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N O T E

By

**K CARTER, Interim Auditor of Court,
Glasgow and Strathkelvin at Glasgow**

IN

DIET OF TAXATION

Glasgow on Thursday, 22 March 2012

In case referred by

**LANIGAN MEECHAN & CO, Solicitors,
2 Hillkirk Street Lane, Springburn,
Glasgow G21 1TE**

FORCLIENT [REDACTED]

relating to Mental Health Tribunal.

V

The Scottish Legal Aid Board.

Legal Aid Reference No. AA/1244455110.

INTERIM AUDITOR'S DECISION.

GLASGOW, 22 March 2012. Act: Alan Meechan. Alt: [REDACTED] for SLAB.

[1] Having heard and submissions by both parties present at the Diet of Taxation, the *interim* Auditor of Court upheld the abatement applied by SLAB to the account and therefore upholds the decision by SLAB that the outlays in dispute [agreed by parties to be in the sum of £284.93] should be disallowed from the solicitor's account.

KEN CARTER

***Interim Auditor of Court
Glasgow and Strathkelvin***

NOTES by interim Auditor.

[1] Messrs Lanigan Meechan, Solicitors, Glasgow [LM &Co] were instructed by client [REDACTED] in relation to Mental Health Tribunal case and had a first meeting with client on 27 July 2010 and thereafter issued a Terms of Engagement letter to the

client dated 29 July 2010 after obtaining legal aid agreement to take the case on from SLAB on 27 July 2010. SLAB applied the following reference numbers to this case AA Reference AA1244455110; firm code 41615; solicitor reference 390299; solicitor nominated, Alan Meechan. [REDACTED]

The legal aid application was under ABWOR and the final account when lodged with SLAB was categorised as a MPS final account which was received by SLAB on 6 August 2010. That account was for total of fees of £1,024.20 plus outlays of £1,207.82, therefore, a total claim to SLAB for £2,232.02.

[2] After the account was lodged there was protracted correspondence between SLAB and this firm of solicitors which I will not detail within this Note, however, it was eventually agreed by both parties that the adjusted sum in dispute amounted to £284.93 which was in respect of outlays relating to another solicitor employed by Messrs Lanigan Meechan on agency basis, namely, Mr Neil Little, [NL] Solicitor, 63 Titchfield Street, Kilmarnock KA1 1QS. NL's Invoice to Lanigan Meechan was for the total of £441.15. However, after negotiation between SLAB and Lanigan Meechan it was agreed that the sum remaining in dispute relating to Mr Little's outlay's claim was £284.93.

[3] The crux of the disputed amount was whether or not Lanigan Meechan were entitled to instruct a Kilmarnock solicitor to cover Mental Health Tribunal hearing in Dumfries on their behalf given that the principal solicitor acting Mr Alan Meechan would be on holiday at the time of the MHT fixed for 20 August 2010. There has been much dispute between SLAB and LM & Co about the timing of when that MHT was adjourned to the later date of 24 August 2010 and when Mr Little was instructed to attend the initial hearing of 20 August and a preliminary meeting with the client Mary Watson which NL set up for 18 August 2010. The timing of the diet fixed for the Mental Health Tribunal of 24 August and the initially assigned hearing of 20 August [which was later agreed to be rescheduled for 24th] is not the crux of the point in dispute today in the Auditor's view. The disputed issue is that SLAB does not agree that a Glasgow solicitor should be paid for instructing a Kilmarnock solicitor to attend MHT hearing in Dumfries. SLAB's position is quite simple; i.e. if Mr. Meechan was not attending any diet in Dumfries then he should be seeking an agency appearance on his behalf from solicitors operating in the Dumfries area and not a solicitor operating in Kilmarnock which is some 50 to 60 miles

from Dumfries (54 miles was referred to at the Diet of Taxation). Put simply SLAB wished to abate the LM&Co claim for expenses and will not allow Mr Little's travel time nor his mileage from Kilmarnock to Dumfries. SLAB strongly argued that this is not a fair and reasonable outlay given that the account is submitted for payment on the basis of solicitor - client with a third party paying [i.e. SLAB paying]. Mr. Meechan's contention was that it was of paramount importance to ensure client representation and also submitted that "the clock was ticking" to obtain that representation and his firm knew (a) that Mr Little was available to act for them on an agency basis and (b) that he had some experience in the Mental Health field of work. Mr Meechan's position was also that Kilmarnock is a lot nearer Dumfries than Glasgow, therefore, Mr Little's expenses were lower than expenses which might have been incurred if he himself or another Glasgow solicitor had attended the MHT hearing. Mr Meechan also submitted that Advice and Assistance (Scotland) Regulations 1996 Regulation 17(3) and 17(4) can be applied to this case. SLAB opposed the contention that paragraph 17(3) and (4) applied here in respect that they refer to summary criminal matters in relation to ABWOR. SLAB submitted that paras 17(3) and 17(4) would not apply in this MHT case and that only 17(1) (a) and (b) should apply when the interim auditor makes his final decision in this matter.

[4] Mr. Meechan was candid in accepting that within his own firm "the clock was ticking" regarding arranging appropriate representation for the client, and that at a later stage whilst investigating the sequence of events with staff within his own office, leading up to arranging cover by Agent NL, he had come to the conclusion that it must have been around 17 August 2010 that his firm instructed Mr Little to cover the MHT of 20 August (the MHT which was at that time intact). His view is that it followed good practice that Mr Little should meet and be familiar with the client before the MHT on 20 August, therefore LM & Co instructed him to attend for a preparation meeting with the client in Dumfries prior to 20 August. The Auditor of Court asked Mr Meechan whether his firm had tried to obtain the services of any solicitors firm in Dumfries to cover in the Dumfries MHT and the Auditor also expressed the view that it would seem to him [the Auditor], to be good practice to instruct Agents as close as possible to the location of the MHT and if none were available, thereafter to work outwards from the

Dumfries MHT location rather than work in the opposite way i.e. instructing someone who was already known to the firm of Lanigan Meechan as a solicitor who was (a) willing to do agency work and (b) was available. The Auditor also asked the parties to note that he had checked the Scots Law Directory for 2010 and had noted that many firms operated in Dumfries who had their specialist area of law listed as Mental Health and Civil Legal Aid work. The question, therefore, arose in the Auditor's mind as to - why LM & Co chose Mr. Little as their first option.

[5] ██████████ for SLAB agreed with the Auditor that Regulations 17(3) and (4) should not be applied in relation to the Auditor's decision making process in this matter. He emphasised that 17(1) (a) and that the fee allowable to solicitors "should have due regard to economy" in ABWOR cases and emphasised that the single most important factor in SLAB's decision not to pay Mr Little had been that a local Dumfries solicitor had not been instructed.

[6] ██████████ also observed that the LM&Co file work had commenced around 27 July 2010 i.e. three weeks prior to the MHT hearing of 20 August and that if it was known that Mr Meechan was to be unavailable on 20 August there could have been a longer "lead- in" time to instruct local Dumfries agents to appear. He reiterated and adopted in oral submissions the written arguments contained in correspondence dated 2 November 2010 from SLAB's ██████████ Accounts Verification Unit to LM&Co, Solicitors in particular paragraph 3 at lines 3 & 4 which refers to LM&Co having left "everything to the last minute". As an observation the Auditor considers that if Messrs LM, Solicitors knew around 17th August 2010 [which is when Mr Meechan thinks his staff instructed Mr Little to appear for them] – would it not have been a safer and more practical idea to cover every possible option for future MHT hearings in this case and ask a Dumfries solicitor to cover (a) the MHT of 20 August 2010 and seek an adjournment of that to a later date or (b) give full instructions to attend the MHT of 20 August and be in a position to represent their client ██████████ If they had been successful in obtaining an adjournment then expenditure would have been minimised, and if they had been unsuccessful and been forced to proceed on 20 August then expenditure on Agents outlays would also still have been minimised. As it turned out it became known to LM & Co , on 19 August [the day before the Tribunal of 20 August]

that the MHT had been rescheduled for 24 August and therefore no appearance was necessary by any solicitor at the MHT of 20 August 2010.

[7] The Auditor of Court had read in detail the protracted exchanges of correspondence in the solicitor's file before the Diet of Taxation and at the Diet of Taxation these were verbally supported although no new material came to light. The Auditor's decision, therefore, boiled down to the one point of contention. Was it fair and reasonable given due regard to economy in this account based on third party paying a solicitor- client account of expenses and outlays – to allow travel time and mileage for a Kilmarnock based Agent to travel from a considerable distance from Dumfries when there were several Dumfries firms who may have been able to take on this work. The issue of availability of Dumfries Agents was never explored by LM \$ Co. The Auditor's position is that it would be a fair and reasonable assumption that some Dumfries Solicitors firm with some expertise in this field work would have been likely to be able to cover the MHT diets more economically than an agent say solicitor based in Kilmarnock.

[8] Accordingly, SLAB's position is upheld, Mr Meechan's submissions written in correspondence to SLAB on their file and verbally supported today have been unsuccessful. I leave it to parties to settle any further payments due on the overall accounts submitted at £2,232.02 but with the decision applying to this case that the disputed outlays of £284.93 should not be allowed as payable to Messrs Lanigan Meechan by SLAB.

[9] The Auditor addressed the position of the audit fee of £150 which had been paid prior to the diet by Messrs Lanigan Meechan and in respect that they had not succeeded in their arguments at today's Diet of Taxation the Auditor indicated that the expense of the Taxation Diet fee would also have to borne by Messrs Lanigan Meechan with no portion of that attributable to SLAB.

K CARTER
Interim Auditor of Court
Glasgow and Strathkelvin at Glasgow.

Noted issued on 24th April 2012 to both parties
and copied to Secretary of the Society of Sheriff Court Auditors for interest.

[REDACTED]

Taxation

[REDACTED] AA/12444!;5110 Glasgow Sheriff Court 22 March 2012

The Auditor, Ken Carter, agreed that the Board was correct to abate the travelling time elements of Neill Little's fee note, so has taxed those off.

The solicitor is to pay the taxation dues.

I didn't move for the expenses of the taxation -- I didn't think in a case where we are arguing that people should instruct genuinely local people that it would look too good from a Board reputational point of view that I had travelled through from Edinburgh for a thirty minute hearing instead of instructing someone local.

The auditor will send us a note of his reasons.

The gist of his decision was that if the solicitor was looking to instruct an agent to deal with a case in Dumfries, he would expect the solicitor to start looking in Dumfries and work out the way if nothing could be found there, instead of starting 50 miles away.

SOLICITOR REFERRAL – DIET OF TAXATION

Assisted Persons Name : [REDACTED]

ABWOR Reference : AA/1244455110

Solicitors Name : Lanigan Meechan & Co;

Date of Taxation & Location: Auditor Glasgow Sheriff Court 22 March 2012 @ 2.30pm

Type of Case : Advice & Assistance Accounts – Mental Health Act

1. Nature of the case:

The solicitors granted ABWOR to the applicant in respect of proceedings before the Mental Health Tribunal for Scotland.

The applicant suffered from a history of mental health problems. It was alleged that as the client had historically been non compliant and that her compliance was dependent on her moods it was recommended that a compulsory treatment order (CTO) was necessary. The applicants view was that any order pronounced should be community based as she was already in the community. An application was therefore lodged with the Mental Health Tribunal (MHT) for a CTO.

The account which has been lodged for taxation is attached at Appendix 1.

2. Fees allowable to solicitors

Solicitors are entitled to payment in terms of regulation 17 of the Advice and Assistance (Scotland) Regulations 1996.

17. (1) Subject to paragraph (2) below, fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance shall, and shall only, be –

(a) fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated, in the case of assistance by way of representation, in accordance with the table of fees in Part I of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3; and

(b) outlays actually, necessarily and reasonably incurred in connection with that matter, due regard being had to economy, provided that, without prejudice to any other claims for outlays, there shall not be allowed to a solicitor outlays representing posts and incidents.

(2) The fees and outlays allowable to the solicitor under paragraph (1) above shall not exceed the limit applicable under section 10 of the Act as read with regulation 12.

The solicitor's statutory right to taxation is enshrined in Regulation 18(4) Advice and Assistance (Scotland) Regulations 1996.

(4) If the solicitor is dissatisfied with any assessment of fees and outlays by the Board under paragraph (3) above, he may require taxation of his account by the auditor; the auditor shall tax the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17, and such taxation shall be conclusive of the fees and outlays so allowable.

3. Nature of dispute:

The taxation is restricted to a single entry (18 August 2010 – charged as an outlay on the final page of the account) in the account the attendance of the “local” (Kilmarnock) agent Neil Little who had been instructed by the nominated solicitors Lanigan Meechan. It appears that the purpose of their attendance was to attend on the client on 18 August 2010 to go over the psychiatric report and then cover the tribunal hearing at **Dumfries** which had been fixed for 20 August 2010.

Lanigan Meechan, were unable to cover the Tribunal Hearing (20/8) due to their Mr. Meechan being on annual leave. An email seeking an adjournment of the hearing was sent to the MHT on 12 August 2010. The solicitors indicate that they received no communication from the MHT until 19 August 2010 when they agreed that the diet of the 20 August 2010 would be adjourned until the 24 August 2010.

Solicitors View

The solicitor's position is that in light of what they see as “the limited time available” they had no alternative but to instruct Mr. Little who they had established was available to attend upon the client.

The solicitor is prepared to accept a restricted fee for Mr. Little's attendance as there was a shorter route which could have been taken from Kilmarnock to Dumfries. They are prepared to accept the following fee as a counter proposal to avoid taxation.

Date		Outlay	Fee
17/8/10	██████████ perusing independent psychiatric report		25.50
18/8/10	Travel to Abbie Gardens Nursing Home, Dumfries for the purposes of going over the terms of the psychiatric report in anticipation of the mental health tribunal due to take place on 20 Aug		
	Return Travel 2hrs 40 mins		140.25
	Attendance with client going over the terms of the psychiatric report and taking her instructions thereon 50 mins		51.00
	Mileage 114 miles	45.60	
Total Fees & Outlays and inclusive of VAT on Fees @ 17.5%		£45.60	£254.33

New Claim £300.28 - against an original claim of £441.15. A restriction of £140.87.

It should be noted that even if the Auditor was to allow the solicitors proposal the time engaged on the 18 August 2010 was consecutive so the travel and attendance time of 2hrs 40 mins and 50 minutes respectively ought to be aggregated. The correct charge should therefore be:-

Date		Outlay	Fee
17/8/10	perusing independent psychiatric report		25.50
18/8/10	Travel to Abbie Gardens Nursing Home, Dumfries for the purposes of going over the terms of the psychiatric report in anticipation of the mental health tribunal due to take place on 20 Aug		
	Return Travel 2hrs 40 mins		140.25
	Attendance with client going over the terms of the psychiatric report and taking her instructions thereon 50 mins (<i>rounded down to 45 mins as the total time engaged as travel is rounded up to 2hrs 45 mins</i>)		38.25
	Mileage 114 miles	45.60	
Total Fees & Outlays and inclusive of VAT on Fees @ 17.5%		£45.60	£239.35

The total claim should therefore be £285.30.

Boards Position

As there are at least four firms based on Dumfries who specialise in mental health (it is not unreasonable to expect Lanigan Meechan to know this given that they also “specialise” in this type of work) a “local” agent in Dumfries ought to have been instructed as opposed to an agent based in Kilmarnock. The Kilmarnock agents invoice as originally claimed is actually more expensive than had Lanigan Meechan attended from Glasgow.

The Boards guidance on the use of a local agent is contained in Part V Advice and Assistance Accounts, Paragraph 9.11 of the Civil Legal Assistance Handbook.

9.11 Use of a local agent

In line with the standard of taxation, you should instruct a local agent for representation before a tribunal at a distant location. Where a firm has more than one place of business, a solicitor based in the office local to the tribunal should, where possible, represent the client before the tribunal. If someone other than the acting solicitor can deal with the matter then a local solicitor is as well suited as any other and travelling costs would be less. Such additional costs would probably be unreasonable and may be the subject of abatement.

You should take various matters into account in deciding whether to instruct a local agent:

- the distance involved;
- the nature and purpose of the hearing,

- to what extent the case will be furthered by the solicitor's personal attendance – for example, whether negotiations at the court could have been carried out earlier in a more economical manner such as phone or letter;
- whether the attendance is of a formal nature since an agreement and a course of action, for example, adjournment, dismissal etc., has been reached;
- the nature, gravity and complexity of the proceedings;
- the availability of local agents.

If you have dealt with a number of other cases on the same day, thus diluting the travel costs, the personal attendance may not be an issue in the particular account. However, a number of attendances, none of them justified, will not be enough to justify the additional travel costs.

The Board's counter proposal for payment based on these guidelines is £89.89. This is arrived at by allowing what may have been reasonable for a Dumfries agent to attend on the client. The time as claimed by the solicitor (excluding travel fees and outlays) for considering the report and attending upon the client has been allowed as follows:-

Date		Outlay	Fee
17/8/10	[REDACTED] perusing independent psychiatric report		25.50
18/8/10	Attendance with client going over the terms of the psychiatric report and taking her instructions thereon 50 mins		51.00
Fees inclusive of Vat @ 17.5%			£89.89

The offer is based on an outlay had a Dumfries agent attended which would have reflected the statutory test of taxation of "actually, necessarily and reasonably incurred in connection with that matter, due regard being had to economy,".

The difference between what the Board has proposed and the counter proposal of the solicitors is £210.39 (£300.28 less £89.89).

The difference between what the Board has proposed and the counter proposal of the solicitor with the correct aggregated times is £195.41 (£285.30 less £89.89).

I have emailed the solicitor

Other Issues

Having reviewed the account and supporting papers there appears to be a number of issues revolving around the Kilmarnock agents attendance which may be worthy of further consideration.

In the solicitors letter 2 November 2010 ([REDACTED]) 3rd paragraph they admit to having "left everything to the last minute". Had more pro-active steps been taken by the solicitors it is possible that there would have been no need to instruct any "local" agent.

It is unclear from the solicitors account as to precisely when they were made aware that the MHT hearing had been fixed for 20 August 2010. There is nothing which helps us on this from in the increase requests. They were certainly aware of the hearing by the 12 August 2010 when they emailed the MHT seeking an adjournment. They do not however appear to have taken any steps to follow this up. **An urgent telephone communication should have been made with the MHT to arrange an adjournment.** The MHT had agreed to adjourn the diet until the 24 August 2010, so they were clearly amenable to this.

4. Similar Taxations

14 March 2012 - The Auditor of Dundee Sheriff Court [REDACTED] Although this was specifically dealing with the issue of a “local agents” attendance at court (as opposed to what happened in this case a meeting taking place) the auditor quite properly takes the view in this case “that a properly instructed local agent deal with such matters every day”.

It is accepted by the profession that where a “local” agent is employed it will be a “local” agent to that court/tribunal.

5. Appendixes

Appendix 1 – Account.

Appendix 2 – Solicitors letter 2 November 2010.

The full account and correspondence is also attached.

Referred by: [REDACTED]

Date: 9-03-2012