

THE SCOTTISH LEGAL AID BOARD

REPORT ON TAXATION

ASSISTED PERSON: [REDACTED] TM

REFERENCE NUMBER: 83/15/705200/87

SOLICITORS: Quinn Martin & Langan

COUNSEL: J A Baird, Advocate

AUDITOR: E H Weir, court of Session

DATE OF TAXATION: 25th July 1988

Please find attached a photocopy of the Report by the Auditor of the Court of Session together with a photocopy of Mr J A Baird, Advocate's claim against the Fund.

In this case Counsel has claimed for a total of £256.50, for work done on the 13th July 1987, which is normally described as a "waiting day". It was felt that a fair and reasonable fee for the work done on this particular day was £206.50, this was arrived at by allowing the waiting day fee in fully of £149.00 and allowing £57.50, to cover the consultation (Counsel was only instructed for this case the day before, Sunday the 12th July). While the sum in dispute is relatively small it was felt that a matter of principle was at stake, in that, the waiting day fee should cover the full day and as the locus inspection took place during normal court hours it was felt that this should not be treated as a separate charge.

As you will see from the Auditor's report he agree with the Department's view.

SOC

25th August 1988

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

RUTLAND EXCHANGE No. 304

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At the request of Faculty Services Ltd. and The Scottish Legal Aid Board, the Auditor has considered the Note of Fee submitted on behalf of Mr. J.A. Baird Advocate to the Board for payment of the Legal Aid (Scotland) Fund. He has perused the substantial body of papers made available to him by the Board. At a diet of taxation he has heard submissions by Mr. Baird and by [REDACTED] on behalf of the Board. The Auditor now taxes at the sum of TWO HUNDRED AND SIX POUNDS AND FIFTY PENCE (£206.50) the whole fees payable to Mr. J.A. Baird for all services performed for his client [REDACTED] on 13th July 1987. To the said fee there will fall to be added VAT at the appropriate rate.

Evan H. Weir

EDINBURGH.

10th August 1988.

NOTE: For the trial set down for Monday 13th June 1987, [REDACTED] solicitor engaged the services of Mr. J.A. Baird, Advocate, who duly attended at the High Court in Paisley. The trial did not proceed and [REDACTED] whose costs were being met by the Legal Aid Fund, became liable to Mr. Baird for what has come to be known as a Waiting Day Fee in the established sum of £149.00.

A client who has so reserved the time of Counsel and in the event has not required his services in Court, cannot be heard to disclaim responsibility for that fee on the grounds that Counsel has put some of the time, for the loss of which he is compensated by the Waiting Day fee, to fee-earning purpose in the service of strangers, but the Waiting Day fee remains sufficiently true to its origin in the engagement of Counsel's time to bar Counsel from seeking on other grounds to charge the same client fees for use of that same time. In the instant case Mr. Baird claimed from Mr. Mahmood certain fees for a consultation and a visit to the locus, both of which he accepted were carried out within the time deemed to be covered by the Waiting Day fee, namely normal Court hours and indeed in this case, probably before the hour at which it was known for certain that the case would not proceed at all on/

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

on the originally appointed day. The Scottish Legal Aid Board declined to pay those fees as claimed and the matter was referred to the Auditor.

The Auditor was surprised to learn that Counsel instructed for a trial on indictment only received the papers for the first time, having just returned from holiday, by delivery to his home on the immediately preceding day, Sunday 12th June, but he refers to the fact now only as demonstrating that the consultation and the visit to the locus were required and possibly even clamantly necessary. Mr. Baird's argument, firstly and indeed finally, was that the fees he claimed should be allowed as the work, if done on other days for which [redacted] was not paying a Waiting Day fee, would have entitled him to higher fees. He sought to derive a degree of support for his claim by pointing to his own demonstrated sense of responsibility in doing this work on this day when, in theory at least, he could have arranged to do the work on other days at greater cost to the Fund.

As it is the duty of Counsel as well as of solicitors to serve their clients and as service involves having reasonable regard to the burden of costs imposed upon them, the Auditor has never found it of assistance when determining a proper fee for known work as it was actually done, to have regard to what in other circumstances might have been the higher proper cost of roughly similar services. If the proper cost of doing the work as it was in fact done, is less than it might have been otherwise, it is the duty of Counsel to do it in that way; and it is not proper for him any more than it is proper for a solicitor to seek to justify his claim by reference to the consequences for the client of his failing to provide the best service that could practicably be given. The argument has been often put to the Auditor and has never been sustained by him: he will not now sustain it as presented by Mr. Baird.

Basically the issue is very simple indeed. [redacted] engaged Mr. Baird for the day but did not require his services for the purpose intended. [redacted] by practice of the profession, still has to pay for Counsel's day. So far as Mr. Mahmood is concerned Counsel's time has been paid for: in a sense it has become his property. [redacted] salvages something from his loss by having some time he has paid for devoted to a consultation and a visit to the locus. He is not to be mulcted by being required to pay twice for the same time, once as compensation to Counsel for the loss of it and once as fees to Counsel for the use of it, albeit for a differently-named service.

But reasonableness blurs the sharp edges of principle, and here there is evinced on each side a wish to be reasonable. Mr. Baird has restricted the fees sought below the figures accepted in other circumstances. The Board acknowledges that the Waiting Day fee provides for Counsel's time only at a cut rate no doubt in recognition of the fact that Counsel is not required in that time to exercise his forensic skills. The Board offered to pay to Counsel £57.50 in addition to the £149.00. The Auditor considers that that offer fairly meets the situation and will tax Counsel's fees for 13th June at that total of £206.50.

In preferring the greater restriction involved in the offer by the Board, the Auditor has looked at the position of the client which generally receives scant, if any, consideration when questions of fees to Counsel are in issue with the Board. On the morning of 13th June, [redacted] met for the first time/

time the Counsel who was to defend him that very morning in the trial on an indictment on which he was later initially sentenced to five years imprisonment, a Counsel furthermore who had had the papers in his possession for no more than twenty-four hours. Whatever the reason for that eminently unsatisfactory position, there is no warrant for a generous approach to the fees Counsel might claim as he took such steps as were open to him at the best inadequately to make up for the deficiency in the service as a whole. A waiting day with a client on bail will usually involve some face-to-face contact between Counsel and the client in the Court building: but seldom will Counsel dub that as a consultation and claim a special fee for it. Likewise if a locus material to the defence can be seen by nipping quickly down the road with solicitor and client, or indeed without them, that is again scarcely an exercise warranting a separate fee. Indeed in the instant case, it may be that these separate additional fees are being sought only because there had been no prior consultation and no earlier opportunity for a meaningful visit to the locus: if that be the proper view, we have the Gilbertian situation whereby the client is being required to pay more fees, and Counsel claims entitlement to receive more fees, for the hours of the waiting day, simply because the services the client has received from Counsel hitherto are poorer than they should have been. In these circumstances the premium offered by the Board is fully sufficient.

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