



CRIMINAL

HAMILTON, 15 December 1976. Having heard Mr Russell of T. P. Russell & Co., Solicitors, Glasgow and Mr Wood and Mr Gunn for the Law Society of Scotland on 22 November 1976 I determine the sum to be allowed to the solicitor for representation of [REDACTED] in TD the summary criminal proceedings in the Hamilton Sheriff Court at the sum of £255.92

Auditor of Court, Hamilton

Note:- The solicitor's account of expenses for £348.38 was rendered to the Law Society of Scotland. Having considered the charges in the account, the Law Society offered a sum which was apparently not acceptable to the solicitor. Without further negotiation he referred it to me for taxation and formal intimation was made by me to the Law Society of Scotland of the diet of taxation.

The Law Society had a number of submissions to make on the solicitor's charges in the account of expenses and I propose to deal with each submission in the order they were made to me at the diet of taxation.

1. PRECOGNITIONS – DRAWING AND EXTENDING

I heard arguments from both sides on the fees to be allowed for precognosed witnesses.

It is clear from the account of expenses that a 'time' charge under Chapter 111(2) of the Table of Fees of Solicitors in the Sheriff Court has been made for "procuring statements" of witnesses or alternatively "interviewing various witnesses and taking instructions for precognitions". In addition, charges have been made for framing precognitions (£1 per sheet) and extending same (30p per sheet) all subject to a 30% increase from 1 September 1997 and, in this account of expenses, charged with a further 25 per cent addition by virtue of a certificate granted by Sheriff Nigel Thomson under 13(3) of the Act of Adjournal (Criminal Legal Aid Fees) 1964, as amended, on the grounds of complexity.

According to the Law Society, not all solicitors charge for drawing precognitions when a charge is made for 'time' under Chapter 111(2). Sometimes they only charge copying fees in addition to the time charge. Presumably such solicitors draw their precognitions simultaneously with their interviews with the witnesses and the only charge they make is for the typist copying same at 10p per sheet. In such circumstances, it would be wrong for a solicitor to charge for drawing and extending as, under 13(?) of the Act of Adjournal, remuneration is for work actually and reasonably done.

Mr Russell assured me in this case that the work was actually done and the sequence of events, so far as precognosing was concerned, was as follows, viz:-

1. Interview of the witness when rough notes were taken for which time charge was made.
2. On return to the office, the solicitor drew up the precognition from the rough notes.
3. The typist extended the precognitions drawn up by the solicitor.



In such circumstances I am not prepared to disallow the charges for drawing and extending although I would consider it proper that solicitors should retain the rough notes taken at the time of interview and the drafts of the precognitions as drawn – unless this is done by tape – all for production to the Law Society or auditors of court, if requested. I wish to make it clear that it is only when a solicitor assures me that each of the steps above narrated have been followed, preferably by production of the appropriate papers, I would allow the separate charges for time, drawing and extending on taxation.

2. FRAMING MOTION FOR 3(3) CERTIFICATE

The solicitor in this case had applied for a certificate under 3(3) of the Act of Adjournal (Criminal Legal Aid Fees) 1964 as amended by the Act of Adjournal (Criminal Legal Aid Fees Amendment) 1976. The Sheriff did not grant the certificate on oral application. The Law Society moved me to disallow the fees for drawing and extending the written grounds which must be lodged when the oral application is not granted. It is not clear from the court papers whether the proper procedure had been followed in this case but there is no doubt that three sheets of written grounds were drawn and lodged by the solicitor for the accused [REDACTED]. Accordingly, I have allowed the fees charged for drawing the written grounds, the extension thereof and the fees for lodging same. Intimation was also made to the procurator fiscal by sending him a copy of the written grounds for which I allowed fees for intimation and a copy in this particular case. This might not always be allowed in cases where the correct procedure had been followed in respect that the procurator fiscal would be aware of the diet to which the hearing should have been adjourned. I draw attention to the fact that the solicitor did not make use of the SCLA 29 available for applications following adjournment.

3. PRECOGNITIONS – CORROBORATION ONLY

Mr Wood for the Law Society invited me to disallow the fees for framing and extending the precognitions of two police witnesses, [REDACTED].

The extended precognition of [REDACTED] reads “I can corroborate the statement of Constable [REDACTED] to ‘A’ in the margin”. The extended precognition of [REDACTED] reads “I can corroborate in full the statement of Constable [REDACTED]. I can identify the accused”. Mr Russell submitted that at least half-fees should be allowed and Mr Wood argued that in this situation time charges only should be allowed.

There is no dispute between parties that a time charge was included in the account for interviewing [REDACTED] and [REDACTED] the two police witnesses. The dispute was in connection with the additional charges for the drawing and extending of the thirteen words in [REDACTED] precognition and fifteen words in [REDACTED] precognition.

Mr Russell was unable to produce the notes taken at the interviews with the police constables from which he says he drew the precognitions. I would have expected in the interests of economy that it might not have been necessary to draw and extend the twenty-eight words if the original notes were available.

In the circumstances, I have disallowed the charges for drawing and extending these two precognitions on the basis that due regard should be paid to economy when the work is done and in the knowledge that the solicitor had received a time charge when he attended on the witnesses at which time he must surely have written almost as many words as are shown on the typewritten precognitions. Even if the solicitor wished a typewritten copy, the time involved must have been minimal.



4. FRAMING CERTIFICATES

Mr Wood for the Law Society submitted that I should disallow the fees charged in the account for framing the SCLA 20 (Length of trial form) and SCLA 25 (Claim for fees form). Mr Russell argued that each was a necessary document required for the case.

I have disallowed the charges for framing these certificates on the grounds that there are claim or record forms to seek payment of the remuneration and that they are not solicitor and client remuneration for the representation of the accused in the criminal proceedings. Further, having seen the heading of SCLA 25 that no covering letter is necessary, I have also disallowed the charge for writing to the Law Society with the account and relative papers.

5. FRAMING THE ACCOUNT OF EXPENSES

Charges were made in the account of expenses for framing the five sheets of the account (£5.00), and extending and two copies of the account (£2.50). To these charges there is added a 30% increase in these fees allowed on 1 September 1975 and, in this particular account, there is also charged a 25 per cent increase in respect of complexity by virtue of a certificate granted by the Sheriff under section 13(3) of the Act of Adjournment (Criminal Legal Aid Fees) 1964 (as amended) on the grounds of length and complexity.

Mr Wood in inviting me to disallow the charges for drawing, extending and copying the five sheets of the account of expenses, stated it was not the practice to allow such charges. In any case, he argued, any such account of expenses so submitted may be in an abridged form in accordance with the Legal Aid (Scotland) (Criminal Proceedings) Scheme, 1975 at Article 26.

Mr Russell argued that he was bound to draw up an account of expenses and should therefore be allowed the appropriate fees for so doing under Chapter III of the Fees for Solicitors in the Sheriff Court. It was optioned to submit same in an abridged form and he submitted that difficulties might arise if referral is made to an auditor of court.

I have disallowed the fees for the drawing, extending and copying of the five sheets of the account on the grounds that the charges are made on a 'solicitor and client' basis under paragraph 5 of Schedule 2 of the Legal Aid (Scotland) Act 1967 and that the Law Society pays the client's account for him. If such be the case, it appears to me that, in the first instance a law agent is bound to make out his accounts at his own expense whenever required by his clients (see Encyclopaedia of the Law Society of Scotland Volume 9 at page 33). I have been unable to find any authority to support the statement in the Encyclopaedia but take the view that any person asked to pay an account for work done by a tradesman, professional man, etc. must surely be entitled to a full statement of the work done and charges made. Regular demands are made for such detailed accounts in the civil courts without charges for drawing same. It is noted that in the Table of Fees for Conveyancing and General Business, Chapter XX, Item 96 that "a Solicitor is not entitled to charge for the actual taking of an account".

I am conscious that charges are allowed for drawing the account in most of the accounts which I tax as Auditor of Court, Hamilton, but these normally come to me by remit from judicial proceedings in the Sheriff Court by order of the Sheriff allowing an account of expenses.../

expenses to be given in. The difference in my view is that in these cases we have an order by the Court which must be carried out and the successful party should not have to pay his solicitor's fees for drawing the account. The account of expenses in the present circumstances reaches me as auditor of court because the parties are in dispute over charges in a solicitor and client account and it is referred to me as auditor for a decision as to what represents fair remuneration for the representation of a person receiving legal aid in connection with criminal proceedings. I therefore take the view that it comes before me under different circumstances than a remit by a Sheriff in judicial proceedings.

If fees for drawing and extending accounts are to be allowed, submitting accounts in an abridged form would certainly be economical as far as fees are concerned. The practicality of taxing such an account will only be established when such an account is referred to an auditor of court.

6. PERCENTAGE ADDITIONAL REMUNERATION FOR COMPLEXITY

The solicitor in this case was granted a certificate under paragraph 13(3) of the Act of Adjournal (Criminal Legal Aid Fees) 1964, as amended, upon (a) the grounds of its length and (b) on grounds of the complexity of the case. The essential qualifying word 'exceptional' is missing from the certificate but, for the purposes of my determination of the further sum to be allowed in respect of exceptional complexity, I accept that the omission is a clerical error.

Under section 13(6) of the Act of Adjournal, where a certificate has been granted under paragraph (2) or (3) of said section upon the grounds that the case has necessarily been of exceptional complexity or difficulty, or upon grounds which include either or both of these grounds, and the certificate so discloses, the determination of what is fair remuneration for the purposes of paragraph (4) of section 13 is to be made in accordance with paragraph (?) of section 13. with the addition of such further sum in respect of such exceptional complexity or difficulty as appears in the particular circumstances to be appropriate, being a sum of up to, but not exceeding, 25 per cent of the remuneration that would, apart from paragraph 13(6), have been determined to be fair remuneration.

There seems to be no doubt that the Court grants the certificate under 13(2) or 13(3) of the Act of Adjournal and that the determination of the additional percentage of fees to be allowed is left for decision between the solicitor in the case and the Law Society and thereafter, in case of dispute, to the appropriate auditor of court. It might have been more satisfactory if the Act of Adjournal had placed the onus on the Sheriff to state the actual percentage to be allowed as in 7(iv) of the General Regulations to the Table of Fees of Solicitors in the Sheriff Court.

It is interesting to speculate on the judgement required of an auditor of court to assess the percentage, up to 25 per cent, which he will allow when the 13(2) or 13(3) certificate discloses exceptional complexity or difficulty, or grounds which include either or both of these grounds. Does he require to have specialised knowledge of criminal procedure and criminal cases as presented in Court? It might indeed be helpful. The absence of any guidance from the Sheriff who granted the certificate is evident from the bare wording of the certificate.

In.../

In addition to practical experience as a clerk of court in criminal matters, HM Advocate -v- Kenney and Others, 1973 S.L.T. Notes 57 gives me some guidance in reaching a decision. In that case, Lord Cameron decided that that case was one of a 'familiar character' and by no means exceptional, it being a street quarrel in which a group of 'teenaged youths and girls were involved which ended with the production and use of knives. All three accused lodged special defences of self defence and all three gave evidence in support of this defence. Lord Cameron also commented on the fact that the solicitors involved were very experienced in the defence of such cases. In my judgement both observations are applicable to the case against [REDACTED] and three others where [REDACTED] was charged with two assault charges and one of breach of the peace by fighting after a disturbance in a Bar at a 21st Birthday Party. Following the reasoning of Lord Cameron, the present case cannot be classed as one of exceptional complexity in respect of the offences charged and his remarks directed to the experience of the solicitors involved must surely also apply in this case.

Lord Cameron, after referring to a total of 100 hours involved in precognosing a huge number of witnesses, reached the conclusion that care in preparation is not conclusive that the case has necessarily been one of exceptional complexity or difficulty. Accordingly, in my judgement, the number of witnesses involved in [REDACTED] case did not amount to complexity but established the grounds of length (as now defined in section 13 of the Act of Adjournal) specified in the 13(3) certificate. Fair remuneration has been charged and allowed in the account for precognosing a substantial number of witnesses, for meetings with Delaney and his father and other matters which might be argued as relating to difficulty.

It is noted that the grounds upon which the certificate was granted did not specify exceptional difficulty as one of the grounds although the written motion itself specified this ground and dealt with it at great length. Accordingly, it seems to me, that I am to decide the percentage addition on the grounds of exceptional complexity only and, in so doing, I accept a further comment by Lord Cameron in the [REDACTED] case that, when granting a certificate, the length, complexity or difficulty must be exceptional – not even unusual.

What I appear to be left with to bring the case into one of exceptional complexity is the accused's mental state. Cases of this nature while not everyday occurrences in the Sheriff Court are nevertheless not unusual and seem to be disposed of without any suggestion that they are cases of exceptional complexity. Normally the main legal decision of the solicitor for the accused is taken after the professional report of the consultant psychiatrist is before him. I can only therefore assume that the Sheriff when he granted the certificate on complexity took into consideration the fact that, according to the accused's solicitor, the accused's mental state was florid and there were day to day contact with the consultant psychiatrist although the details account does not contain very many entries in this connection.

Finally, there is the fact that the case did not proceed to trial against [REDACTED] but was deserted pro loco against him. If the trial had proceeded the maximum additional sum could only have been 25 per cent of the fees and I therefore consider a lesser percentage must be allowed.

Accordingly, having examined the account and the fees charged and (1) having excepted the entries thereon which appear to me to relate to grounds of length and difficulty on the basis of Lord Cameron's decision in [REDACTED]; (2) having accepted that Lord Cameron's decisions as to (a) lack of exceptional complexity on the basis of familiar character and (b) the fact that the.../

the case was dealt with by experienced criminal lawyers are both applicable to the [REDACTED] case; (3) having decided that the accused's mental state tended to make the case an unusual one rather than one of exceptional complexity; and (4) having taken into consideration the fact that the case against Delaney did not proceed to trial, I exercise my discretion as allowed under the Act of Adjournal and assess the additional sum to be allowed at 5 per cent of the total fees allowed. This means a reduction under this head from £57.62 to £10.72.

POSTS, INCIDENTS, ETC

A charge has been made in the solicitor's account for posts and incidents amounting to £34.57. This sum is calculated at 12% on the total fees charged in the account amounting to £288.11. The latter sum includes a charge of 25 per cent in addition to the fees in respect of the 3(3) certificate granted by the Sheriff on the ground of complexity.

Although the question of the charge for posts, incidents, etc, of £34.57 was not the subject of argument at the taxation, I feel bound in taxing the account to consider whether a charge of 12% of the total fees is in accordance with the Legal Aid (Scotland) Act of 1967 and the rules made under 16(2) of said Act relating to fees.

Under paragraph 2(3) of Schedule 2 of the Legal Aid (Scotland) Act, 1967 "The sums allowed by way of remuneration to a solicitor in connection with criminal proceedings shall be the full amount allowed on taxation on account of ????? and the full amount so allowed of the fees fixed by Act of Adjournal under the said section 16(2), or, in connection with any criminal proceedings for the conduct of which an inclusive fee is so fixed, shall be that fee".

Under paragraph 5 of the said Schedule 2 "Expenses shall be taxed for the purposes of this Schedule according to the ordinary rules and as between solicitor and client".

The Act of Adjournal (Criminal Legal Aid Fees) 1964, as amended, as I interpret sections 13(3), 13(4), 13(5) and 13(6), allows the solicitor to charge "fair remuneration for the work actually and reasonably done, due regard being had to economy" and in particular in Section 13(4) the words "such fees" are used.

The determination of what is fair remuneration, in the case of proceedings other than in the High Court is fixed under 13(5)(b) of the Act of Adjournal where it is stated that it be made on the basis of the charges set out in Chapter III of the Table of Fees of Solicitors in the Sheriff Court. It is noticeable that the reference is to "Chapter III" of the Table and not to the Table of Fees. No reference is made to Schedule 2 of the Table where, under paragraph 13, a solicitor would be entitled, in addition to the fees, to include a charge in respect of posts and sundries of 12% of the taxed amount of fees. I do not consider that said Schedule 2 of the Table of Fees can be invoked in charging this account. It seems to me that provision is made in the Legal Aid (Scotland) Act of 1967 for the full amount of outlays to be allowed on taxation and that these outlays should be the actual outlays, or a sum reasonably related to the outlays, which may include a sum for the cost of posts and telephone calls.

Having checked on the account of expenses, I assess the sum I am prepared to allow for posts, incidents etc, at £5.00. Accordingly, I have taxed off £29.57. I would expect solicitors who include a charge for posts and incidents etc, in their accounts to make such a charge reasonable related to the incidental outlays incurred. The Law Society would then, when considering such a charge, be able to assess from the accounts and the papers lodged whether the amount is reasonable.

It is noted that under paragraph 12 of the Act of Adjournal (Criminal Legal Aid Fees) 1964 that outlays are dealt with separately from fees, and this fortifies me in my decision to tax off this sum of £29.57. Other outlays, under said paragraph 12, including mileage, have been charged and allowed in this account.

Mr Russell made a final point that I should allow him his attendance fee at the audit for 3 hours (one of which was travelling time) at the going rate. In the circumstances that I have taxed off more than one-fifth of the account, I have followed the decision in Meiklejohn -v- Moncrieff, 1850, 13D, 303 and have not allowed any fee to the solicitor for attendance at the taxation.