SCOTTISH COURT SERVICE
Sheriffdom of North Strathclyde
Sheriff Clerk's Office
Sheriff Court House
St James Street
PAISLEY
PA3 2HW

77

[redacted]
Scottish Legal Aid Board
DX Box ED250
EDINBURGH

Your Reference:

Our Reference: KMacK/MJ

Date: 8 December 1997

[redacted] WI

TAXATION - JOHN MUNDAY, ADVOCATE

I enclose copies of my decision in the above and of my note relative thereto.

Please note that if you intend to object to my taxation written grounds of such objection should be lodged with the sheriff clerk within 7 days of his receipt of my note. The 7 days is normally considered to begin one day after the day on which notice is sent.

I suppose such objection will have to be lodged in the original process (that is, the revocation of the freeing order process), and, of course, the objection must relate to an improper or misguided or otherwise incorrect exercise of my discretion, having regard only to matters raised at the taxation.

Yours faithfully
K MacKenzie

K MacKenzie
Auditor of Court
Paisley

Telephone: 0141 887 5291 Fax: 0141 887 6702 DX: PA48

RUTLAND EXCHANGE BOX NO. DX 501316
WILLIAM IRVINE
PER MACKINLAY & SUTTIE,
THE CENTRE,
48 CROSS ARTHURLIE STREET,
BARRHEAD
GLASGOW, G78 1QU

06 Jan 97

M210/IR962508/5

Unallocated Solicitor Name

MGL

[redacted] REVOCATION OF FREEING FOR ADOPTION ORDER [redacted]

CIVIL - LEGAL AID.

CI/06/2025777 92
11 Dec 92

M29 MR JOHN K MUNDY

446 5864 15

1 Sep 96	11,13,16,17,18.9.96 - PROOF, PAISLEY S C	
	6 DAYS @ 90% OF 750.00	4050.00
2 Nov 96	PROOF HEARING, PAISLEY S C - 2 DAYS	1350.00
29 Nov 96	PROOF HEARING, PAISLEY S C	675.00

	LEGAL AID 121827	6075.00
17.50		1063.13
		7138.13

Paisley, 17 October 1997 Act: Munday, advocate, Alt Mr Haggarty
Having heard counsel and Mr Haggarty I continue the taxation for further consideration
K MacKenzie Auditor of Court

Paisley 25 November 1997. Having considered parties' submissions further I tax a daily rate of fees in this case at the sum of £675, and a legal aid rate of £607.50. I apply this daily rate of fees to each day specified on this ~~page~~ page and the foregoing 2 pages, and to the attendance at taxation on 17 October 1997, a total of 12 days, and I find Mr Munday entitled to the taxation dues of £30. The VAT on Mr Munday's fees is £1275.75. I therefore tax the whole account at the sum of £8365-75.
K MacKenzie Auditor of Court Paisley

NOTE RELATIVE TO

John Munday, Advocate: Taxation of legal aid account of his fees in revocation of freezing for adoption order.

This taxation was sought by the Faculty of Advocates on behalf of Mr John Munday who appeared at the taxation. The Scottish Legal Aid Board (hereinafter referred to as SLAB) were represented by [redacted]. During the taxation, the following matters were agreed by parties:-

Firstly, they agreed that the Civil Legal Aid (Scotland) (Fees) Regulations 1989, Regulations 9 and 10(2), as amended, set out the principles governing the taxation of counsels' fees to be paid by SLAB.

Secondly, they agreed that in terms of regulation 10(2) the auditor of court is required to bring the same considerations to bear on counsel's fees as he would apply to a solicitor's fee taxed as between solicitor and client, third party paying.

Thirdly, they agreed that Mr Munday had conducted the proceedings in question in a proper manner, and that therefore regulation 9 of the said regulations sanctioned payment of his fees for all the work described in his fee note.

Lastly, they agreed that each of Mr Munday's appearances in Paisley should be paid for at a full daily rate, as taxed, although [redacted] argued that different daily rates should apply to the days relating to the preliminary hearings.

Before turning to parties submissions about the amount of fees, I draw attention to regulation 10(2) of the said regulations which limits counsel's fees in this case to 90% of the amount 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. To avoid doubt I will make it clear throughout this note whether a rate mentioned is the full 100% or the legal aid 90% rate. All rates mentioned will be net of value added tax.

Mr Munday addressed me first. At the outset he stated that because he now felt the full daily fee invoiced for in this case (£750) had been too low, he wished to argue for its substitution by a fee of £900.

In support of such an enhanced fee he sought to persuade me that the challenge to his fee note threw the question open to my discretion to increase the rate as well as to limit it or leave it unchanged.

He then turned to the nature of the proceedings in question. He argued that the case had been unusually difficult, partly because of its complexity and its importance to the parties involved, but also because its novelty deprived him of the judicial guidance which so often is available from prior judgements relating to similar questions.

He also relied on the fact that his daily rate here included preparation, which is not always the case, and on the distance to be travelled between Edinburgh & Paisley. These factors, he said, were well accepted as justifying a higher daily fee than would apply for work in or nearer to Edinburgh.

Turning then to the detail of his fee note, Mr Munday pointed out its three separate parts. These were for court attendances for a preliminary hearing on 15 May 1996, for a motion on 30 August 1996 and for the proof and related matters on 9, 11, 13 and 16 to 18 September, and 12, 13 and 29 November 1996. All these were charged at a legal aid daily rate of £675, which SLAB now sought to restrict to £475 for 15 May, £400 for 30 August and £500 per day for the other days.

To support his present opinion that £750 per day did not truly reflect the time value of his services in this case, Mr Munday presented me with a number of old fee notes. These showed that he had been paid, this year, daily rates of £750 and £800 for non-legal aid work, in Edinburgh and Dunfermline respectively. That even these rates were on the low side, was demonstrated, he said, by a fee note showing that another counsel, several years less experienced than he is, had been paid £900 for one day in Paisley Sheriff Court in 1995. He also put before me a fee note indicating that he had

been paid sums of £200 and £250 for attendances at consultations in preparation for hearings or giving advice.

All these factors, Mr Munday said, showed clearly that the fee he had submitted in the instant case was too low, and I should therefor hold his proper daily rate for non-legal aid work to be £900 and award him 90% of that amount, being £810 for each day's attendance. He argued for that rate, not only for the proof, but for the two preliminary diets, which had also to be fully prepared for, and on which the Sheriff had been fully addressed.

[redacted] suggested I should adopt a more critical approach to the question of a commercial rate than Mr Munday proposed. He argued that a commercial rate for a service is not the rate that may be asked for from, and paid by, an uncritical buyer. This was so for any service, whether in an hotel, a car showroom or at the Bar or elsewhere.

He referred me to McLaren on taxation, part C, at page 508, as a general guide to the approach I should adopt, and, in particular, he referred me to three specific statements. On page 509, seventh line, it is stated "Taxation as between agent and client varies according to whether the account is charged (1) against the agent's own client or (2) against the opposite side. In the former case the rule is that the client is liable for all expenses reasonably incurred by the agent ..... even although such expenses cannot be recovered from the opposite party. The client is, of course, also liable for any expenses which he has specially authorised; and it is proper and prudent that agents should have their client's authority before incurring expenses of an extraordinary character". On the same page, 13th last line, dealing with payment by a third party, it is stated "That principal is, that while the taxation as prescribed by the statute be as between agent and client, yet as the expenses ..... have to be paid ..... by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client", and Lord McLaren's view was that "where a statute authorises the taxation of expenses as between agent and client what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge

that his account would be taxed". I was further especially referred to page 511, the middle paragraph, which states "In taxing the account of an agent against a third party on the basis of agent and client the fact that the agent had done the work for his own (sic) client and may be a good charge against the latter does not conclude the matter in a question with a third party, as many items may be modified or taxed off, though not to so great an extent as in a taxation between party and party". That statement is not entirely grammatical, but I think I know what it means.

[redacted] also referred me to the more recent case of HMA v Gray 1992 SCCR p.883, in which sheriff Stoddart at Paisley considered a photographer's account of £9,791.90 which had appeared as an outlay in a solicitor's account at taxation. Sheriff Stoddart, in remitting the account back to the auditor of court for reconsideration of that outlay, re-affirmed that the test an auditor of court should apply to such an outlay in an account at taxation between party and party is "what would a prudent man of business have done in relation to the matter?"

In the sheriff's opinion a prudent man, whilst allowing for the urgency and other circumstances which led the solicitor to use a photographer known to her to be reliable and to provide a good service, would have sought competing estimates and would not necessarily pay the fee first quoted by a supplier. [redacted] also referred me to the case of Cassidy v Celtic Football & Athletic Co Ltd SLT 1995 Sh. Ct. p.95. In that report the sheriff stated (referring to an opinion of Lord President Clyde in Caledonian Railway v Greenock Corporation 1992 SC 299 at p.311) that the auditor of court, in relation to counsel's fees, should have considered first and foremost "the amount of the fee which the pursuer's solicitor had seen fit to send to his counsel and secondly the amount which his (the auditor's) own skill and experience in taxing accounts in similar cases had led him to form upon the question of whether the fee was in all the circumstances of the case a reasonable fee or an extravagant one. At p.97G the sheriff suggested that the test is essentially a market one, and he gave his view on how an extravagant fee may be recognised.

[redacted] questioned whether any attempt had been made by the solicitors, in the cases to which Mr Munday's proffered fee notes referred, to question the fees quoted

or to seek alternative counsel at lower cost. To convince me that lower prices could have been obtained, he produced several old fee notes invoiced for by counsel in legal aid cases. These showed that after their submission to SLAB, at the conclusion of the court cases involved, these fees had been negotiated by SLAB and substantially lower fees had been paid than had been sought. In these, daily legal aid fees were reduced from £500 to £425 for a proof in 1994 and early 1995 and from £720 to £495 in 1996 for a fatal accident inquiry. [redacted] argued that these fees, having been accepted by counsel, were far better indicators of a true commercial rate than the fees invoiced for. He argued that the market test proposed by the sheriff in Cassidy v Celtic Football Club had to be seen in the context not only of the price that one private individual has paid in a similar case, but in the ability of people in general to pay. The fact that legal aid fees were paid from a source that was not cash limited (in effect, as he put it, a bottomless pit!) should not be a consideration. I took these remarks to mean that as SLAB paid legal aid fees on behalf of private individuals, I should have regard to the general ability of private persons to pay for advocates' services. That, he said, was the real market in which these services were being sold. The existence of SLAB did not, he said, create a separate market.

Lastly, [redacted] argued that the duration of the cases was also a factor. The more days' work a case produced, the smaller was the appropriate daily fee.

Mr Munday, replying, said that fees accepted by counsel after a case was over were no indication of a private rate, and the rates already established by counsel had been so established in a very competitive market. He said his own rates were reasonable. He also said that as he had appeared for the same party in the freeing for adoption hearing which this case sought to revoke, it was reasonable that the solicitor in the case should not have sought the services of another advocate. Referring to the £1,200 per day awarded to senior counsel by the Sheriff in Cassidy v Celtic Football Club, he argued that that was itself an endorsement of £800 as a proper full daily fee for junior counsel, and that as long ago as 1994. It was, he said, recognised that junior counsel is entitled to two thirds of senior counsel's fees. The £900 he now asked for as a base for application of the 90% legal aid rule was therefore reasonable for 1996.

In my consideration of these matters I rapidly came to think that there is little of certainty in the whole question of counsels' fees. Even so, I have become certain of two things. The first is that a market rate cannot be arrived at after a case unless, as was not the case here, the service was defective in some way, and that is a separate argument. The second is that a true market rate cannot be established by reference to uncritical acceptance of first quoted prices.

I think that each case must be decided on its own merits at the time when counsel's services are required. Relevant circumstances are, as Mr Munday argued, the experience of counsel, the difficulty of the case, having regard to complexity, novelty and other such factors, the importance of the case to the clients, the inclusion or otherwise in the daily rate of preparation and the travelling involved.

Although I know it was common in times past to award a higher rate for the first day of a proof and a lower rate, or rates, for the second and subsequent days, I am not convinced that, as [redacted] argued, a case of long duration is any good argument for a lower daily rate overall. It seems to me that a careful advocate would, for his client's protection, review each day's proceedings ~~and~~ as it concludes and prepare in the light of what had gone before for his next day in court, and his performance in court must continue at the same level of competence.

I do, however, agree with [redacted] when he encourages me to consider the sum at which a solicitor sees fit to engage counsel's services in the light of what a prudent man would do in the same circumstances. In my experience solicitors, when defending the amount of counsel's fees at taxation, are seldom able to demonstrate that they "shopped around" or asked counsel for a lower quote. From memory, I would say that in every case in which a solicitor could demonstrate to me that he did question counsel's fees, he was offered a lower price. I also agree with [redacted] argument that the existence of legal aid does not create a separate market. Legal aid certainly extends the market for counsels' services to persons who would otherwise have no means to obtain them. I do, however, take the point that the purpose of legal aid, at least as I understand it, is to put these people on an even footing with those members

of the public who can, if necessary, afford to employ counsel, and by that means, although the existing market is extended, no new market is created. Since legal aid is not intended to confer on its recipients any privilege not available to other ordinary people, I understand [redacted] to mean that the extension of this market by means of legal aid is at that market's lower end and the legal aid fees should reflect that fact. I see the logic of that argument.

Having regard to all these factors, I have come to the following conclusions. Firstly, that rates negotiated by SLAB at the conclusion of cases do not represent a market rate. Secondly, that a market rate cannot be higher than the rate originally offered. Thirdly, that there was no attempt by the solicitor to negotiate Mr Munday's fees downwards. Fourthly, that a prudent man would have so negotiated, and would have met with some success, even though, in this case he would not have instructed alternative counsel, and, fifthly, that the same prudent man, in this case, would have settled for a 10% reduction. Throughout this taxation daily rates for any service were variously referred to as commercial, market, private or going rate. Mr Munday did suggest that there was a difference between a commercial rate and a market rate. I have concluded that all these adjectives, in this context, mean much the same, and I have not attempted to differentiate between them.

In the light of these conclusions, and having regard to Mr Munday's years of experience, to the inclusion of preparation, to the travelling involved, to the principles relating to third parties paying, to the principle of the prudent man, to the nature of the market, and all the other circumstances I find that a suitable daily rate of fees for Mr Munday in this case is £675. Applying the 90% rule to this amount I find the daily rate of fee for legal aid purposes to be £607.50, and this rate applies throughout all the days to be paid for.

Mr Munday asked me to find him entitled to a fee for attending the taxation. I think in all the circumstances it was reasonable that he should seek to have his fees taxed, and I therefore find him so entitled. Because [redacted] had conceded in this case that a full daily rate was appropriate for each day in Paisley, I find Mr Munday entitled to a legal aid rate of fee of £607.50 for attending the taxation.

I will conclude with two observations. Firstly, I do not accept, in general terms, that every day in court should be paid for at a full daily rate, and if an officer of SLAB said this, to whatever audience, I think he or she was in error. Secondly, it would be no bad thing, and I hope legal protocol does not prevent it, if SLAB, as well as sanctioning the employment of counsel in appropriate cases, also took the part of the prudent man in agreeing the level of legal aid to be paid as counsel's fees in such cases before they reach court. At the very least they could remind solicitors to do so at their own instance.