

DECISION OF AUDITOR – COUNSELS' FEES – CRIMINAL

DATE OF DECISION	09.05.94
NAME OF CASE	HMA –V- [REDACTED] M G
CASE TYPE	Not Known – Glasgow High Court
AUDITOR	J Haldane Tait, Court of Session
COUNSEL/SOLICITOR ADVOCATE	JC
AMOUNT(S) AWARDED	NIL
FEATURES	<p>Trial commenced on 29.09.92 when accused pled guilty. Sentence deferred until end of co-accused's trial.</p> <p>JC claimed fees for 5 waiting days.</p> <p>Board accepted attendance at court on 06.10.04 where plea did not proceed and offered $\frac{2}{3}$^{rds} of the basic trial fee which was accepted by JC.</p> <p>On the other days, JC did not attend court; he was on "standby" doing other work at Glasgow University Library.</p> <p>The Auditor concluded that as he did not attend at court on any of these days, no work was actually done by him and no payment could be made.</p>

for info

THE SCOTTISH LEGAL AID BOARD

To: [redacted]
Assistant Manager

From: [redacted]
Board Solicitor
Room No. T10a
Ext. No. 277

Ref: [redacted]

Date: 27 April 1994

HMS -v- [redacted] MG
TAXATION ON WAITING DAYS

I attended the diet of taxation, as you are aware, on Monday 25 April 1994. Adam Ardrey was present in person. At the start of the taxation I confirmed my understanding that Mr Ardrey did actually appear on the fifth day when he was advised that the jury would shortly be going out to consider their verdict. Accordingly, I offered two thirds of the daily rate and this was accepted by counsel.

As regards the 'four waiting days' remaining, the position adopted by the Board was that they were not waiting days at all. Mr Ardrey had done no 'work' in respect of the case of HMA -v- [redacted] on any of the days in question. Further, according to Lord Coulsfield, the auditor must consider whether work was carried out and, if so, what reasonable remuneration would be. The argument was advanced that it would not be reasonable to remunerate counsel at all.

MG

It actually transpired that counsel had spent the time in the University library doing written work and it was put to the auditor that 'other work' included not just attendance at court but all other remunerative employment.

Mr Ardrey was fairly straight down the middle as regards his arguments. He assured the auditor that he had nothing to hide and that his understanding of 'work' would be court work and that if he had simply attended court at the start of each day then he would have been entitled to remuneration. I said that this was not the case - counsel must attend court with the reasonable hope and expectation of there being business for him to perform. This was not the case.

I am quietly confident as to the outcome although one can never tell with the Court of Session Auditor.

I have retained all the papers meantime pending receipt of the auditor's decision.



AUDITOR OF THE COURT OF SESSION

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REPORT

ON

HM ADVOCATE v. [REDACTED] M G

Re. COUNSEL'S FEES

EDINBURGH. 9th May 1994. A dispute having arisen between the Scottish Legal Aid Board ('the Board') and Mr Adam Ardrey, Advocate, in the matter of certain fees claimed by Mr Ardrey the Auditor, in virtue of the provisions of Regulation 11(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, held a diet of taxation on 24th April 1994.

Mr Ardrey was instructed as Counsel for legally-aided [REDACTED] in his defence to an Indictment against him and others at the High Court, Glasgow. The trial commenced on 29th September 1992 on which day Mr Ardrey tendered a plea of guilty on behalf of [REDACTED]. However, as the other accused maintained their pleas of not guilty, sentence on [REDACTED] was deferred and Mr Ardrey was excused from further attendance at Court until the end of the trial.

Mr Ardrey informed the Auditor that he did not attend at the trial again until 6th October, having been informed the previous day that the trial might finish on the morrow. In fact, however, the Court was unable to proceed to sentence in respect of Mr Ardrey's client until 7th October.

Mr Ardrey claimed fees for five waiting days, namely 30th September and 1st, 2nd, 5th and 6th October which the Board have declined to pay. In the course of the taxation the Board acknowledged Mr Ardrey's attendance at Court on 6th October and stated that the Board would be prepared to pay him two-thirds of the basic trial fee for that day which was acceptable to Mr Ardrey. The Board, however, was not prepared to make any payments to

Mr Ardrey in respect of the other four days. The Board submitted that Mr Ardrey not having been at Court on any of these days, which he acknowledged, was not entitled to any payment for these days.

Mr Ardrey informed the Auditor that he had spent these four days in Glasgow University Library waiting to be contacted whenever the Advocate-Depute considered that his attendance was required. Mr Ardrey kept in touch by telephone with the prosecuting Advocate-Depute as to the progress of the trial and it was as a result of such a telephone enquiry that Mr Ardrey attended Court on 6th October ready to make a plea in mitigation on behalf of his client, although, as already mentioned, circumstances delayed his being able to do so until the following day.

Mr Ardrey, while acknowledging that he had not attended in person at Court on these four days, emphasised that he had had to travel to Glasgow to be in readiness to appear for his client at the conclusion of the trial, which was an unpredictable event. Furthermore he was not free to accept instructions to appear in another Court on these days, he had not received any such instructions, and he had not done any other Court work. He accepted that he was probably working on other papers while waiting at Glasgow University Library, which location facilitated his attendance at Court at much shorter notice than would have been possible if he had remained in Edinburgh, which is currently regarded as an Advocate's place of business. See HM Advocate v. Birrell 1994 S.L.T. 480 at 483 A-B.

In reply [REDACTED] for the Board, submitted that the Auditor could not consider these four days to be waiting days, there having been no actual attendances at Court and no work actually done in the case on any of these days; even if Mr Ardrey had attended on any of these days, the Board would still have refused to make payment on the basis that there was, in the circumstances, no need for him to attend and that, having regard to due economy, any attendance would have been unnecessary. [REDACTED] further submitted that performing any other work was not confined to work by Counsel in Court.

The Auditor has had occasion to consider waiting days, on which there had been no reported judicial ruling until HM Advocate v. Birrell supra. In that case the Court at page 484 I-K stated:

"In my view, in all the circumstances, the Auditor is entitled to regard **attendance** (emphasis added by the Auditor) at Court in readiness to conduct a trial which does not in fact proceed as the performance of work, whether that attendance takes place in Edinburgh or elsewhere. When counsel so attends, he makes himself available and is prepared to devote the whole day to the conduct of the trial and, in my view, by doing so he can properly be regarded as performing work. It may be added that, in practice, the readiness of counsel to attend on a day on which the case may be called but without the certainty that it will be called may be a useful contribution to the organisation of the business of the Court in criminal matters. Since, however, counsel does not actually conduct the case on a waiting day, it can reasonably be regarded as appropriate that the full fee laid down in the table for a trial day should not be paid. While counsel does not, ex hypothesi, undertake other remunerative work on such a day, he is not required to expend the effort necessary for the conduct of a trial and he does have the time available for his own purposes. The appropriate fee must depend upon the precise circumstances of the case."

Regulation 10(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, as amended, provides that:

"10.-(1) 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."

The Auditor having regard to the terms of the Regulation refuses to allow fees for Mr Ardrey, as claimed, in respect of the four days, on the ground that, as he did not attend at Court on any of these days, no work was actually done by him in the case on these days.



In view of the above decision it is not necessary for the Auditor to express any view on the Board's subordinate submission that even if Mr Ardrey had actually attended Court on any of these days no fee would be payable.

A handwritten signature in black ink, appearing to read 'M. D. ...', written in a cursive style.

AUDITOR OF THE COURT OF SESSION