Meaning of 'judicial expenses' etc.

COURT OF SESSION, SCOTLAND

30th October 1987.

The Lords having heard counsel for the objectors and respondents allow their Note of Objections to be received late and form No. 16 of Process; appoint the Auditor of Court to lodge, within fourteen days from the date hereof, a minute stating the reasons for his decision in terms of Rule of Court 394 (3)(b)(ii).

"W.R. Grieve"
I.P.D.

MINUTE

by the

AUDITOR OF COURT

in Appeal

from

The Lands Tribunal for Scotland

NORMAN MacDONALD, 9 Portnaguran, Point, Isle of Lewis, per Messrs. Bird Semple & Crawford Herron, Solicitors, 249 West George Street, Glasgow

APPLICANT & APPELLANT

against

THE STORNOWAY TRUST, The Estate Factor, Estate Chamberlain's Office, Stornoway, Isle of Lewis, per Messrs. Anderson, MacArthur & Co., Solicitors, Old Bank of Scotland Buildings, Stornoway, Isle of Lewis

OBJECTORS & RESPONDENTS

In obedience to the interlocutor of 30th October 1987 the Auditor begs to set out his reasons for the taxation complained of by the Objectors & Respondents in their Note of Objections No. 16 of Process.

In disallowing all of the items in the Account of Expenses No. 10 of Process for work done on behalf of the Objectors and Respondents by their legal advisers in connection with the preparation and adjustment by the Lands Tribunal of Scotland of the stated case which was presented to the Court of Session for the appeal by the Applicant, the Auditor followed a practice which so far as he can ascertain has/

/has obtained throughout living memory. The practice is simply an application of the principle that when a Scots court sets out in general terms a finding of expenses in favour of a successful party in completed proceedings before it, whether the liability be imposed upon the opponent or upon the fund represented by that party, the expenses so awarded are the expenses of process, sometimes referred to as judicial expenses or the expenses of the litigation.

In Scottish Union and National Insurance Co. v Surveyor of Taxes (Smiles) 1889 16 R. 624, the report records that "the appellants were found entitled to expenses": although the exact words of the interlocutor setting out the finding are not quoted, it was clearly a general finding. In taxing the account presented on the authority of that interlocutor, the Auditor applied the rule of practice exactly as has been done in the instant case. The Court approved his taxation, the Lord President (Inglis) giving the opinion of the Court in eight lines, asserting that "what would be called in ordinary cases 'expenses of process'... do not include the expense of wranglings with the Commissioners as to the statement of the case". It is noted that the Lord President also referred to "the expenses we have to award" in an apparent reference to the interlocutor setting out the finding.

In McGovern v Cooper & Co. 1901 4 F 249 the Court had pronounced an interlocutor, reported in terms, finding "the appellants liable in the expenses of the appeal". The Auditor disallowed certain charges which were accepted as being in connection with the adjustment of the stated case. On his disallowance being challenged, the Court affirmed the Auditor's decision, the Lord President (Balfour) again giving the opinion of the Court shortly. The Court does not appear to have been referred to the case of a dozen years earlier but it was informed by Counsel for the objecting Respondent that the previous practice of the Auditor had been to allow such expenses and this is adverted to fairly abruptly in the opinion - "and if this was his practice, it is satisfactory to learn that he has altered it". There is no record of any comment by the Auditor on the allegation of his following a practice disapproved by the Court only a dozen years earlier. Lord McLaren concurred along with Lords Adam and Kinnear. It might have been thought that these two cases would be seen as giving a conclusive and final answer to the point but in Laird (Christie's C.B.) v The Commissioners of Inland Revenue 14 TC 395, the successful appellant objected to the Auditor's disallowance of two groups of items, firstly the charges incurred in connection with his eight-year battle with the Inland Revenue against the assessments which the Court had ultimately deemed should go for nothing and secondly those incurred in connection with the preparation/

/preparation of the case on which the appeal proceeded. In disposing of the merits of the case, the Court had been very critical of the Commissioners' decision and appeared to have acknowledged, in their finding him entitled to judicial expenses as between agent and client, the extreme equitable considerations in the taxpayer's favour, and this may have induced the appellant to hope for an exceptional decision in his favour on the taxation question. But for all its unreserved sympathy, the Court held unanimously that the first group of charges did not constitute any part of the expenses to which the Appellant had been found entitled, namely judicial expenses, and again unanimously but perhaps with more reluctance, that the authority of S.U.N. v Smiles (op. cit) conclusively excluded the second group, namely the expenses incidental to the preparation of the case, from the category of judicial expenses, the expenses of the litigation. Finally the Court held that their unusual allowance in the case of expenses taxed as between agent and client, did not extend the scope of the judicial expenses awarded. Lord Sands concurred with the approach of the Lord President (Clyde) on the conclusive effect of the decision in S.U.N. v Smiles in relation to the second group of items: "we cannot, sitting here as we do as a Division, help considering that case as governing the question of procedure and having been acted upon for a long time". Lord Sands was speaking of a case decided forty years earlier: it is now fifty-eight years further on that the instant case is brought before the Court.

Each of the three cases referred to had as its starting-point on the taxation question, what was accepted to be a general finding for expenses pronounced at the practical conclusion of the proceedings in the Court of Session. In the instant case, the finding for expenses is located, not in the interlocutor of 26th March 1987 which contained in short form the remit on which the Auditor taxed the account but for the rest is an order for payment, but in the interlocutor of 21st March 1986 by which the appeal was disposed of: there the words are "Find the Appellant liable as an assisted person in the expenses of the appeal". The remit in that interlocutor was not operated upon, no Account being referred to the Auditor until after the later interlocutor was pronounced. On 9th July 1986, the Respondents sought an order for payment out of the Legal Aid Fund and on 24th March 1987 renewed that motion after taking the necessary qualifying steps: on each occasion they referred simply to "the respondents' expenses". The interlocutor of 26th March 1987 used the words "the expenses incurred by the respondents in connection with this appeal". At the taxation it was not contended that "expenses incurred in connection with the appeal"/

/appeal" denotes an extension of the scope of expenses defined in "the expenses of the appeal" and indeed it seems fair to infer that the change in the definition of the expenses was not sought deliberately by the Respondents who exhibited to the Court the Account of Expenses No. 10 of Process when the only finding for expenses in existence was that in the earlier interlocutor of 21st March 1986, and twice enrolled for an order for payment out of the Legal Aid Fund without disclosing in the terms of the enrolment that any extension of the scope of the expenses already found due was being sought. From the presentation at the taxation, the Auditor drew the irresistible inference that it had not occurred to the Respondents' advisers, prior to the taxation, that the expenses of the preparation of the case did not fall within the terms of a general finding for expenses. The Auditor's duty is to report to the Court what passed at the diet of taxation in so far as it contributes to his decision now under challenge: the records and recollection of the Court and parties may well entirely override the Auditor's impression that so far as Respondents' advisers were concerned, no extension of the finding for expenses was deliberately sought. The Court may have been satisfied that in the whole somewhat unusual circumstances of this case, it was competent and proper to extend the recovery of expenses from the Legal Aid Fund by the Respondents beyond those clearly set out in the finding for expenses against the Appellant in the interlocutor of 21st March 1986.

The Auditor who in terms of present procedure on a Note of Objections, has to set out his whole views in this Minute, has considered whether "the expenses incurred by the respondents in connection with the appeal" falls to be interpreted as embracing more than "the expenses of the appeal" (or any of the standardly-used variants for a general finding for expenses at the conclusion of proceedings, such as "expenses of the action/cause", "expenses of process", "judicial expenses"). He has not been able to locate any authoritative analysis of the meaning of "expenses in connection with" when used in an interlocutor whether recording an interim finding for expenses or a finding at the conclusion of proceedings. He cannot recall a case in which he has had remitted to him an account for taxation on the basis of a finding for "expenses in connection with" in an interlocutor pronounced at the conclusion of proceedings in the Inner House or the Outer House. The terminology is in regular use for interim findings for expenses: its use is best illustrated in relation to expenses arising from a motion. The party who is considered by the Court to have been improperly subjected to the expenses of an appearance in the Motion Roll may be found entitled to "the expenses of to-day's appearance in the Motion Roll" or/

/or "the expenses of the motion" or "the expenses occasioned by/in connection with the motion", each of these findings being an expansion on the one before. If the Auditor accepts that "expenses in connection with" in relation to a motion represents the Court's maximum expansion of the expenses recoverable by the entitled party, why does he not allow items beyond the scope of the normal general finding for expenses at the conclusion of proceedings when the Court has instructed him to tax "expenses incurred in connection with those proceedings"? The Auditor's answer must be that in his opinion the Court has always regarded the limit of the proceedings before it as constituting a major breakpoint, a view reflected by the Lord President in S.U.N. v Smiles - "we have nothing to do but to hear parties on it (the case prepared) and therefore the expenses we have to award are... "expenses of process""; by the Lord President in McGovern v Cooper (op. cit) - "the charges in question cannot be described as being in any reasonable sense "expenses of the appeal" allowed by the interlocutor"; and by the Lord President in Laird v Inland Revenue (op, cit) "the only expenses we ever do deal with in such findings, namely judicial costs, judicial expenses". There is of course, no doubt whatever about the power of the Court in such a situation as is presented in the instant case: the Court has power to make "such order as to costs as to (the High Court) may seem fit" - the words are taken from the Taxes Management Act 1880, Section 59 where it deals with appeal procedure - and here the Court had power, on presentation of an appropriate motion at the Bar on 21st March 1986, to find the Appellant liable to the Respondents in the expenses incurred by them in connection with the adjustment and finalisation of the Stated Case and in the expenses of the Appeal. The special circumstances of the respondents are proper matter for the consideration of the Court which has the power to make any order on expenses and may do so, given appropriate circumstances and presentation: it is not for the Auditor, given the strong current of authority against his doing so, so to read the unexplainable and unusual minor variation in the words of an interlocutor in the Court of Session as to create a liability in expenses for procedure conducted wholly outwith the Court of Session and beyond its scrutiny.

In their Note of Objections the Respondents refer to the Rules of Court and the Tribunals and Enquiries Act 1971. It was suggested to the Auditor, although no substantial argument was addressed to him, that the incorporation in the Rules of Court of provisions governing the preparation, adjustment, finalisation and delivery of the stated case brought the expense incurred in that procedure within the scope of the expenses of the Appeal or whatever other words/

/words might be used to signify a general finding for expenses. It is true that the promulgation of such provisions has been variously located at various times in the last hundred years - the statutory basis for the stated case in S.U.N. v Smiles appears in the Taxes Management Act 1880 with some supplementary provisions in the Act of Sederunt of 9th December 1880. The case of McGovern v Cooper & Co. arose under the Workmen's Compensation Act 1897, but the provisions for appeal by way of stated case are to be found entirely in the Act of Sederunt of 3rd June 1898, along with considerable regulation of procedure at first instance before the Sheriff. It is not known to the Auditor what considerations led to the adoption of the Rules of Court as the location for instructions on how a stated case should be prepared by the body making the decision appealed against but it seems reasonable to suppose that the increase in the number of tribunals argued for standardisation of procedure and the location of those procedural rules in the Rules of the Court of Session to which all the appeals were to come. It is seldom that argument can usefully be based upon the imagined thinking of legislators but it may be legitimate here where the legislation is under the hand of the Court. If it be the case that the incorporation of those provisions in the Rules of Court has effected an outright reversal of a proposition which has been very firmly, perhaps even vigorously asserted by three Lords President, then in passing the Act of Sederunt either the Court was acting per incuriam, not being mindful of the rule so established by authority, or it was effecting the change deliberately: one cannot suggest the former without disrespect and it is difficult to accept the latter alternative when the change said to be deliberate is demonstrable only by carefully devised interpretation. It may be that the reference in the Note of Objections was made only to preserve the position in case further consideration might produce a tenable contention based upon it.

If the Court considers that the Auditor was in error in disallowing the charges relating to the preparation, adjustment and finalisation of the Stated Case on the grounds that together they do not form part of the expenses for which the applicant was found liable or which were ordered to be paid out of the Legal Aid Fund, the Court will instruct the Auditor to tax the Account of Expenses No. 10 of Process in accordance with its directions. The Auditor begs respectfully to mention that the charges in question are open to substantial objection such as the Auditor would feel bound to take ex proprio motu as being of the nature of competency. The expenses which are clearly within the expenses of the appeal are set out on the basis of block fees provided for in Chapter III of the Table of/

/of the Table of Fees in R.C. 347 and in particular in Part V of Chapter III which sets out fees for Inner House Business: notwithstanding the provision in Part V - "4. Where applicable, charges under Part IV of the Table" - the Auditor does not regard as appropriate in this case the importation of the Record Fee from Part IV where it is specified to cover "All work in connection with adjustment and closing of Record including subsequent work in connection with 'By Order Adjustment Roll'". Chapter III was introduced to provide for the normal case conducted in the normal way: the block fee is to be selected if the work done is reasonably covered by the description set out in the Table: it is not properly used in the case where one can say only: "It does not really fit the work and we know that we are taking it right out of context, but it's the nearest thing we can find, so it must be right". The entry described as "Fee for Incidental Procedure" is in the Auditor's view another unjustified importation from a procedural setting essentially applicable only to the Outer House. Block fees are a very convenient alternative to the fully-itemised account but it has never been imagined that any case, however unusual, could be presented in block fees, regardless of the insult involved to their definitions in forcing them to serve purposes for which they were not designed. It is clear to the Auditor that if the work involved here in the preparation and adjustment of the stated case is to be fairly assessed for purposes of recovery on the party-and-party basis, that work will require to be set out in detail.

IN RESPECT WHEREOF

"EVAN H. WEIR"