

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
RUTLAND EXCHANGE No. 304
031 225 2595 Extn. 306

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[Handwritten signature]

21 AUG 1987

The Scottish Legal Aid Board
44 Drumsheugh Gardens
EDINBURGH
EHC 7SW
For the attention of [REDACTED]

10th August 1987
Your ref: 37/80/314882/83
DWA/MF

Dear Sirs,

GD GG

[REDACTED] (ap) v [REDACTED]

The Auditor encloses a copy of his letter to Messrs Ross Harper & Murphy together with copies of the two Notes in which he records his decisions on the various matters referred to him within the context of the solicitors' account and the Faculty Services fee notes. He trusts that these will enable you to reach finality with the solicitors and Counsel in early course.

The Auditor's Notes of Fee in respect of the two taxation exercises are enclosed.

Yours faithfully,

Janet P. Buck

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

*Includes report
claw*

AUDITOR OF THE COURT OF SESSION

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21 AUG 1987

Messrs Ross Harper & Murphy
Solicitors
133 Lauriston Place
EDINBURGH

10th August 1987

Dear Sirs,

[REDACTED] (ap) v [REDACTED]

The Auditor returns the principal Account of Expenses herein together with his Note on the matters therein referred to him. The situation does not appear to him appropriate for a Report in normal form. Clearly some discussion will be required with the Board before the final payment due to yourselves can be determined.

The Auditor has dealt in the same way with Counsels' fees. The whole Faculty Services fee notes are returned to you along with his Note thereon. It may be that you will not be concerned with the finalising of the payment due to Faculty Services Ltd. and that you will just forward these documents to the Board for further processing.

As you cannot reasonably be called upon to deal with the Auditor's fee in relation to the latter, the Auditor is sending his Notes of Fee in respect of both matters to the Board for settlement.

Certain papers remain in the Auditor's possession following upon the taxation. Would you please arrange to have these uplifted from his chambers in the Cowgate.

Yours faithfully,

"JANET P. BUCK."

21 AUG 1987

Auditor of the Court of Session
Note by the Auditor
in causa

[REDACTED] (ap) v [REDACTED]

[REDACTED] 37/80/314882/83

At the request of the Scottish Legal Aid Board and Messrs Ross Harper & Murphy, Solicitors, Edinburgh and Glasgow, the Auditor has considered the whole papers made available to him along with the detailed Account of Expenses presented by the solicitors to the Board in respect of their actings for Mr Devaney. He has further heard representations on behalf of the Board by [REDACTED] and for the solicitors, by Mr G C Warner, W.S., supported by [REDACTED] of the firm's law accountants. The Auditor accepted the invitation of parties to concern himself only with the particular items hereinafter referred to, all other issues on the account having been resolved by agreement between the Board and the solicitors.

On certain occasions (see pages 20,53,68,70,71,91 and 93) fees are claimed for the attendance at consultations and hearings of both an Edinburgh solicitor and Mr Sweeney, a member of the firm based in Glasgow. The Auditor is of opinion that in the circumstances of this case, it is proper on each occasion to allow the charges for Mr Sweeney's attendance (and the travelling expenses he incurred) but to restrict the charges for the Edinburgh attendance to the half-rate appropriate to a clerk. This applies in each of the places enumerated above with the exception of page 91 where both charges fall to be allowed as stated.

On page 81 a fee of £1046.40 is claimed in respect of forty-eight hours estimated to have been spent in preparation for the proof. The Auditor has grave reservations about the very prevalent practice of adding to an account prepared to set out with an appropriate charge each separate item of specific work a further omnibus catch-all time-based entry for unspecified work seeking admissibility under the head of "preparation", but it would be wrong to regard it as altogether unreal. It seeks to cover time actually spent, most often by the solicitor himself, in maintaining order for the papers for Counsel and solicitors, in checking over and refamiliarising himself with the whole material prepared and in the items of work which have slipped out through the recording system and evaded reconstructive recollection. ~~The first of these is claimable~~ but dangerous to commit to clerical staff: ~~the second is traditionally a non-chargeable activity~~; and the third, in the most brutal analysis, is a cover-up for inefficiency in record-keeping. In the normal case the Auditor will allow only a very limited charge for this "preparation". In the present case which is very special, and in the context of this particular account the Auditor will not tax the/

the item off or reduce it but it will be taken particularly into account in the Auditor's appreciation of the whole charges in relation to the additional fee which he is to determine.

The Auditor was asked to consider the fee sought by [REDACTED], the consultant cardiac surgeon for whom the case became a crusade. His proposals, possibly quite unwittingly, perhaps unthinkingly, involve a significant measure of duplication. Over and above the fees totalling £350 as noted on pages 19 and 23, the Auditor considers that [REDACTED] contribution in terms of work and of time spent will be fairly and reasonably remunerated by a fee of £5,000.

The fee for attendance at the taxation (page 100) is to be allowed at £43.60, the sum of £87.20 being taxed off.

To quantify the additional fee allowed by the Court, the Auditor has first to make an appreciation of the responsibility undertaken by the solicitor in the conduct of the case. Two aspects must be considered: firstly the demand made upon the solicitor by the whole specialties of the case and secondly, the response by the solicitor in terms of performance. From each of these standpoints, the rating in this case must be high: the difficulties were formidable and ultimately proved insuperable; the solicitors responded with high competence and anxious judgment. The additional fee must be substantial.

The value of the professional services of legal advisors and representatives like those in other professional disciplines, is not open to objective ascertainment. No service has an immutable value which can be insisted upon, regardless of the context in which it is provided. In the final analysis, the Auditor's assessment will reflect his experience and his discretion; it cannot wholly avoid the arbitrary, the non-logical.

Respect must be had to the figures suggested by the solicitors and Counsel acting here - respectively an additional fee amounting to 100% of the amount of the fees as taxed, and finally £500 per day for the period of the proof. It casts no doubt whatever on their responsibility but at the same time it would be wrong to exclude the possibility of an element of self-interest. It is fairest, in the Auditor's view, to regard their suggestions as sums sued for of that rather rare kind which enable Counsel at the end of the hearing with genuine conviction to commend it to the tribunal as the sum which should properly be awarded.

When/

When allowing an additional fee, the Lord Ordinary was well aware that it was to feature in an account submitted on the agent-and-client basis; and he was further aware that it was agent-and-client, fund paying. As a fee for the conduct of Court proceedings, its setting is that of Court remuneration - for Court work the hourly rate for solicitors remuneration is lower than it is in chamber work, although the apparent shortfall is materially reduced by the different methods of computation. For fees to be met by the Legal Aid Fund, a lower statutory scale applies, presently on the same method of application as under the Court tables. Although the Account of Expenses is remitted by parties, the Court limitations remain paramount, parties having accepted that the charges are those accepted for the relevant periods by the Fund. It is within this setting that the Auditor must fix the additional fee allowed by the Court. While the Auditor is generally favoured with the support of the Court on any decision involving his discretion, that discretion must be exercised on the basis on all proper considerations.

The account in this case has been carefully prepared, obviously on the basis of well-kept work records. It sets out to record, as every proper solicitors' account in this form must record if it is to be an intelligible basis for remuneration, each item of chargeable work done by the nominated solicitor or any partner in his firm and any member of their staff, qualified or unqualified, so long as on the responsibility of the solicitor or under his supervision; and the accepted charges are correctly applied. In theory the account sets out the whole solicitor input: in practice, as is universally accepted, the time recorded for work falls short of the time actually spent by the solicitor in proportion, principally, to the anxiety generated by the case in all its aspects. In this case it is the Auditor's view that the work which could have been recorded in allowable terms but escaped record or recollection, has been amply covered by the unusually-allowed fee for preparation already referred to: the solicitors are to be considered barred from asserting that further provision should be made on this head, and in effect calling in question the efficiency of the detailed account they have themselves presented.

The Auditor derives minimal assistance from the headings set out in Rule of Court 347 D. With minor variations in detail and wording, these are found in solicitors' charging provisions in Scotland and in England where they are quite ineptly dignified by the nickname "The Seven Pillars of Wisdom". They combine the self-evidently crucial considerations of value and difficulty with relatively unimportant indicia with no necessary bearing on the work required or the level of fee warranted. Their usefulness is more for the Court than the Auditor: the Court sees the end result/

result in the case presented to it at the final hearing and can easily be left uncertain of the solicitor input throughout the preparation of the case. The indicia can usefully be looked at if the Court is otherwise left in doubt and will justify allowance of an additional fee, the amount of which is to be determined by the Auditor to whom the solicitors' input is directly demonstrated.

Neither from R C 347 D nor indeed from any other source can the Auditor derive rules for balancing the relevant considerations: the criteria are not habile for the construction of a purposeful matrix. The Auditor can only seek to achieve a sufficient appreciation of the particular case through the material presented to him and elicited by him and reach a decision by considering that case in its proper charges setting in terms of type, scale and system of charge. In this case the additional fee will be £5,750.

Walter H. Kerr

EDINBURGH
20th August 1987

AUDITOR OF THE COURT OF SESSION

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RUTLAND EXCHANGE No. 304
031 225 2595 Extn. 306

21 AUG 1987

Note by the Auditor
on certain fees incurred to Counsel
in causa

[REDACTED] (ap) v [REDACTED]

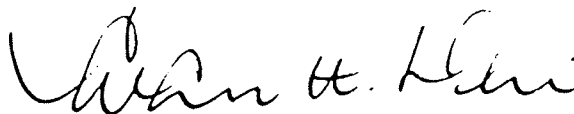
[REDACTED] 37/80/314882/83

In the opinion of the Auditor, where a case is accepted as appropriate for abnormal fees, the determination of the fee for Counsel which in the circumstances is fair and reasonable and consequently proper will take account of broadly the same considerations as applied to the additional fee authorised by the Court for a party's solicitors. For those considerations the Auditor refers to his note on the taxation of solicitors' fees in the present case. He refers to the same note for the importance of the context to the determination of proper fees and to the weight to be attached to the figures proposed to the Auditor for fees submitted to him for taxation.

In this case Counsel and Legal Aid (Scotland) jointly sought taxation of fees payable to Counsel for work over a period of eight months consisting of six consultations, three notes, a joint note, an opinion, and attendance at proof for a period of nineteen days with one additional day when the proof was rendered aborted. At a diet of taxation the Auditor was greatly assisted to an appreciation of the burden borne by Counsel by the submissions of Counsel who set out the difficulties inherent in the case, in handling the material presented and in representing the party concerned. This comprehensive picture made it possible for the Auditor to determine the proper fees payable to Senior Counsel for the whole of that work. This is set out in the attached schedule. At the diet, it was accepted that Junior Counsel should receive fees of approximately two-thirds of those allowed to his Senior. The Auditor has found it most convenient to define the fees submitted to him for determination as those noted in the Faculty Services Limited fee notes indexed with the numbers appearing at the top of the schedules.

Of no assistance whatever to the Auditor are the scraps of information which have subsequently been collected by assiduous inquiries carried out by Senior Counsel: these inquiries will have been successful in making a public spectacle of the fees now under consideration. Two fees were put before the Auditor, presumably with the intention that they should be persuasive. Neither fee had been taxed by the Auditor. In one case Legal Aid (Scotland) agreed to pay to the Dean of Faculty a sum of £12,500 for "a consultation and twenty four days of preparation for an attendance at proof (sic).". That was also a case of some medical difficulty. As/

As the Auditor had no reason to review that case in relation to Counsel's fees, he is not aware of what other fees the Dean received nor of any of the many other factual considerations which he would have taken into account in taxing such a fee. The second fee quoted is of £500 per day allegedly paid to the Vice-Dean of Faculty for his attendance at the proof in this case on the instructions of Legal Advisor to the Scottish Health Board who represented the defenders. It must be immediately apparent that the context in which that fee was sought and paid could scarcely differ more markedly from the context within which the Auditor requires to make his present determination. To the Auditor's knowledge, the Vice-Dean has been acting for the Scottish Health Services for a great many years both as Junior and as Senior Counsel. It is a continuing relationship between Counsel and client, to all intents and purposes as close as that of standing Counsel to a government department. No-one can know what personality and commercial considerations were taken into account by either party to the contract of Counsel's employment there. But the vast gulf between the contexts of the two fees is only the starting point of the total inadequacy of any purposeful comparison between the two.



EDINBURGH
20th August 1987

A R Hardie, Esq., Q.C.
Faculty Services Ltd Notifications of Fee
DE 848600/23,24 and 27

26. 6.86	Consultations Note	£ 150
30. 7.86	Consultation	90
24. 9.86	Consultation	90
30. 9.86	Joint Note	50
3.10.86 (recorded by solicitors as 26. 9.86)	Consultation with expert witness ([REDACTED])	180
3.11.86	Consultation with expert witnesses	150
5.11.86 (recorded by solicitors as 4.11.86)	Consultation with expert witness ([REDACTED]) in Glasgow	180
20.10.86 to 25.11.86	(19 days) Proof (1 day) Proof adjourned	8265 150
3.12.86	Note	50
- 1.87	Joint Opinion	75
18. 2.87	Note	30
		<u>£9460</u>

I A S Peebles, Esq., Advocate
Faculty Services Ltd Notifications of Fee
DE 848600/13,15,19,20,21 and 22

26. 6.86	Consultations Note	£ 100
30. 7.86	Consultation	60
24. 9.86	Consultation	60
30. 9.86	Joint Note	25
3.10.86 (recorded by solicitors as 26. 9.86)	Consultation with expert witness (██████)	120
3.11.86	Consultation with expert witnesses	100
5.11.86 (recorded by solicitors as 4.11.86)	Consultation with expert witness (██████) in Glasgow	120
20.10.86 to 25.11.86	(19 days) Proof	5510
	(1 day) Proof adjourned	100
3.12.86	Note	<u>25</u>
		<u>£6220</u>