

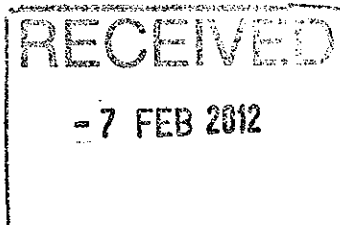
Stirling Sheriff Court and Justice of the Peace Court



[REDACTED]
The Scottish Legal Aid Board
DX ED 555250
Edinburgh 30

Sheriffdom of Tayside Central and Fife
Sheriff Clerk's Office
Viewfield Place
Stirling
FK8 1NH
DX ST15/LP-6 STIRLING

06 February 2012



Our Ref: APJ

Your Ref: Letter 1583512

[REDACTED] FC

Dalling, Solicitors v Scottish Legal Aid Board
[REDACTED] Solemn Account- SL/08/1335518710
Taxation 3rd February 2012

Following the diet of taxation held at Stirling on 3rd February 2012, I enclose a copy of my report for your consideration.

Yours sincerely


Alan Johnston
Auditor of Court
01786-460651
ajohnston@scotcourts.gov.uk

Auditors Report

Diet of taxation at Stirling on 3rd February 2012 at 11.00am

Present: Mr K Dalling Solicitor Stirling
[REDACTED] SLAB

Account of Expenses incurred by Dalling Solicitors relating to client [REDACTED]
[REDACTED]

Background

A section 76 letter was tendered by [REDACTED] an Indictment was prepared and served and on 11th April 2011 the indictment called at Stirling Sheriff Court and a plea of guilty was tendered By [REDACTED] which was accepted by the prosecutor.

The prosecutor moved for sentence and laid before the court a schedule of previous convictions pertaining to the accused.

The court adjourned the diet for preparation of a social enquiry report and community service risk assessments until the 11th May 2011, and gave notice of the reporting requirements in terms of the Sexual Offences Act 2003, bail being continued. A transcript of the proceedings was made.

On 11th May the court having seen and considered the reports previously requested and having heard Mr Dalling for the accused in mitigation of sentence, made a Probation Order for a period of 3 years and ordered that the accused's name be entered on the Sex Offenders Register for a period of 3 years and further made a Sexual Offences Prevention Order.

On conclusion of the case Mr Dalling submitted his account of expenses to SLAB, in relation to expenses incurred during the period 24th November 2010 through to 11th May 2011. The account was prepared under the Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2010

Following discussions and correspondence between Mr Dalling and SLAB, there are 2 issues in dispute;

1. Firstly, Mr Dalling is seeking to charge the fee 4(b) below in circumstances where there has been no trial. The position of SLAB being; as such no fee was previously chargeable under Part 2, paragraph 4(a). In this case proceedings were resolved by way of Section 76 procedure. As this was a sheriff court case Mr Dalling is seeking payment of £38.00 for preparation of the deferred sentence.

Paragraph 4(b) - The fee for preparation, including citing and settling with witnesses, perusing evidence and preparing lines of enquiry and submissions

but excluding relative consultations, in respect of ... (b) "a subsequent day of trial or diet of deferred sentence".

2. Secondly Mr Dalling is seeking to charge for detailed entries in addition to the "inclusive fee" (block 5) for post conviction work. The Board have taxed off these "detailed" entries on the basis that the "post conviction" fee is an inclusive fee which covers "all work **in connection with** post conviction discussions and advice, including advising and giving an opinion on prospects of any appeal. The only work that can be charged in addition to the post conviction inclusive fee are those items prescribed in paragraph 1(5) on the Notes on the operation (see below).

Paragraph 5 – The fee for all work in connection with post conviction discussions and advice, including advising and giving an opinion on prospects of any appeal

It is for the above areas of dispute that a diet of taxation was assigned. During the course of the taxation both Mr Dalling and [REDACTED] concurred that the points in dispute were down to the interpretation of the notes on the operation of Schedule 1

Discussion and Conclusion

Mr Dalling's view in regard to the point in regard to the preparation for a subsequent day of trial or diet of deferred sentence is that the fee should be payable for preparing for a diet of deferred sentence even in circumstances where the case does not proceed to trial as the regulation do not state that the fee is chargeable only where the case has proceeded until trial. Initially I had some support for this argument due to the required level of preparation and complexity of the matter and importance to the client. However Mr Haggerty directed me to Regulation 7 (1) the terms of being

Subject to the provisions of regulations 4, 5, 6 and 9, a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy. The fees allowed shall be calculated in accordance with Schedule 1.

His view being that the regulation compels the auditor to calculate fees in accordance with schedule 1 and this must therefore include having regard to the detailed notes on the operation which now accompany that fees schedule.

██████████ further advised that the practise of the board is that solicitors are no longer entitled to be paid a "block" fee for preparation. With a fee now only being chargeable in the following circumstances (Schedule 1, Part 2; Paragraph 4(A)):

- (i) the indictment, containing a libel against the client, proceeds to trial; or
- (ii) on or after the day fixed for trial, the Crown withdraws any libel against the client;

In addition, the board have the authority from the Government to allow a preparation for trial fee in the circumstances where a lesser plea is accepted by the Crown on the day of trial.

In the Boards view, the deferred sentence diet fee under paragraph 4(b) is not chargeable unless it is preceded by a charge under 4(a).

The fee 4(b) is in terms of Note 3(m) on the Notes on the operation a maximum of twice in any case:-

3(m) preparing for a subsequent day of trial or diet of deferred sentence if more than two fees have already been charged under paragraph 4(b) of Part 2 of the Table of Fees;

██████████ referred me to the relevant provisions of the Notes on the Operation of Schedule 1 being as follows:

- 3.(j) preparing for a hearing, except as provided for in Part 2 of the Table of Fees;
- (k) preparing for a hearing to which paragraph 4(a) of Part 2 of the Table of Fees relates unless-
 - (i) the indictment, containing a libel against the client, proceeds to trial; or
 - (ii) on or after the day fixed for trial, the Crown withdraws any libel against the client.
- (l) preparing for a hearing to which paragraph 4(a) of Part 2 of the Table of Fees relates if a fee under that paragraph has already been charged in respect of the case;
- (m) preparing for a subsequent day of trial or diet of deferred sentence if more than two fees have already been charged under paragraph 4(b) of Part 2 of the Table of Fees.

Having considered the arguments on this point and the terms of the note on the operation of Schedule 1. I am not persuaded by Mr Dalling's submission that it is appropriate to charge a preparation fee and accordingly I agree with ██████████ interpretation

that unless a block fee under 4(a) is chargeable in the case block a fee under 4(b) cannot be applied.

In regard to Mr Dalling's second point, Mr Dalling explained the background to these charges being made, which had come about ahead of the diet of deferred sentence, following receipt of a letter from a female, who stated her views on the background to the prosecution. As an officer of the court, Mr Dalling required to make representations to the court and prosecutor advising of this.

█ stance is that Inclusive Fee 5 is the fee for **all work** (emphasis added) in connection with post conviction discussions and advice, including advising and giving an opinion on the prospects of any appeal. The boards view being that the reference to "all work in connection with post discussions and advice" makes it sufficiently clear as to the intention of this fee.

Having considered the matters raised, and whilst I accept the work undertaken was required to be undertaken, from my reading and understanding of the regulations and the note on the operation of Schedule 1, I cannot see beyond the words "all work" and accordingly I agree with Mr █ that the fee for the additional work cannot be allowed.



Alan Johnston
Auditor of Court
6th February 2012

DALLING

• SOLICITORS •

2/4/2012
@ 9.15.

KENNETH A. R. DALLING
LL.B.(Hons), Dip.L.P., N.P., S.S.C.

83 Barnton Street
Stirling FK8 1HJ
Legal Post L.P.5

[REDACTED]
Legal Services Department,
Scottish Legal Aid Board
LP 2
Edinburgh 7

Telephone: (01786) 448111
Facsimile: (01786) 448222

Mr Dalling ^{If calling please ask for:} M

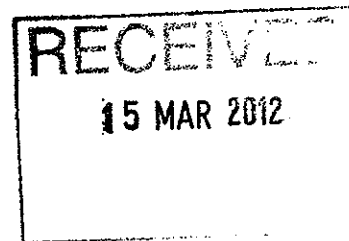
14 March 2012

Dear Sir

Dalling Solicitors -v- Scottish Legal Aid Board

Solemn Account SL/08/1335518710

Hearing, Stirling Sheriff Court 19/3/12



Thank you for your letter of 12th March. We apologise for the oversight and enclose a copy of the Note of Objection which was faxed to your office today (13th March.)

Yours faithfully,

A handwritten signature in black ink, consisting of several loops and a final flourish, positioned below the closing text.

NOTE OF OBJECTION TO AUDITORS REPORT DATED 6/2/12

In Causa

HMA

-v-
[REDACTED]



ACCOUNT WITH DALLING SOLICITORS, STIRLING

Objection is hereby lodged to the Auditors Report dated 6th February 2012 in the case of Her Majesty's Advocate against [REDACTED] the report following a diet of taxation at Stirling Sheriff Court on 3rd February 2012.

The account to be audited fell to be considered in terms of the Legal Aid (Scotland) (Fees) (Amendment) (No 2) Regulations 2010. Procedural history of the case was a matter of agreement and is as reported by the Auditor.

The issues in this case related (1) to whether or not it was appropriate to charge a fee in terms of Paragraph 4(b) of the Table relative to preparation for a diet of deferred sentence and (2) whether it was appropriate to charge for additional work as specified in addition to the block (Paragraph 5) for all work in connection with post conviction discussions and advice.

The instructing solicitor contended that it was appropriate to make said charges. The Scottish Legal Aid Board contended that said charges were inappropriate.

The Auditor of Court found in favour of the Scottish Legal Aid Board.

It is respectfully submitted the Auditor of Court has erred in his interpretation and the application of the relevant legislation:-

1. The relevant regulations make provision for the payment of a fee for preparation for a diet of deferred sentence. The regulations specifically state circumstances in respect of which said fee is not payable. Those circumstances do not apply in the instant case. Preparation having been undertaken payment should be made therefor.

2. The said regulations make provision on an inclusive basis for “all work in connection with post conviction discussions and advice.” The Auditor contends that emphasis should be added to the question of “all work” in respect of work undertaken post conviction. The solicitor contends that the work to be included in the said “block” is “in connection with post conviction discussions and advice.” The work which the solicitor seeks to charge for separately though undertaken “post conviction” did not relate to discussions and advice and is therefore separately chargeable on a detailed basis in terms of Paragraph 1(5) of the notes in the said regulations.

It is respectfully submitted the Auditor of Court has reached an erroneous decision.

IN RESPECT WHEREOF

DALLING SOLICITORS
83 BARNTON STREET, STIRLING
FK8 1HJ

Sheriffdom of Tayside, Central and Fife at Stirling

Note

by

Sheriff A. Wyllie Robertson

in

Appeal to Sheriff Principal

against

Decision of Objections to taxation of

Account of Expenses

in causa

HM Advocate v Fraser Cormack (Case

Number B35/2012)

Note to interlocutor dated 2 April 2012

[1] There were two issues I required to determine at the hearing on objections. In relation to me decision on the issue under appeal, I gave the following reasons from the bench:

[1] I have to say that I find the more straightforward issue to decide is the one that Mr. Haggerty [solicitor for Scottish Legal Aid Board] thought was more problematic. That is whether the auditor was right to disallow the preparation fee of £38 under the heading preparation of deferred indictment. The regulations require to be interpreted or qualified by reference to the notes as they both fall within schedule 1. The notes tell us that no fee is to be chargeable for preparation of a hearing except as provided for in part 2 of the table of fees. Paragraph 4 (b) provides for preparation for a diet of deferred sentence. I can see nothing in the interpretation of paragraph 4 or in the notes at paragraph 3 (k) (l) or (m) that supports Mr. Haggerty's interpretation that paragraph 4 (b) applies only in the event that paragraph 4

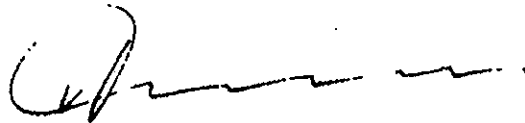


(a) is invoked. It stands alone in my view and is chargeable subject to the restriction that payment for preparation of the Block fee would only be payable on two occasions.

[2] I am not persuaded that preparation for a diet of deferred sentence comes within paragraph 5. The definition of the term 'all work' is restricted to that connected with 'post-conviction discussions and advice'. That, in my respectful view, relates to discussions with and advice that would be given to the client in connection with, for example, a diet of deferred sentence but it seems to me that such discussions and advice are entirely separate from preparation for what is to be said in a plea in mitigation and, arguably, such preparation can really only take place after the solicitor has had discussions with the client and has advised the accused and he accepts the advice. The solicitor can then prepare his plea in mitigation. I am further reassured in this interpretation from the fact that the remaining part of paragraph 5 goes on to include 'advising and giving an opinion on the prospects of any appeal', which is even further removed from preparing for the plea in mitigation.

[2] I have nothing to add.

Reported by me



ALEXANDER WYLLIE ROBERTSON

Sheriff of Tayside, Central and Fife at Stirling.

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT STIRLING

NOTE OF APPEAL

in the cause

HMA -v- [REDACTED] (A.P.)

relating to fees incurred by

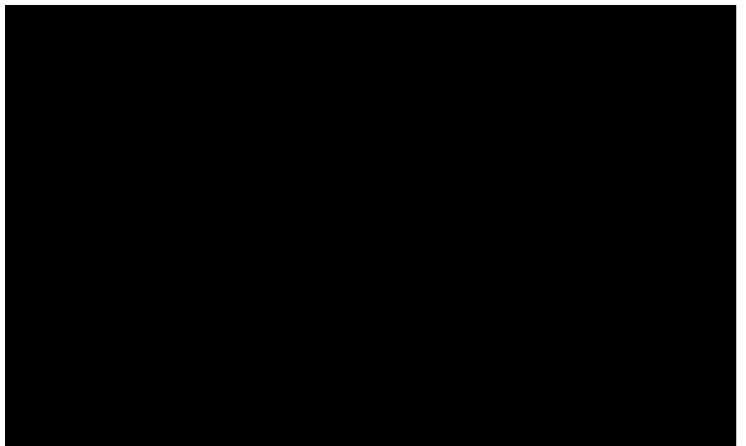
Ken Dalling, Solicitor

The Scottish Legal Aid Board, in respect of a Note of Objections to the Sheriff from a decision of the Auditor on taxation under regulation 11 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, appeals to the Sheriff Principal on the following grounds.

1. In reaching his decision, the Sheriff misdirected himself in law, at paragraph 1 of his Note, in finding that paragraph 4(b) of Schedule 1, Part 2 of the Table of Fees stands alone and that a discrete fee for preparation for a deferred sentence is chargeable in the circumstances of this case. Paragraphs 4(a) and 4(b) have to be read together. Paragraph 4(b) provides for a "subsequent" day of trial or diet of deferred sentence and can only apply, by definition, where it follows paragraph 4(a), and has to be read in context;
2. The Sheriff misdirected himself in law, at paragraph 1 of his Note, in failing to read sub-paragraphs 3(j), (k), (l) and (m) of the notes on the operation of Schedule 1 together, within the scheme set out in Schedule 1. Paragraph 3(m) also refers to a "subsequent" day of trial or diet of deferred sentence. It is submitted that "trial" has to be read as qualified and defined by sub-paragraphs 3(j), (k) and (l). Sub-paragraph 3(m) cannot be read in isolation;
3. In reaching his decision, the Sheriff, whilst acknowledging that the "regulations require to be interpreted or qualified by reference to the notes as they both fall within Schedule 1", failed to have sufficient regard to the terms of sub-paragraphs 3(j), (k), (l) and (m) of the notes on the operation of Schedule 1. The Table of Fees prescribes the level of fee for an identified piece of work; the notes on the operation of Schedule 1 determine the circumstances in which the fee is chargeable;
4. Lastly, the Sheriff failed to have sufficient regard to the whole scheme set out in Schedule 1 in giving undue attention to whether or not preparation for a diet of deferred sentence can fall within paragraph 5 of Part 2 of the Table of Fees (the fee for all work in connection with post-conviction discussions and advice). The

observations made by the Sheriff, in paragraph 2 of the Sheriff's Note, appear to proceed on the assumption that there should be a discrete fee for preparation for a deferred sentence in all circumstances.

Date 16 APRIL 2012



NOTE OF APPEAL

in the cause

HMA -v- 

relating to fees incurred by

Ken Dalling, Solicitor

2012

REF: JDH/CS

**SCOTTISH LEGAL AID BOARD
LEGAL SERVICES DEPARTMENT**

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE

B35/12

JUDGMENT

of

SHERIFF PRINCIPAL R A DUNLOP QC

in the cause

SCOTTISH LEGAL AID BOARD

Appellant

against

MR KEN DALLING, SOLICITOR

Respondent

Act: Mr Cownie, Solicitor, SLAB, Edinburgh
Alt: Mr Dalling, Solicitor, Stirling

STIRLING, 6 December 2012. The Sheriff Principal, having resumed consideration of the note of appeal by the Scottish Legal Aid Board, dismisses the appeal as incompetent; finds no expenses due to or by either party.

NOTE:

[1] The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 (SI 1989/1491) makes provision for fees and outlays allowable to solicitors from the Scottish Legal Aid Fund in respect of criminal legal aid under the Legal Aid (Scotland) Act 1986. The Regulations are made by the Secretary of State in exercise of the powers conferred by section 33 of the 1986 Act.

[2] In terms of regulation 11(1) of the 1989 Regulations, if any question or dispute arises between the Scottish Legal Aid Board and a solicitor as to the amount of fees or outlays allowable to the solicitor

in respect of legal aid in criminal proceedings in the sheriff court, "the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place."

[3] In terms of regulation 11(3) the Board and any other party to such a reference "shall have the right to state written objections to ... the sheriff in relation to the report of the auditor within fourteen days of issue of such report and the Board and any such other party may be heard thereon."

[4] A dispute arose between the Board and Mr Dalling, solicitor, as to the amount of Mr Dalling's fees and a reference was made to the auditor of court for taxation of these fees. The auditor issued his report on 6 February 2012 and Mr Dalling stated objections thereto. The sheriff heard parties on the objections and on 2 April 2012 issued an interlocutor sustaining the objections in part.

[5] The Board then lodged a note of appeal and a preliminary question arises whether such an appeal is competent. Mr Dalling contends it is not whereas the Board contends that it is.

[6] In support of the competency of an appeal the solicitor for the Board submitted that any decision of the sheriff was subject to appeal unless excluded expressly or by necessary implication. Reference in this regard was made to *Harper v Inspector of Rutherglen* 1903 6F 23 and *Jeffray v Angus* 1909 SC 400. Under reference to *Magistrates of Portobello v Magistrates of Edinburgh* 1882 10R 130 it was submitted that, if the legislature gives jurisdiction to a court without any specific form of process being provided, it is presumed that the ordinary forms of that court will apply. It was submitted that this approach had been endorsed in *Central Regional Council v B* 1985 SLT 413 and *Glasgow City Council v H* 2003 SLT 948. It was conceded however that section 27 of the Sheriff Courts (Scotland) Act 1907 did not apply. It was further submitted that the provisions of regulation 11 were to be contrasted with other provisions in the legal aid legislation which made it clear when a decision was to be viewed as final.

[7] In responding to these submissions Mr Dalling submitted that a right of recourse to the sheriff would not exist but for the provisions of the regulations and that this was not a case in which the legislature had invoked an existing recognised jurisdiction. Section 27 of the 1907 Act had no application and accordingly the jurisdiction given under regulation 11 must be regulated by the conditions of the regulation itself which made no provision for appeal.

[8] In my opinion the submissions for Mr Dalling are to be preferred. In *Magistrates of Portobello v Magistrates of Edinburgh* the distinction is made between on the one hand the situation where a new and special jurisdiction is given to any court and on the other the situation where a well known and recognised jurisdiction is invoked by the legislature for the purpose of carrying out a series of provisions without any specific form of process being prescribed. In the former situation it is clear that the special jurisdiction given to the court "must be regulated entirely by the conditions of the statute under which it is conferred, and that in the general case remedies which might have been competent in an ordinary civil process, are not to be presumed or inferred to be given by the particular statute" (per Lord Justice Clerk at page 137). In the latter situation the presumption is that the court has been chosen and selected because it is seen to be advisable that the ordinary rules of that court shall be applied to give effect to the provisions of the legislative act.

[9] In both *Central Regional Council v B* and *Glasgow City Council v H* the matter came before the court on a summary application, which was plainly an existing and well recognised jurisdiction of the sheriff to which the provisions of section 27 of the 1907 Act applied. In the present case however no such jurisdiction is engaged and it was common ground that section 27 of the 1907 Act did not apply. On that ground alone therefore these two cases can be distinguished. Beyond that point of distinction however there is in my opinion nothing in the regulation to suggest that the ordinary processes of the court were engaged or should apply. The process was initiated by a mere letter of reference to the auditor and the nature and extent of the process was specifically identified within the terms of the regulation. In these circumstances it is difficult to see how an appeal to the sheriff principal can be open. In saying that I have in mind the observations of the Inner House in *Gupta v West Lothian Council* 2012 CSIH 82 when considering the scope for a common law appeal outwith the provisions of section 27 of the 1907 Act. The question whether the sheriff's disposal of Mr Dalling's objections is susceptible to judicial review as part of the supervisory jurisdiction of the Court of Session was not a matter which was discussed.

[10] In my opinion the scope of regulation 11 must be seen as falling within the first type of situation discussed in *Magistrates of Portobello v Magistrates of Edinburgh*, namely a new and special jurisdiction which is governed by the provisions of the regulation itself which, according to its terms, makes no provision for an appeal to the sheriff principal. In these circumstances in my view the note of appeal is incompetent.

[11] Parties were agreed that there should be no expenses due to or by either party.