

AUDITOR OF THE COURT OF SESSION

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NOTE

re

SENIOR and JUNIOR COUNSEL'S FEES

in

HOUSE OF LORDS APPEAL

in PETITION of

D v GRAMPIAN REGIONAL COUNCIL

EDINBURGH. 16th June 1997.

The Auditor has been requested in terms of paragraph 11(1) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, as amended, ("the Regulations") to tax the fees of both E. F. Bowen, Esq., Q.C., and Miss I. R. Ennis, Advocate, respectively Senior and Junior Counsel for the Respondent in the above Appeal to the House of Lords from decisions of the Court of Session.

At the diet of taxation The Scottish Legal Aid Board ("the Board") was represented by [REDACTED] and [REDACTED]. Mr. Bowen, Q.C., was represented by the Vice-Dean of Faculty, and Miss Ennis, Advocate, by her Clerk, Miss Christine Ferguson.

A diet of taxation had been made necessary because the Board had not been prepared to accept the fees as claimed as they considered these to be excessive, particularly having regard to the level of fees agreed between the Board and other Senior and Junior Counsel in previous House of Lords Appeals.

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

Principal Clerk Mrs Janet P. Buck

The fees claimed by Counsel (exclusive of value added tax) are as follows:-

E. F. Bowen QC

January 1995	Case	£ 2,000.00
	Statement of Facts and Issues	1,500.00
	List of Authorities	500.00
	Brief Fee	10,000.00
	Refresher (1)	<u>2,000.00</u>
		<u>£16,000.00</u>

Miss I. R. Ennis, Advocate

January 1995	Case	£ 2,000.00
	Statement of Facts and Issues	1,500.00
	List of Authorities	500.00
	Brief Fee	6,750.00
	Refresher (1)	<u>1,250.00</u>
		<u>£12,000.00</u>

Whereas paragraph 5(3) of the Regulations makes provision for the calculation of solicitors' fees for proceedings in the House of Lords, there is no such provision in respect of Counsel's fees.

Paragraphs 9 and 10(2) of the Regulations contain general provisions as to Counsel's fees. These are in the following terms:-

"Fees allowable to counsel

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.

10-(2) Counsel's fees for any work in relation to proceedings in the Sheriff Court, House of Lords, Restrictive Practices Court, Employment

Appeal Tribunal, Lands Valuation Appeal Court, Scottish Land Court of Lands Tribunal for Scotland shall be 90 per cent of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid."

The Appeal had involved the interpretation of several Acts of Parliament relating to the rights of a natural mother of a child freed for adoption to seek parental rights.

A Local Authority had obtained an Order under Section 18 of the Adoption (Scotland) Act 1978 freeing two children for adoption. The Order vested the parental rights relating to the children in the Local Authority, and the children were placed with prospective adopting parents. However, the Law Reform (Parent and Child) (Scotland) Act 1986 provided that any person claiming interest may make an application to the Court for an Order relating to parental rights. The natural mother of the children presented a Petition to the Court of Session seeking an Order relating to parental rights, namely for custody of, which failing, access to the children. The Local Authority had challenged the competency of the proceedings and was unsuccessful, both in the Outer House and in the Reclaiming Motion to the Inner House of the Court of Session.

The Appeal was heard by the Appeal Committee in the House of Lords on 6th and 7th January 1995 and was allowed on 9th March 1995.

The case is reported as D. v Grampian Regional Council 1995 S.L.T. (H.L.) 519.

In support of the fees claimed by Counsel the Vice-Dean, after referring to paragraph 10(2) of the Regulations, submitted that account should be taken of the following factors:-

"1. Urgency of the case

Legal aid was granted to the Respondents in mid December 1994. The Judicial Office of the House of Lords was informed and the legal aid certificate forwarded to it. Because the case was of particular importance regarding a question of custody / adoption, the case enjoyed the accelerated procedure. Almost immediately the Judicial Office fixed dates for the hearing of 6th and 7th February 1995. This gave both the Appellant and the Respondent very little time to meet the requirements of time limits laid down within the Practice Directions and Standing Orders Applicable to Civil Appeals for the House of Lords (the "Practice Directions") - Parliament House Book Vol. I B503. The statement of facts and issues together with the appendix required to be lodged within 6 weeks of the presentation of the appeal. Although the time limit was suspended until legal aid was granted, the almost immediate fixing of dates for the hearing by the Judicial Office meant that there was only little more than 6 or 7 weeks between the grant of legal aid and the actual hearing.

The Statement of Facts and Issues proved particularly contentious in this case. As drafted by the Appellants it was wholly unacceptable to the Respondent. Senior counsel for both parties were involved in prolonged negotiations regarding it. It was necessary to consider that the Respondent would require to lodge a separate statement of facts and issues. After lengthy negotiation lasting several days between senior counsel for both parties, a compromised Statement of Facts and Issues was reached, which bore little resemblance to the initial draft proposed by the Appellants.

The Respondent's Case required to be lodged no later than two weeks before the proposed date of the hearing. Consequently this gave both senior and junior counsel on their return from the Christmas vacation, approximately 2 weeks to prepare the Case. This required to be done almost simultaneously with the preparation of the statement of facts and

issues and revisal by counsel of the appendix. A list of authorities required to be lodged at least one week before the hearing.

All time limits as laid down in the Practice Directions were complied with. This necessitated junior counsel taking the entire month of January out of her diary. It was devoted exclusively to preparation of this Appeal. Senior counsel had spent at least one week exclusively on it. Both senior and junior counsel spent several days drafting and revising their case exclusively. This required them to pass on existing work and decline alternative instructions during the very intensive period of preparation.

2. The importance of the case

This case was the first test of the Law Reform (Parent and Child) (Scotland) Act 1986. The Appeal at a superficial glance, turned upon the interpretation of section 3(1) of the said Act of 1986. However, it was considerably more complex than this. It involved careful analysis of the inter-relationship with this legislation and adoption legislation. It raised very complex issues of law regarding title and interest of pursuers in relation to custody cases for children. This required a careful historical analysis of the Court of Session's jurisdiction to deal with custody matters, from it being a matter entirely for the Nobile Officium to the present day legislative framework. It required a consideration of the inter-relationship with the present adoption law and many aspects of other social work legislation. Such was the complexity of issues raised by this Appeal that it required a two day hearing to be fixed before the Judicial Committee. Both parties were called upon to speak. As a consequence of this Appeal being taken and an apparent acceptance of the complexity of the issue and the difficulties raised by the previous legislation, the Children (Scotland) Bill 1995 [at that time under consideration in the House of Lords] was amended. New subsections were added to section 11 of the now 1995 Act. These were added to reflect the decision of the Judicial Committee and

answer the questions raised by the Appeal.”

The Board submitted that Counsel’s fees were greatly in excess of other fees for like work paid by the Fund in recent Legal Aid House of Lords cases and referred to three such cases which they considered as being comparable with this Appeal, and in respect of which they were able to give information as to the respective fees paid. The cases being:-

1. Wallis v Wallis 1993 S.C. (H.L.) 49
2. Brown v Rentokil Ltd - H.L. 26th November 1996 (unreported)
3. Boyter v Thomson 1995 S.C. (H.L.) 15

The Board in correspondence with Counsel’s clerk had apparently made reference to the case of Brixey v Lynas 1996 S.L.T. (H.L.) 908 but, as Counsel’s fees for that one-day Appeal had at the time of the diet of taxation still to be agreed, reference to it was of no assistance to the Auditor. In any event the official report stated that the case raised no questions of legal principle and was without merit.

The Board also drew to the Auditor’s attention the cases of Elas v The Scottish Motor Traction Co. Ltd. in 1950 S.C. 570 and Cassidy v Celtic Football and Athletic Co. Ltd. 1995 S.L.T. (Sh/Ct) 95.

The Vice-Dean submitted that the cases of Wallis, Brown and Boyter could not properly be compared to this Appeal. None of these cases had enjoyed the accelerated procedure. He commented on each of the cases as follows:-

A. Wallis

This came before the Judicial Committee in early 1993. (The Judgment was issued on 22nd July 1993). Although this was the first case to go to the House of Lords under the Family Law (Scotland) Act 1985, it was based on a narrow point. There was only one argument presented to the Judicial

Committee. There was no respondent represented. The hearing lasted one day.

B. Brown

This case was an Employment Law case. It has been referred to the European Court of Justice on a reference under Article 177 of the Treaty. However it was considered by counsel conducting the appeal to be a short and straightforward point, narrowly focused. It was fixed for one day.

C. Boyer

This case proceeded from a Sheriff Court action. It concerned the statutory interpretation of section 14 of the Sale of Goods Act 1979. It was not considered by counsel who conducted it to be especially novel or difficult. Again it was fixed for one day.

None of them had required the degree of urgent attention given by both senior and junior counsel to this Appeal. All of these cases considered questions of law on fairly short and narrow points. All of these cases were set down for one day, which was reflective of their limited scope and the issues raised by them. In contrast this Appeal was considered by all counsel involved to be of considerable complexity. It ranged across very broad areas of childcare law, both statutory and common law.

The cases of Elas and Cassidy showed that it was for the Auditor to determine what was a fair and reasonable fee to be paid to Counsel in each particular case and not to be deflected by comparison with other civil legal aid cases funded by the Scottish Legal Aid Board to the House of Lords.

The Vice-Dean informed the Auditor that the Appellants' Senior Counsel had received a fee for all his work in the Appeal of £20,000.00 and it was submitted that such a fee was in the circumstances fair and reasonable and that it did not

contain an element of premium.

The Board submitted that the fee paid by the Appellant to their Senior Counsel was on a solicitor and client basis and might be regarded as containing an element of premium, whereas in this case the Respondent's Senior Counsel's fee had to be assessed on a "*solicitor and client, third party paying basis.*" (emphasis added).

The Vice-Dean also drew to the Auditor's attention that the instructing solicitors in the case had for their work in the Court of Session been allowed an additional fee in terms of Regulation 5(4) (a) and (b), these being:-

- “(a) the complexity of the proceedings and the number, difficulty or novelty of the questions involved.
- (b) the skill, specialised knowledge and responsibility required of and the time and labour expended by the solicitor.”

In the course of the diet the Auditor observed that the fees of both Senior and Junior Counsel for preparing (1) the Case, (2) the Statement of Facts and Issues and (3) List of Authorities, were identical in amount. He was informed that it was customary for Senior and Junior Counsel's fees to be charged at the same rate for these items of work.

In reaching a decision as to what are reasonable fees to be paid to Counsel for conducting the proceedings in a proper manner as between solicitor and client, third party paying [Regulation 9 and 10(2)], the Auditor has taken account of what Lord Mackintosh said in Elas at page 571:-

“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 at p. 311, "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." In taxing the present account therefore the Auditor, in my opinion, should have had in his consideration not any supposed scale of fees propounded by the Faculty of Advocates or any other body or person - which in my view was irrelevant consideration - but first and foremost the amount of the fee which the pursuer's solicitor had seen fit to send to his counsel and in the second place the view which his (the Auditor's) own skill and experience in taxing accounts in similar cases had led him to form upon the question whether the fee which had been sent by the instructing solicitor was in all the circumstances of the case a reasonable fee or an extravagant one."

and by 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."

The Auditor noted the corresponding fees paid to the Appellants' Senior Counsel but did not have any information from the counsel concerned as to the fees which he considered he was justly entitled to receive from his clients for his services under the conditions which he gave them.

The Auditor has noted that the fees claimed by both counsel for the Respondent in this Appeal are higher than any of those agreed, by different counsel, with the Board in the three quoted Appeals. However, the Auditor has to determine fair and reasonable fees in the particular case (Elas page 571).

The Auditor, having regard to the documentation seen by him and the submissions made on behalf of counsel and the Board, and having taken account of the importance and complexity of the Appeal which required two days of argument before the Judicial Committee, and the concentrated effort required of counsel in consequence of the expedited procedure, allows the following fees (these being 90% of the fees which would otherwise be allowed if the work were not legal aid).

SENIOR COUNSEL

Case for the Respondent	£ 2,000.00
Revising Statements of Facts and Issues	1,500.00
List of Authorities	Nil
Brief Fee	10,000.00 ✓
Refresher	<u>1,500.00</u>
	<u>£15,000.00</u>

NOTES:

- NOTES: 1. *The Auditor has allowed Senior Counsel's fees as claimed for the Case and Statements of Facts and Issues in recognition that in this Appeal his work in connection with the Case had to be performed with considerable urgency and that he, himself, had considerable negotiations and discussion with Senior Counsel for the Appellant in connection with the latter which resulted in a mutually agreed document being lodged, thereby contributing to the expeditious progress of the Appeal.*
2. *The Auditor has not allowed Senior Counsel a fee for revisal of the List of Cases. Paragraph 19.1 of the Practice Directions states that a List of Authorities in Two Parts is to be **drawn up by Junior Counsel**. The Auditor has noted that Part One of the List simply records the six authorities referred to in the Case for the Respondent and that Part Two lists four references which the Respondent's counsel did not themselves intend to cite and it is to be expected that these would be identified by counsel when working on the Case and is covered by the fee allowed for that.*

JUNIOR COUNSEL

Case for Respondent	£ 1,750.00
Statement of Facts and Issues	1,000.00
List of Authorities	150.00
Brief Fee	6,650.00
Refresher Fee	<u>1,000.00</u>
	<u>£10,550.00</u>

In conclusion the Auditor wishes to record that he does not consider it appropriate that *as a matter of course* identical fees are charged by both Senior and Junior Counsel for identical work in the same case. The remuneration of Counsel requires to be based upon their respective input to a case commensurate with their experience.



AUDITOR OF THE COURT OF SESSION