

*Basis of calculating counsel's fees.*

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

RUTLAND EXCHANGE No. 304

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On the joint request of Mr. H. S. Kerrigan, Advocate, and Miss Frances J. McMenamin, Advocate, and of The Scottish Legal Aid Board, the Auditor has considered the fees proposed by Counsel in the light of the whole material put before him by the parties. Counsel were unable to attend the diet appointed for the taxation: there the position of the Board was set out in brief outline. The Auditor now taxes at the figures undernoted the whole fees due to leading Counsel and Junior Counsel as fair and reasonable remuneration to them for their whole work in the representation of [REDACTED] as second accused on the two indictments at the instance of Her Majesty's Advocate respectively deserted on 30th March 1987 and tried in the High Court at Kilmarnock on 19th October 1987 and following days and advice to their client on the prospects of Appeal thereafter. The fees as taxed are not subject to any deduction on payment other than to take account of payments already made by the Board towards the whole fees, but Value Added Tax at the appropriate rate will fall to be paid additionally.

H. S. Kerrigan, Esq., Advocate	£15,625.00
Miss Frances J. McMenamin, Advocate	10,220.00

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EDINBURGH

27th April 1990.

NOTE: By indictment [REDACTED] were charged with conspiracy to defraud H.M. Customs & Excise of £112,387.85 or alternatively of embezzling that sum, and with the perpetration of fraud on individuals in the sums of £7,265.00 and £10,937.30. The business of the firm ran in the name of [REDACTED] was an undischarged bankrupt but it was accepted on all hands that the conduct and control of the business was wholly in [REDACTED] hands. The trial ran in the High Court at Kilmarnock for thirty-three days, terminating with an arranged plea by [REDACTED] and the acquittal of his wife. The presiding judge granted the common certification in terms of length, complexity and difficulty. An earlier indictment had been grumblingly deserted by the Crown when it had to accept that its case, like the defence of the second accused, was materially affected by the production by him from his repositories /

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

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repositories only days before the proposed trial of a substantial body of business records which had not been impounded by the Customs & Excise investigators. The revised indictment on which the case went to trial proceeded on new schedules prepared to take account of the additional documentation produced. There can be no doubt about the complexity of the alleged fraud/embezzlement and the business records of the firm by which it was to be evidenced; and equally no doubt about the difficulty which Counsel for [REDACTED] encountered with him personally from the outset. These two aspects are set out eloquently and at length by leading Counsel, particularly in his representations in support of his proposed fees and the consequential fees sought by his Junior.

Leading Counsel proposed fees totalling £21,020.00. For the most part specification was given of each item of work and its duration. An indication was given to the Auditor in a written submission of hourly rates used in the calculation of fees for formal consultation and preparation before and during the trial. It was explained that incidental conferences with the accused and the solicitors before and after court hours were absorbed into a standard daily rate adjusted to make allowance for them and for variations in the length of the court day. No separate charges were made for incidental notes. Each item of work taken by itself could no doubt be fully justified; and the fee proposed for any one piece of work, taken in isolation, would no doubt readily withstand challenge by any wealthy client with a substantial interest at stake. But in determining a fair and reasonable total charge on public funds, it is not appropriate to disregard the fact that appearances in court charged at £13,325.00 were supplemented by fees for some 43 hours of consultations in Glasgow, 64 hours of consultations at leading Counsel's home and 66 hours of preparation. The total so brought out the Auditor finds quite unacceptable: it cannot be sustained as a charge against the Legal Aid Fund which it has never been proper to regard as an ever-consenting client prepared to apply unlimited funds. The duty owed to the common fund by Counsel and solicitors is not an overriding duty but its interest must constantly be regarded as underlying the service to the client. In determining what constitutes proper, fair and reasonable remuneration for Counsel the Auditor has accepted, so far as appropriate, the work done as detailed, and has made due allowance for the demonstrated complexity and difficulty of the case. Although his assessment differs materially from the total of the fees proposed by Counsel, it proceeds upon the same detailed factual basis, giving weight additionally to the fact that all the items formed parts of a single whole. The Auditor considers that like solicitors' charges, Counsel's fees for a case should be subjected to a general test of whether they are fair and reasonable: they should be fixed as a matter of balanced judgment and not of arithmetical calculation.

In reaching his conclusion the Auditor has, after the most anxious deliberation, left entirely out of account the strong impression he has formed from the whole picture of the case presented to him, namely that leading Counsel did not exercise adequate control over the preparation of the representation of the accused. It is for leading Counsel to direct the other members of the team (in this case his learned Junior and his very experienced instructing agents) to their particular areas of concern and finally to bring together their various contributions. There was indeed in this case a vast body of documentation but they were the business records of the accused himself: the review and checking of the whole should have been carried out sufficiently by the solicitors under the guidance of the accused their creator and so reported to Counsel as to enable them to focus /

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focus their attention and devote their time to documents of a type and particular documents which were deemed to be crucial. There was certainly much material for leading Counsel to review with the accused but if properly managed by the solicitors and Junior Counsel it should not have required of leading Counsel the thirty-seven hours of consultation within five days - immensely long sessions at leading Counsel's home - or seventy hours of consultation altogether before desertion of the first indictment. The line of defence as explained by Counsel and their account of developments leading to the plea altered on the thirty-third day of the trial leave the Auditor surprised that the fatal weakness of the position of the accused was not recognised and acted upon earlier. Making all possible allowance for the extreme peculiarities of the case, the Auditor cannot accept that it was managed by defence Counsel with the expertise reasonably to be expected or that sufficient care was taken by leading Counsel to devolve appropriate areas of responsibility on to other members of the defence team.

*W. H. G.*