

AUDITOR OF THE COURT OF SESSION

Soe

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

RUTLAND EXCHANGE No. 304

031 225 2595 Extn. 306

HMA v DN

The Auditor taxes at the sums undernoted the fees due and payable by Legal Aid (Scotland) to Mr W J Taylor and Mr I W Donaldson for their whole work and responsibility in representing [redacted] as fifth panel in the indictment of [redacted], whose trial took place in the High Court at Edinburgh on 27th May 1985 and following days:

Mr Taylor	£6070.00	<i>f 4255 / 00</i>
Mr Donaldson	£4400.00	

On payment of these fees VAT will require to be added.

Evan H. Weir

EDINBURGH.

3rd November 1986.

Co Accusis

<i>H.A. KERRISAN</i>	[redacted]
<i>D.Q. Gibson</i>	[redacted]
<i>ASST TIPSOLASID</i>	[redacted]
<i>H MATSONS</i>	[redacted]
<i>R. McDonald</i>	[redacted]
<i>R. DOUGHERTY</i>	[redacted]
<i>C. J. MacArthur</i>	[redacted]
<i>J.R. Campbell</i>	[redacted]
<i>J.H. Thomson</i>	[redacted]
<i>W.J. Jackson</i>	[redacted]
<i>J.H. Jarboe</i>	[redacted]
<i>A. WELING</i>	[redacted]

RECEIVED
10 NOV 1986

General Account

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NOTE: /

The Auditor Evan H. Weir, W.S.
Principal Clerk Janet P. Buck

NOTE:

When [REDACTED] was indicted along with several others for the attempted importation of a substantial quantity of cannabis resin (the case is reported sub nom. HMA v [REDACTED] & Ors) he was represented by Mr W J Taylor, Advocate, acting as leading Counsel, and Mr I W Donaldson, Advocate. The instructing solicitors were Messrs Beltrami & Co., Glasgow. As Legal Aid (Scotland), (the fund being represented by the Legal Aid Central Committee) and Counsel were unable to agree upon appropriate fees, Counsel's fees were remitted to the Auditor to tax. Before the diet there were made available to the Auditor, at his request, the papers available to the Committee, namely the solicitors' business account and the papers submitted by them in support of the solicitors' claim against the Fund. Before the Auditor at the diet of taxation, the Legal Aid Central Committee were represented by [REDACTED], Head of Criminal Accounts; Mr Taylor attended to represent his own interests and also those of his Junior, Mr Donaldson; the Solicitors had not been asked to attend.

For the solicitors, the presiding Judge had granted a certificate under Paragraph 13 (1) of the relevant Regulations on the grounds that the case was of exceptional length, complexity and difficulty. The trial had run for twenty four days in Court. The papers initially made available to him went far to satisfy the Auditor that for Counsel for [REDACTED], the case had had these same characteristics in at least like degree. The lucid and balanced exposition of the case by Mr Taylor at the diet left the Auditor in no doubt whatever on the matter. Questions of criminal jurisdiction, of Court procedure and of powers of search arose substantially in the course of the trial and added to the burden upon Counsel, over and above all the difficulties over evidence which had been earlier the primary concern of the solicitors and the basis of the presiding Judge's certification.

Faculty Services Ltd had submitted on behalf of Mr Taylor a fee notification setting out three consultations at Barlinnie and work on examination of productions in the three weeks before the trial. The fees sought for these items totalled £430.00. For Mr Donaldson, a fee notification set out a total of £440.00 for work prior to the trial - in his case two consultations in Barlinnie and a much longer time spent on the productions. Mr Taylor advised the Auditor that this additional work on the productions had been expressly instructed by himself to his Junior. The Auditor was informed that the Legal Aid Central Committee had instructed a proposal/

proposal to each Counsel that they receive fees only for two consultations at Barlinnie - £210.00 for Mr Taylor and £140.00 for Mr Donaldson. In form the Auditor finds the Committee's approach untenable, even on the most generous interpretation of the position of the Fund in the context of an agent-and-client fund paying. In substance the Auditor finds the Committee's proposal unsupportable. He finds it unnecessary to set out in detail his reason for these views. He earnestly hopes that the Committee will radically reconsider their practice in this respect.

While it is true that the Auditor had the additional benefit of Mr Taylor's submissions at the diet, it must have been obvious also from the papers before the Committee that there was no material on the basis of which it could be asserted that it was either extravagant or unreasonable in this case to have more than two consultations with the client, and further that in preparation of proper defence of the fifth panel, a considerable amount of work would be required of Counsel. On all hands it is recognised that the Committee in its administration of the Fund, requires to ensure that no excessive fees be paid to Counsel or solicitors. If the Committee come to the opinion in a particular case that excessive fees are being sought for work done, the reasonable response is not, as the Committee have sought to do here, to assert that particular work which was done should not have been done and should not be paid for, but to accept that the work was in fact done (and it is not understood that there is any contest about this in the present case) and if it is thought that the total fees claimed are in excess of reasonable fees for the work properly required, the fees or the total of the fees should be reduced. An informed appraisal can be made of the preliminary work probably required in a particular case on the basis of the whole information about the case before the Committee and a figure can be put on that preparatory work, leaving it to Counsel to allocate the total as between the various items of work actually done. In the present case, the claims for such preparatory work (£430.00 for leading Counsel and £440.00 for supporting Counsel) are patently reasonable and should be allowed as claimed.

Mr Taylor and Mr Donaldson do not adopt exactly the same approach to the question of the fee per day for the twenty four days of the trial. Mr Taylor proposes a fee of £275.00 per day to provide for the continuing complexity and difficulty of the case as it came before the Court and also the fact that on seven of the twenty four days, the hearing ran significantly beyond the normal daily length. Mr Donaldson proposes a base rate, as it were, of £180.00 per day the/

the rate being increased for long days to £200.00 or £220.00. Each Counsel claims an additional fee for a consultation at Saughton in the course of the trial. The Auditor prefers Mr Taylor's approach and proposes to determine an appropriate single daily rate for use throughout the period of the trial, this taking into account not only the extended sittings on certain days but also the intermediate consultation at Saughton while the trial was running before the Court.

The Auditor was informed that the practice of the Committee, widely accepted by Counsel, is to allow for a trial in the High Court in Edinburgh a fee of £210.00 to Senior Counsel (whose Junior, if any, will receive a fee of £140.00 per day); of £163.00 per day to Junior Counsel, acting alone; and to Junior Counsel, acting as leading Counsel, having the Committee's authority for the engagement of a supporting Junior, a fee approximately mid-way between those for Senior and Junior, namely £186.00 per day or thereby. In the present case, it was proposed by the Committee that Mr Taylor should receive a fee of £190.00 per day, Mr Donaldson receiving two-thirds of that figure. These fees Counsel are not prepared to accept.

Looking first at the fee proposed for Mr Taylor, it is noted that it does not differ materially from the fee payable to a leading Junior Counsel in a case which involves no special features at all and is not the subject of the issue of a certificate to the solicitors. [redacted] very properly had to concede that this was indeed so. [Once again, with regret, the Auditor finds the Committee's proposal quite unsupportable, given the substantial body of information before the Committee about the special features in the case, including those in respect of which the Committee had already paid enhanced fees to the solicitors.] It was mentioned at the diet that as at this date, the Committee has not agreed fees with any of the several Junior Counsel who acted as leading Counsel for the various accused in this trial. The Auditor was not invited to deal with this case as a test case to determine fees for general application and he has not done so, deliberately restricting himself to a consideration only of the defence of the fifth accused and the representation of his interests by Mr Taylor and Mr Donaldson. [It is hoped that it was not in the mind of the Committee to serve a general purpose also by proposing an obviously unacceptable figure in this particular case.] Inevitably, however, there are general considerations as well as particular ones to be taken into account in determining the proper fee for Mr Taylor in this case. In a world ideal from one philosophical/

philosophical standpoint, the same service would command the same remuneration, by whomsoever carried out. But it would not be acceptable within the present system to proceed upon the basis that the only difference between Senior and Junior Counsel is one of no practical significance in terms of remuneration. Further, services which can be regarded as quantitatively the same, can differ qualitatively in performance and of this even those who have observed the trial from beginning to end may not be entirely adequate witnesses. Finally, an accepted level in the sense of a datum, must continue in acceptance only in so far as it satisfies critical evaluation at any given time. Applying to all these factors the best assessment he can, the Auditor has concluded that an appropriate daily rate for Mr Taylor representing [REDACTED] in the present case is £235.00 per day.

In the case of Mr Donaldson, another general consideration enters the picture, in this case also in conflict with the ideal principle of equal remuneration for equal service. The fees fixed by the Auditor for the preparatory work done by Mr Taylor and Mr Donaldson take account of the particular input of each but when Counsel are sitting side by side throughout the day in court and making such preparations as are necessary in the evening, the two-thirds rule is generally regarded as still applying - recently in an unreported civil case, the Auditor was told by the Lord Ordinary that no alteration in the respective input of Senior and Junior Counsel entitled him to allow to Junior Counsel a fee lesser than the two-thirds of his Senior's fee, that proportion being the due measure of Junior Counsel's necessary responsibility. When the fee of leading Counsel is adjusted to take account of the fact that he is not a Senior Counsel, should his supporting Junior be restricted to two-thirds of leading Counsel's fee? The attraction of those administering public funds of an affirmative answer to that question is understandable: the only other justification for it must be that the law constitutes part of the system within which the legal profession in Scotland works. In the present case, the Auditor does not require to answer the question as to whether or not the two-thirds rule should always apply in these circumstances. Taking the best account he may of all the conflicting considerations, the Auditor has determined ~~£165.00~~ per day as the appropriate fee for Mr Donaldson for his part in the representation of [REDACTED] at this trial.

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 235
 165

72.22 112.70 76.78