

AUDITOR OF THE COURT OF SESSION

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NOTE

re

FEE for JOHN MAYER ESQ ADVOCATE

SM in causa

██████████, residing at ██████████
PURSUER

against

(FIRST) THE ROYAL BANK OF SCOTLAND PLC, a Company incorporated under the Companies Acts and having its seat at 42 St Andrew Square, Edinburgh; and (SECOND) ██████████, residing at ██████████ M

DEFENDERS

EDINBURGH. 30th January 1997

The Auditor has been requested in terms of Regulation 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ("The Regulations") to tax the amount of the fee claimed by John Mayer Esq., Advocate, Junior Counsel for ██████████, in respect of Counsel's work of preparation for and conduct of a Procedure Roll debate on 4th and 5th January 1996.

The Scottish Legal Aid Board (the Board) was represented at the Diet of Taxation by ██████████ and ██████████. Mr. Mayer appeared personally.

The Diet of Taxation had been necessary because the Board had not been prepared to accept the fee of £950.00 per day for each of two days in which Counsel had been engaged with Senior Counsel in the conduct of a Procedure Roll debate.

In order to appreciate fully the increased fees claimed it is necessary to set out succinctly the subject matter and issues arising.

The Auditor J. Haldane Tait, S.S.C.

Principal Clerk Mrs Janet P. Buck

BACKGROUND

On 27th July 1994 Mrs. [REDACTED] raised an action of payment in the Court of Session against the Royal Bank of Scotland PLC on the grounds that the Bank was in breach of her arrestment and had allowed [REDACTED], the second defender, to withdraw arrested funds to her loss.

When this action was raised, [REDACTED] had an action of divorce depending in Paisley Sheriff Court in which she craved, inter alia, payment of a capital sum of £20,000, although at the outset of the Procedure Roll hearing it fell to be restricted to £1,500.

[REDACTED] stated that on 21 October 1992 in virtue of a warrant granted by the Sheriff at Paisley she had arrested £21,000 in the hands of the Bank on the dependence of the divorce action. On 22 or 23 October 1992 [REDACTED] had effected a transfer of £7,000 from an account with the Bank at their branch at St Helier, Jersey, to an account at their branch at Moncrieff Street, Paisley. On 23 October he withdrew £8,000 from the Paisley account. The Bank facilitated this withdrawal, when they knew or ought to have known that that sum was the subject of an arrestment. The Bank admitted these facts.

[REDACTED] claimed that by allowing [REDACTED] to withdraw funds from the Paisley account the Bank were in breach of the arrestment and thereby contravened the Breach of Arrestment Act 1581 (c.23).

The Bank, however, plead two defences to the action on the merits. First, that at the date of the arrestment the account of [REDACTED] was at their branch in St Helier, Jersey; that the relationship between them and [REDACTED] as to that account was governed by the law of Jersey; that they had a duty to repay the balance at credit of the account only at that branch; and that accordingly their obligation to account was not attached by the arrestment. Second, the Bank claimed that,

assuming that the arrestment was effective, the indebtedness of [REDACTED] to them at the date of the arrestment exceeded any sums held by them to his credit. They therefore had no duty to account.

In consequence of a number of preliminary pleas for the Bank, including one that the action was incompetent (sic.) because the Act 1581 c.23 on which it was founded had been impliedly repealed by desuetude so far as it related to breach of arrestment, two days for a Procedure Roll hearing were allocated and took place on 4th and 5th January 1996, although there was some delay at the outset of the hearing in respect of a necessary adjustment to the Pursuer's pleadings which the Lord Ordinary noted "was of considerable significance" and which at the end of the day resulted in a finding of no expenses due or by.

In advising the case on 4th April 1996 the Court stated:-

"The Act of 1581 has been amended by the Statute Law Revision (Scotland) Act 1906 ("the 1906 Act") and the Statute Law Revision (Scotland) Act 1964 ("the 1964 Act").

In its original form the Act provided that those convicted of deforcement or of breaking of arrestments should be punished by escheat of their moveable goods and by the punishment of their persons. The 1906 Act deleted the preamble and the provisions relating to alienations made in defraud of creditors. (Sched.1) and gave the Act the short title "Breach of Arrestment Act 1581" (Sched.2).

The amendments made by the 1964 Act reflected the abolition of the penalty of escheat by the Ward Holdings Abolition Act 1746 (s.11). On the other hand the Acts of 1906 and 1964 left intact the provision relating to "punishment of thair personis". These words were interpreted to mean corporal punishment which by the nineteenth century had become an obsolete sanction.

The submission for the Bank was that the Act of 1581 was in desuetude in respect of breach of arrestment but that it remains in force in respect of deforcement.

The Act 1581 c.23, being pre-Union legislation, is capable of being impliedly repealed by desuetude and since it deals with a number of severable matters, it is capable of being in desuetude in respect of any one of those matters.

A number of general principles of desuetude apply to this case.

- (1) A party who maintains that a statute is in desuetude bears the onus of proof.
- (2) For desuetude to be established there must be a considerable period not merely of neglect but of contrary usage of such a character as to indicate that the statute is out of keeping with modern conditions.
- (3) In the court's decision on a question of desuetude the effect, if any, of the Statute Law Revision (Scotland) Acts is an important consideration.
- (4) The question may be decided on the pleadings, but the court may remit it to proof."

Applying these general principles, the Court considered that the argument for desuetude failed in this case and allowed a proof.

The Auditor, having narrated briefly the circumstances leading up to the Procedure Roll Debate, and before addressing the fee claimed by Counsel, considers it appropriate to refer to the relevant parts of the Regulations which relate to fees payable to Counsel in the Court of Session, which are as follows:-

"FEES ALLOWABLE TO COUNSEL

Paragraph 9 Subject to the provisions of regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

Paragraph 10 Counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4.

Schedule 4

Fees of Counsel for proceedings in the Court of Session

1. Subject to the following provisions of this Schedule, the fees of counsel and of solicitor-advocates shall be calculated in accordance with the Table of Fees in this Schedule

The Table of Fees prescribes a fee of £182.80 per day for Junior Counsel appearing at a Procedure Roll with Senior Counsel.

Paragraph 4 of the Schedule provides:-

"The auditor shall have power to increase any fee set out in the Table of Fees in this Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances such an increase is necessary to provide reasonable remuneration for the work."

Counsel in submitting that the fee claimed of £950.00 per day was a reasonable one having regard to his whole work including the extent of preparation and the novelty and general importance of the questions raised for legal, commercial and international banking practice. There had been no reported decisions of assistance in respect of the terms of the Breach of Arrestment Act 1581 (c.23) the original title of which reads "Anent deforcementis breking of arreistmentis and alienationis maid in

defraud of creditouris" and the provisions contained therein are also in the old Scots tongue.

Preparation for the Procedure Roll hearing had involved very extensive research into early decisions of the Court, consideration of the writings of institutional writers and modern commentators and interpretation of various Acts of Parliament subsequent to the Act of 1581, and the applicability of the Statute to international Banking Law.

The Board in submitting that the fee claimed was excessive stated:-

"The Board has not been persuaded that the preparation involved in this Case was so exceptionally removed from the ordinary or run of the mill case to justify the fees claimed by [both] Junior [and Senior] Counsel."

FEES CLAIMED

It is appropriate to record that at the outset of the diet the fees of Senior Counsel for his work in the Procedure Roll hearing, submitted for taxation along with Junior Counsel's fees, were withdrawn in hoc statu. The Auditor was informed, however, that Senior Counsel's fees (no longer before the Auditor for taxation) were somewhat less than he normally would have charged, account having been taken of Junior Counsel's input in the cause.

The Auditor, although noting that Junior Counsel's claimed fees exceed two-thirds of the indicated fees of Senior Counsel, is required to consider the proper fee payable to any Counsel, having regard both to his input to the case and his experience, and not to make comparisons with fees of other Counsel not before him for taxation, and to which other considerations may be relevant.

In giving consideration to the proper fee to be allowed to

Counsel in this case, the Auditor has in mind the opinions of:-

1) Lord Mackintosh in Elas v Scottish Motor Traction Company Limited 1950 S.L.T. 397 where he said:-

"In my opinion it was the duty of the Auditor in the exercise of his own skilled discretion to determine what was a fair and reasonable fee to be paid to Counsel in this particular case and in the circumstances of the present time, and not to have been deflected from that aim either by reference to any scale of fees which he may have understood to have been propounded by the Faculty of Advocates or by waiting for some direction from the Court or general consensus of opinion in the profession regarding the proper fees to be paid to Counsel. There is not and never has been any rigid scale of fees for Counsel. As was stated by Lord President Clyde in Caledonian Railway Co. v Greenock Corporation 1922 S.C. 299, 1922 S.L.T. 30, "both the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one" are just such fees as a practising law agent finds sufficient in order to command the services of competent Counsel in cases of a similar character.", and

2) Lord President Cooper in Macnaughton v Macnaughton 1949 S.C.42 (referred to in *Elas*) who, in considering what was a "proper fee" of "competent Counsel" for the conduct of a case of known magnitude and difficulty involving a stake of known importance, said (page 46):

"The answer cannot be found by applying arbitrary standards of rules of thumb, but requires an appraisal of the nature of the amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing Counsel in an average case of the type in question presenting no specialities but, if the case is abnormal in magnitude or difficulty, or in any other respect, a second approximation must be made

to reflect these specialities, and this approximation may yield a substantially higher figure."

Both opinions referred to the taxation of fees on a party and party basis.

The Auditor, recognising the various issues raised in the cause, notes that in Padwick v Stewart 1874 1 R 697 Lord President Inglis said:-

"This was a difficult case in point of law, but in a case, however difficult, which turns upon matters of law, the counsel who actually conducts the argument must apply himself to every point in the case."

In the opinion of the Auditor this was not "a run of the mill case" on any view, as the twelve page Opinion of the Lord Ordinary demonstrates. The cause raised complex, difficult and important questions. The Minute of Proceedings records that Junior Counsel's submissions to the Court extended over two days and apparently dealt with all the arguable points to his Senior Counsel's satisfaction, who required to address the Court but briefly. The Auditor, therefore, is satisfied that an increased fee, beyond that prescribed by the relevant Table of Fees, is merited.

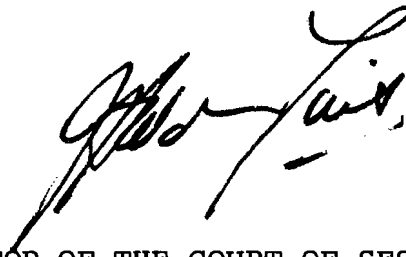
The Auditor in considering the appropriate fee has noted that Junior Counsel for [REDACTED] gave an Opinion in March 1994 as to the reasonableness of raising an Action, which Opinion the Auditor has perused and, while it provided a general basis for founding the contemplated action, and while considering conflicting views experienced in some Sheriff Court cases, did not at that time require to go exhaustively into the whole of the relevant law, but which work was required in preparation for the Procedure Roll in response to the Defences and preliminary pleas. The Auditor, however, considers that the Opinion was, of some assistance in Counsel's preparation and has taken account of that in fixing the increased fees.

A fee for preparation, as such, is not an item separately provided for in the Table of Fees, but is nevertheless an integral and crucially important item of the work to be taken into account when fixing the proper fee for reasonable remuneration for a Day in Court. As was said by the Court in Geddes v Lothian Health Board 17th February 1993, 1993 G.W.D. 11-76:

"As soon as one leaves the world of the run of the mill case, covered by the Table itself, I can see no basis for expecting the fee for a day or days in Court (inclusive of preparation) in one case to bear any relationship at all to the fee for that same item in another."

The Auditor considers that it is required of him in a case such as this, to take account of such necessary preparation when considering the fees claimed by Counsel for the Procedure Roll.

The Auditor, having considered the submissions made by Counsel and on behalf of the Board, and taking the whole circumstances of the cause into account, is of opinion that an increased fee of £750.00 per day, exclusive of Value Added Tax, is necessary to provide reasonable remuneration for Counsel's work in preparation for and substantial conduct of the argument in the Procedure Roll.



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