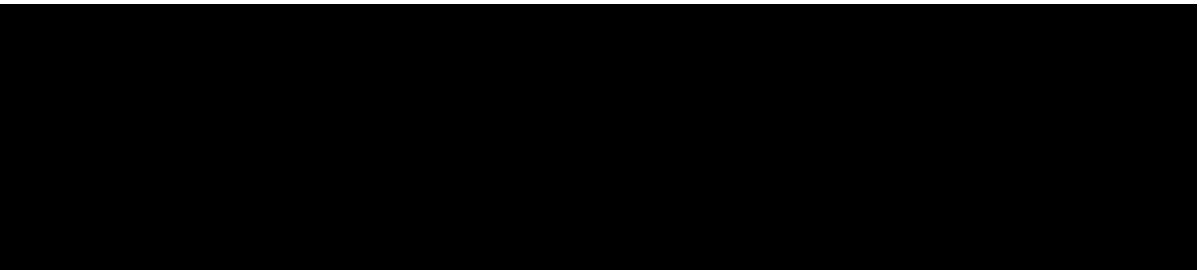
Kind Regards



We have been asked to arrange taxation in this case now. I will proceed to do this. In the meantime is there anything further you need from us in the way of documentation. I will simply be sending copies of all our correspondence and fee to the Auditor and I think you will now have all of that material.

I imagine the auditor will contact you in due course intimating the date of the diet of taxation.

Regards,



For the avoidance of any doubt, these abatements are not acceptable. The Board is simply ignoring the complexity of the work done. Indeed, the complexity of this written work product should be self-evident.

I do not accept the Board proposition that there should be never be any provision for payment for revisal of pleadings. That approach is completely irrational. Adjustment or amendment of pleadings in response to further information or legal research actually assists the court - and the Crown (who might otherwise argue that they have been ambushed). Pleadings often grow organically as a case progresses.

The regulations do not preclude or limit the number of Bills of Suspension that might be drafted in relation to any one case. Accordingly, it is not correct to state that there is no provision for payment arising from the drafting of a (revised) Bill of Suspension.

Furthermore, I fail to understand why a communication with a solicitor does not warrant any kind of payment. This communication was advancing the case.

Meanwhile, I would suggest that given that the fees in relation to the drafting of the Bill(s) of Suspension (the actual appeal documentation) are effectively capped at unrealistic levels, then there should be provision for an element of cross-subsidy elsewhere on other written work - to properly reflect the complexity of the work undertaken in relation to the drafting of the Bill(s) of Suspension. That is the only basis that this type of complex work can be rendered economic. I would be happy for the auditor to make a determination in relation to that.

Agents abandoned this appeal so it is not as if there is any provision for payment under the ambit of the daily court rate.

Please take this to taxation immediately.

Can you send confirmation that this has been done?

Lewis



Hi Lewis,

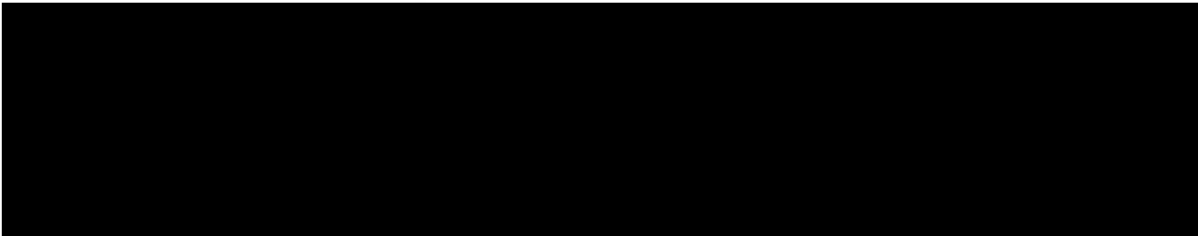
Please see below a response from SLAB. I have attached copies of all relevant documents for your info.

As you will see they are unfortunately, unwilling to increase their offer it therefore still stands at £100 with an abatement of £192.

If you are not willing to accept this, your only other option would appear to be to take this one to taxation. Can you please let me know your thoughts.

I look forward to hearing from you.

Kind Regards



You should read the legal disclaimer at the end of this e-mail about the terms and conditions that apply to it.

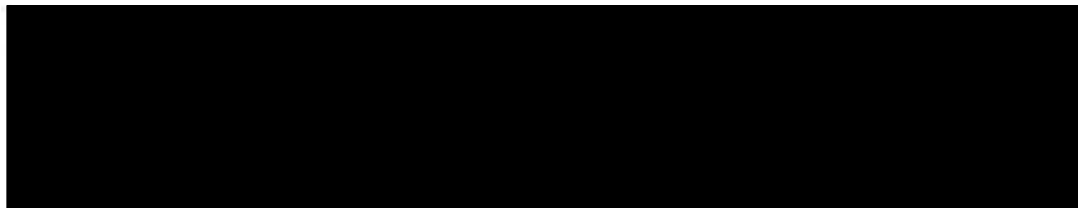


Thank you for your e-mail of 15th January 2009.

27th of August 2008 - For the avoidance of doubt, please confirm the e-mail of this date is counsel's opinion. in the event it is, I am of the view this does not constitute an opinion on appeal but is effectively communication with the solicitor.

28th August 2008 - You have asked me to clarify why we proposed to abate the revival of bill of suspension?
The point is there is no fee for revival of Bill of Suspension.

I await you comments.



Many thanks for your offer dated 12th January re the above. Counsel is not prepared to accept your offer of £100 with a proposed abatement of £192. Please now find attached copy of counsel's opinion dated 27/8/08 and also copy of revival of bill of suspension dated 28/8/08. Can you please clarify why you are proposing to abate the revival of bill of suspension? Counsel would like paid as claimed for these documents.

Please review your offer accordingly and get back to me.

I look forward to hearing from you.

Kind Regards