

AUDITOR OF THE COURT OF SESSION

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25 AUG 1987

DS & GS

H M Advocate v [REDACTED]

Ref: 86/36/600723/86

H M Advocate v [REDACTED]

Ref: 13/600722/86

At the diet of taxation the Auditor was given a comprehensive review of the combined trial by leading Counsel for [REDACTED] Senior Counsel for [REDACTED] being unable to be present. He was also informed of the approach to the amount of Counsel's fees adopted by Legal Aid (Scotland) then represented by the Legal Aid Central Committee of the Law Society of Scotland.

The three accused were charged with fraudulently obtaining goods to a value of £600,000 by operating, in breach of provisions of the Companies Act, a progression of companies. The documentation was very substantial indeed. The trial ran for 33 full days with a final short day for sentencing. It is impossible from any legal standpoint to reduce a particular case to general propositions: its own special facts will intrude and modify or even distort the application of the most tentative generality. Nonetheless it seems to the Auditor proper to note some of the considerations which he has had in mind, along with the particular facts of this case, in reaching a concluded view on the figures at which Counsel's fees are to be taxed.

Counsel's fees, along with the solicitors charges and outlays, are a claim for remuneration on the agent-and-client, fund paying, basis. The operation of free market forces is pushed into the distance by the imposition of statutory fees upon solicitors and by the less articulated but equally powerful inhibition of Counsel's fees by their acceptance of the Legal Aid ambience. If the market metaphor is apt at all, it is a market where all the traders are captive to the single customer, a monolithic customer whose purse contains only a Treasury-controlled cheque-book.

There is no basis in custom or practice for Counsel claiming or receiving payment of fees for preparation work such as is involved in his familiarising himself with the evidence or the law bearing upon the case, the collating of material or the planning of submissions. Remuneration for such essential activity is built into the fees charged for the production of written material such as pleadings or opinions, for meetings with client and solicitor and specific attendances of other kinds and principally for the presentation of the case in fact and on law to the Court or other tribunal. Indeed that general position was accepted in the hearing before the Auditor in this case, Counsel contending that the specialties of this case justified the necessary departure from the normal approach. The /

The Auditor does not agree that the general rule falls to be set aside here. A suitable increase in Counsel's fees for attendance at the very long trial can take account of all the prior work devoted to consideration of the evidence collected by the Crown and made available by the solicitors: and indeed it was not suggested to the Auditor that any other aspect of the case called for any substantial increase in Counsel's fees for the trial - it was not a case in which the evidence in the course of presentation produced surprise elements or unusual features calling for reappraisal of approach or tactics.

██████████ was the second accused on the indictment. He was an awkward, demanding and vociferous client. Mr Nisbet had seven meetings with him in Barlinnie and Saughton before the trial, the first on 11th June. He was acquitted after trial of all involvement in the company manipulation but he was convicted on other counts, being sentenced to community service. ██████████

██████████ the third accused, pleaded guilty on a negotiated basis. Mr Daiches submitted fees for two consultations only, on 19th September and 23rd October. Mr Nisbet admitted, in answer to direct enquiry by the Auditor, that he did indeed bear the brunt of cross-examination in the interests of both ██████████

██████████ Mr Nisbet and Mr Daiches set down in their contemporaneous Notes of Fee, daily rates for the trial of £220 and £219.50 respectively: at the end of the trial, they claimed supplement to that daily rate - Mr Nisbet of £100 per day and Mr Daiches of £100.50. It was not suggested to the Auditor that the identity in total daily rate proposed was fortuitous. Mr Nisbet submitted that the special circumstances of the case warranted equiparation of his own and Mr Daiches' fees. The Auditor has considered this with particular anxiety. The status of Queen's Counsel and his entitlement to higher fees is not readily to be disregarded. Here Mr Nisbet's case is strong in circumstance. As Counsel would not have brought themselves into competition on this before the Auditor, he can only adduce himself the great experience of Senior Counsel and the fact that he has not had the benefit, in terms of preparation and consideration, which Mr Nisbet must have derived from his long series of consultations. In the Auditor's view, in the present case, the distinction in status must be preserved: in assessing Counsel's fees, he has allowed to Senior Counsel a daily rate which is higher by a token amount.

There may be cases in which Legal Aid (Scotland) is justified in disallowing entirely fees claimed by Counsel for consultations with the accused or with their instructing solicitors but nothing in the papers nor at the diet inclines the Auditor to the view that such a course here is warranted. It/

It is true that the point was not matter of directed discussion but much of the general background set out does bear on the question. The Fund refused to admit a claim for fees for preparation and in this the Auditor has supported them, but in doing so the Auditor had very much in mind that Mr Nisbet was claiming fees for consultations included in each of which there is an element of preparation. The Auditor considers that all the consultations and meetings at the Crown Office should be allowed, but not all at the very full fees proposed by Counsel.

Not more than two or three years ago the Court held, overturning the Auditor, that Junior Counsel in a Court appearance was entitled to two-thirds of the fee receivable by his Senior on the basis that Junior Counsel, whatever his actual contribution, still had his own meed of responsibility. The Auditor had taken the view on the facts of the case that a Junior, quite new to the case, brought in to support a Senior with long acquaintance with the case for a hearing which was agreed between parties to require only two speeches, required neither by any preparation nor any performance in Court the usual two-thirds fee, and allowed wrongly only a reduced fee. In the present case, the contribution of Mr Oatway without any doubt at all entitles him to fees at two-thirds of the rate held proper for his leader in all work in which they were engaged together. The Auditor has taxed his fees at the figure so appropriate.

W. A. H.

EDINBURGH
20th August 1987