

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

RUTLAND EXCHANGE No. 304

031 225 2595 Extn. 309

H M ADVOCATE v [REDACTED] AB

COUNSEL'S FEES

EDINBURGH. 17th March 1993.

Mr. I. R. Hamilton, Q.C., was instructed as Senior Counsel for [REDACTED] in his defence to an indictment listed for trial at the High Court, Edinburgh, on Thursday, 10th October 1991. The Crown was, however, unable to commence the trial on that day, nor on Friday 11th October, nor on the following Monday 14th October, but did call the indictment on Tuesday, 15th October 1991.

Mr. Hamilton's engagement as Senior Counsel for [REDACTED] had been sanctioned by the Scottish Legal Aid Board to whom Mr. Hamilton in due course submitted a Note of his fees for his services to [REDACTED]. One such Fee was in respect of what was described therein as three "waiting days" namely 10th, 11th and 14th October 1991, at a charge of £200 per day. The Board refused to pay these fees and the matter was referred to the Auditor for his decision.

A diet of taxation was held on 4th November 1992 when Mr. Hamilton, Q.C., was represented by his Clerk and the Scottish Legal Aid Board by two members of its Taxation Department.

At the outset of the diet the Auditor was informed that Mr. Hamilton was in fact claiming for only two waiting days since, although he had attended at the High Court on Monday 14th October when he was told that the trial would not commence on that day, he was able to make use of the afternoon of that day for other work. He apparently had no other work which he could do on either of the two previous days when he attended Court only to be told on each occasion that the indictment would not be called that day.

It was explained to the Auditor that the Board in refusing payment of these fees had merely followed its practice and that of its predecessor the Legal Aid Central Committee, which operated the Legal Aid Scheme under the aegis of The Law Society of Scotland until the Board took over that responsibility

in 1986. It was explained to the Auditor that the Board's practice was to pay Counsel appearing in all High Court trials outwith Edinburgh two-thirds of the appropriate Daily Trial Fee, but that it did not make any such payments to Counsel in trials set down for trial in the High Court in Edinburgh. It was also explained that the practice had been recognised for many years and that the present claim was "novel."

The Board was of the view that, as Parliament House was the recognised place of business of an advocate, he would be able to do other work in the event of his not being required on a particular day.

It was submitted on behalf of Counsel that he had a large criminal practice and lived and substantially worked outside Edinburgh. He had attended the High Court on each of the three days when he was told that the case would not be taken on each of those days and it was only on the last of the three days that he had been able to arrange to hold a consultation on the afternoon of that day.

The Auditor was informed that Mr. Hamilton had had to return papers in respect of a case allocated for trial at a High Court sitting in Forfar on Monday 14th October, having been directed to take [REDACTED] case in preference. It was accepted that Junior Counsel had not charged a fee for any of the three days on which the trial had not proceeded but it was explained that that may have been because he had been able to undertake other work on those days or had simply accepted what was said to be the practice.

Neither party was at that time able to draw to the Auditor's attention any decisions of previous Auditors on the matter.

The matter was left to the Auditor for his decision.

After giving the matter some consideration, the Auditor decided that he wished to hear parties further and he wrote to each of them on 23rd November 1992 raising a number of questions which he would wish to discuss at a further diet of taxation.

For sake of completeness the Auditor now quotes the more important parts of that letter:

"The Auditor has been required by virtue of Regulation 11 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, as amended, to tax a fee of £200 per day claimed by Senior Counsel in respect of two "waiting days" in the High Court sitting in Edinburgh in October 1991 when the Trial per day for Senior Counsel was prescribed at £300.

A "waiting day" is understood to be a day for which a trial has been set down but which does not for any reason proceed on that day, and on which day Counsel has no other Court appearances.

The Auditor has given consideration to the submissions made to him on behalf of parties at the diet and, as he wishes to be satisfied that he is taking into account all relevant matters before reaching a decision, he considers it necessary to hold a further diet of taxation so that he may be addressed on the questions raised by him at the end of this letter.

The Auditor has in mind the following:

1. that all payment of fees to Counsel acting under the provisions of the Legal Aid (Scotland) Act, 1986, fall to be made in terms of Section 33(1) out of the Scottish Legal Aid Fund in accordance with Section 4(2)(a).
2. that Section 33(2) authorises the Secretary of State to make, by way of Regulations, such provisions as seem to him appropriate in respect of the fees and outlays of solicitor and counsel.
3. that by virtue of Section 33 the Secretary of State has made the above mentioned Regulations, Regulation 10(1) of which is in the following terms -

"Counsel shall be allowed such fee as appears to the auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy.

and Schedule 2 thereof is headed -

"FEES OF COUNSEL"

which is immediately followed by four numbered paragraphs, Numbers 1, 2 and 4 of which read as follows -

- "1. Subject to the following provisions of this Schedule, fees shall be calculated in accordance with the Table of Fees in this Schedule.
2. Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.
4. The auditor shall have power to reduce any fee set out in the Table of Fees in this Schedule where he is satisfied that, because of any particular circumstances, a reduced fee is sufficient to provide reasonable reumuneration for the work."

The numbered paragraphs are followed by two chapters, "Chapter 1 - Junior Counsel" and "Chapter 2 - Senior Counsel". Each chapter contains seven items describing mutatis mutandis the various activities performed respectively by Junior and Senior Counsel in criminal cases and the prescribed fees therefor.

Item 1 in both Chapters is in identical terms (apart from the prescribed fees) and reads as follows:

- "1. Trial per day
 - (a) In Edinburgh
 - (b) In Glasgow
 - (c) Elsewhere within 60 miles journey by road from Edinburgh
 - (d) In Aberdeen, Inverness or Dumfries
 - (e) Elsewhere beyond 60 miles journey by road from Edinburgh

Such fee as the auditor considers appropriate with regard to the journey involved and the level of fees prescribed in this paragraph.

The Auditor would wish to be addressed on the following points:

1. Is a claim for remuneration in respect of a "waiting day" a claim for work **actually** and reasonably done in terms of Regulation 10(1)? (emphasis added)
2. If the answer to question one is in the affirmative and a "waiting day" is a trial day, by what statutory authority is a fee (1) currently paid at less than the appropriate **full** rate and (2) not paid in respect of sittings of the High Court in Edinburgh?
3. If a "waiting day" is not a trial day, is it "an item of work" for which no fee is prescribed by the Table of Fees and for which a fee falls to be allowed by the Auditor in terms of Paragraph 2 of the Table?"

A further diet of taxation was held on 24th February 1993 when Mr. Hamilton, Q.C., was represented by Mr. Andrew Hardie, Q.C., and the Scottish Legal Aid Board by Mr. Angus Stewart, Q.C.

Just prior to the second diet of taxation the Scottish Legal Aid Board sent to the Auditor a copy of a report of taxation by his predecessor on the subject of "waiting days" which arose in *H M Advocate v [REDACTED]*.^{JW} The Auditor was not previously aware of that report nor had the Board recollected it at the time of the first diet of taxation. A copy of the report, which is dated 20th April 1990, was given to Mr Hardie at the outset of the second diet of taxation.

It is noted that the Auditor in his report in the [REDACTED] case records:

"By long-established practice, accepted by members of the Faculty, the Legal Aid fund has paid no fees to Counsel for days waiting in the High Court when it sits in Edinburgh, although such fees are always allowed for sittings outside the Capital".

The Auditor followed the practice and refused to allow any fees to Counsel for "waiting days".

not their professional day is gone".

Although these views were expressed in a civil Jury Trial which settled on the trial day before the Jury was empanelled, Mr. Hardie submitted that they were equally applicable to a criminal trial.

Mr. Hardie emphasised that, Mr. Hamilton having accepted instructions to represent ██████████, could not accept instructions from anyone else for that day, that he had had to prepare for the trial, and that he had had to turn up on the day to await the Crown's decision as to when it would have the Indictment called. Mr. Hardie submitted, therefore, that Mr Hamilton was entitled to the then full Trial day fee of £300, and the Auditor was invited to allow that fee for each of the two days.

Mr. Stewart in reply pointed out that Mr Hamilton's Note of Fee described the item of work for which the fee was claimed as a "waiting day" and that was not an item of work within the terms of the Regulations.

In respect of payments to Counsel Mr Stewart defined a "Trial Day" as one when Counsel was necessarily at the Court, and a "waiting day" as one when Counsel required to attend and spend the day at a court **outwith Edinburgh**, (emphasis added) the trial not proceeding and Counsel undertaking no other work and making no other use of that day.

With regard to the phrase "work actually done" Mr Stewart drew attention to the fact that in the relevant Regulations relating to solicitors [see, for example, Regulation 7(2) (a) and (b)] there is specific provision for his appearance in court, time necessarily spent waiting, and travel to a Court not being a Court in the town where he has his **place of business** (emphasis added), whereas the "block fee" prescribed for Counsel is intended to cover such items. ^{waiting} "Work actually done" in the context of the Regulation therefore included ~~work~~ and travel only outwith Edinburgh, Parliament House being traditionally regarded as Counsel's place of business. The Auditor understood from Mr. Stewart's submission that it was to be assumed that Counsel had other work which he could do when in Parliament House and not in Court, and it would be for Counsel to demonstrate to the Auditor that he had made no other use of the day. The Auditor understands that he would be expected to be inquisitorial in his approach to being satisfied on that matter.

Mr. Stewart submitted that, as there is no item in the Table of Fees for "preparation", "preparation" is regarded as being subsumed in the daily Trial fee and it is to be assumed that the same Counsel would be available for a following day and would not have to prepare afresh.

So far as the Board's practice of paying, for a "waiting day", in cases outwith Edinburgh only two-thirds of the trial fee, Mr Stewart explained that this was in recognition of Counsel's travelling expenses and subsistence for which items the Regulations made specific provision for solicitors to claim in appropriate circumstances over and above their fees for appearance in Court.

Mr. Hardie, in reply, accepted Mr Stewart's definition of a "waiting day", but only under deletion of the words "outwith Edinburgh". He submitted that it was in effect and should be treated as a "Trial Day." He also accepted that Edinburgh is currently regarded as an Advocate's place of business,

It was explained that if Mr. Stewart's arguments were accepted in respect of the Board's practice pertaining to Edinburgh it could result in a Counsel receiving no remuneration although he had prepared for a trial attended at Court, but for some reason the trial never started, or the Indictment was called on a later date for which that Counsel was unable to accept instructions to appear.

The Auditor notes that his predecessor in the [REDACTED] case, although following the practice, expressed unease about the continuance of it having regard to the significant changes which he mentioned. It would not appear that he was asked to consider any statutory provisions.

The Board in administering the Legal Aid scheme can pay only what it is authorised to pay but cannot refuse to pay what it is obliged to pay. The Regulations and Schedule make no reference to "a waiting day" as such, nor is there specific provision for any period of time less than a Trial day and the Board's practice of paying two-thirds of the trial fee in all cases outwith Edinburgh where trials do not proceed on the day is not provided for by the Regulations or Schedule. // The numbered paragraphs at the beginning of the Schedule vest in the Auditor alone, power inter alia to allow a fee for any item of work not prescribed in the Schedule or to reduce any fee set out in the Table of Fees, where he considers that to be justified.

The payment of two-thirds of the "out of Edinburgh Trial fee" would appear to be arbitrary since the travel and subsistence costs of attending a sitting of the High Court in Glasgow are considerably less than those for, say, Aberdeen or Inverness.

The Auditor is of opinion that, in order to justify payments for "waiting days" in cases outwith Edinburgh, the Board must regard the activity as an item of work. The only item of work that it can be, having regard to the various items specified in the Table of Fees, is a Trial day, and on that basis the appropriate fee is payable wherever the sitting of the High Court takes place. To regard it as otherwise and follow the present practice, results, for example, in Counsel instructed for a sitting of the High Court in Edinburgh receiving no remuneration for his work done in preparation either because the Indictment is never called or he is not available for the later date when it is called. Such a conclusion is not consonant with a legal aid scheme which recognises that those providing services under it are entitled to some remuneration for their services.

The Auditor considers that he can derive some support for his view that a "waiting day" in Edinburgh falls to be remunerated since Mr. Stewart's subordinate argument appears to recognise that Counsel could be paid for such a day if the Auditor were satisfied to the high standard posited.

The Auditor recognises that, if a Counsel claims payment for attendance at a trial at a sitting of the High Court wherever held, and the trial does not proceed, he may not be entitled to the full fee, or any fee, if he made other use of the day. The Board in its operation of the scheme may be entitled to require Counsel to sign a certificate in appropriate terms. If other work was undertaken then no doubt a proper fee could be agreed between Counsel and the Board failing which the Auditor has power, as noted, to reduce the fee claimed if the circumstances justify his doing so.

Having regard to the views expressed above, the Auditor is of opinion that Mr. Hamilton is entitled to the full day's trial fee of £300.00 for each of the two days in which the Auditor has been informed Mr. Hamilton was not engaged in other work.

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