

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ

DOCUMENT EXCHANGE ED. 304

Tel. 031 225 2595 Extn. 309

Fax 031 220 0137

NOTE

re

FEE for JOHN MAYER ESQ ADVOCATE

in PETITION of

[REDACTED]

AP v. FP

PETITIONER

against

[REDACTED]

RESPONDENT

for

Declarator under and in terms of the Child
Abduction and Custody Act 1985

EDINBURGH. 8th December 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, Counsel for Mr. Andrew Pirrie, in respect of Counsel's work of preparation for, travelling to and appearing at an Open Commission to take the evidence of the Respondent in Chicago, USA.

The Scottish Legal Aid Board was represented at the Diet of Taxation by [REDACTED] and [REDACTED] Mr. Mayer appeared personally.

The Diet of Taxation had been necessary because Counsel had not been prepared to accept the Board's offer of a fee of £500.00 per day for each of four days in which Counsel had been engaged in and committed to the Commission and for which Counsel has claimed a cumulo fee of £3,200.00 based on a uniform fee of £800.00 per day.

The Auditor J. Haldane 1ait. S.S.C.

Principal Clerk Mrs Janet P. Buck

On 8th May 1996, the Court granted Commission to C Harris, Esq., Q.C., to take the oath and evidence of [REDACTED]. The need for the Commission arose because [REDACTED] who had remarried and was resident in the United States of America had applied for American citizenship. A decision on her application would not be known for some twelve months. She had surrendered her British Passport and had been advised that her status was that of an illegal alien and that, should she leave America pending the outcome of her citizenship application, she might not be allowed to re-enter that country.

Briefly put [REDACTED] were divorced on 12th December 1989. Mrs. Pirrie was granted custody of the two children of the marriage, Andrew and Vicky.

After the divorce [REDACTED] formed an association with an American citizen, [REDACTED] whom she later married. [REDACTED] returned to America in the autumn of 1992 and for a period [REDACTED] lived with him there and then from time to time thereafter stayed for periods in Scotland and again in America until she finally left Scotland on 13th June 1994 when she took the two children with her to live permanently there.

On 26th July 1995 [REDACTED] presented a Petition to the Court of Session under the Child Abduction and Custody Act 1985 for return of his two children.

As the Lord Ordinary stated in his Opinion apart from the periods of [REDACTED] residence in Scotland and in America the parties diverged very greatly in their evidence. [REDACTED] averred that [REDACTED] had been aware of her intention to take the children to live permanently in America and had indicated his agreement to that. In view of the importance of [REDACTED] evidence in enabling the Court to resolve the matters in dispute, the Court considered that her evidence required to be obtained by way of Open Commission and not by Affidavit and since she could not attend in Scotland, it was necessary to have the Commission carried out in the United States of America.

[REDACTED] solicitors' Legal Aid Account notes the itinerary of those involved in the Commission as follows:-

"4th July 1996

10 am Travelling to Glasgow Airport to pick up International Flight to Chicago, check in time and flight leaves 2.45 pm, arriving in Chicago (their time) 4

pm, travelling to Comfort Inn, Chicago.

5th July 1996

1 hour discussion with Counsel regarding Commission, attending at Commission -
Eng 10 am to 1.10 pm

6th July 1996

Agency travelling to Chicago Airport, returning to Glasgow Airport Sunday at 11 am.

7th July 1996

Travelling through to Edinburgh - Eng 1 hour."

The Auditor, having narrated briefly the circumstances leading up to the Commission, 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

2. Where the Table of Fees in this Schedule does not prescribe a fee for any class of proceedings or any item of work, the Auditor shall allow such fee as appears to him

appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.”

Parties were agreed that the Table of Fees does not prescribe a fee for work by Counsel participating in an Open Commission wherever held.

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.

Counsel in submitting that the fee claimed of £3,200.00 based on a uniform daily fee of £800.00 and exclusive of out-of-pocket expenses, separately paid, was a reasonable one having regard to the whole work and commitment involved over a period of four days: he emphasised that the work had involved two lengthy periods of travel and had been of the utmost importance to the client who was seeking the return of his two children to Scotland. There was an additional public interest element in respect of the Court's obligation to respect the provisions of the Hague Convention as enacted into Scottish Law. Counsel stated that considerable preparation had been undertaken prior to the Commission being executed, including consideration of numerous documents.

It was noted that Mr. Pirrie's solicitors had been awarded an additional fee under heads (a), (b), (d) and (e) of Regulation 5(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989.

As to the level of fees, both Counsel and the Board gave examples of fees allowed to Counsel in other cases. Counsel referred to a case where he had been allowed a fee of £900.00 per day in a civil proof in Lerwick Sheriff Court, and the Board to a serious criminal case in the High Court at Aberdeen where the Auditor had allowed a fee of £850.00 per day, which they said was the highest such fee so far allowed to (Junior) Counsel in a legally-aided case.

The Auditor was not familiar with the circumstances of the Sheriff Court case in which Counsel was involved in April 1996 but the fee note exhibited recorded that Mr. Mayer, along with witnesses and agents and the Sheriff, remained in Shetland over a week-end in case the weather might have prevented their attendance at the continued proof on the Monday, and for which Mr. Mayer claimed two waiting days at £450.00 per day and proof fees of £900 per day, all of which were said to have been met by the Board. With regard to the Board's reference to a High Court case in Aberdeen, the Auditor noted that he allowed Counsel a daily trial fee of £850.00 but had disallowed additional preparation fees of £6,000.00 separately claimed as he had not been much assisted by Counsel in the taxing of his fees.

Proof and trial fees in both cases included travel and any necessary accommodation expenses, which charges had been separately met in [REDACTED] case.

These examples merely confirm that the Auditor can have regard only to the circumstances of the case before him to determine what is a reasonable fee.

Counsel, in addition to necessary prior preparation, was committed to the work from the morning of Thursday 4th July to Sunday 7th July inclusive which included a period outwith normal Court hours. Counsel summed it up as "a gruelling trip."

The Auditor derives little assistance by way of reference to the daily fee allowed for a proof conducted by Junior Counsel in the Court of Session which in Schedule 4 of the Table of Fees is stated at £240.50; nor is the Auditor assisted in having regard to a daily trial fee for Junior Counsel alone in a trial conducted, for example, in Aberdeen, Inverness or Dumfries of £408.50 per day which also includes overnight accommodation but he notes that the Table provides that where the work is performed:-

"Elsewhere beyond 60 miles journey by road from Edinburgh, such fee as the Auditor considers appropriate, with regard to the journey involved and the level of fees prescribed in this paragraph."

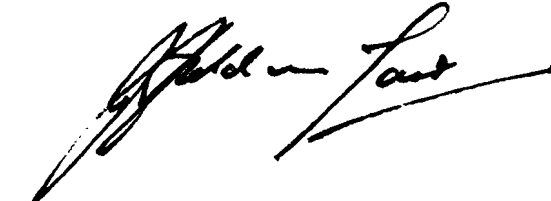
In this case the journey involved was considerable, both in respect of time and distance.

The Board drew attention to the fact that Counsel's colleague, who appeared for the Respondent, charged a daily fee of £500.00 exclusive of out-of-pocket expenses, and submitted that a similar fee for Mr. Pirrie's Counsel would be reasonable. The Auditor does not wish to enter into invidious comparisons between fees of one Counsel and another, particularly when there may be different factors affecting the comparative fee which the counsel claimed, and of which the Auditor is ignorant.

The Auditor, while noting that the third day (6th July) had been more of a waiting day for the return flight, nevertheless appreciates that it was a captive waiting day when Counsel was presented with a Hobson's choice as to where and how to spend the day and, following upon his return on the fourth day, after a lengthy period of travel, he could not reasonably have been expected immediately thereafter to be fit to engage himself in further

remunerative work, or even leisure activity.

The Auditor, having perused the instructing solicitors' Accounts and considered submissions made by Counsel and on behalf of the Board, and having taken account of the importance of the work and the place and circumstances in which it was performed, is of opinion that a total fee of TWO THOUSANDS SIX HUNDRED POUNDS (£2,600.00), exclusive of Value Added Tax, is reasonable for Counsel's work effeiring to the Open Commission.



AUDITOR OF THE COURT OF SESSION