

COPY

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

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NOTE

by

JOINT AUDITOR

in Remit by

Mr. DANIEL KELLY in terms of Civil Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 12.

1. This taxation arose out of a dispute between the Scottish Legal Aid Board (the "Board") and Mr. Daniel Kelly, Advocate ("Mr. Kelly") in relation to a fee claimed by Mr. Kelly for conducting a five-day proof at Edinburgh Sheriff Court, commencing on 24th November 1995. The note of fee, rendered by Faculty Services Limited on behalf of Mr. Kelly, included a fee for a pre-proof Consultation, but this aspect was not in dispute.
2. At the taxation on 20th October 1997, Mr. Kelly appeared for himself, accompanied by his Clerk, Miss Jackie Muirhead. The Board were represented by [REDACTED] Solicitor, and [REDACTED] Team Leader.
3. Mr. Kelly had acted for Mrs. F in a civil action by Lothian Regional Council against Mr. and Mrs. F (who were separately represented). The case involved assumption by the Council of parental rights in respect of a child of Mr. and Mrs. F. On the conclusion of the case, Faculty Services Limited, on behalf of Mr. Kelly, charged a daily fee of £675 for the five-day proof. Mr. Kelly explained that this was based on a normal fee of £750 per day, reduced, in terms of the Regulation set out below, by 10 per cent., to £675 per day.
4. [REDACTED] for the Board, addressed me first. He pointed out that taxations under the Civil Legal Aid (Scotland) (Fees) Regulations 1989 depend on two different

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calculations, to be read in sequence as follows:-

- (a) Regulation 9 provides for the base-level of the fee, in that "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", and thereafter
- (b) Regulation 10 provides that the fee actually paid "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".

5. [REDACTED] invited me to decide what would be a reasonable fee on the basis of "market test". He defined the market by what other Counsel, in a variety of other cases, had accepted from the Board in a number of comparable cases at about the same time. The Board had offered Mr. Kelly £550 per day, based on "our experience of what the market is prepared to accept". He illustrated this from a range of comparable cases, where Counsel had accepted between £425 and £500 per day.

6. In the course of his submission, Mr. Shearer referred me to passages in:-

Cassidy v. Celtic Football and Athletic Co. Ltd. 1995 S.L.T. (Sh Ct) 95.

Elas v. S.M.T. Co. Ltd. 1950 S.C. 570, 1950 S.L.T. 397

The Caledonian Railway Co. v. Greenock Corporation 1922 S.C. 299

McNaughton v. McNaughton 1949 S.C. 42

When he addressed me, later, Mr. Kelly also referred to, and founded on, passages in Cassidy and Caledonian Railway Co. All of these were helpful, and focused on the two key phrases, namely "reasonable fees" and "solicitor and client, third party paying".

7. Mr. Kelly, in response, maintained that the true "market test" was not what the Board had in fact paid to other Counsel in comparable cases, but 90 per cent. of the fees which were actually paid, day in and day out, in civil cases in Edinburgh Sheriff Court, where the employment of Counsel is authorised or sanctioned. Mr. Kelly submitted that what Counsel accepted from the Board, in the cases quoted by [REDACTED], might not be the true open market rate for various reasons. Counsel might be anxious for their

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cash flow and accept what was first on offer for early payment. If Counsel did not take the first offer, they might compromise to avoid the necessity of taxation. Mr. Kelly produced a bundle of Faculty Services invoices from 1994/95, for fees actually paid to himself. These were helpful up to a point, but most of them were "agent and client, client paying", which is a more generous scale than the one applicable here. He produced also the note of fee, available to him through Faculty Services, for the fee rendered by Counsel employed by the pursuers in this very case. It was £750 per day for five days, but again this was on the "agent and client, client paying" basis. Mr. Kelly contended that the going rate for a Counsel of his experience, in a case like this, was between £750 and £900 per day in the Autumn of 1995. He had taken the lower of these figures, and then deducted 10 per cent.

8. Mr. Kelly then submitted that this was indeed a complex case. He was replying to [REDACTED] who had anticipated this point by submitting that complexity in itself did not justify a larger fee, but was only one of the many factors in assessing a fee. Mr. Kelly advised that the case, if lost, would result in a child being in effect removed permanently from her parents. Parental rights had been assumed by the local authority, and the child was unlikely to have much further contact with her parents. The importance of the case for those involved could hardly have been greater. Numerous issues had to be explored in evidence, which resulted in the case lasting for five days. The Sheriff gave a 27-page decision, which reflected the matters requiring to be explored. The Sheriff said:

"In conclusion I wish to record my appreciation of the careful presentation of the evidence and the thoughtful submissions which were made by both counsel. Cases involving the future of a child deserve the fullest consideration, and I derived very real assistance from their efforts in that regard."

Mr. Kelly also pointed out that the Board had sanctioned the employment of Counsel in the case. Although Mr. Kelly was not involved in the subsequent appeal, he drew attention to the decision in the appeal against the Sheriff's judgment, reported in Session Cases as Lothian Regional Council v F 1997 S.C.164. He used this to illustrate the complexity of the case. The fact that his client had walked out after the first day of the five-day proof, but had left him instructions to continue to oppose the

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case, had given Mr. Kelly anxious consideration as to what his position should be. It was, therefore, far from a "normal" case.

9. Parties agreed, in subsequent discussion, that the true "market" test, in a case proceeding under Legal Aid, is that Counsel confer with their Clerks, after the case is over, and invoice what seems a reasonable fee in light of the case as it has actually turned out. This differs from the situation where a solicitor, instructed by a client privately, approaches the Clerks for various Counsel, seeking a "contract" in advance, for Counsel to appear for a given fee - where a private client has only a limited amount of money available for the case.
10. Mr. Kelly pointed out that he had made no additional charge for preparation - his note of fee states "including preparation therefor" - so the £750, scaled down to £675, included all work per day over the five day period of the Proof. At this point I indicated that based on my own experience, both of instructing Counsel and of taxing accounts, £750 seemed to be a reasonable fee, even on a party/party scale, for conducting proceedings of this nature at Edinburgh Sheriff Court in November 1995. I am fortified in my view by referring back to a contested taxation before the Auditor of the Court of Session, in which I was involved in October 1992 - Stephen Connery v Northern Scaffolding Group PLC. A fee of £750 per day was accepted as reasonable for a four day Proof, taxed on the basis of "solicitor and client, client paying". It is true that this present taxation is on the basis of "solicitor and client, third party paying", which is not as generous as "client paying" but Connery was three years before this case, and "third party paying" is more generous than the "party paying scale", which was the basis of many cases, some of which I taxed and in others of which I instructed Counsel to appear, in the autumn of 1995.
11. [REDACTED] responded that the test remained what a "prudent man of business" would pay and that the Board, as prudent holders of the public purse, were in the best position to judge and assess this for cases payable by the Board.

*FAW*

12. DECISION.

While the Board define "the market test" as the figure which they find most Counsel are prepared to accept from them, and on that basis £550 is reasonable in their eyes, Regulation 10 expressly makes the test more objective, where it states, "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". I have no doubt that Counsel were regularly and reasonably being paid £750 per day in November 1995 for work of this nature, and that this was being sustained on taxation, certainly by myself, at that time - even on a party/party basis, and the scale here is more generous than that. I therefore sustain the Note of Fee for the five day proof at Edinburgh Sheriff Court, including preparation therefor, at £3,375.

13. EXPENSES.

Mr. Kelly moved for the expenses of his appearance at the taxation. [REDACTED] responded that the Board is entitled to a "free accounting". Neither gave me any authority for their propositions, and there is nothing in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 about it. I have given anxious thought to the submission. On the one hand, it is true that when a solicitor lodges an account with the Board, no allowance is made for subsequent correspondence, which can be extensive. On the other hand, when an "additional fee" is given in the Court of Session, and even where (for the reason mentioned) no allowance is made for the adjustment of the basic fee, the solicitor always recovers a fee for preparation and attendance at the taxation before the auditor to assess the "additional fee". I appreciate that is not a true analogy, because there is no other way of fixing the additional element, but all the work done by the solicitor, in going to court for the additional fee and in making up a supplementary account, is paid by the Board. The other area which I explored was the decisions of other Sheriff Court auditors, of which I have a few. None of the Notes in my possession deals with this issue, which implies that the point was not raised, or at least not at the first diet. On balance, I have decided that Mr. Kelly should receive some recompense for the taxation and the preparation for it - he copied a substantial bundle of papers for my benefit and prepared detailed written submissions.

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14. The question is what? Although Mr. Kelly was appearing for himself, it is not appropriate to look at the "party litigant" provisions. A solicitor would receive a block fee of just under £75 in a normal case, which falls to be scaled down by 10% here. Taking a broad axe, and considering the preparation made for the taxation, and the time occupied at it, I have added £70 to the docquet of taxation and in terms of Regulation 12 (1) I adjudicate on the "dispute" as follows:

Consultation (not in dispute)		£ 270.00
Proof per Note of Fee		£3,375.00
Fee for taxation		£ <u>70.00</u>
		£3,715.00
VAT thereon		<u>650.12</u>
		£4,365.12
Audit fee at 4%	£176.00	
VAT thereon	£ <u>30.80</u>	£ <u>206.80</u>
		<u>£4,571.92</u>

*Ian L.S. Balfour*

Ian L.S. Balfour,  
 Joint Auditor, Edinburgh Sheriff Court  
 58 Frederick Street,  
 Edinburgh EH2 1LS

20th October 1997.

RUTLAND EXCHANGE BOX NO. 898

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BEVERIDGE SQUARE,  
LIVINGSTON, WEST LOTHIAN

EH54 6QF

01 Dec 95

1 of 1

U050/L0959085/1

Unallocated Solicitor Name

F221/4 FR/DLM

LOTHIAN REGIONAL COUNCIL -v- [REDACTED]

[REDACTED]

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MR DANIEL KELLY

CIVIL - LEGAL AID.

NOT KNOWN

592 8370 06

17 Nov 95  
20 Nov 95

PRE-PROOF CONSULTATION IN LASSWADE  
- 24.11.95: FIVE DAY PROOF AT EDINBURGH  
SH.CT., INCLUDING PREPARATION THEREFOR

270.00

3375.00

LEGAL AID  
51220

3645.00

17.50

637.88

4282.88