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SCOTTISH LEGAL AID BOARD

[REDACTED]
JOINT REMIT

EDINBURGH. 31 October 2017. At a diet of taxation on 2 October 2017, the Auditor heard representations by [REDACTED] on behalf of the Scottish Legal Aid Board and [REDACTED] on behalf of George Mathers & Co, Solicitors. Having considered the matter, the Auditor now taxes the Legal Aid Account submitted to the Legal Aid Board at the sum of NIL (£0.00). To the said sum there falls to be added the Auditor's Fee, inclusive of VAT @ 20%, £24.00.



AUDITOR OF THE COURT OF SESSION

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs Sheila Muir

Scottish Legal Aid Board
LP - 2
Edinburgh 7


Our Ref:JAM/JC/B134.H

Date: 19th of December 2017

Dear Sirs,

WB


7195671107

We refer to the above and to previous correspondence with . We enclose herewith cheque in the sum of £1255.18 in repayment. We trust you will find this to be in order.

Yours faithfully,

Dear Mr Auditor

-v- HMA - 2 OCTOBER 2017

I refer to the Diet of Taxation 2 October 2017, at which time you requested full detail on the Board's competency or authority in seeking recovery of sums which have been paid erroneously.

The Scottish Legal Aid Board ('SLAB') is required by statute to protect the Fund. In terms of section 1(2)(b) of The Legal Aid (Scotland) Act 1986 ('the Act'), *"the Board shall have the general functions of administering the Fund"*. Similarly, in terms of section 2(1)(b) of the Legal Aid (Scotland) Act, the Board may do anything *"which is calculated to facilitate or is incidental to or conducive to the discharge of its functions"*.

Section 4 of the Act provides for the establishing and maintaining of the Scottish Legal Aid Fund ('the Fund'). Section 4(2) addresses the only payments which can properly be made out of the Fund. Section 4(2)(a) being in the following terms:

"There shall be paid out of the Fund

(a) subject to section 4A(13), such sums as are, by virtue of this Act or any regulations made thereunder, due out of the Fund to any solicitor or counsel or registered organisation in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33(3A) of this Act, in connection with the provision, in accordance with this Act, of legal aid or advice and assistance;..."

It is also important to bear in mind that in terms of Section 25A (1)(a) of the Act, *"the Board shall, in accordance with the provisions of this section, establish and maintain a Criminal Legal Assistance register ("the Register") of solicitors who are eligible to provide criminal legal assistance"*. Section 25(3), makes clear that *"only those solicitors whose names appear on the Register may provide criminal legal assistance; and, subject to subsection (4) below, a solicitor may provide criminal legal assistance only when working in the course of a connection with a registered firm"*.

Section 25B (1)(d) of the Act, places a statutory obligation that *"The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision the manner in which applications for criminal legal assistance are to be presented"*.

In terms of *Part Four: Standard of Service of the Code of Practice for Criminal Legal Assistance*, paragraph 4.4.5.1 *"Applications shall be for competent proceedings. Applications shall be necessary and properly directed towards the appropriate form of criminal legal assistance as provided in the legislation"*.

Given that in our view, which I believe is not disputed, this was an incompetent appeal from the outset, the application that was presented by the solicitor runs contrary to paragraph 4.4.5.1 of the *Code of Practice* and as such the fees and outlays which have been paid were not *"properly incurred"* in terms of section 4(2)(a). Consequently, the payment of the solicitor's account was *ultra vires*.

The Board's approach to recovery of funds which have been paid, in error, is in accordance with the Scottish Government's guidance on overpayments which equally applies to bodies sponsored by the Scottish Government, see <http://www.gov.scot/Topics/Government/Finance/spfm/overpayments>

You will note that this guidance directs that organisations such as the Scottish Legal Aid Board "*...should always pursue recovery of overpayments*" and that "*a decision not to pursue recovery, or not to pursue recovery in full, should be exceptional...*"

Mindful of our statutory obligations and the Scottish Government's guidance, SLAB undertakes various forms of post assessment reviews of both solicitor's and counsel's claims against the Fund to ensure that a recovery of sums identified as overpayments is subsequently pursued.

I hope this goes some way to explaining our entitlement to seek refunds of sums identified as overpaid.

Yours faithfully

A large black rectangular box redacting the signature of the sender.

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OVERPAYMENTS

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[Scope](#)

1. This section gives guidance on how to proceed when an overpayment or a payment made in error is discovered. The guidance is aimed primarily at the constituent parts of the Scottish Administration (i.e. the core Scottish Government (SG), the Crown Office and Procurator Fiscal Service, SG Executive Agencies and non-ministerial departments) and bodies sponsored by the SG. However, other organisations to which the Scottish Public Finance Manual (SPFM) is directly applicable should ensure compliance with any relevant provisions and follow procedures consistent with the guidance.

[Key Points](#)

2. In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. Each case should therefore be dealt with on its merits.

3. As a general rule, public sector organisations should only take a decision not to seek recovery of an overpayment on the basis of a cost benefit analysis of the options. A decision not to pursue recovery should be exceptional and should only be taken after a careful appraisal of the relevant facts.

4. Overpayments which organisations decide not to pursue are subject to the guidance in the section of the SPFM on

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Scottish Parliament Public
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Losses and Special Payments. Any decision not to pursue recovery, or not to pursue recovery in full, should be defensible in the public interest.

5. Any proposal by a constituent part of the Scottish Administration or a SG sponsored body to forgo recovery of the whole or part of a collective overpayment must be approved by the relevant SG Finance Business Partner (or equivalent) **before** the recipients of the overpayments are informed.

Background

6. In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. Each case should therefore be dealt with on its merits. When deciding on appropriate action, taking legal advice, organisations should consider:

- whether the recipient accepted the money in good or bad faith;
- the cost-effectiveness of recovery action;
- any relevant personal circumstances of the payee, including defences against recovery;
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances.

7. An algorithm for dealing with overpayments is set out in the **Annex**.

Good Faith / Bad Faith

8. Whether the recipient of an overpayment has acted in good or bad faith will, as a matter of policy, influence the decision on how far recovery should be pursued in a particular case. Good faith alone, however, is not a valid defence against recovery.

9. Lack of good faith can be implied if the person overpaid has wilfully suppressed a material fact or has otherwise failed to give timely, accurate and complete information affecting the amount payable. Other cases may be more a matter of judgement, for example, where the failure to give information clearly involved carelessness. There may also be cases where the error is so obvious, e.g. where an amount stated is very different from that payable, that no one could claim that they had received the money in good faith.

10. In the case of pay, pay-related allowances, and superannuation payments, the regulations are not always simple. It may therefore be unreasonable to assume that all individuals will know so precisely how their entitlement is calculated, or what factors might alter it, that they can themselves immediately detect an overpayment. If, however, there are strong grounds for thinking that the payee knew or could have found out that there had been an overpayment, for example, from a handbook or office notice explaining pay entitlement, or from a pension award, or if the cause of overpayment was an obvious one such as simple arithmetical error evident to the recipient, it may be reasonable to assume that the payee did not act in good faith.

11. In seeking to establish the payee's good faith the following should be considered:

- the complexity of the entitlement calculation;
- the extent to which the payment depended on changes in the payee's circumstance that he / she was obliged to inform the payer; and
- the extent to which the basis of how the payment was calculated was explained to, or was readily accessible to, the payee.

Fraud

12. Where a public sector organisation is satisfied that the circumstances of an overpayment involved bad faith on the part of the recipient, it should consider, in addition to recovery action, whether the recipient obtained the overpayment fraudulently, for example by dishonestly giving false information or knowingly failing to disclose information which he/she was under a duty to disclose. If there is evidence of fraudulent intent, where appropriate and practicable, prosecution or disciplinary action should be undertaken. (See the separate section of the SPFM on **Fraud**) Such action will not eliminate the debt which had resulted from the overpayment, so recovery of the debt should continue to be pursued by any means available.

Cost-effectiveness of Recovery Action

13. As a general rule, public sector organisations should only take a decision not to seek recovery of an overpayment on the basis of a cost benefit analysis of the options. A decision not to pursue recovery should be exceptional and should only be taken after a careful appraisal of the relevant facts, taking into account the legal position. The option of abating any future payments due to the recipient of the overpayment should always be considered.

Defences Against Recovery

14. A number of defences against recovery may be claimed by recipients of overpayments, including:

- **the length of time that had elapsed since the overpayment was made.** In Scotland, any obligation to repay is extinguished 5 years after the payment was made unless a relevant claim has been made in relation to it or its existence has been relevantly acknowledged. A relevant claim is a claim made by or on behalf of the paying



organisation. A relevant acknowledgement is where the recipient of the overpayment acts in such a manner as to clearly indicate that the claim still exists or where the recipient or his agent makes an unequivocal written admission that it does so.

- **hardship.** As a matter of policy public sector organisations may waive recovery of overpayments if it would cause hardship, but hardship must not be confused with inconvenience. To be required to pay back money to which there was no entitlement does not in itself represent hardship, especially if the overpayment was discovered quickly. To be acceptable, a plea of hardship should be supported by reasonable evidence that the recovery action proposed would be detrimental to the welfare of the recipient or his / her family.
- **change of position.** It could be argued that the recipient of an overpayment may in good faith have relied on it to change their lifestyle. It might then be inequitable to seek to recover the full amount of the overpayment. The paying organisation's reaction should depend on the facts of the case. The onus is on the recipient to show that it would be unfair to repay the money

15. It is not the role of public sector organisations to advise recipients of overpayments of possible defences against recovery, particularly in cases where there is evidence of bad faith. Legal advice should be sought as and when appropriate.

Set-Off

16. Set-off is a right of common law which, in appropriate circumstances, provides a means of settling mutual debts between two parties. This applies where a debtor and a creditor under a contract are, in the same capacity, debtor and creditor under another contract. In these circumstances both sets of debts may be set off against each other so as to extinguish each other completely or where unequal, pro tanto.

Invoicing

17. Where it is decided to effect recovery other than by abating any future payments due to the recipient of the overpayment or by way of set-off an invoice should be raised on the organisation's accounting system for the sum in question.

Write-Off

18. Overpayments (or parts thereof) which organisations decide not to pursue or pursue further are subject to the guidance in the section of the SPFM on **Losses and Special Payments**. Write-off of overpayments is an area where any level of delegated authority should be modest and proportionate. It is essential to ensure the segregation of responsibilities between staff involved in some way in the overpayment and staff authorising the write-off. Any decision not to pursue recovery, or not to pursue recovery in full, should be defensible in the public interest.

Collective Overpayments

19. If a group of people have **all** been overpaid as a result of the same mistake the members of the group should not be treated differently as regards the degree of recovery required and should thus be invited to repay on the same basis. However:

- repayments should not be pursued against any individuals who can claim one of the legitimate defences against recovery; and
- it may be impossible or disproportionately expensive to enforce recovery against some individuals - it can be expensive to trace an individual and, in some cases, the individual may not have the resources to pay and the sum would be, in practice, irrecoverable.

20. Public sector organisations should decide how best to handle collective overpayments so that they do not inhibit the maximum recovery possible. The fact that recovery cannot, in practice, be made from some members of a particular group does not mean that recovery should be waived for others in the group. The individual who pays up voluntarily (or who is worth suing) should not be regarded as having been treated unfavourably. All have been required to pay. The difference is one of practicality in pursuing the claim.

21. There is no obligation to inform other individuals of what steps are being taken, or not being taken, to recover a claim. Although there is a general principle of treating like cases alike, as a matter of the law relating to recovery, the fact that a claim is pursued against one person and not another, when they are both equally liable, does not affect the validity of the claim against either.

22. Where it is considered, as a matter of policy, that it would not be fair to recover the amount outstanding, then the individuals concerned must be informed of such a policy. However, any proposal by a constituent part of the Scottish Administration or a SG sponsored body to forego recovery of the whole or part of a collective overpayment must be approved by the relevant SG Finance Business Partner (or equivalent) **before** the recipients of the overpayments are informed. The Finance Business Partner will need to be satisfied that a collective waiver is defensible in the public interest or on the basis of value for money.

Specific Overpayment Situations

Overpayments to contractors, suppliers, etc.

23. Subject to the general guidance above, recovery of overpayments arising out of business transactions with suppliers etc. should be pursued in all cases, irrespective of the cause of overpayment. If a request for repayment is not accepted and set-off against subsequent payments is not possible, organisations should consider taking legal action. Efforts



(through legal action or otherwise) should be commensurate with the amounts involved and the particular circumstances of the case.

Overpayments of grants and subsidies

24. As a general rule, payments of grants and subsidies, whether to persons or to corporate bodies, should be regarded as if they were business transactions and full refund of any overpayment should be sought.

Overpayments of pay, allowances, pensions, etc.

25. Subject to the general guidance above, recovery of overpayments of pay, allowances, pensions, etc. should be pursued in whole or in part, as appropriate. In cases of bad faith, recovery of the full amount overpaid should be sought. In cases of good faith it may not always be appropriate to seek full recovery, in accordance with the general principles of recovery expressed above. Factors to be taken into account may include how recently the overpayment was made and how long it went on for. While treating each case on its merits, it is still necessary to ensure that like cases are treated in like fashion.

26. It will often be possible to recover an overpayment through deduction from later salary. If this is the case, the individual concerned should be notified in advance. Deductions from pay should not, however, be made if the individual has a valid defence against recovery. If there is any doubt about whether recovery through deduction from pay is appropriate, legal advice should be sought.

European Union

27. Where an overpayment was wholly or partly funded by the EU organisations should, in addition to applying the general guidance set out in this section of the SPFM, take care to observe any additional EU requirements relating to the handling of overpayments.

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1. This section gives guidance on when it may be appropriate to write-off losses and make special payments and on associated notification and accounting procedures. The guidance is aimed primarily at the core Scottish Government (SG), the Crown Office and Procurator Fiscal Service, SG Executive Agencies and non-ministerial departments. However, other organisations to which the Scottish Public Finance Manual (SPFM) is directly applicable, including bodies sponsored by the SG, should ensure compliance with any relevant provisions and follow procedures consistent with the guidance.

Key Points

2. Losses should only be written off or special payments authorised after careful appraisal of the facts. All reasonable action must have been taken to effect the recovery of losses.

3. Delegated authority to individual core SG business areas to authorise write-offs or make special payments must be approved in writing by the relevant Finance Business Partner (or equivalent). Delegations to SG Executive Agencies, non-ministerial departments and sponsored bodies must also be agreed by the relevant Finance Business Partner and set out in the organisation's framework document. Any cases which exceed delegated authority limits must be submitted to the relevant Finance Business Partner for approval.

4. Total losses exceeding £250,000 and total special payments exceeding £250,000 should be brought to the attention of the Parliament through notes to the organisation's resource accounts. Individual losses and special payments of more

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than £250,000 should be noted separately.

Background

5. Losses and special payments are in the nature of transactions which the Parliament cannot be supposed to have contemplated when approving the annual Budget Act and subsequent Amendment Orders. A formal approval procedure is therefore required in order to regularise such transactions. Losses should only be written off or special payments authorised after careful appraisal of the facts. All reasonable action must have been taken to effect the recovery of losses. In dealing with individual cases consideration must be given to the soundness of relevant control systems and the efficiency with which they have been operated and all necessary steps must be taken to put failings right.

Classification and Delegated Authority

6. Losses and special payments have been grouped into a number of different categories to assist with decisions on delegated authority arrangements and on notation of resource accounts. The **Annex** to this section sets out those categories. More detailed guidance on specific categories of losses and special payments is provided later in this section.

7. Delegated authority to individual core SG business areas to authorise and process write-offs or make special payments must be approved in writing by the relevant Finance Business Partner (or equivalent). General arrangements for SG Executive Agencies, non-ministerial departments and relevant sponsored bodies provide for delegation of authority to agree and process write-offs or make special payments. These delegations must also be agreed by the relevant Finance Business Partner and set out in the organisation's framework document.

Reference to Finance Business Partners

8. Any cases which exceed delegated authority limits must be submitted to the relevant Finance Business Partner (or equivalent) for approval. Submissions to should explain:

- the nature of the case, the amount involved and the circumstances in which it arose;
- the legal advice, where appropriate;
- whether fraud (suspected or proven) is involved; and/or whether the case resulted from dereliction of duty; and whether failure of supervision is involved;
- whether the case in question could have a wider impact;
- the value for money case for the proposed action, where appropriate; and
- whether investigation has shown any defects in the existing systems of control and, if so, what corrective action is proposed.

9. Irrespective of any delegated authority limits the relevant Finance Business Partner should also be consulted on any cases which:

- are novel or contentious;
- involve important questions of principle;
- raise doubts about the effectiveness of existing systems;
- contain lessons which might be of wider interest; and
- arise because of obscure or ambiguous instructions issued centrally.

Record of Losses and Special Payments

10. A record of all losses and special payments should be maintained centrally (e.g. by specialist finance staff) to inform the notes to the organisation's resource accounts.

Notification and Accounting

11. Total losses exceeding £250,000 and total special payments exceeding £250,000 should be brought to the attention of the Parliament through notes to the organisation's resource accounts. Individual losses and special payments of more than £250,000 should be noted separately. Losses should be noted even if they may be reduced by subsequent recoveries. In the case of a serious loss or significant special payment consideration should be given to the need for an immediate report to the Finance Committee and relevant Subject Committee. When separate provision is made in Budget Documents there is no need to note the accounts.

12. Bad debts must be accounted for in the accounts by provision or write-off irrespective of whether they have completed the procedures for dealing with losses and special payments. Cash losses should initially be accounted for as debtors pending recovery or write-off.

Losses of Pay, Grants etc

13. Where a loss is wholly or partly recovered by non-issue of pay, grants, etc only the balance outstanding (if any) is treated as a loss for write-off purposes. Likewise, where the loss is wholly or partly met by voluntary payments or by a payment from an insurance company or other non-public source, only the net loss is written off. Where pay or pension subject to PAYE is withheld in settlement of a loss, tax must be deducted to arrive at the amount attributed to the debt repayment.



Losses of Stores

14. Stores losses are in effect resources used without the authority of the Parliament. In establishing the amount of the loss, and hence whether the accounts should be noted, the net value of the loss after crediting any sums recovered will be the determining factor.

15. Where there is an identifiable claim against some person the loss need not be noted. However, if it is subsequently decided to waive the claim, or the claim cannot be presented or enforced, the loss should be treated as an abandoned claim and noted accordingly. Repairable damage to buildings, stores, etc, should not be noted unless it is known to arise from a culpable cause. Any loss recoverable from a third party, but in respect of which recovery is waived because of a "knock for knock" agreement with an insurance company, should be noted as a stores loss.

16. Where stores are to be written off they should be valued in accordance with the Government Financial Reporting Manual, unless circumstances justify exceptional treatment.

Fruitless Payments and Constructive losses

17. A payment which cannot be avoided because the recipient is entitled to it even though nothing of use will be received in return should be classified either as a fruitless payment or as a constructive loss. The latter category should be used where the loss was "constructively incurred".

18. A **fruitless payment** is a payment for which liability ought not to have been incurred, or where the demand for the goods and services in question could have been cancelled in time to avoid liability, for example:

- forfeitures under contracts as a result of some error or negligence by the payee;
- payment for travel tickets or hotel accommodation wrongly booked; or for goods wrongly ordered or accepted;
- the cost of rectifying design faults caused by to lack of diligence or defective professional practices; and
- extra costs arising from failure to allow for foreseeable changes in circumstances.

19. There are many degrees of error which might be involved in making a fruitless payment; the criterion is not whether the error is considered serious enough to warrant disciplinary action but simply whether the payee was at fault in incurring or not avoiding the liability to make the payment. Because fruitless payments will be legally due to the recipient they are not regarded as special payments. As due benefit will not have been received in return, however, they should be regarded as losses, and brought to the attention of the Parliament in the same way as stores losses.

20. A **constructive loss** is similar to a fruitless payment, but one where procurement action itself caused the loss. For example, stores or services might be correctly ordered, delivered or provided, then paid for as being in conformity with the order; but later, perhaps owing to a change of policy, they might prove not to be needed or to be less useful than when the order was placed. A constructive loss need not be noted in the losses statement in the resource accounts, but should be recorded under "other notes" if significant.

Waiver and Abandonment of Claims

21. Waiver or abandonment of a claim occurs if it is decided not to present or to pursue a claim which could be or has been properly made. Examples are:

- a decision to reduce the rate of interest on a loan, and therefore to waive the right to receive the amount of the reduction;
- claims actually made and then reduced in negotiations or for policy reasons;
- claims intended to be made, but which could not be enforced, or were never presented;
- failure to make claims or to pursue them to finality, e.g. owing to procedural delays allowing the Limitations Acts to become applicable;
- claims arising from actual or believed contractual or other legal obligations which are not met (whether or not pursued) e.g. under default or liquidated damages clauses of contracts;
- the amounts by which claims are reduced by compositions in insolvency cases, or in out-of-court settlements, other than reductions arising from corrections of facts; and
- claims dropped on legal advice, or because the amounts of liabilities could not be determined.

22. If a claim has been presented in error or otherwise proves to be ill-founded, the claim should be withdrawn (whether or not it has actually been presented) and need not be noted. A claim should not, however, be regarded as withdrawn where there is doubt as to whether it would succeed if pursued in a court of law, or if the liability of the debtor has not or cannot be accurately assessed. A claim for refund of an overpayment which fails or is waived should be regarded as a cash loss.

Special Payments

23. An **extra-contractual** payment is one which, although not legally due under the original contract or subsequent amendments, appears to place an obligation on a public sector organisation which the courts might uphold. Such obligations will usually arise from administrative action or inaction in relation to the contract. A payment is regarded as extra-contractual even where there is doubt whether or not the organisation is liable to make it, e.g. where the contract provided for arbitration but a settlement is reached without recourse to arbitration. A payment made as a result of an arbitration award is contractual.

24. A **compensation payment** is one made in respect of unfair dismissal or in respect of personal injuries (except payments under section 11 of the Principal Civil Service Pension Scheme), traffic accidents, damage to property etc, suffered by civil servants or by others. When separate provision is made in Budget Documents there is no need to note the accounts.

25. **Extra-statutory and extra-regulatory payments** are payments considered to be within the broad intention of the statute or statutory regulation but which go beyond a strict interpretation of its terms. Where a payment is of a continuing nature, but does not form part of a general concession of sufficient importance to justify separate Budget Act authority, the payment should be noted in the resource accounts for all years in which it falls. The need for amending legislation should be considered in all cases that arise -

26. **Special severance payments** are paid to employees beyond and above normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract. See the section of the SPFM on Severance, Early Retirement and Redundancy Terms.

27. **Ex gratia payments** are payments made where there is no legal obligation to pay. There must always, however, be good public policy grounds for making such payments. Into this category will fall some out of court settlements, such as cases where the pursuer has no legal case but the government wants to stop the litigation because it is costly in time and resources. It would not however include cases where the settlement is a negotiated price to settle a potentially higher legal liability. Other examples of ex gratia payments would be payments as compensation for distress or loss arising from a perceived failure of the government but where there was no legal obligation to pay or awarding a dismissed office holder a gratuity that went beyond any legal entitlement by virtue of his/her employment as a type of reward for going with good grace and minimum disruption of services.

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Page Published / Updated: June 2009

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Page updated: Wednesday, July 25, 2012



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OVERPAYMENTS: ANNEX

OVERPAYMENTS ALGORITHM

A Was the payment of a type subject to later adjustment?

Yes - Recover automatically

No - Go to B

Where a payment is subject to later adjustment any overpayment should be recovered by means of a deduction or set-off from later payments. The recipient should be informed, in advance if possible, of any adjustment. If automatic adjustment is not appropriate or feasible, recovery by other means should be considered.

B Is it already clear that it would not be cost-effective to pursue recovery?

Yes - Waive recovery

No - Go to C

The presumption is that recovery action should be pursued in all cases. A decision at the outset not to pursue recovery should only be taken if the recovery action was not considered to be cost-effective.

C Does the recipient agree, albeit reluctantly, to repay the amount due?

Yes - Recover

No - Go to D

Where the recipient agrees to refund an overpayment the overpayment should be recovered applying set-off if necessary.

D Did the recipient receive the overpayment in bad faith?

Yes - Proceed with recovery action for the full amount and also consider whether prosecution or disciplinary action should be taken - go to G

No - Go to E

Where the recipient acted in bad faith all practicable efforts should be made to recover the full amount (including recovery from pension benefits, if relevant, or set off against other sums due to the recipient). Consideration should also be given whether the matter should be regarded as one of fraud, with prosecution or disciplinary action being taken as appropriate.

E Does the recipient allege a valid defence?

Yes - Take legal advice

No - Go to F

Where the recipient claims to have a valid defence then legal advice should be taken before proceeding. Note: it is



possible that defences will only be raised at stage H below.

F Do the special circumstances for partial recovery of pay, allowances and pensions apply?

Yes - Calculate the proportion recoverable and go to G

No - Go to G

G Has hardship been claimed and would recovery cause genuine hardship to the recipient or to his/her family?

Yes - Waive recovery in whole or in part as appropriate

No - Go to H

Repayment may be waived in part or whole if genuine hardship would be caused.

H Is it now clear that it would not be cost-effective to pursue recovery?

Yes - Consider waiving recovery

No - Go to I

The presumption is that recovery action should be pursued in all cases. A decision not to further pursue recovery should only be taken if the further recovery action was not considered to be cost-effective.

I Make further attempts to recover, including, if necessary, legal action.

All feasible attempts should be made to recover the overpayment, including set-off against subsequent payments or other monies owed to the recipient of the overpayment.

Page Published/ Updated on: 4th November 2004



Scottish Legal Aid Fund

4. (1) The Board shall establish and maintain a fund to be known as the Scottish Legal Aid Fund (in this Act referred to as "the Fund").

(2) There shall be paid out of the Fund

(a) subject to section 4A(13), such sums as are, by virtue of this Act or any regulations made thereunder, due out of the Fund to any solicitor or counsel or registered organisation in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33(3A) of this Act, in connection with the provision, in accordance with this Act, of legal aid or advice and assistance;

33.

(1) Subject to subsections (3A) and (3B) below, any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting.

(1A) A registered organisation shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by it in respect of the advisers it approves providing advice and assistance under this Act.

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

by

THE SCOTTISH LEGAL AID BOARD

to the

ACCOUNT ON BEHALF OF MESSRS GEORGE MATHERS & CO, SOLICITORS

relating to the case of



Date of Taxation: 2 October 2017 @ 10.00 am

Type of case: Criminal - Appeal -v- Sentence

1. Nature of the case

The appellant, together with co-accused [REDACTED] pled guilty to a charge of murder on 8 August 2000. Following a deferred sentence, the appellant was sentenced to detention without limit of time and a minimum tariff of 12 years before he would become eligible for parole. Co-accused received the same sentence. Following appeal on 3 March 2006, the co-accused's punishment part was reduced to 11 years.

Agents took instructions in August 2009 in respect of a possible appeal.

Agents instructed counsel two years later on 3 August 2011 who subsequently provided a negative Opinion, on 21 November 2013, on the prospects of success of an appeal against sentence.

2. Fees allowable to solicitors

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 prescribe fees payable to solicitors:

"7. (1) 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."

Regulation 11(1)(a) makes the following provision for the taxation of fees and outlays:

11.(1) If any question of dispute arises between the Board and the solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in -

(a) the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session;..."

3. Preliminary point

The issue in dispute has been put before the Auditor previously (diet of taxation 3 November 2014), in respect of the same case but was concerned with counsel's fee note for an Opinion on appeal against sentence. Reference is made to the Auditor's decision of 7 January 2015 which taxed counsel's fee note at NIL.

Given that the dispute arises from the same issue which led us to the Auditor in respect of counsel's fee note, the same arguments equally apply to the solicitor's account.

4. Nature of dispute:

The solicitor applied for and was granted a legal aid certificate in respect of an appeal against conviction and sentence on 11 August 2009.

The solicitor's account was received for consideration on 15 November 2013. The claim against the Fund totaled £1,233.06 (inclusive of VAT) and was erroneously passed for payment in full on 3 December 2013.

Counsel's fee note for the Opinion on appeal against sentence was received on 6 January 2014 and an offer of 'nil' made at that time. No payment was considered appropriate on the information now available to the Board for the first time as it was clear that an appeal against sentence had already been taken and heard. The principle of finality applies. This information was contained within counsel's Opinion, at paragraph [10], where counsel states the following:

"In any event, I do not consider that it is open to the appellant to raise a "further" appeal against sentence at this stage. It is apparent from the papers made available to me that an appeal against sentence was timeously marked on behalf of the appellant; and that said appeal was considered by the court and refused. Whilst there is provision for the court to consider appeals which are taken out of time, that must be done on cause shown. Notwithstanding the position of the co-accused, I can see no basis on which it could be argued that cause has been shown to permit the appellant to mark a late appeal against sentence. The first point here is

that the appellant has already taken an appeal against sentence and has been unsuccessful; that is essentially an end to the matter. Even if it were not so, the second issue arises: I observe that the co-accused had his punishment part reduced to eleven years as long ago as 3rd March 2006; there is no possible justification for the lapse of time since then, even were it possible to raise an appeal on a comparative justice basis at such a remove from the date of the original imposition of sentence."

Our position, as with counsel's fee note for his Opinion, is that the solicitor's account is not payable. The legal aid certificate was issued, it transpires, in relation to proceedings that had already achieved finality, and the work undertaken in respect of this incompetent procedure cannot satisfy the standards set out in regulation 7 (1).

Agent's Position

At the time of the dispute concerning counsel's fee note the agent's position was that it was not a further appeal against sentence that was being pursued, rather it was *"the prospect of an appeal against sentence on a ground not previously raised, namely comparative justice..."*

In response it was suggested to the solicitor *"...that the distinction between a "further" appeal against sentence and the "prospect" of an appeal against sentence appears to be a very subtle one. Presumably the potential end result would have been the same i.e. an appeal against sentence. That brings us full circle back to the view of counsel which accords with our own"*.

We cannot comment, standing the Auditor's decision of 7 January 2015, whether the agents remain of their view as originally stated.

In the course of correspondence concerning counsel's fee note, the solicitor also argued that they were initially unaware of the previous sentence appeal and that the Board *"...is much better equipped than are we to cross reference details and to be able to establish very early on, for example, whether there had been a previous appeal"*, essentially suggesting that the Board granted legal aid in this matter and so should have carried out our own investigations to establish if there had been a previous appeal.

The Board advised, *"...it is incumbent upon the agent applying for legal aid to have taken reasonable steps, perhaps under a grant of A&A, to satisfy him/herself that no prior appeal existed"*. In the event that there is any indication that an appeal has already been taken, or there is any doubt surrounding the matter, it is open to the solicitor to contact the Justiciary Office and seek clarification, thus avoiding incurring the cost of work in relation to an incompetent procedure.

Given the terms of Counsel's Opinion, it is clear that counsel was made aware from the supporting papers that there had indeed been an appeal against sentence taken and disposed of. As counsel advised, that should have been an end to the matter.

Subsequent to the initial taxation decision, repeated requests were made for return of the sums paid to the agents. Our email of 9 April 2015 was in the following terms:

"Firstly, I think it would be prudent to point out that we accept that the taxation in this case related solely to the issue of counsel's fees. That was because your account had by that stage already been paid by SLAB. Our view and one that we believe is supported by the Auditor's decision, albeit that was in relation to counsel's fees, was that your account has been paid in error. The work undertaken under this grant of legal aid was not, in our view, properly chargeable against the legal aid fund. The legal aid certificate was effectively functus from the date it was granted given that there had already been a previous appeal that had taken place. This is in line with the terms of s.124 of the Criminal Procedure Act 1995, which precludes a further appeal being pursued. It is on this basis that we are seeking payment of your account to be refunded to SLAB. The payment amounts to £1,233.06 inclusive of VAT."

The agent's reply of 22 April 2015 was in the following terms:

"Plainly, we are constrained to accept the decision of the Auditor. With respect however what you are proposing goes further. The Auditor was not asked and therefore did not opine on the charges for this firm.

If you accept, as presumably you do, that the work was done in good faith then we are already out to the extent of Counsel's fee, the effect of what you are now proposing is that we go further into the red.

We would suggest that lessons have been learned on both sides but if you are insisting then would propose a further Taxation on the point not yet covered."

Following on from that, we confirmed that agents should proceed to taxation.

Board's Position

It is counsel's Opinion itself that supported our position in the taxation of his fee note and again the terms of the Opinion equally applies here. In particular that an appeal had already been taken against sentence and that is **"essentially an end to the matter"**. This is in line with the terms of s.124 of the Criminal Procedure Act 1995 which precludes a further appeal being pursued. The whole procedure was incompetent.

In the course of correspondence it was suggested that the work undertaken by the agents in respect of exploring the prospects of an appeal against sentence should more properly have been carried under A&A, subject to increases in authorised expenditure.

Following intimation to counsel that his fee note was not considered payable, correspondence began between agents and the Board. At the very outset of that correspondence it was brought to the agent's attention that it was very

likely that the Board would seek return of funds already paid. This was confirmed to be our position in subsequent communications with the solicitor.

We submit that the Auditor's decision of 7 January 2015 in the dispute concerning counsel's fee note essentially reflected and validated our understanding as to the effect of s.124 of the Criminal Procedure Act 1995 and our application of the criminal fees regulations when considering the reasonableness of the fee note itself. Those same considerations equally apply to the solicitor's account, notwithstanding the grant of legal aid, on the information made available to the Board at the time, and payments made thereunder.

IN RESPECT WHEREOF



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Appendix:

1. Previous Points of Objection from diet of taxation before the Auditor of the Court of Session 3 November 2014.
2. Decision of Auditor dated 7 January 2015.