Stephen Kerrie

Airdrie Sheriff Court

Scottish Legal Aid Board
Thistle House
91 Haymarket Terrace
Edinburgh EH12 5HE

Sheriff Clerk's Office
Sheriff Court House
Graham Street
Airdrie
ML6 6EE

DX 570416 / LP7

29 May 2015

Your ref: TK/LM/
Our Ref: JGH/JT

Dear Sirs

DIETS OF TAXATION – 9 SEPTEMBER 2014
SLAB ACCOUNTS x 20

JG & others

	LARN No.
	743362507
	7013682707
	7423429707
	7616375907
	7010982407
	7616486407
	7616139907
	7608340207
	7423407307
	7616443407
	7616124007
	7608342807
	7616142207
	7423420507
	7616479907
	7616427807
	6309499106
	7616419507
	6279138206
	7607989907

I refer to the above and my recent e-mail.

I now enclose hard copies of my note and taxed accounts of expenses.

I also return you cheque for the sum of £205.00 in respect of the audit fees.

Yours faithfully

J Hamilton
Depute Auditor of Court
Enc.

Mobile: 0773 7172392

jhamilton.auditor@gmail,com

Note by Depute Auditor of Court in relation to Diet of Taxation held on 9 September

October 2014

[redacted]

[redacted]

RECEIVED
01 JUN 2015

The diet of taxation in respect of the foregoing accounts of expenses submitted by Taylor and Kelly, Solicitors, Coatbridge took place on 9 September 2014 in the presence of Mr Kelly, Solicitor, Coatbridge and [redacted] Principal Legal Adviser, Scottish Legal Aid Board.

20 accounts of expenses had been submitted by Mr Kelly for taxation in terms of Regulation 18 (4) of the Advice and Assistance (Scotland) Regulations 1996.

Mr Kelly provided me with detailed written submissions and authorities. [redacted] also provided me with detailed written submissions and documentation which are attached hereto.

The taxation proceeded with Mr Kelly submitting there had been no detailed comment provided by the Board with regard to the individual charges in the individual accounts. He advised that the Board had applied a broad brush approach and had proposed that the accounts be dealt with in batches. Mr Kelly then proceeded to go through the various points contained in his written submissions.

Mr Dickson then rehearsed the points of objection as contained in the Board's written submissions.

The main submission of the Board is referred to at page 11 of their written submissions. The following is an extract:

"In essence the Board submission falls into two alternative parts which may be summarised as follows:

The primary submission is that while the solicitor, around 1 October 2007, agreed to run the Crawford application as a test case, it could and should have been apparent at an early stage that such an approach would have been appropriate and sufficient to determine the issue of the challenge to the Board decision in the voting cases. Thus while each client was entitled to seek advice on their position in relation to the refusal of the authorised expenditure in the voting cases, that would have been susceptible to relatively simple and contained advice, perhaps contained in a letter, advising a test case would be used to determine whether the challenge could be made. The Board's submission is that any work undertaken in cases other than the test case, beyond such general advice, after the date upon which it could reasonably have been determined that the appropriate vehicle was a test case, is not work that was necessarily and reasonably undertaken with due regard to economy. The issue is to consider from what date is applied and that is addressed below.

In the event that the foregoing argument is not accepted the fall back (for some cases) and secondary argument (for other cases) is that the accounts lodged for taxation are appropriately and variously susceptible to elements being taxed off for one or more of the following reasons:

(a) Some entries are identical to account entries which have previously been considered by the auditor in relation to the taxation which took place on 10 March 2014 and for the reasons then considered by the Auditor such entries should be similarly taxed.
(b) Some further entries do not pass the standard for taxation
(c) Some entries relate to work in cases which post-dated the date when the Crawford case was identified as the test case, as opposed to any earlier date, and thereby relates to work that was not necessarily and reasonably undertaken, beyond advising the client as to the use and effect of the test case, etc."

These points were expanded upon further at pages 15/16 8(a) (b) and (c) of the Board's written submissions.

In relation to the test case, the Board provided a timeline / calendar. [redacted] advised that the document was intended as a visual aid to assist with the deliberations at the diet. This provided a timeline of the events regarding the "test case" of Robert Crawford against the work undertaken for each matter in respect of each of the accounts submitted except those for Andrew Inglis and John Higgins.

Mr Kelly commented that it was unrealistic to suggest that a solicitor should be involved in that level of work to deal with cumulative cases in this manner. He added that the Board had not provided any guidance to assist in such matters 7 years after this work had commenced. These comments are expanded at page 12 of Mr Kelly's submissions.

[redacted] conceded that the Board had not issued guidance for dealing with multiple actions with a high degree of similarity. That was because it happens so infrequently that it has not been an issue. At the end of the day, guidance is guidance and the determining factor is regulation 17.

In Mr Kelly's written submission at page 15, he referred to the letter from SLAB to his firm;

"You have asked for confirmation that the Board would be bound by the decision in the [redacted] case. If a decision is taken to refer the matter to the Sheriff of Lothian and Borders at Edinburgh, then the Board will consider his determination of the application including possible action in respect of any petition for judicial review in the Court of Session. ....."

Mr Kelly in his written submissions then goes on to state;

This falls to be contrasted with the position of the Board in (their) submission at page 13

"they should not be lost in sight that the situation was eminently suitable for a test application approach. A decision in one would have effectively been a decision in all standing on the nature of the circumstances. If the Board was wrong to refuse an increase in one case then it was clearly wrong to refuse an increase in the other cases. There can be no argument in that."

Mr Kelly states;

Why could that position not have been stated in a straightforward fashion after it was suggested? The Board have sought to alter their position when it suits them – they have adapted their legal strategy....."

At the diet, [redacted] indicated that it was important to remember that all the accounts are advice and assistance cases. If legal aid was granted then the client would apply for judicial review. Reference had been made to the Board not committing to the decision in the [redacted] case. The Board was unashamed for that decision because it only required one person to obtain legal aid and then take the judicial review route. [redacted] added that Mr Kelly's view seemed to be that if legal aid was granted to [redacted] then the other applicants would also be granted legal aid and his (Mr Kelly) criticism was that the Board would not agree to this outcome.

[redacted] added there should be no criticism because there was no need to give legal aid to others as only one person was required to take the judicial review route,

[redacted] then rehearsed a hypothetical scenario in the following terms:

If Mr Kelly wrote to SLAB to say, I have obtained legal aid for [redacted] and will raise a judicial review. Would the Board be bound by that outcome? – then the Board would be so bound.

Mr Kelly responded by stating that if that was the position then why didn't the Board suggest such an approach. Mr Kelly added in such a hypothetical situation, the Board was now relying on such a letter which would have been written had Mr

[redacted] been granted legal aid. That was trying to impute the knowledge of what would happen and such scenarios were not within the realms of Regulation 17.

In relation to (a) above, [redacted] referred to the taxation of accounts which took place on the aforementioned date and suggested that a similar approach be applied in these matters.

In relation to (b) above, at the diet, [redacted] commented that contained in the accounts of expenses was a letter seeking an increase in expenditure. In each case where this was relevant, the authorised expenditure is £500.00. At the point in time when this request had been made the current expenditure had not been near that level. It was not a legitimate charge for a letter sent in such terms when only £200.00 had been expended at that time.

In relation to (c) above, [redacted] commented that once the [redacted] case had been identified then that would have an effect on work done thereafter for the other cases.

He also commented on Mr Kelly's observations; that Mr Kelly had not received fair notice of the points as they relate to individual charges in individual accounts and also the fact that the accounts be considered in batches. [redacted] submitted that in his view there was such a similarity and commonality across the accounts that they are susceptible to such an approach and would leave this to the auditor to decide.

[redacted] referred to Regulation 17 of The Advice and Assistance (Scotland) Regulations 1996. The test to be applied related to fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given with due regard being had to economy.

The Board's position is that it wasn't argued that work hadn't been done. It was about necessity. This factor impoverished Mr Kelly's argument when referring to the case of Malpas v Fife Council 1999 SLT 499. In his view that decision was based on a decision allowing reasonable fees and was ultimately a discourse on how you go about assessing reasonableness. That was only one part of the test to be applied. The important part was necessity and Malpas did not assist here nor did it assist with the issue of economy.

Mr Kelly's written submissions at page 7 on this matter were:

- "Onus is upon the unsuccessful (or paying) party to show where expenses incurred were unreasonable were extravagant and should thus be taxed off:
- The benefit of the doubt in agent and client taxation is given to the party seeking recovery (in litigation the successful party)

- Taxation with which we are concerned is more generous than party and party – the basis of taxation in Malpas – " *should only disallow an item if it can truly be said that to incur that expense was not reasonable, in the sense that a competent solicitor acting reasonably would not have incurred it.*"
- Predictability, at the time of the tendering of the advice or doing the work is an important consideration (Malpas)"

Mr Kelly also challenged the comments made by the Board at pp7/8/9 of their submissions as narrated below:

Board comment

"Was work carried out in most efficient and cost effective manner consistent with proper provision of advice" ; "clear injunction to the solicitor to actively address cost at every stage"

Mr Kelly's comment

"Not borne out by either terms of regulations; basis of taxation or authorities on what constitutes reasonableness ("would a solicitor acting reasonably incur the expense")"

Board comment

"Agent & client, third party paying said to be a higher standard of taxation; work must be necessary in circumstances of advice being given to client and extent to which it assists the client ..."

Mr Kelly's comment

"higher standard of taxation". MacPhail is right: the correct characterisation (if that assists) is somewhere between party and party, on the one hand and agent and client, client paying on the other"

Board comment

"The onus is always on the solicitor to establish the work is actually necessarily and reasonably done otherwise it is not allowable....."

Mr Kelly's comment

"Not accepted; onus is on Board, not simply enough to raise concerns must point to entries and basis for saying particular entries are not reasonable or necessary"

Auditor's decision

Having considered the submissions made by Mr Kelly and [redacted] I am of the view that the Board did not agree to be bound by the decision of the [redacted] case and I have accepted Mr Kelly's submissions on this matter referred to at pages 3 and 4 above. I believe that [redacted] hypothetical scenario as described at page 4 above would have crystallised matters. Whilst I understand that it may not always be the case that the Board require to advise solicitors as to how matters should progress or the action they should take, I would expect that some discussion and exchange of views take place.

[redacted] did make reference to the lack of guidance etc. in such matters since they are very infrequent. I would have thought that in such circumstances that is when it is most needed and to engage in dialogue to secure the most appropriate way forward. Had this scenario been canvassed at the time then it may have altered the present situation. I am not persuaded to apply any "cut off" date as suggested by the Board and accordingly I have rejected their primary submission.

Turning to the secondary argument made by the Board and referred to at pages 3 above, Mr Kelly had submitted there was nothing in the Regulations which allowed for abatement of letter fees e.g. by reducing a 3 page letter to 1 page. This had been the approach which I had undertaken following the aforementioned taxation held on 10 March 2014.

At that time, in my note following that diet of taxation, I stated "I am of the view that the work undertaken in each of these accounts was properly undertaken but I cannot subscribe to view that the expense incurred in respect of the identical letters referred to above should be reflected in the fees sought by Mr Kelly. Whilst I accept there is an onus on SLAB to explain their position in this matter and it was unfortunate they did not attend at the diet, there is also a responsibility placed upon the auditor to apply what they believe to be a proper decision on the matter. Accordingly, where there are identical letters, I have allowed the full fee sought where that was the first "original" letter issued to a client and thereafter the other identical letters issued to other clients at a subsequent date, I have allowed a one page letter fee."

The Board's submissions at page 12. 7.2(a) in relation to this matter were;

"Some entries are identical to account entries which have previously been considered by the auditor in relation to the taxation which took place on 10 March

2014 and for the reasons then considered by the Auditor such entries should be similarly taxed."

Auditor's decision

I remain of the view that a fair and reasonable decision is required in respect of such fees and I have applied the same principle to the accounts presented at this taxation.

In relation to the Board's submission at 7.2(b) – "Some further entries do not pass the standard for taxation". This related to a number of the accounts of expenses which referred to a letter seeking an increase in expenditure. In each case where this was relevant, the authorised expenditure is £500.00. At the point in time when this request had been made the current expenditure had not been near that level. It was not a legitimate charge for a letter sent in such terms when only £200.00 had been expended at that time.

Auditor's decision

I do not recall Mr Kelly making any specific comment to this matter at the diet other than those contained in his written submissions. I have allowed the fee for this letter contained in each account where the increase was granted (this occurred in 11 of the 14 requests.) I found it difficult to understand the argument that such a request had been premature when it was subsequently granted fairly quickly after the request had been made. If the request had been premature then I would have expected the Board to require further comment but in those cases that does not appear to have been done or if they did, the end result was the increase had approved. In respect of the remaining 3 accounts where such requests had been refused, I have taxed off that fee.

In relation to the Board's submission at 7.2 (c) – "Some entries relate to work in cases which post-dated the date when the Crawford case was identified as the test case, as opposed to any earlier date, and thereby relates to work that was not necessarily and reasonably undertaken, beyond advising the client as to the use and effect of the test case, etc." This submission is further expanded upon at pages16/17 at 8(c) of the Board's written submissions.

It was submitted there were 7 cases in which the bulk of work, including prison visits and subsequent work were carried out post – 1 October. It was the Board's view that such work, excepting only allowable correspondence advising as to the Crawford situation should be taxed off.

Further written submissions at page 17 stated "..... The reason that the separate letters were justified to those clients who got letters of 8 and 16 October was that following the issue of the [redacted] letter, the Board wrote to the solicitors with further information, which the solicitors properly were able to relay to their clients. However after that date, the solicitors were in possession of that information. Any client appropriately sent a '[redacted]' type letter post-16 October could and should have had a single letter combining the content of the "[redacted] and "referral to Sheriff" letters as by then the solicitors were aware of the whole position. Any residual separation of the [redacted] and "referral to Sheriff" letters was unnecessary and unreasonable."

Auditor's decision

I have already indicated that in my view there was no test case agreed. On that basis, I am satisfied the work undertaken with regard to the prison visits etc. was reasonable and necessary and with due regard to economy and falls within the terms of Regulation 17. As an aside, the prison visits were always conducted on a day when a number of other clients were visited. This course of action resulted in reduced expenditure. Accordingly, I have allowed the fees for such work subject to the abatement where they apply to the same letter sent to a number of clients.

In relation to the "[redacted]" and "referral to Sheriff" letter type which were sent to clients after 16 October, I am of the view that it would have been appropriate to combine this correspondence into a single letter. Accordingly, in those accounts I shall allow a one page letter fee for the "[redacted]" letter since that style of letter had been considered and dealt with in the taxation decision of March 2014 (the first letter drafted in that style, a 2 page letter fee had been allowed, in all subsequent similar letters a 1 page fee was allowed).

In relation to the "referral to Sheriff" letter, the first letter to be drafted post 16 October, [redacted] I have allowed a 1 page letter fee since that could have been incorporated within the "[redacted]" letter and I believe that fee would be fair and reasonable. Thereafter in relation to all such "referral to Sheriff" letters, I have taxed off the fee sought in full.

The remaining accounts to be dealt with relate to

(a) [redacted]

The Board's written submissions at page 20, has specific comments relating to specific entries:

28 March 2007

26 January 2008

22 May 2008

Abatement of fees is sought in all 3 entries. In relation to the first and third entries, this submission was made on the basis of a previous taxation of the account of expenses for David Dewar on 10 March 2014. In that taxation which had similar such entries, the auditor had allowed only a one page fee for both entries. In relation to the second entry of 26 January 2008, it was argued that entry "... would seem to be on all fours with the [redacted] letter and that one page should be allowed.

Auditor's decision

I am of the view that such an abatement is appropriate for the submissions made in respect of the first and third entries. I have also allowed the second abatement on the basis that this letter had also been sought and allowed for another account of expenses [redacted] which had been taxed in March 2014. On that basis, I have allowed a one page fee for that entry.

(b) [redacted]

The Board submission in this matter is:

"The exact nature of the advice sought and provided is unclear from the detail on the face of the account. The Board assumes, from the request for an increase in expenditure to £500.00 and the fact that the account has been lodged together with Board challenge cases for this taxation, that it is indeed a Board challenge case and, if so, it would appear to be an extreme example of the issue raised at 8.2(c).

The first meeting took place on 26 January 2008, two months after the test case [redacted] for judicial review of the Board's decision to refuse an increase in authorised expenditure had been remitted to the Sheriff Principal, and a month before the Sheriff Principal's decision to refuse civil legal aid.

A charge has been made for travel to HM Prison, Edinburgh, apportioned apparently with four other cases, suggesting that instructions had already been taken from the client and admitted to A&A. Given the stage reached in the [redacted] application, it was premature to visit the client and the A&A application could have been sent to the prisoner with a short covering letter explaining the current position. In the event that a visit is deemed necessary, there was no basis for completing what is referred to as a SU/MAN, a special urgency mandate. What was the special urgency in these circumstances? Such advice as was necessary could have been given in the course of a 15 minute meeting. The entries at January 30 and March 7 are premature and separately, unnecessary. It is noted that file was closed and, of course, the client was advised of this at the meeting on March 7 and, therefore, there was no

discernible point in the letter of March 27. It is difficult to see the value of the advice given this client at a cost, as claimed, of £83.70 from public funds."

Auditor's decision

I do not recall and have not recorded any specific comment from Mr Kelly in respect of this matter outwith what is contained in his written submissions.

I have already indicated that I am not of the view that a test case had been adopted or established. Similarly, I believe that the work undertaken was reasonable and necessary and it is also clear that the solicitors, when arranging a prison visit with their client sought to do so when visiting other clients on the same day. I would also consider that approach was in accord with having due regard to economy.

Having said that, I am not clear as to why it was necessary to complete the SU/MAN. I don't recall Mr Kelly commenting on that particular matter. I have allowed the meeting time in full but taxed off the fee in relating to framing the SU/MAN.

In relation to the letter of 30 Jan 2008, I have taxed off that letter fee in full but I am satisfied that the fee for meeting held on 7 March should be allowed.

In relation to the letter of 27 March, there does appear to be an element of duplication here since matters had been discussed and determined at the earlier meeting held on 7 March and accordingly I have taxed off that fee in full.

At the diet of taxation, it was noted that the preparation time for the diet for both Mr Kelly and [redacted] had been 4 hours. The diet of taxation itself lasted for a period of 2.5 hours and the fees for these times have been reflected within the accounts of expenses.

J Hamilton

Depute Auditor of Court, Airdrie

27 May 2015

POINTS OF OBJECTION

on behalf of

THE SCOTTISH LEGAL AID BOARD

in connection with various A&A Accounts

Diet of Taxation: Airdrie Sheriff Court, Tuesday 9th September 2014 at 10.30 am

Solicitors: Messrs Taylor & Kelly, Solicitors, Coatbridge

(A list of material accompanying this document is provided on the final page hereof (page 21))

1. THE ACCOUNTS

The Advice & Assistance accounts lodged before the Auditor in connection with this diet are all of a type, with the exception of two, being those for clients Inglis and Higgins. These two are dealt with separately at the end of this submission. The focus of the submissions is otherwise on the remaining eighteen accounts unless otherwise stated.

The Auditor will be aware of the distinction between the two types of legal aid, Advice & Assistance ("A&A") and civil legal aid. A&A is available to provide general legal advice and assistance but does not, other than in limited circumstances irrelevant in the current context, cover representation in connection with civil court proceedings. For that civil legal aid is required. A&A is often a precursor to civil legal aid, and A&A is regularly used to carry out the work associated with preparing and lodging an application for legal aid.

A&A is granted by the solicitor and is available up to an initial limit of authorised expenditure, the standard amount being £95.00. Increases may be authorised by the Board, although the Board also operates a template increase system whereby in certain common circumstances, an increase in authorised expenditure is covered by a templated amount, usually available on request where the solicitor is able to confirm that certain qualifying criteria for that templaté are met. Accordingly where a solicitor seeks an

increase in authorised expenditure, he or she will either apply for a template, or if a standard template is not available, make a bespoke application for an authorised increase.

Civil legal aid is granted by the Board upon receipt of an application and supporting material compiled for the purpose. Where an application for civil legal aid is received where the Board is the opponent, and after any refusal by the Board, a review is lodged, the application goes before the Board's Legal Services Cases Committee to ensure the application is scrutinised at the highest level. Unless the Committee is minded to grant an application, the application is then remitted to the sheriff principal of Lothian & Borders at Edinburgh for consideration in terms of Section 14(4) of the Legal Aid (Scotland) Act 1986

The work shown in the accounts, undertaken under A&A, all relates to advice given to prisoners in connection with a proposed judicial review against the Scottish Legal Aid Board. The challenge forming the basis of this advice to these various individuals was to a decision by the Board not to grant increases in A& A authorised expenditure, over and above the initial statutory limits of authorised expenditure of £95, to allow the solicitors to undertake further work, following the *Smith* decision (below), to prepare civil legal aid applications to seek further remedies against the Electoral Registration Officer in connection with their right to vote.

The work in the accounts before the auditor, therefore, does <u>not</u> relate to the applications for civil legal aid to seek these further remedies (prisoners voting rights/electoral cases - hereafter "voting cases"); it relates to multiple and continuing advice to prisoners on seeking civil legal aid to challenge by way of judicial review, the Board's decision to refuse an increase to £750 to allow the solicitors to seek these further remedies (judicial review of Board decision cases - hereafter "Board challenge cases").

2. BACKGROUND

2.1 It may be helpful to broadly set out the background leading, indirectly, to the provision of this advice and the fees claimed by the solicitors in these accounts. The starting point, and leading case, is the case of *Smith -v- Scott [2007 CSIH 9] [or 2007 SLT 137]* in which the Registration Appeal Court, in a judgement issued on 24th January 2007,

made a declaration to the effect that section 3(1) of the Representation of the People Act 1983, which provides that a convicted person during the time that he/she is detained is legally incapable of voting at any Parliamentary or local Government election, was incompatible with the rights bestowed by Article 3 of the First Protocol to the European Convention. That declaration followed on a decision of the European Court of Human Rights in *Hirst -v- UK [No 2] [2005] 42 EHRR 41.* Mr Smith was not actually successful in the primary issue of whether he ought to have been admitted to the Register of Electors: in response to the question in the stated case, "Was I correct to refuse the appeal?" the Court answered in the affirmative, meaning that the Registrar was correct not to admit Mr Smith to the register. The Court then granted the Declarator of incompatibility. In considering the effect of this, it has to be noted that section 4(6) of the Human Rights Act 1998 provides that a Declarator does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, in this case The Representation of the People Act 1983, and nor is it binding in the parties. Additionally, section 6(2)(a) makes it clear that a public authority does not act unlawfully where it acts under a provision of irredeemably incompatible primary legislation, which appeared to be the case here. Accordingly, it seemed to the Court that it is still the law that convicted prisoners are not entitled to vote, so it is difficult to see how a right to reparation arises. The effect of the Declarator is simply to prompt the Government to amend legislation, which, from the terms of *Smith*, it appeared to be doing as a result of the decision in *Hirst*.

Additionally, it was pointed out that this case cannot be viewed as one that gives all prisoners the right to vote; this issue was simply a blanket ban on any prisoners voting was felt to be incompatible. It remained to be seen which category of prisoners would be allowed to vote by the Government and so at that stage it was impossible to tell whether the applicant's position would be any different, so a claim for reparation was premature. The Court concluded that, in any event, if it was wrong in this analysis, it was noted that in the ECHR case of *Hirst -v- United Kingdom application number 74025/01,* on which reliance was placed in the recent *Smith* case, the Grand Chamber noted that it would be for the United Kingdom Government in due course to implement such measures as it considered appropriate to fulfil its obligations to secure the right to vote in compliance with the judgment. The Grand Chamber considers that this in itself provided *Hirst* with just satisfaction for the breach. Mr Smith appeared to be in the same position.

2.2 Following this judgement, the Board became aware that the solicitors were now providing advice and assistance to a large number of prisoners on the prospect of raising further proceedings, following the *Smith* case and to prepare civil legal aid applications for this purpose. The applications were largely the same and stated, "(the client) seeks to exercise his right to vote and as such has applied for inclusion in the electoral register. The Electoral Registration Officer has refused his application. The Electoral Registration Officer is acting contrary to the convention rights of the applicant." The increase sought in each case was to £750. On review of the Board's decision to refuse an increase, the issue of "just satisfaction" (public law damages) was introduced.

2.3 The Board continued to refuse these applications broadly for the following reasons:

- The principle had already been looked at by the Court which had established that although the law was clearly incompatible with the Convention, the Electoral Officer was bound by the domestic law which was clear in its terms;
- There is no stateable claim to reparation;
- The claim for damages was premature. The incompatibility arose from the absolute bar to voting. Some of these prisoners would in due course still, lawfully, be excluded from voting so any claim for damages, even if competent, was premature on an individual basis;
- The ECHR made no award in the case of *Hirst*, the case that had given rise to the issue in the UK.

Following the issue of the decisions to refuse increases in A&A authorised expenditure to £750 in each of the applications by prisoners received in voting cases, the Board became aware of the intimations of subsequent grants of A&A relating to the Board challenge cases. Typically, following the initial grant of the A&A by the solicitor, application for increase in authorised were lodged. From the batch of accounts currently the subject of taxation, it is noted that the first application for increase was in May 2007, but thereafter it was late May/June 2007 before further increase applications/template notifications were received.

Although the start dates for work in each of the accounts varies, there is a broad similarity in the form of work undertaken in each case, regardless of when the work was commenced/done, as disclosed by the account entries.

By way of further explanation, the Board at the time expressed concern (and indeed continued so to do) at the fact that similar work was being undertaken on behalf of multiple persons unnecessarily to prepare and lodge applications for civil legal aid in the Board challenge cases. The Board position was then, and remains, that even if the Board decision to refuse increases in the voting cases was challengeable, that a single action for judicial review would have been sufficient to resolve the issue, and that accordingly, a single-application for civil legal aid for such an action was all that needed to be contemplated. In turn, A&A under a single application by one prisoner, to prepare such an application would have been enough. A "test case", in other words. While this would have been so even if prisoners had been represented by a number of firms of solicitors, this was particularly so when the same firm were instructed by most if not all.

A "test" case was eventually identified[1], by the agent, as the vehicle to advance determination of the issue as to whether civil legal aid be made available to judicially review the Board on its decisions to refuse increases in authorised expenditure: [redacted] - 7811266307. The process, as touched on previously, given that the Board would be the respondent in such proceedings, is that unless the application is granted by the Board on a first consideration, any review of the application (in this case the test application) is be placed before the Board's Legal Services Cases Committee, consisting of solicitors, counsel, sheriffs etc. and if the application is refused by the committee, the matter is referred to the Sheriff Principal of Lothian & Borders for final determination as to whether civil legal aid is to be made available in terms of Section 14(4) of the Legal Aid (Scotland) Act 1986. Mr Crawford lodged his application for civil legal aid on 17th July 2007. It was refused on first consideration, with the refusal being intimated on 16th August 2007. Review was lodged on 1st October 2007, but only at that time was it promoted as a test case. Subsequently, the LSCC did refuse the application, on 19 November 2007. The application was referred to the Sheriff Principal who refused it on 6 February 2008, see Decision attached.

3. STATUTORY BASIS OF TAXATION

[1] On 1st October 2007

The 20 accounts lodged for taxation, as undernoted, all relate to work undertaken by the solicitor under advice and assistance.

Advice and assistance is defined at section 6(1) (a) and (b) of the Legal Aid (Scotland) Act 1986 ("the Act") as oral or written advice provided to a person by a solicitor

- on the application of Scots law to any particular circumstances which have arisen in relation to the person seeking the advice; and

- as to any steps which that person might appropriately take having regard to the application of Scots law to those circumstances.

It includes assistance provided to a person by a solicitor by taking or assisting the person in taking such steps.

The Advice and Assistance (Scotland) Regulations 1996 state the basis or standard of taxation on which fees and outlays are allowable to a solicitor upon any assessment or taxation and make specific provision for taxation of fees and outlays.

Section 17(1) states

> 17(1) ... fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice and 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 2 of Schedule 3.
>
> (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.

Regulations 18(3) and (4), read together, state

> 18(3) Where the Board receives an account in accordance with paragraph (1) above it shall assess the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17 and shall determine accordingly any sum payable out of the Fund and pay it to the solicitor... .
>
> (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.

This is the basis on which we shall convene at the taxation diet, and the structure within which the fees in dispute fall to be assessed.

4. COMMENT

As the Auditor will be aware, the provisions relating to the assessment and taxation of an A&A account are prescriptive in that they state, in clear terms, what fees shall be "allowable" to the solicitor upon any assessment or taxation of his account. A solicitor shall only be allowed fees for work actually, necessarily and reasonably done, due regard being had to economy. The Board seeks to objectively assess whether work carried out by the solicitor was necessary and, if so, was carried out in the most efficient and cost-effective manner consistent with the proper provision of the advice. The words "due regard being had to economy" are a clear injunction to the solicitor to actively address the question of cost at every stage of the advice. The standard is equivalent to the civil standard of "agent and client, third party paying" the third party, of course, in connection with the provision of A&A, being the Legal Aid Fund. On this basis, the Board will only allow such expenses as "a prudent man of business, without special instruction from his client, would incur in the knowledge that his account would be taxed".

This is a higher standard of taxation than between agent and client. The most significant consequence, for practical purposes, is that it is not enough that a solicitor carries out an item of work, even with the specific instructions of his client. Work must be necessary in

the circumstance of the advice being given to the client and the extent to which it assists the client, and it must be reasonable in the whole circumstances of the case. Also, advice and assistance, being a creature of statute, has to fall within the definition at 6(1)(a) and (b), to which reference has been made. The work must consist of -

- oral or written advice or assistance to the client; and

- relate to any particular circumstances which have arisen in relation to the person seeking the advice.

The onus is always on the solicitor to establish that work is actually, necessarily and reasonably done, otherwise it is not allowable and to this end the solicitor should be in a position to support all entries with file notes, vouch all expenditure and be in a position to justify all costs when submitting an account to the Board, or before the Auditor at taxation.

The Board is mindful that it is exercising its powers on receipt of an account by which time, of course, the expenditure may well have been incurred. It is for this reason that guidelines are prepared and published for the assistance of the profession. The detailed guidelines reflect the Board's experience and practice in taxing A&A accounts over 27 years. Whilst the advice contained in these guidelines may, at times, appear somewhat peremptory, it is only proper to clearly state the Board's requirements.

The Board, as third party paying, is entitled to state what it will or will not pay for in certain circumstances, and in providing A&A, the solicitor is doing so on an informed basis, at least in circumstances where a taxation point coincides with specific guidance on that issue. The solicitor may well decide in the particular circumstances to adopt a course of action which conflicts with this advice. That is entirely a matter for the solicitor. However, in these circumstances, the solicitor should address the issues of cost and be in a position to support and justify any expenditure incurred.

Relevant parts of the Board's guidance on the assessment of advice and assistance accounts are attached.

It is emphasised here that the Board's position is in relation to the issue of what can properly be paid for under the A&A regulations. The Board recognises that a solicitor has, in terms of the relationship with the client, a range of approaches as to what work is done, and how. That is a separate issue, and not one with which the taxation is concerned. The Board expresses no view in this submission on anything other than how the statutory scheme for advice and assistance should operate in relation to claims for payment in respect of work undertaken.

5. FEES INCURRED EXCEEDING THE LIMIT OF AUTHORISED EXPENDITURE

As indicated at section 1, the Act prescribes an initial limit of authorised expenditure which, if exceeded, renders any work not chargeable to the Fund. It is equally the case that if at any time during the course of the advice, a solicitor undertakes work exceeding the increased limit of authorised expenditure at that time. Again, such work is ineligible for payment.

Reference is made to the terms of section 17(2), referred to above, which states, "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". To explain, regulation 12 is the regulation that allows the Board, as it thinks fit, to grant an increase in the authorised expenditure under A&A.

This matter was dealt with in the leading case of *Drummond & Co -v- Scottish Legal Aid Board*. 1990 (HL) 1.

This is a matter that goes beyond assessment and, indeed, taxation of accounts. It is *ultra vires* the Board's powers to make such payments. The Board wishes to make it clear that although the terms of regulation 18(4) are such that taxation shall be conclusive of the fees and outlays so allowable, that reference only applies to the extent that the fees allowed fall within the *vires* of the Board, or the Auditor.

We suggest that the accounts be taxed but, in the event that this is is an issue in any account, always subject to further abatement by the Board in the event that any of the work undertaken was so undertaken in excess of the limit of authorised expenditure at the time.

6. OBSERVATIONS ON ACCOUNTS PREVIOUSLY TAXED

As the auditor is aware, the Board was not in attendance to act as a contradictor, on 10th March 2014, at the first diet of taxation in which similar accounts are considered. The Board agrees the abatements made by the auditor, to the extent that they related to the "Board challenge" *judicial review* cases, and has paid the taxed accounts as assessed. The Board does not, however, consider itself bound by the outcome of this taxation as regards the proper assessment of other similar accounts given that the auditor did not have the benefit of the Board's observations at the diet. The Board believes that further abatement may have been made to these accounts in the event that the Board had been present.

It should be noted that the sums allowed by the auditor included work otherwise not chargeable in terms of regulation 17(2) as the work had been undertaken outwith the limit of authorised expenditure available at the time. However, given the circumstances, the small sum £47.22 at issue will also paid the solicitors. This is currently being processed under an *ex gratia* payment.

A number of the accounts taxed related to *prisoners voting rights/electoral* cases which are not relevant for the purpose of this upcoming diet other than in relation to the Inglis account. In the course of dealing with these accounts, the Board had offered and, in the absence of agreement, had made a payment to account of £50 in respect of each of these cases prior to the first taxation. The total number of voting cases is estimated at 120.

Also, the sum of £35 had been paid to account in respect of each judicial review case. The total number of Board challenge cases is estimated at 70.

7. OBSERVATIONS ON ACCOUNTS TO BE TAXED

All the accounts before the auditor (other than the two referred to at the outset which will be subject to separate treatment) relate to advice given to prisoners in connection with a judicial review against the Board challenging the decisions of the Board not to grant an increase in authorised expenditure to provide advice and prepare civil legal aid applications to seek further remedies against the Electoral Registration Officer.

The Board bases its challenge firmly on whether the work undertaken under A&A was, in the circumstances, *necessary* (and, therefore, reasonable) all in terms of regulation 17. The standard of taxation is not qualified in any way. There may be a tendency to restrict or contain the prescribed standard of taxation to the length of a letter, the need for a meeting or whether travel was justified. These are, of course, entirely appropriate issues for taxation and shall be addressed by the Board in the course of its submissions. However, the proper application of regulation 17 goes further than that: section 17 also asks whether the work itself was necessary, not just whether the way in which the work was carried out. The Board will query whether

- the advice in some or all of these cases was necessary at all;
- as time wore on during 2007, the issues between the solicitors and the Board became crystallised and a test case ([redacted] was identified, what was the purpose of this continuing advice to other prisoners;
- was such advice and assistance as was appropriately given within the lodged accounts carried out efficiently and with due regard to economy; and
- should the test case (whether or not the case eventually adopted) have been adopted at an earlier stage.

In essence the Board submission falls into two alternative parts which may be summarised as follows:

1. The primary submission is that while the solicitor, around 1st October 2007, agreed to run the [redacted] application as a test case, it could and should have been apparent at an early stage that such an approach would have been appropriate and sufficient to determine the issue of the challenge to the Board decision in the voting cases. Thus while each client was entitled to seek advice on their position in relation to the refusal of authorised expenditure in the voting cases, that would have been susceptible to relatively simple and contained advice, perhaps contained in a letter, advising a test case would be used to determine whether the challenge could be made. The Board's submission is that any work undertaken in cases other than the test case, beyond such general advice, after the date upon which it could reasonably have been determined that the appropriate vehicle was a test case, is not work that was necessarily and reasonably undertaken with due regard to

economy. The issue is to consider from what date this applied, and that is addressed below.

2. In the event that the foregoing argument is not accepted the fall-back(for some cases) and secondary argument (for other cases) is that the accounts lodged for taxation are appropriately and variously susceptible to elements being taxed off for one or more of the following general reasons:
    a. Some entries are identical to account entries which have previously been considered by the Auditor in relation to the taxation which took place on 10th March 2014 and for the reasons then considered by the Auditor such entries should be similarly taxed.
    b. Some further entries do not pass the standard for taxation
    c. Some entries relate to work in cases which post-dates the date when the [redacted] case was identified as the test case, as opposed to any earlier date, and thereby relates to work that was not necessarily and reasonably undertaken, beyond advising the client as to the use and effect of the test case, etc.

8. DETAIL OF THE SUBMISSIONS

8.1 The "Earlier Recognition of Test Case" Argument

To assist with deliberations the Board has prepared a timeline/calendar and this is referred to. This is intended merely as a visual aid. It uses abbreviations and codes to describe work items, and an accompanying code explanation sheet offers paraphrased explanations.

The starting point here is that the solicitors acting for the clients themselves recognised and accepted, and intimated that proceeding with a test application/case to the effect of avoiding unnecessary work on the other cases, was an appropriate way forward. The Board's position is that it was entirely right and proper for them to do so. However, the Board's position is that is was apparent that such a view could and should have been taken much sooner to the effect of avoiding unnecessary work in other cases, as had been suggested by the Board.

The case selected for the "test" was [redacted], and key dates for that case may be summarised as follows:

24 January 2007:	Date of *Smith* Judgement;
28 February 2007:	Date of request for increase in authorised expenditure;
6 March 2007:	Date of Board's refusal;
16 March 2007:	Date of reconsideration letter from solicitors;
16 July 2007:	Application for civil legal aid submitted in relation to judicial review
16 August 2007:	Application for civil legal aid refused
1 October2007:	Date of letter from Taylor & Kelly identifying Crawford as a test case, and applying for review of civil legal aid refusal;
19 November 2007:	Date LSCC refuse application for judicial review, and remit to Sherifff Principal of Lothian & Borders;
6 February 2008:	Date of Sheriff Principal's Decision refusing civil legal aid;

On 16th July 2007, being the point in time when [redacted] application for legal aid was submitted, nine of the eighteen clients whose cases give rise to the accounts currently being considered, had made known an intention to challenge the Board's decision in the voting cases, and increases in authorised expenditure or templates had been applied for/granted. In the Board's submission, it could have been recognised as at that time that a test application (whether it was [redacted], or another) was the appropriate way forward, and that other than to proceed on that basis was not to carry out work on the basis that it was necessary and reasonable, with due regard to economy.

It should not be lost sight of that the situation was eminently suitable for a test application approach. A decision in one would have effectively been a decision in all standing the nature of the circumstances. If the Board was wrong to refuse an increase in one case, it was clearly wrong to refuse an increase in the other cases. There can be no argument on that. That the same solicitors were acting simply made the situation even clearer. And, critically, that point was eventually conceded. The Board simply submits that it was clear in July 2007 that the test application route would be appropriate.

If that date is not accepted, then certainly by 16th August 2007, when the initial refusal was intimated in the [redacted] case, and it was known that to proceed further the

application would have to go to the Legal Services Cases Committee and possibly the Sheriff Principal, that should have crystallised as the date after which attention should be focussed in a test application/case. By that date a total of seventeen of the eighteen clients had made their intentions known.

It may be suggested in response that that was not the case, as following the refusal, Mr [redacted] would have to consider his position, and he might have chosen not to seek review of the refusal, and his case would therefore not be susceptible to being chosen as the test until such time as he had given an instruction to seek review (via the Legal Services Cases Committee and possibly thereafter the Sheriff Principal). To make this suggestion, however, would miss the point. All that was required was that one applicant, in circumstances where legal advice would have alerted that client (a) to the possibility of refusal of legal aid at first instance, and (b) the conduciveness of the whole circumstances to running a test, to give instructions that their case be run as a test, and that instruction could have been sought and then implemented, in the relevant stages from the outset. That was not an instruction that had to wait until after a first refusal. Furthermore it could have been any one of ten we know about who had taken advice by mid-July. If the response to that was to be that none of them might perhaps have decided to take matters forward, then the whole necessity and reasonableness of doing any work up to that point would be undermined.

Which ever of those two dates is adopted, be it 17th July or 16th August, work in the accounts after that date should be taxed on the basis other than in relation to advising the client as to the test application/case was unnecessary and unreasonable, due regard being had to economy. In the later commentary on accounts this will be referred to as the "cut-off" date.

As a double-check on the value and appropriateness of the test application approach it is worth reconsidering the overall position here. The taxation necessarily proceeds with the auditor assessing each account under reference to the regulation 17 of the A & A regulations. That is concerned with assessing that work is necessarily and reasonably done with due regard to economy. This is the yardstick against which work must be measured if it is to be paid from public funds. The assessment process cannot be done in isolation. It necessarily can and does include reference to wider factors, including the background circumstances and the context of the advice, including the fact that the

decisions to be challenged emanated from a particular principled (whether right or wrong) approach by the Board which would either have been affirmed or overturned by one challenge, the result of which would then have shaped the position for the remaining challengers. However there is also relevance in the fact that the same firm of solicitors was acting for more than one/many clients in similar or identical circumstances, at or around the same time. What was necessary and reasonable for the first client was not necessarily necessary and reasonable for the third, and what was necessary and reasonable for the third was not necessarily necessary and reasonable for the seventeenth, etc. This principle that what was happening in one could and should affect the processing of the others was of course ultimately accepted and adopted by the solicitors, i.e. the reference to the Crawford case, but this notion that what was necessary, reasonable with due regard to economy should and could have been recognised much earlier. It is of moment to recognise ex facie of the accounts that no client objected to the suggesting that they needed to wait for the "test" case" and also that intimation of the negative outcome of the test case was in almost all cases the end of the legal service. The point is that this recourse to a common approach much earlier was precisely that which was required in the circumstances , having regard to what was necessary and reasonable , having due regard to economy.

8.2 The Other Taxation Arguments

(a) Entries considered and ruled upon previously at taxation on 10 March 2014

Reference is made to the account of [redacted] which was subject of Auditors determination of 10th March 2014, and a copy of which is provided along with this submission. The Dench case was in fact a typical Board challenge case, with the account bearing entries directly comparable with the accounts under consideration currently.

Four entries were subject to taxation (the following narratives are paraphrased).

(i) Letter to client advising as to possible legal aid ramifications and obligations was allowed as one page, as opposed to the four pages claimed, and the sum of £21.75 taxed off. For shorthand, this will be referred to as the "legal aid obligation" letter.

(ii) Letter to client advising as to refusal and that in view of the [redacted] case, review in client's case await the Crawford determination was allowed as one page rather than the two claimed with £7.25 taxed off. For shorthand this will be referred to as the '[redacted]' letter.

(iii) Letter to the Board referring to [redacted] and requesting confirmation Board will be bound and that there is no prejudice to the client was allowed as one page rather than two claimed, with £7.25 taxed off. For shorthand this will be referred to as the "[redacted]" letter.

(iv) Letter to client advising of referral to Sheriff and no prejudice to position, was allowed as one page rather than two, with £7.25 taxed off. For shorthand this will be referred to as the "referral to Sheriff" letter.

Put shortly, other than further circumstances referred to hereafter, where additional action is necessary, the corresponding entries in the current accounts should as a minimum, be taxed in accordance with the Auditor's earlier determination.

For ease of reference on the timeline/calendar, these entries are shaded red.

(b) Further item

A further items of work disclosed on some of the accounts which were not necessary or reasonable is in relation to applications for increase in authorised expenditure to £700.00 usually around the time the refusal of civil legal aid is refused, where there was in place authorised expenditure of £500.00 Firstly, in none of the accounts where this was requested, had the case got to the point where an increase was indicated. Secondly, standing the use (whether actual or indicated) of a test case, it is not obvious what further work would have justified the increase, even if the existing limit had been approached. The sum of £7.25 should be taxed off.

(c) Work post dating the [redacted] test application identification.

Even if the first arm of the Board's submission, in relation to either suggested cut-off date, is rejected, the fact remains that as at 1st October 2007, the test application was identified, and that in itself is a cut-off date. That is to say, the selection of the test case rendered substantive work in other similar cases unnecessary and therefore unreasonable, due regard being had to economy. There are seven cases in which the main

bulk of work, including prison visits and subsequent work were carried out post-1st October. In our submission this work, excepting only allowable correspondence advising as to the Crawford situation, should be taxed off.

The issue of allowable correspondence in relation to the Crawford situation is also different for those clients whose cases had not progressed at 1st October. The timeline/calendar shows that contemporaneously with the submission of [redacted] as a test case, in the files of nine of the clients, the [redacted] letters were sent on 8th October, and the "referral to Sheriff" letter was sent on the following week, on 16th October. The Board accepts (and the solicitors will presumably agree) that the "referral to Sheriff" letter resulted from the Board corresponding with the solicitors between those two dates on the matter.

Leaving aside the issue of whether three sets of nine identical letters issued on the same date but for different clients falls properly to be charged at the full letter rate, notwithstanding the abatement from two sheets to one sheet already determined by the Auditor identical cases, there is a separate issue for the seven cases in which substantive work had not commenced as at 1st October, as follows.

The reason that the separate letters were justified to those clients who got the letters of 8th and 16th October was that following the issue of the "[redacted] letter, the Board wrote to the solicitors with further information, which the solicitors properly were able to relay to the clients. However after that date, the solicitors were in possession of that information. Any client appropriately sent a '[redacted] type letter post-16th October could and should have had a single letter combining the content of the '[redacted] and "referral to Sheriff" letters, as by then the solicitors were aware of the whole position. Any residual separation of the "client Crawford" and "referral to Sheriff" letters was unnecessary and unreasonable.

9. COMMENTARY ON THE INDIVIDUAL ACCOUNTS

In view of the foregoing general commentary, the specific comments on individual accounts are brief, and rely on the general remarks made. It is quickly seen that the suggested treatment breaks into a few standard approaches, and this in turn suggests that a batch-based approach to allow similar cases to be viewed side by side.

Batch 1

Applies to:

[redacted]

Suggested Approach

Depending on the view taken as to the principal submission, and depending on which ever cut-off date is preferred, assuming the submission be accepted, there will be items to tax-off.

If the principal submission is not accepted, this account is still susceptible to the issues raised at 8.2 (a) and (b), but not (c)

Batch 2

Applies to

[redacted]

Suggested approach

These cases are potentially affected by both the view taken in relation to the principal submission, depending on the determination on that, all three parts of 8.2 including, importantly 8.2(c)

[redacted]

This account is basically the same, but is singled out as even the initial application for the first increase to £500 was only lodged on 1st October. This is perhaps the only account where virtually every entry, again in "standard" form, other than correspondence in relation to awaiting the test case is unnecessary and unreasonable.
This applies no matter the view taken on the principal submission.

Batch 3

These cases are similar to each other but not identical.

[redacted]

The principal submission at 8.1 applies. Depending on the view taken as to the principal submission, and which ever cut-off date be preferred, if the submission be accepted, there will be items to tax-off.
If the principal submission is not accepted, this account is still susceptible to the issues raised at 8.2 (a) and (b), but not (c)

[redacted]

The principal submission at 8.1 applies. Depending on the view taken as to the principal submission, and which ever cut-off date be preferred, if the submission be accepted, there will be items to tax-off.
If the principal submission is not accepted, this account is still susceptible to the issues raised at 8.2 (a) and (b), and also (c) in relation to the [redacted] letter

10 THE OTHER CASES

As indicated previously the following two cases are atypical at least in terms of the commonality otherwise attaching to the foregoing eighteen cases.

[redacted]

Just as the distinction was made previously between voting cases, and Board challenge cases, before dealing with the foregoing Board challenge cases, this case is a voting case within that distinction. It is of a type known to the Board, and indeed to the Auditor, and cases of a similar nature were subject to determination on 10th March 2014. Reference is made to the account of [redacted] taxed on said date, a copy of which is submitted herewith. This, and elements of the foregoing Board challenge commentary assist and support the following remarks:

(i) In relation to the entry of March 28, consideration of an identical entry in the Dewar account (May 29) saw the Auditor allow one page. This indicates taxing-off £7.25.

(ii) In relation to the entry of Jan 26, this would seem to be on all fours with the [redacted]" letter of the eighteen Board challenge accounts previously discussed, and allowance of one page indicated, as the Auditor has previously determined for such letters.

(iii) In relation to the entry of May 22, consideration of an identical entry in the [redacted] account (May 16) saw the Auditor allow one page rather than nine. This indicates taxing-off £58.00.

(iii)

[redacted]

The exact nature of the advice sought and provided is unclear from the detail on the face of the account. The Board assumes, from the request for an increase in expenditure to £500 and the fact that the account has been lodged together with Board challenge cases for this taxation, that it is indeed a Board challenge case and, if so, it would appear to be an extreme example of the issued raised at 8.2(c).

The first meeting took place on 26 January 2008, two months after the test case [redacted] for judicial review of the Board's decision to refuse an increase in authorised expenditure had been remitted to the Sheriff Principal, and a month before the Sheriff Principal's decision to refuse civil legal aid.

A charge has been made for travel to HM Prison, Edinburgh, apportioned apparently with four other cases, suggesting that instructions had already been taken from the client and admitted to A&A. Given the stage reached in the [redacted] application, it was premature to visit the client and the A&A application could have been sent to the prisoner with a short covering letter explaining the current position. In the event that a visit is deemed necessary, there was no basis for completing what is referred to as a SU/MAN, a special urgency mandate. What was the special urgency in these circumstances? Such advice as was necessary could have been given in the course of a 15 minute meeting. The entries at January 30 and March 7 are premature and, separately, unnecessary. It is noted that the file was closed and, of course, the client advised of this at the meeting on March 7 and, therefore, there was no discernible point in the letter of March 27.

It is difficult to see the value of advice given this client at a cost, as claimed, of £83.70 from public funds.

List of materials accompanying this submission

1. Calendar/Timeline
2. Code explanation
3. Copy Account and Auditors Determination - [redacted]
4. Copy Account and Auditors Determination -
5. Sheriff Principal's decision
6. Copy letter from Taylor & Kelly to SLAB dated 1st Oct 2007
7. Copy letter from SLAB to Taylor & Kelly date 9th Oct 2007
8. Extracts from SLAB Handbook - Intro to Advice & Assistance, etc.
9. Extracts from SLAB Handbook Advice & Assistance
10. Extracts from SLAB Handbook - Accounts preparation
11. Extracts from SLAB Handbook - Accounts-fees

Diets of Taxation

Airdrie Sheriff Court – 9th September 2014

Outline

1. Statutory scheme
2. Basis of taxation
    i. Party and party;
    ii. Agent and client
3. Advice as at date of entries
4. Test case
    i. The Board's Position
    ii. Practical considerations
    iii. Test cases in litigation
    iv. Reform
5. Conduct of the Board
    i. In these cases
    ii. Taxation
    iii. Contested litigation

No Fair Notice

Despite account being submitted, delay and exchange of communication and this account being intimated some considerable time ago – no detailed comment about individual charges in individual accounts.

I am unaware of Board's position.

See McPhail 19.36 – "If a party intends to take objection **to any charge stated in the account,** he should advise the other party of his objection"

1. Statutory Provisions

The Legal Aid (Scotland) Act 1986

"6.— Definitions.

(1) In this Act—

"advice and assistance" means any of the following—

(a) oral or written advice provided to a person by a solicitor (or, where appropriate, by counsel)—

(i) on the application of Scots law to any particular circumstances which have arisen in relation to the person seeking the advice;

(ii) as to any steps which that person might appropriately take (whether by way of settling any claim, instituting, conducting or defending proceedings, making an agreement or other transaction, making a will or other instrument, obtaining further legal or other advice and assistance, or otherwise) having regard to the application of Scots law to those circumstances;

...

(b) assistance provided to a person by a solicitor (or, where appropriate, by counsel) in taking any steps mentioned in paragraph (a)(ii) above, by taking such steps on his behalf or by assisting him in so taking them; "

Scope of A&A:

Breadth is virtually unfettered. See *M v Scottish Legal Aid Board*, 2012 SLT 354, Lord Malcolm

"The advice and assistance régime appears to cover any appropriate steps taken by a solicitor on behalf of a client: see s.6(1)(a)(ii) and (b) , especially the phrase "or otherwise" in the former subsection."

I do not understand it to be argued by the Board that there has been work done outwith the scope of A&A.

The Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996 S.I. 1996 No. 2447

General Scheme

Form for AA

Regulation 8A(5) – one application for ancillary matters

(5) Where the subject matter to which the advice and assistance relates is a distinct matter the solicitor may approve one application for advice and assistance which shall include–

(a) all distinct matters reasonably ancillary thereto; and

(b) all matters reasonably ancillary thereto which are not distinct.

Regulation 12 – increase in authority

"Authority to exceed financial limit

12. (1) Where at any time it appears to the solicitor that the cost of giving the advice and assistance is likely to exceed the limit applicable under section 10 of the Act or under paragraph (2) below, he shall apply to the Board for its approval to an increased limit, stating the reasons for the excess, the likely amount, and giving such other information as may enable the Board to consider and determine that application.

(2) The Board, if it approves an application made under paragraph (1) above –

(a) shall authorise such increased limit as it thinks fit; and

(b) may require that the advice and assistance **be subject to such conditions, and limited to such subject matter,** or, in the case of assistance by way of representation, such proceedings (or stages of proceedings), as it thinks fit.

(3) The Board shall inform the solicitor of its decision in regard to an application under paragraph (1) above."

Regulation 17 - Fees

"Fees and outlays of solicitors

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.

Assessment and taxation of fees and outlays

18. (1) Where the solicitor considers that the fees and outlays properly chargeable for the advice or assistance exceed any contribution payable by the client under the provisions of section 11 of the Act together with any expenses or property recovered or preserved under the provisions of section 12 of the Act as read with regulation 16, he shall, within one year of the date when the giving of advice and assistance was completed, submit an account to the Board:

Provided that, where civil legal aid has been made available to an applicant to whom in connection with the same matter advice and assistance has been given, the account for such advice and assistance shall be submitted to the Board at the same time as that for civil legal aid; and any work which is charged under civil legal aid shall not be charged in the advice and assistance account.

(2) The Board may accept an account for advice and assistance submitted outwith the period referred to in paragraph (1) above if it considers that there is a special reason for late submission.

(3) Where the Board receives an account in accordance with paragraph (1) above, it shall assess the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17 and shall determine accordingly any sum payable out of the Fund and pay it to the solicitor.

(3A) Where the solicitor has given advice and assistance by way of a diagnostic interview then he shall, within 3 months of the date when the giving of the advice and assistance was completed, submit an account to the Board separate from any account or accounts submitted under paragraph (1). No account supplementary to that provided for in this paragraph may be submitted.

(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."

2. Basis of Taxation

I understand the Board now to accept that the basis of taxation is agent and client, third party paying

(i) Party & Party

Different from normal taxation where one would have a process to divine what has occurred and tax off charges which are unreasonable having regard to the conduct of the litigation. This recognises that between parties, the court regulates what is recoverable. This is known as party and party taxation.

Malpas v Fife Council 1999 SLT 499

Rule 42.10 (1) of the Rules of the Court of Session 1994 provides that:

"Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed."

"If the decision or act is one which is within the range that a person might make or do in the exercise of his own judgment or discretion, then it cannot be described as unreasonable.

...

In his initial submission to me counsel for the defenders suggested that it was entirely a matter for the auditor, in the exercise of his discretion based on his own wide experience of practice and taking into account any material he considered relevant, to decide what charges were reasonable. In my opinion that cannot be the test. If it were, agents would have no basis on which to gauge whether expenses incurred might be recoverable in the event of success. It is also inconsistent with the opinion of the Lord President (Cooper) in Macnaughton v Macnaughton at 1949 SC, p 46; 1949 SLT, p 12 setting out how what was then the "proper" fee for counsel should be ascertained: "The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature and amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing counsel in an average case of the type in question presenting no specialties."

...

It was accepted by both parties that different charges are made by different counsel for similar work, and that **a range of charges for any given work might be reasonable**. Similarly it is common experience that different agents might approach preparation for a case in different ways and with differing degrees of diligence, but the additional work done by one would not obviously in these circumstances be described as "unreasonable". **So there may be a range of different ways of conducting a case that might all be described as "reasonable"** . It seems to me to follow that, in deciding whether to allow or disallow any particular item, the auditor is undertaking a task similar to mine and **should only disallow an item if it can truly be said that to incur that expense was not reasonable, in the sense that a competent solicitor acting reasonably would not have incurred it.**"

(ii) Agent and Client

On agent and client, only those sums which are unreasonably or extravagantly incurred, may be taxed off – the onus being upon the paying party to point out why that should be the case.

Difference between various bases of taxation is onus:

Marshall v Fife Health Board, 2013 SLT 13 Lord Glennie

"This explanation of the test for recovery on a party and party basis is to be compared with the test for recovery of expenses on an **"agent and client" basis, where all the expenses incurred by the successful party are allowable on taxation, except for those unreasonably or extravagantly incurred, or unreasonable in amount, the benefit of the doubt in each case going to the successful party who is seeking to recover expenses on this basis**. Like many such distinctions, the distinction between expenses on a party and party basis and expenses on an agent and client basis is perhaps easier to recognise than to define. The difference, as I understand it, essentially comes down to whether, as in taxation on a party and party basis, the **onus** is on the successful party to show that his expenses were reasonable and reasonably incurred; or whether, as in taxation on an agent and client basis, the onus is on the unsuccessful [paying] party to show that the expenses claimed against him were unreasonable or unreasonably incurred. Subject to this, there is no reason why an award of expenses on a party and party basis should not provide full recovery for a successful party who has acted reasonably in the litigation and whose expenses have been reasonably incurred and are reasonable in amount."

Agent & Client, Third Party paying/ Agent & Client, Client paying

McPhail, *Sheriff Court Practice*, Third Edition, para.19.46

"In the 1936 Rules of the Court of Session a decerniture for expenses as between solicitor and client, when a third party or fund was paying was held to cover "those expenses which would be incurred by a prudent man of business without special instructions from the client in the knowledge that the account would be taxed."(*Hood v Garden* (1896) 23R 675)

...

Taxation as between solicitor and client, third party paying is the appropriate basis of taxation where the taxation of expenses between solicitor and client is authorized by statute"

An award of expenses on the basis of agent and client third party paying is on a more generous scale than party and party, but less generous than agent and client *McPhail's, Sheriff Court Practice* (3rd edn, 2006) para 19-46.

Submission –

- Onus is upon the unsuccessful (or paying) party to show where expenses incurred were unreasonable or extravagant and should thus be taxed off;
- The benefit of the doubt in agent and client taxation is given to the party seeking recovery (in litigation the successful party)

- Taxation with which we are concerned is more generous than party and party – the basis of taxation in *Malpas* –

"should only disallow an item if it can truly be said that to incur that expense was not reasonable, in the sense that a competent solicitor acting reasonably would not have incurred it."

- Predictability, at the time of the tendering of the advice or doing the work, is an important consideration (*Malpas*)

Board say pp.7/8/9

- "was [work] carried out in most efficient and cost effective manner consistent with proper provision of advice"; "clear injunction to the solicitor to actively address cost at every stage"

Comment – not borne out by either terms of regulations; basis of taxation or authorities on what constitutes reasonableness ("would a solicitor acting reasonably incur the expense")

- Agent & client, third party paying said to be a "higher standard of taxation; work must be necessary in circumstances of advice being given to client and extent to which it assist the client..."

Comment – "higher standard of taxation". McPhail is right: the correct characterisation (if that assists) is somewhere between party and party, on the one hand, and agent and client, client paying, on the other

- "The onus is always on the solicitor to establish the work is actually necessarily and reasonably done otherwise it is not allowable....."

Comment – Not accepted; onus is on Board, not simply enough to raise concerns must point to entries and basis for saying particular entries are not reasonable or necessary

3. Advice as at Date of Entries

The standpoint of the client, at the time the advice is tendered, is of direct relevance and, it is submitted, is not without interest. Also of relevance is the position of the client prior to the instruction of this work.

The applicants sought advice from their solicitor in connection with their right to participate in the franchise. It is not the case that the various issues in connection with this matter were separated out into separate grants of advice and assistance. The original grants of advice and assistance in connection with this matter encompassed the advice sought in connection with:

i. Gaining the right to vote – inclusion on the Electoral Roll;

ii. Participating in the electoral process, in –

local authority elections
Scottish parliamentary elections
EU elections
UK general elections

Before going through the detail of the decision which was to be the focus of challenge by way of judicial review, and the subject of many of the accounts, the background in relation to this matter has to be canvassed. It is detailed. It is legally complex. Some of the matters that were live for consideration at that time have subsequently been resolved. Some of them have become clear.

However, the overarching submission in connection with the background is that the statutory scheme guides the solicitor in the provision of the advice and the auditor in determining what has to be paid. The clients sought advice. Advice and assistance was granted by the solicitor in terms of the Act and all that was sought was an increase in authority (under Regulation 12) for further steps to be taken and for this advice to be tendered.

In response, the Board's decision at a very early stage was dismissive and conclusive of each of the points raised. The focus of the challenge was that these matters were clearly the subject of advice to be tendered and then for applications for civil legal aid to be submitted. It was not clear at this juncture i.e. the time of the provision of advice, precisely what could and could not be done and the Board's view certainly looked questionable. In any event, the clients required to be appraised of the circumstances.

Background

Smith v. Scott 2007 SC 345

It is simply incorrect to say (as the Board does in its Note) that Mr Smith was unsuccessful. Although the questions posed were answered as set out in the Opinion of the Court, the Advocate General for Scotland ultimately accepted that he

had been defeated before the Court and paid over judicial expenses. A Declarator of incompatibility was granted.

This had important ramifications for each and every individual prisoner. Each individual client who sought advice was admitted to advice and assistance. Each client was entitled to be given advice under the scheme about these matters. The precise consequence of that declarator of incompatibility, together with the important decision in *Hirst*, was the subject of detailed and complex advice between solicitor and client under the initial grant of advice and assistance. What the decision of the Board attempted to do was to cut across that - in a rather summary fashion - and to say that the matter was settled; no advice could be tendered beyond the initial cap.

That was challengeable. It bore no relation to what was happening "on the ground". Aside from practicalities of what was involved in seeking inclusion on the electoral roll (who to write to, when would that application be dealt with, do postal ballots apply etc) when in custody each and every individual prisoner required to be advised upon:

1. Whether a decision of the Electoral Registration Officer was required – recently settled in the case of *Firth;*

2. Their precise dates of detention and interplay with each of the previous elections – local government, Scottish parliamentary, general elections and EU elections;

3. The prospective position in relation to each of those forthcoming elections.

4. The effect of *Hirst* and the evolving jurisprudence of the Court – see *Scoppola, Frodl, Greens* and whether this amounted to a clear and constant jurisprudence in terms of *Ullah* – section 2 of the Human Rights Act.

The Application of Section 6(2). HRA 1998

"6 Acts of public authorities.
(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
(2) Subsection (1) does not apply to an act if—
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 A.C. 546

Somerville v Scottish Ministers 2007 SC (HL) 45 per Lord Hope of Craighead at paras 12- 15

This applied to public authorities acting in pursuance of Westminster legislation. The position was entirely different in the event that there would be an act of the Scottish

Ministers. In those circumstances section 6(2) HRA does not have application. The closest to that would be section 57(3) of the Scotland Act 1998 – not capable of providing a defence in these circumstances.

Traynor & Fisher v Scottish Ministers [2007] CSOH 78.

First Hearing: 20th, 23rd & 24th March 2007

Challenging the Scottish parliamentary elections on the basis that they were proceeding on a Convention incompatible footing. The Registration Appeal Court in *Smith v. Scott* had found this to be the case.

B. v Scottish Ministers

Outer House: 4th & 5th April 2007 [2007] CSOH 73; 2007 SLT 566

The applicant was a recalled prisoner in terms of section 17 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. He contended that the decision to recall him was ultra vires the Scottish Ministers in that it was an act incompatible with his Convention rights standing that an inevitable consequence would be his exclusion from the franchise.

XY v Scottish Ministers

24th & 25th April 2007; 27th April 2007; [2007] CSIH 45, 2007 SLT 657; 2007 S.C. 631

In this appeal against the anonymised decision above, the First Division gave an authoritative ruling upon construction of "incompatible" in s.57 Scotland Act 1998.

Reparation and Just Satisfaction

The Board failed to appreciate the difference between the right to reparation and/or just satisfaction. This has only recently been authoritatively decided upon in Docherty v Scottish Ministers 2012 SC 150. It certainly was not settled at that time that just satisfaction would not be awarded. In the circumstances, in the event that prisoners were excluded by virtue of an act of the Scottish Ministers, just satisfaction questions would arise without reference to section 6(2) HRA defence. There is a question as to whether in the event of continued disobedience from Strasbourg, in breach of international obligations; the Court could make such an award.

These were all live areas for consideration. There were colourable and stateable arguments in respect of each. More importantly than that, these matters had to be resolved in a digestible and understandable format for the clients who wanted to know what to do. Some of those questions had been distilled and are clearer now. Most certainly they were not at that point in time, and to the extent communicated in the manner distilled by the Board.

The decision to refuse the increase in authorised expenditure, which was the subject of advice tendered and the basis the work claimed in these accounts, has to be seen

in that light. It was capable of challenge. The *effect* of that decision, however, was of some consequence in relation to each and every individual client. That summary decision cut across and thwarted the right of each individual client to receive advice and to be able to take a view with his solicitor upon what should be done.

The importance of an ability to contact a solicitor and to seek advice has been recognised in *Raymond v.* Honey [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756 and in European Court case *Golder v. the United Kingdom*, 21 February 1975. It is an aspect of a right of access to the Court.

What the Board did in issuing these individual decisions in respect of individual clients was to, across the board – it could be said in a blanket fashion – in a manner that was clearly capable of review, restrict significantly the ability of prisoners to consult with their solicitors.

The necessity of going into the background that pertained at this juncture points up all the more clearly each of these points – the significance of the matter for the client, the fact that many of them were disenfranchised, disempowered and inarticulate individuals incarcerated and not able to, as we would ordinarily do, consult the internet or speak to others about what ought to happen. These matters were of some complexity and more particularly focussed in questions of deciding upon applications for legal aid after detailed submissions to allow for weighing up the prospects of success and the significance to be attached to particular arguments. These issues were not closed as the decision of the Board seemed to suggest

The summary consideration of matters brought down the shutters upon consideration of these questions for individual clients wanting to know what to do in the wake of the *Smith* decision.

Submission

These individual decisions – perhaps abstract and esoteric – now, looking to the past, do not have to be resolved by the auditor. It is not a question of ruling upon the stateability of the arguments at this stage. Certainly the Sheriff Principal was of the view that there was more to the issue than the Board's view:

"It is wholly open to those representing Mr Crawford to argue that the issue as now focussed in particular by Mr O'Neill's opinion was not before the Courts in the case of Smith. There may be a claim for public law as opposed to private law damages open to Mr Crawford. It may be open to argument that he is "here and now" a victim of a breach of his convention rights and that his claim is not premature. Mr O'Neill makes a compelling case for probable cause in an anticipated action for common law damages to which full weight would have to be given in any legal aid application to pursue such a claim."

Without resolving these points it is clear that there was much to be discussed and much to be advised upon. The issue was far from straightforward – on any view. Certainly none of the issues fell to be determined in the clean and summary fashion as explained by the Board

4. Test Case

At the outset of considering this proposition it is important to highlight that the solicitors here acted on behalf of individual clients, not an amorphous or homogenous group. They were spread throughout the Scotland; they were at differing levels of literacy and intelligence; of understanding what the challenge to the exclusion from the vote involved. The Board's decision cut right across the ability of each individual client to consult a solicitor. The fact that each individual client was a serving prisoner does not detract for the fact that they were covered by the AA scheme and were entitled to individual advice. They ought not to be prejudiced in that simply because like many hundreds of others they were excluded from the vote and wanted to do something about that and were affected by a decision significantly impairing their right to do so

a. The Board's position

There appears to be at least a tension, if not a barefaced contradiction, in the position of the Board – not only in its written submissions upon these taxations but also in relation to its position over time in relation to this issue and indeed in the conduct of other litigation.

The Board in its submission about these taxations makes a reference to the question of guidance issued by it to solicitors on the question of accounts – see page 8:

"The Board is mindful that it is exercising its powers on receipt of an account by which time of course the expenditure may well have been incurred. It is for this reason guidelines are prepared and published for the assistance of the profession. The detailed guidelines reflect the Board's experience and practice in taxing A&A accounts over 27 years. While the advice contained in these guidelines may at times appear somewhat peremptory, it is only proper to clearly state the Board's requirements"

If that justification for guidance is accepted one would have expected to find support in the Board's own guidance for the obligation now said to be incumbent upon a solicitor to adopt a different method of working in cases where he was instructed. Despite, it says, that adopting a 'test case' approach is a method of some efficiency in relation to multiple cases; the Board has not issued guidance about the approach it expects.

No regulations have been promulgated either in the past or since these cases authorising such an approach. The Board's proposition therefore has no basis in law (regulations), in its guidance and, I will come to submit, in practicalities. What we come to, then, is a broad assertion of what the Board would like a solicitor and client, in these circumstances, to be obliged to do. It goes further, the Board asserts that notwithstanding the absence of guidance and regulation – and leaving to one side what it says and does – a solicitor will not be paid (in circumstances which have yet to be defined). If that were the considered position of the Board one would have expected, at least, it to have been embodied in guidance.

One would have expected the Board to have been proactive in suggesting such an approach absent detailed guidance or regulations, for the avoidance of doubt, in

order that it could, for example, in a dispute such as this point to the clear understanding and constant position adopted by it.

One would have expected the Board to have agreed readily to be bound by the outcome of a 'test case' approach. In fact the Board did the opposite. It did not agree to be bound by it. All it conceded was that a late application for review would be accepted in other cases. This (the absence of agreement) had important practical consequences in relation to the advice to be tendered.

b. Practical Considerations

The Board says that one case should have been (or was) identified as a test case - as a vehicle for resolving the matter. It did not, however, suggest this as a method of proceeding. That suggested method of proceeding came from solicitors involved. It ran into difficulties in relation to the obduracy of the position of the Board. A 'test case' approach could not be adopted between clients and the Board because of this failure to accept the outcome as binding

Practical difficulties also arise for the solicitors in relation to ascertaining when the obligation to adopt such a procedure 'kicks in". This is important bearing in mind the predictability of the charges being paid for (or recoverable on taxation) being an important consideration (*Malpas*). After a considerable period of time the Board has furnished us with a detailed timeline, annexed with codes to facilitate understanding. This suggests an approach that is highly sophisticated and multi layered – evolving depending on, for example, the number of clients instructed – but far from clear (or explained with any clarity) as to how that operates in practice in order that the solicitor and client can predict what work is covered and what not. When should such a procedure be adopted – when more than one client is faced with similar circumstances; how close must the circumstances be to each other, does it arise at the time of provision of advice or only upon if increase in authority to expend sums?

The Board's approach may have attractiveness to it (and one may ask why it has not sought to apply it before now – in advance of multiple cases being pursued) but practically that may be impossible to define. In the submission of the applicants, it cannot be defined after the fact and it cannot be defined with reference to the statutory scheme of taxation

c. Test Cases in Litigation

The approach of the Courts when faced with considerations of adopting what may be termed somewhat generously, for present purposes, a 'test case approach' can be seen most clearly in the Opinion of Lord Gill (as he then was) in the case of *Anderson v. The Braer Corporation* 1996 SLT 779.

Lord Gill dealt with a substantial number of cases arising from the oil spillage in the Shetland Isles. Details of the volume of litigations are mentioned in the Lord Ordinary's Opinion. The pursuer sought to sist a number of cases and identify lead actions to resolve the questions that would assist in the resolution of the remainder. The Lord Ordinary held that the motions were premature because the Record had

not closed. Only after the Record was closed would the issues of fact and law be focussed and only then would the Court be in a position to make an informed and reliable judgement on what was properly at issue in each of the actions; what was to be litigated about. The Rule of Court provided that a motion in those terms had to come after the closing of the Record.

The Lord Ordinary recognised the burden on the Court, and parties and the expenses associated with this. He acknowledged that at first sight the offer had an attractive solution to many of those difficulties. His first reason for refusal – prematurity – may be viewed as somewhat technical given that it was founded upon the terms of the Rule of Court. However, even if he had not been bound by his construction of the terms and particular Rule of Court, he would not have been for sisting the actions. This was because the Lord Ordinary was not persuaded that the lead actions would reduce significantly the time, effort and expenses incurred overall. The Lord Ordinary had particular regard to the fact that parties **had not agreed to be bound by the decision**.

This had the important consequence, in the view of the Lord Gill, that

"...parties would be free to adapt their legal and evidential strategies in the sisted actions in light of the outcomes in the leading actions; and no other Lord Ordinary would be bound by any decision reached by the Lord Ordinary in any of the leading actions.

The proposed sist might therefore delay rather than accelerate the ultimate resolution of these claims"

The Lord Ordinary went on to consider that the attitude of the other party was a material consideration:

"in this case the defenders are anxious to have all the actions proceed to the earliest possible conclusion. Having regard to their statutory rights and liabilities and particularly to the practical problem that none of the present claims can be met until all of them have been finally resolved I consider that the defenders opposition on this ground is well founded"

Similarly in these cases each of the applicants had good reason to take advice upon the important question of his right to consult a solicitor and to take advice about all of the matters. The effect of the Board's decision was to thwart that right. Important considerations of resolving these for each and every individual client - the practical considerations in relation to what procedure required to be adopted and what each individual client had to do and also, separately, questions of time bar: in relation to making application for a right to vote, for inclusion on the electoral roll and challenging the various decisions but also in relation to the decisions of the Board.

Reform

The Scottish Law Commission looked at, as long ago as July 1996 and in some detail, the possibility of streamlining procedures for class actions – Scottish Law Commission, Paper No.154 *Multi-Party Actions*. This was preceded by a very detailed Discussion paper and Report by a Working party in June 1993. The recommendations have yet to be adopted.

Individual litigants bring individual cases before our Courts requiring individual adjudication - even in cases where there are common factual scenarios and common legal issues to be resolved. I have had considerable experience of the frustrations that this can give rise to together with the inefficiencies in the context of volume litigation – slopping out.

Report of the Scottish Civil Courts Review (The Gill Review) looked at this in considerable detail essaying the practical problems and suggesting what ought to happen. This has not been taken forward in the Civil Courts Reform (Scotland) Bill

This is relevant because it shows that the Court would be slow to adopt the approach pressed on the solicitor (after the fact) by the Board of adopting a test case. This is because of the practical problems – it is certainly not as open and shut as portrayed (at least as the board's position has come to). If it is difficulty in practice to pursue before the court's how much more difficult is it for an individual solicitor representing individual clients in the face of an obdurate Board.

d. Conduct of the Board

(i) In these cases

It is important to note that the Board did not agree to be bound by the decision in Mr Crawford's case. This meant, as in the *Braer* case, that the Board could simply, if Mr Crawford had been granted legal aid, put that to one side and not deal with any of the adverse points raised. In other words, they "would be free to adapt their legal and evidential strategies". They did so.

Therefore, it is of some moment, and relied upon by the applicants, that the Board in responding to the approach about adopting an efficient system of resolving the issue should respond as follows in Crawford: see letter dated 9th October 2007 at the foot of page 1 and to the top of page 2:

"You have asked for confirmation that the Board would be bound by the decision in the Richard Crawford case. If a decision is taken to refer the matter to the Sheriff of Lothian and Borders at Edinburgh, then the Board will consider his determination of the application including possible action in respect of any petition for judicial review in the Court of Session. ...."

This falls to be contrasted with the position of the Board in submission at page 13

"they should not be lost in sight that the situation was eminently suitable for a test application approach. A decision in one would have effectively been a decision in all standing on the nature of the circumstances. If the Board was wrong to refuse an increase in one case it was clearly wrong to refuse an increase in the other cases. There can be no argument in that."

Why could that position not have been stated in a straightforward fashion after it was suggested? The Board have sought to alter their position when it suits them – they have adapted their legal strategy. They see no difficulty in so doing. An adverse

inference may be drawn – or the benefit of the doubt may not be given to them. They adopt this position late in the day and only when it is to their advantage.

One can see that, too, in what it makes of previous taxation decisions. They seek to rely upon favourable decisions. As for the adverse they argue that the Board is not bound by them; they seek to persuade the auditor to depart yet provide no basis or excuse for the non-appearance.

(ii) Taxations

In context of these diets of taxation I have trying to resolve this question for a very long time. There has been communication between myself and the Board as long ago as 2008 trying to agree a strategy for resolution of the unpaid accounts perhaps by the identification of a lead case and for the Board to be bound by it so that the issues would be resolved.

I lodged an account in the case of *Hamza* back in 2011. A diet of taxation was fixed. The Board approached me one day beforehand asking for that to be cancelled. I advised them that the account was being lodged in order to resolve the issues between us. The account was paid. I was assured that all of the issues arising in relation to these matters would be looked at in the wake of that compromise of the taxation. They were not.

Again, after instructing solicitors in relation to this matter, I was assured that things would be done. They were not. After expressing exasperation further accounts were lodged. No appearance was made. Now in the submissions of the Board in connection with these taxations it appears they want to take advantage of the decisions in those cases which are favourable to them but also argue that the import of other decisions which may be said to prejudice them ought not to be followed on the basis that they were not present at the diet of taxation. They give no reason for not being present. They give no explanation. They simply say that they ought not to be bound by the previous decisions of the auditor. This is a clear example of the Board adapting their legal and evidential strategies.

(iii) Contested litigation:

Donaldson v. Scottish Legal Aid Board 2013 SLT 35; 2014 SLT 459

In this case Mr Donaldson, a serving prisoner, challenged a decision of the Scottish Legal Aid Board not to allow an extension of advice and assistance from diagnostic to standard. Mr Donaldson was admitted to advice and assistance on 11th October 2010. Applications by him to change the basis of advice and assistance (from "diagnostic" to "standard") were refused on 22nd October 2010 and again on 5th November 2010. He submitted an application for legal aid to challenge those decisions. The communication between the petitioner in that case and the Scottish Legal Aid Board runs to in excess of 100 pages. A detailed inventory was produced. It shows the chronology of the application. An application for legal aid was submitted on 22nd December 2010. It was not considered by the Legal Services Cases Committee until March 2011. It was referred to the Sheriff of Lothian and Borders in

terms of section 14(4) of the Legal Aid (Scotland Act) 1986. The Sheriff granted the application.

What is significant is at the end of that considerable period of time, some 17 months, the Scottish Legal Aid Board proposed simply to reverse its position and to grant the application - see paragraph 2 of the Opinion of Lord Drummond Young which he records that that change in stance rendered the petition academic. Notwithstanding that change in position, the Court proceeded to hear argument upon the petition.

This is significant for present purposes because each of the applicants who sought advice from the solicitor in challenging the decision of the Scottish Legal Aid Board to thwart their right of access to a solicitor would have potentially stood in the same position as those who awaited the outcome of Mr Donaldson's application. The Board could have reversed its decision and it would only have had application to Mr Donaldson. Another disenchanted applicant would have to then start the process and potentially take another 17 months to get to the same position. That is unacceptable. This is why individual applicants require to consult solicitors and submit applications for legal aid in the absence of a clear undertaking that the Board would be bound by the outcome of the decision in *Crawford.*

In *Donaldson*, the Board wrote on 28th May 2012 saying that the determination of the Sheriff "applies to the merits of the case only..." and "should a petition be raised we will in the circumstances found on this in previous correspondence on the question of expenses"

See the pleadings: plea in law number 1 for the respondents:

"the petition having no practical utility in light of the respondents May 2012 decision to grant the application for an uplift to standard advice and assistance, the petition should be dismissed *in limine*"

McGeoch v. Scottish Legal Aid Board 2013 SLT 183

Mr McGeoch lodged a detailed petition for judicial review seeking to challenge various decisions relating advice and assistance, advice and assistance increases in authorised expenditure; applications to commence proceedings under special urgency provisions and in relation to decisions around civil legal aid. Those decisions are detailed in the Opinion of Lord Brodie at paragraphs [14] – [24].

The position is that notwithstanding the very detailed communication about these, the Board took a point about the utility of the remedy sought. This was rejected, see paragraphs [38] and [77].

The plea of mora was also taken and rejected, see paragraphs [78] – [81].

The Board have not been averse to taking competency points in relation to *mora*. They did so even in the context of the delay occasioned in the determination of an application for legal aid.

And so the reasonable concern of each of these individual clients was that the Board would stand upon their summary and challengeable decision to thwart their right of access to a solicitor and adopt a strategy, which would see that not being resolved for a very long time. That is with the benefit of hindsight. Of course looking from the other end of the telescope that was not an unreasonable apprehension to have. It was all the more reasonable whenever the Board expressly declined to be bound by the decision of the Sheriff Principal in the case of *Crawford.*

It therefore hardly lies in the mouth of the Board to come along today in an attempt to devise some form of proposition unfounded in law and not the subject of guidance (which, it says, would put solicitors on notice) about a 'test case' scenario. The Board's position had been contradictory in relation to this matter in litigation.

Conclusion on Test Case

If the Board were serious about the application of a test case scenario one would have expected them to have behaved entirely differently. They would have suggested this at the outset. There may have been in place already – or since – detailed guidance about what they would expect in particular circumstances; an explanation of those circumstances; where they had application; one perhaps would have expected regulations to be in place either in relation to the treatment of increases in authorised expenditure or, separately, application of this approach at the accounts and taxation stage.

Instead, the Board remained entirely silent at the outset. In response to a suggestion from the solicitor as to an efficient method of dealing with this approach, they were less than straightforward in their response. This has important practical ramifications and consequences for advice being tendered and the work to be done.

The foregoing considerations are, however, relevant when looking at this homogeneous bundle in a manner that can be treated together as outlined by the Board. It is submitted that the approach of the Board is difficult to work out from its Note. It suggests a different method for providing advice in processing multiple applications for legal aid. In the event that actions for judicial review followed on this basis, challenging the decision of the Board, the Court's power to deal with these as such a homogenous group is, at the moment, limited. Detailed changes have been under consideration for a long period of time. These are likely to culminate in Rules of Court and, perhaps, primarily legislation.

It is difficult to see the basis for a submission – if the notice of opposition or points of objection by the Scottish Legal Aid Board come to this – for saying that in an assessment of fees claimed - applying legislation 17 of the Advice and Assistance Regulations 1996; in the context of taxation proceeding on the basis of agent and client, third party paying (the benefit of the doubt going in favour of the claiming party and the onus being upon the paying party) that those considerations should, in a manner not made clear in the point of objections, and to the precise extent undefined, have application to the taxing of particular sums.

Specific Submissions

Regulation 18(4)

The Board make a submission at page 9. I confess to having some difficulty in understanding what this means. It appears to invoke submissions on the limit of authorised expenditure. If that is the case then the Board should plead that, and, on questions of fair notice, plead that with precision in relation to specific charges and entries in the accounts.

It is difficult to reconcile the precise terms of Regulation 18(4) with the conclusion of the Board at the foot of page 9 that

"we suggest that the accounts be taxed but, in the event that this is an issue in any account, always subject to further abatement by the Board in the event that any of the work undertaken was so undertaken in excess of the limit of authorised expenditure at the time"

The auditor will tax the account in relation to the sum of outlays and fees due in respect of taxation. This is the sum due by the paying party (the Board) to the agents. It is conclusive and an obligation to pay arises. The Board's consideration is in relation to the question of *vires*. It seems to suggest that ought not to be resolved at the diet of taxation. If it were not, then the Board appear to be suggesting that there is a second or further level of review which it is able to carry out in relation to the question of *vires*.

These matters should be resolved at the diet of taxation.

Cumulative Knowledge

We have already made the point that the test case scenario or method of proceeding was not adopted. This is the complete answer to the Board's submissions. However, what the Board appear to do, in pages 13-15, is ascribe to the instructing solicitors cumulative knowledge in relation to the information which they have drawn together from a series of decisions and applications (and on a spreadsheet).

At page 14 in relation to, perhaps, (because it is far from clear) questions of practical considerations as to the selection of the test case approach not being taken forward. The Board suggests that the matters canvassed by them – Mr Crawford not taking forward his review – would be to "miss the point".

And so the Board's position is focussed down to this proposition at page 14:

"all that was required was that one applicant, in circumstances where legal advice would have alerted that client a) to the possibility of refusal of legal aid at first instance and b) the conduciveness of the whole circumstances to running a test, to give instructions that their case be run as a test and that instruction could have been sought and then implemented in the relevant stages from the outset"

This is difficult to work out the meaning of. It seems to suggest that if Mr Crawford failed then another simply takes up the task. It completely leaves out of account the Board's position in relation to this – that they sought to take advantage and then to rely upon **any** failure.

At pages 14-15 the Board then look at the fact that the same solicitors were instructed –
"what was necessary and reasonable for the first client was not necessarily necessary and reasonable for the third, and what was necessary and reasonable for the third was not necessarily necessary and reasonable for the seventeenth etc".

It suggests cumulative knowledge is ascribed to the solicitors. It leaves out of account the position of the solicitor, the position of the client, the overall progress of matters, the importance of the right in question – the right to vote and the right to consult a solicitor - and the importance of efficient despatch of these when the very essence of the right is impaired.

Impliedly at the forefront - and ignoring all other considerations - is the starting point of the Board's position to he exclusion of all else.

The "other taxation arguments" put by the Board appear to deal with the cases in batches and then simply point to submissions made that are said to have application. These do not provide fair notice

KL/AJB

ACCOUNT OF EXPENSES

incurred by

THE SCOTTISH LEGAL AID BOARD

to

MESSRS TAYLOR & KELLY, SOLICITORS, COATBRIDGE

On behalf of

[redacted]

REF. NO.
AA/07/6319223206

Authorised Expenditure - £85

Contribution Payable - Nil

LEGAL AID CODE 388495

2007 Apr	4	Writing you advising you to write to the Electoral Registration Officer and request a final decision to be made and advising we cannot assist you until all internal avenues of appeal have been exhausted	7	25
Apr	17	Writing you advising we understand that the terms of the letter received from the Electoral Registration Officer is not a formal decision letter, therefore, you should revert to the Electoral Registration Officer advising that you are a convicted prisoner and insist that a formal decision is made and advising we cannot assist you until all internal avenues of appeal have been exhausted by yourself - 2 pgs	14	50
May	9	Writing you advising we understand that the Electoral Registration Officer has refused your Application for inclusion on the Electoral Register and that you are not appealing to the Sheriff and explaining we shall seek authority to frame an Application for Legal Aid and attend upon you to have you complete same - 2 pgs	14	50
		Writing SLAB submitting request for an increase in expenditure to £700 (request refused)	7	25
2008 Mar	2	Writing SLAB submitting request for an increase in expenditure to £350 (request refused)	7	25
May	12	Writing you advising we sought permission from SLAB to allow us to progress your case, however, we were refused permission to do so, providing details of the refusal, together with our response, however, SLAB upheld their original decision and advising that, should you wish further assistance in applying to the European Court of Human Rights, do not hesitate to contact us - 9 pgs	65	25
			116	00
		Add Outlays		
			£ 116	00

B/F £116.00

VAT @ 17.5% 20.30

£136.30

PREPARATION FEE FOR TAXATION
2 HOURS ALLOWED @ £51.00 PER HOUR = £8.50
÷ 12

ATTENDANCE FEE AT DIET
1 HOUR @ £51.00 PER HOUR ÷ 12 = £4.25

£12.75

VAT @ 20% 2.55

£15.30 15.30

LODGING FEE £39.00
AUDIT FEE- £10.00
£49.00 49.00

£200.60

AIRDRIE 10 MARCH 2014.

Having examined consideration of the foregoing Account of Expenses, I hereby tax said Account at the sum of £200.60.

Depute Auditor of Court

DEPUTE AUDITOR OF COURT
AIRDRIE

AUDITOR OF COURT AIRDRIE

THE SCOTTISH LEGAL AID BOARD

ACKNOWLEDGEMENT OF ADVICE AND ASSISTANCE AND ACCOUNT SYNOPSIS

Date: 15/03/07

LAURA MORTON
TAYLOR & KELLY
SOLICITORS
LP9 COATBRIDGE

Reference AA/07/6319223206 [redacted]

RECEIVED
- 9 JUL 2008

NAME & ADDRESS - ORGANISATION RENDERING ACCOUNT

THIS ACKNOWLEDGEMENT OF AN APPLICATION SHOULD BE RETAINED AND SUBMITTED WITH YOUR ACCOUNT TO ACCOUNTS REGISTRATION SECTION, ACCOUNTS DIVISION, 44 DRUMSHEUGH GARDENS, EDINBURGH EH3 7SW RUTLAND EXCHANGE ED250. NO COVERING LETTERS PLEASE.

REGISTRATION DETAILS

PLEASE COMPLETE, TICK ONE BOX IN ROW BELOW

J	✓	CIVIL	L		CIVIL ABWOR

Please tick initial expenditure limit applicable to this case

£85	✓	£160	

TICK ONE BOX IN COLUMN BELOW

H		I enclose an application under the Hardship Provisions of Regulation 16(3)
M		I claim the minimum fee in respect of this certificate
N		I make no claim in respect of this certificate
Z	✓	Final account

	NOMINATED SOLICITOR	FIRM'S CODE	ACCOUNT POINT ID
PRACTITIONER NUMBER FOR SOLICITOR TO WHOM PAYMENT IS TO BE MADE	388495	26332	
SOLICITOR'S OWN INTERNAL REFERENCE	TK/LM/B654		
VALUE OF CLAIM - SOLICITOR'S FEES AND OUTLAYS, (EXCLUDING VAT AND FACULTY FEES). DO NOT DEDUCT CONTRIBUTION	85.00		
FINAL AUTHORISED EXPENDITURE	£ 85.00		
CLIENT'S CONTRIBUTION	£0.00		
COMMENCEMENT DATE	12/03/07		
CATEGORY	JR		
SUBJECT MATTER	ELECTORAL REG PRISONERS RIGHT TO VOTE ART 3 ECHR		
PROCURATOR FISCAL'S REFERENCE			
COURT	HIGH/SHERIFF/DISTRICT IN (TOWN)		
CLIENT'S DATE OF BIRTH	30/01/1983		
CLIENT'S ADDRESS	HM PRISON DUMFRIES PRISON NO 61522 DUMFRIES		

	BOARD REFERENCE	CLIENT'S NAME
RELATED CASES:- IF MORE THAN ONE LEGAL AID CERTIFICATE COVERS THE WORK CLAIMED IN THIS ACCOUNT COMPLETE THE BOXES OPPOSITE		

PLEASE INSERT THE TOTAL OF EACH ADVOCATE'S FEE NOTE IN THIS CLAIM. GIVE SEPARATE TOTALS FOR FEES UNPAID & FOR FEES ALREADY PAID BY THE SOLICITOR.

ADVOCATE'S NAME	ADVOCATE'S PRACTITIONER CODE	FACULTY SERVICES FEE NOTES CLAIMED (EXCL VAT)	
		NOT PAID BY SOLICITOR	ALREADY PAID BY SOLICITOR

FOR OFFICIAL USE ONLY

	WITH VAT	NO VAT	VARIABLE VAT
FEES			
OUTLAYS			
COUNSEL			
SUB-TOTALS			

£

TOTAL PAYABLE (EXCL VAT)

PAYMENT AUTHORISED ..... DATE .....

PLEASE ENCLOSE THE FOLLOWING DOCUMENTS, IF APPROPRIATE, IN SUPPORT OF THE ACCOUNT

- ☐ All Faculty Services Fee Notes
- ☐ Applications under the Hardship Provisions for Regulation 16
- ☑ All applications for increase in authorised expenditure (even if refused)
- ☐ Vouchers for all outlays

PART A
THE SOLICITOR MUST COMPLETE THIS SECTION FOR ALL CLAIMS

1. Are expenses payable to the client in respect of the matter in connection with which Advice and Assistance was provided? (If YES please attach full details) — ~~YES~~ NO

2. Was any money or other property recovered or preserved for the client? (If YES please attach full details) — ~~YES~~ NO

3. If the answer to paragraph 1 or 2 above was NO, is there still a possibility that expenses may be paid to the client or that money or other property may be recovered or preserved for the client? — ~~YES~~ NO

4. Has the subject matter proceeded, or is the matter likely to proceed to an application for civil/criminal legal aid? — ~~YES~~ NO

5. Has a civil/criminal legal aid certificate been granted? (If YES please give Board reference number) — ~~YES~~ NO
   CIVIL/CRIMINAL REFERENCE .....

PART B
THE SOLICITOR MUST COMPLETE THIS SECTION IF ADVICE BY WAY OF REPRESENTATION HAS BEEN GRANTED

1. I granted ABWOR for civil matters — YES ☐

2. I granted ABWOR for criminal matters — YES ☐
   If YES please tick box (A), (B), (C), (D), (E), (F), or (G), as appropriate:-

   (a) (1) a plea to the competency or relevancy was tendered? — A ☐

   (2) a plea in bar of trial was tendered? — B ☐

   (3) a question of a reference to the European Court was raised? — C ☐

   (4) there was tendered a plea of guilty to the charges or a plea of guilty to part thereof, which partial plea was accepted by the prosecutor? — D ☐

   (5) the court was considering the accused's plea of guilty and where there had been no change of plea? — E ☐

   (6) the court was considering the accused's changed plea of guilty, where this had been intimated to the prosecutor within 14 days of the not guilty plea? — F ☐

   (7) the court ordered a proof in mitigation? — G ☐

   (b) If you ticked box (D), (E), (F) or (G), state whether you provided representation because:-

   (1) it was likely the accused would lose his liberty? — H ☐

   (2) it was likely the accused would lose his livelihood? — J ☐

   (3) the accused was unable to understand the proceedings or make his own plea in mitigation because of:-

   (i) his age? — J ☐

   (ii) inadequate knowledge of English language? — K ☐

   (iii) mental illness? — L ☐

   (iv) other mental or physical disability? — M ☐

   (v) other incapacity? — N ☐

   (c) If a guilty plea was tendered, was a custodial sentence imposed? — YES ☐ NO ☐

   (d) Did the ABWOR consist of representation in disciplinary proceedings before the governor of a prison or a young offenders institution? — P ☐

   (e) Did the ABWOR consist of representation at a hearing before a Parole Board tribunal? — Q ☐

   (f) State below the dates of all diets/hearings in respect of which Advice By Way Of Representation was provided, the nature of each diet or hearing (i.e. plea to competency, relevancy, in bar of trial, question for European Court, plea of guilty, adjourned diet, appeal to High Court, prison disciplinary hearing, Parole Board tribunal, etc.) and the outcome including sentence, if any, imposed.

DATE OF DIET	NATURE OF DIET	OUTCOME INCLUDING SENTENCE

PART C
CERTIFICATE (TO BE COMPLETED FOR ALL CLAIMS)

I certify to the best of my knowledge and belief that the items charged in this account are accurate and represent a true and complete record of all the work done; that all the work was carried out by the solicitor unless otherwise stated in the account and that the person carrying out the work was not engaged in any other business at the time and place except as apportioned in the account.

Date 7/7/08 Solicitor .....

THE SCOTTISH LEGAL AID BOARD

44 Drumsheugh Gardens
Edinburgh EH3 7SW

Telephone *0131 226 7061*

APPLICATIONS DIVISION

MS LAURA MORTON
TAYLOR & KELLY
SOLICITORS
LP9 COATBRIDGE

Please ask for extension number 549

Your ref: TK/LM/B654

Please quote the department above and our reference: 07/AL

17 May 2007

Dear MS MORTON

Applicant's Name: [redacted]
Advice and Assistance Reference: AA/07/6319223206
Applicant's Identifier: [redacted]

I refer to your request for an increase in authorised expenditure dated .

We are refusing this request for the following reason(s):

see attached reasons.

Yours sincerely

[redacted]

Case Officer
Applications Division

JR

The principle concerned has already been looked at and determined by the Court.

The principle concerned has already been looked at and determined by the Court. A judicial review is therefore unnecessary and an inappropriate use of public funds. We note that in the recent case of [redacted] was not actually successful on the primary issue of whether he ought to have been admitted to the Register of Electors: in response to the question in the stated case, "Was I correct to refuse the appeal?", the Court answered in the affirmative, meaning that the Registrar was correct not to admit Mr Smith to the Register. The Court then granted the declarator of incompatibility. In considering the effect of this, it has to be noted that section 4(6) of the Human Rights Act 1998 provides that a declarator does not effect the validity, continuing operation or enforcement of the provision in respect of which it is given, in this case The Representation of the People Act 1983, and nor is it binding on the parties. Additionally, section 6(2)(a) makes it clear that a public authority does not act unlawfully where it acts under a provision of irremediably incompatible primary legislation, which appears to be the case here. Accordingly, it seems to us that it is still the law that convicted prisoners are not entitled to vote, so it is difficult to see how a right to reparation arises. The effect of the declarator is simply to prompt the Government to amend legislation, which, from the terms of [redacted] it appears to be doing as a result of the decision in Hirst. Additionally, the case cannot be viewed as one which gives all prisoners the right to vote: the issue was simply that a blanket ban on any prisoners voting was felt to be incompatible. It remains to be seen which categories of prisoners will be allowed to vote by the Government and so at this stage it is impossible to tell whether the applicant's position will be any different so a claim for reparation is premature. In any event, if we are wrong in this analysis, we note that in the ECHR case of Hirst v United Kingdom application number 74025/01, on which reliance was placed in the recent Smith case, the Grand Chamber noted that it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with the judgement. The Grand Chamber considered that this in itself provided Hirst with just satisfaction for the breach. The applicant would appear to be in the same position.

[redacted]

AA107/631922306

SCOTTISH LEGAL AID

THE SCOTTISH LEGAL AID BOARD

44 Drumsheugh Gardens
Edinburgh EH3 7SW

Telephone 0131 226 7061

APPLICATIONS DIVISION

MS LAURA MORTON
TAYLOR & KELLY
SOLICITORS
LP9 COATBRIDGE

Please ask for extension number 381

Your ref: TK/LM/B654

Please quote the department above and our reference: 07/DH/21

03 March 2008

Dear MS MORTON

Applicant's Name: [redacted]
Advice and Assistance Reference: AA/07/6319223206
Applicant's Identifier: [redacted]

I refer to your request for an increase in authorised expenditure dated .

We are refusing this request for the following reason(s):

Please see covering letter

[redacted]

Case Officer
Applications Division

It is not necessary for a solicitor to travel from Coatbridge to Peterhead to take a statement. There is no reason why that work cannot be done by a local solicitor within the limits of authorised expenditure. Although the request mentions cost sharing with a number of clients the reality is that the Board has received several identical requests involving expenditure of at least £5500. As with this request they seek to put together an application for civil legal aid to pursue proceedings in the Court of Session for (1) declarator of an issue that is now well settled and can only be altered through the democratic process and (2) a financial claim that lies well below the small claims limit for which civil legal aid cannot be made available. In all the circumstances this request is unreasonable

Apps name: [redacted]
Ref: 6319223206