

SHERIFFDOM OF TAYSIDE CENTRAL & FIFE AT DUNDEE

NOTE OF TAXATION

By Craig Donald

In causa

JB

[REDACTED]

v

[REDACTED]

1. This is the Note of Taxation from the taxation diet held at Dundee on 27th September 2013 in the above case following a remit on 29th May 2013. Miss A Wilson of Thorntons, Solicitors appeared on behalf of the Pursuer and [REDACTED] appeared on behalf of the Scottish Legal Aid Board (SLAB). Mrs. E Foulis, the Curator *Ad Litem* appeared during the course of the taxation. There was no appearance by or on behalf of the Defender.
2. Two Account of Expenses were lodged. The first (No.11 of process) was submitted on behalf of the Pursuer by Thorntons to SLAB for the period 28th August 2012 to 17th December 2012. Within that account is an outlay of £3763.19, being the amount charged by Mrs. Foulis as Curator *Ad Litem*. Her account for that amount is the second Account of Expenses (No.11A of process).
3. I was provided with a history of this case as far as it relates to the applications made to SLAB during the relevant period. On behalf of the Pursuer, Throntons applied for special urgency cover under Regulation 18(1)(b) of The Civil Legal Aid (Scotland) Regulations 2002, as amended, on 20th August 2012 along with an application for legal aid. SLAB sent a letter to them dated 21st August stating that cover had been refused, as it

appeared there was already a legal aid certificate in place in respect of the same subject matter. However, when Miss Wilson contacted SLAB they said this was not the case and the special urgency application was to be reconsidered. They confirmed on 27th August that cover under Regulation 18(1)(b) had been granted. There appears to be some confusion when the cover started, it is either from 20th or 27th August. In terms of Regulation 18(4)(a), the cover was limited to "*seek orders for interim residence failing which contact and interim order for delivery*".

4. Regulation 18(4)(b) states that that "*the solicitor shall, if an application for legal aid has not already been submitted, submit an application for legal aid within 28 days of commencement of the urgent work and failure to do so shall exclude that work from any legal aid that may be made available*".
5. SLAB wrote to Thorntons on 31st August advising they had received the application for civil legal aid but they were unable to consider it until they received a completed Statement of Earnings by the application's employer or for her to provide 3 wage slips. Thorntons wrote to the Pursuer on 4th September advising her. I understand that legal aid was not granted in favour of the Pursuer until April 2013.
6. On 21st November Thorntons made a further application for special urgency cover under Regulation 18(1)(b) along with an application for "sanction" to pay the cost of Mrs. Foulis' report. On the same date, SLAB wrote to Thorntons advising them that the application for special urgency was refused, as was the application for sanction. The reasons were as follows:

"The application has been rejected since 21st August and remains rejected. In the circumstances the urgency appears to have been self created as had the information been provided a decision could have been taken on the full legal aid application. Furthermore, it is unclear when

report is required by. The interlocutor refers to being required 48 hours prior to the child welfare hearing but no date is given as to when this is to take place."

"Sanction is not appropriate as a legal aid certificate is not in place. The only means of funding the cost of this report would be under special urgency provisions but the Board has no power to make a retrospective grant in these circumstances."

7. On 23rd November, Thorntons responded as follows:

"We note your position. We can confirm that the interlocutor refers to a Child Welfare Hearing that was to be assigned when a notice of intention to defend is lodged. We attach herewith the form G5, which shows that a Child Welfare Hearing was fixed for 11 October 2012 and accordingly took place then with Ellenore Foulis' reports being made available for that Child Welfare Hearing.

On the basis that Sheriff Davidson has ordered the appointment of Mrs. Foulis to prepare the report we consider that funding should be made available for that. We would therefore request that you reconsider your position. Failing which we will simply require to arrange for a diet of taxation in due course when our account is prepared. You will be aware of course that special urgency was indeed granted in terms of Regulation 18(1)(b) on 27 August 2012. We fail to follow your suggestion that the "urgency appears to have been self created". We would therefore be grateful if you could reconsider this matter."

8. [REDACTED] a solicitor at SLAB responded on 12th December as follows:

"I refer to your online message, which has recently been passed to me for attention. It appears that the Bar Report has already been obtained. The Board does not have the power to grant special urgency cover retrospectively so we are not able to meet the cost of the report.

In any event, even if the report had not yet been obtained, it would not have been appropriate for the application for special urgency cover to be granted. The application was rejected in August 2012, and remains so. If we are not provided with the full application papers within a reasonable time then we can refuse special urgency cover, as any urgency is at that stage created by the applicant's delay in providing the outstanding information, as opposed to genuine urgency in the case, and that does not satisfy the special urgency test. You may find it helpful to refer to the Board's mailshot of 18 March 2011 at page 4".

9. Turning to the objections, [REDACTED] objected to the entries and outlays in the Pursuer's account after 13th September. He stated that as there was no legal aid or special urgency cover in place for that work then SLAB was not liable for payment thereafter. His submission was that the special urgency cover ended at the hearing on 13th September as an interim order for residential contact was made and that was the limitation of the cover granted. [REDACTED] said SLAB has no discretion to retrospectively allow the fees for further work as a full legal aid application was not made within 28 days of the special urgency cover being made and no new application for urgency cover was made before the work was carried out. Miss Wilson responded that the Pursuer did not apply for further special urgency cover after that hearing as she did not believe it was necessary on the basis that there was cover for the interim hearing and it was at the interim hearing that the Sheriff ordered the report. In any case, as the Sheriff ordered the report *ex proprio muto* then SLAB ought to pay for the cost of the report.

10. Miss Wilson said that SLAB had not informed her that legal aid had not been granted. However, I am not sure there is any onus on them doing so. They had written to Thorntons on 31st August to say they did not have enough information to grant the application. Obviously, as the special

urgency cover only lasts a maximum of 28 days, there is no need for SLAB to inform when that cover expired.

11. [REDACTED] produced decisions from two taxations at Glasgow on similar terms to this one. While both cases were in favour of SLAB I do not consider they add any more weight to the submissions already made by him.

12. The question I have to decide is fairly straightforward - was there cover in place to enable SLAB to consider paying for the work in the Pursuer's account after 13th September, including the expenses of Mrs. Foulis' report? It is not for me to consider if the work after that date was justified, etc. but simply if SLAB is liable for payment. Having considered all the submissions made very carefully and the relevant legislation I have concluded that they are not on the basis of the special urgency cover granted in August. However, while I agree with [REDACTED] that the cover fell after the Sheriff granted interim orders on 13th September, I note that SLAB had previously allowed the entries of 17th-19th September on the Pursuer's account and only abated the entries therein after the 19th September. I assume the view taken by them at that time was that this work still fell within the special urgency cover granted notwithstanding those entries happened to be dated after the 13th September in the account. I agree with this view and will allow these entries. However, with regret, I cannot extend that view to include the cost of Mrs. Foulis' report.

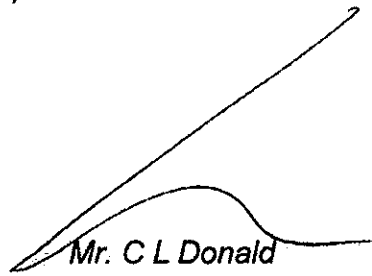
13. Mrs. Foulis confirmed the Sheriff made enquiries at the hearing on 13th September to ascertain if the Pursuer had suitable cover in place from SLAB for the cost of the report. Miss Wilson advised the court there was. I am in no doubt she genuinely believed this was the case. If there had been any doubt then I am sure the Sheriff would have been informed and a further application in terms of Regulation 18 could have been submitted

to seek SLAB's approval before that work commenced. Mrs. Foulis said she would not have undertaken the work if there was a doubt if cover was in place and she was sure the Sheriff would not have ordered her to do so. Therefore, I can assume that the Sheriff ordained Mrs. Foulis to report and for the Pursuer to be liable for the cost thereof in the first instance on the basis he believed that there was cover in place, in some shape or form, for SLAB to pay the cost of the report. I agree with [REDACTED] that SLAB is not compelled to pay the cost of the report simply because the Sheriff made the order *ex proprio motu*.

14. I do not consider it relevant that Mrs. Foulis happened to be in the courtroom when the order was made. If she had not been there then Thorntons would have been required to instruct her but, as she was, there was no need for them to give any formal instruction. As Thorntons were under the impression that there was cover in place for the cost of the report then there would have been no reason for them to apply for additional cover regardless of when Mrs. Foulis was instructed. The misbelief that the special urgency cover granted in August covered the cost of the Curator's report and the uncertainty if there was legal aid cover in place does not appear to me to be the responsibility of SLAB.

15. To confirm, in my view, the special urgency cover granted in August does not cover the work after the 13th September (after the 19th September in the account), including the cost of the Curator's report. A new application for special urgency should have been made before the Curator undertook her work as the application for legal aid had not been granted at that time due to the failure of the Pursuer to provide the necessary financial information. Therefore, I do not consider that SLAB is liable to pay the fees or outlays in the Pursuer's Account of Expenses, No.11 of process, dated after 19th September on the basis of the limited special urgency cover granted in August.

16. In my view, it will be very unfortunate indeed if Mrs. Foulis does not get paid for the work she has done. She undertook the work on good faith on the understanding that she would be paid and it is clear that she spent a lot of time undertaking the work ordered by the court. I do note that the Sheriff ordered that the Pursuer be liable for payment of the report in the first instance. It maybe that the Sheriff can make a further order to ensure Mrs. Foulis receives payment in some way.
17. For what it is worth, I could have taxed Mrs. Foulis Account of Expenses (No.11A of process) at the slightly higher figure of £3879.77 so I would have been willing to tax the full amount sought in the account.
18. I will tax the Pursuer's Account of Expenses, No.11 of process the sum of FIVE HUNDRED AND EIGHTEEN POUNDS SEVENTEEN PENCE, £518.17 (£295.13 fees and £223.04 outlays).



Auditor of Court

22nd October 2013

Dundee

23 January 2014

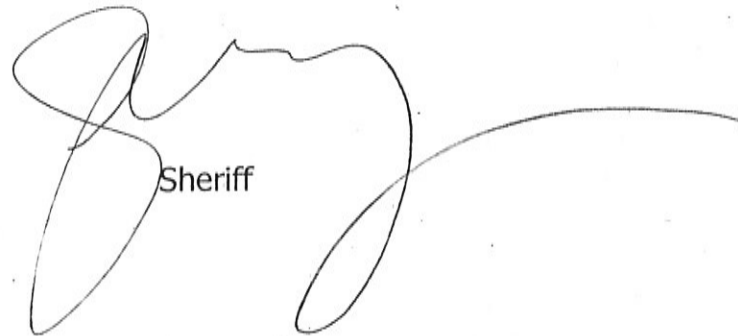
WAY

Act: **Wilson**

Alt: **Haggerty**

The sheriff, Having heard parties' procurators on the Pursuers Objection to the Auditors report, Finds that the Auditor has not erred in making his report and Confirms the Report of the Auditor.

CH



Sheriff

Certified a true copy
Sheriff Clerk Depute