DECISION OF AUDITOR – COUNSELS' FEES – CRIMINAL

DATE OF DECISION	11.01.00
NAME OF CASE	[redacted] –V- HMA
CASE TYPE	Appeal –v- Conviction (Murder)
AUDITOR	Neil Crichton, Court of Session
COUNSEL/SOLICITOR ADVOCATE	SC and JC
AMOUNT(S) AWARDED	£650 per day (SC) - conduct of appeal £150 per hour (SC) – preparation £236 first consultation (SC) £177 further consultation (SC) £344 per day (JC) – conduct of appeal £100 per hour (JC) – preparation £110 first consultation (JC) £82.50 further consultation (JC)
FEATURES	Appeal hearing took place on 07.05.97. Board prepared to allow an extra preparation fee of 25 hrs to reflect the "unusual and exceptional circumstances of the case". Four separate SC had refused to act for appellant stating there were no grounds of appeal. LJC directed Dean to nominate SC to argue appeal and LA directed SC and JC. Neither counsel duly appointed had been involved in the original nine day trial. The work far exceeded that which counsel would normally carry out where they were involved in the original trial. The direction by the court to the LA involved a very heavy responsibility. Difficult to obtain clear instructions from the accused. Appellant alleged numerous complaints re the conduct of his original defence and irregularity during trial. Novel point re admissibility of statements not previously considered by the Appeal Court.

FEATURES

Contempt proceedings had been taken against two newspapers during the trial which had to be considered.

Behaviour of witnesses at trial described as "bizarre" and had to be considered.

During appeal itself an affidavit obtained from a witness gave rise to an indication of new evidence.

Conflict between Appellant and Police Officers arising from the police interviews.

All the above required to be considered by SC and JC.
Appeal then proceeded on 3 grounds:-

(i) Insufficiency of evidence
(ii) Trial judges' directions relating to same
(iii) Trial Judges' failure to direct adequately on culpable homicide.

In October 1996 the Appeal Court ordered a further report from the Trial Judge.

The appeal involved complex argument, was an unusual and important Appeal with complex and novel issues outwith the norm.

Lengthy and detailed preparation and consultation shortened the Appeal hearing itself.

Since Appeals dismissal appellant petitioned to Secretary of State for Scotland and European Court.

HIGH COURT OF JUSTICIARY

Lord Justice Clerk
Lord Kirkwood
Lord Hamilton

28/64

OPINION OF THE COURT

delivered by the LORD JUSTICE CLERK

in

NOTE OF OBJECTIONS

by

THE SCOTTISH LEGAL AID BOARD

to

REPORT OF THE AUDITOR OF THE COURT OF SESSION

under Regulation 11 of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989

in causa

UISDEAN McKAY

against

HER MAJESTY'S ADVOCATE

---

25 June 1999

The Scottish Legal Aid Board, to which we will refer as "the Board", disputed the amount of fees which should be allowed to senior and junior counsel from the Legal Aid Fund in connection with an appeal by Uisdean McKay against his conviction on 15 April

1994 on a charge of murder. The appeal was refused on 11 June 1997 following a half day hearing. The dispute was referred for taxation to the Auditor of the Court of Session, who issued a report on the taxation dated 30 July 1998. Thereafter the Board submitted a Note of Objections to this court under Regulation 11(1) of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989. The Auditor submitted a Minute in answer. In due course a hearing on the Note of Objections and the Auditor's Minute was held at which submissions were made on behalf of counsel and on behalf of the Board. The discussion was directed to three matters.

The first was the rate per hour at which allowance should be made for preparation. In his report the Auditor stated that senior and junior counsel had been directed by the Dean of Faculty to represent the appellant. This entailed a very heavy responsibility. Neither had been involved in the trial. Four senior counsel had previously refused to act, on the basis that there was no arguable ground of appeal. He said that the appeal involved a great deal of work, far exceeding what counsel would normally do when they had been involved in the trial. He was provided with a considerable number of papers, including the solicitor's account. He was satisfied that counsel should be paid 25 hours for extra preparation "in this exceptional case". He recorded that the Board had been prepared to concede an extra preparation fee of 25 hours to reflect "the unusual and exceptional circumstances of this case", and he was satisfied that counsel should be paid such a fee. The period was ultimately not in dispute. What was in dispute was the appropriate hourly rate for this purpose.

Para. 1 of Schedule 2 to the 1989 Regulations states: "Subject to the following provisions of this schedule, fees shall be calculated in accordance with the Table of Fees in this schedule". No item for preparatory work is contained in the Table. Para. 2 states:

> "Where the Table of Fees in this schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general level of fees in the said Table of Fees".

Before the Auditor the Board suggested that the appropriate rate was £42 per hour, which was extrapolated from the daily rate set out in the Table. The representative of counsel sought £150 and £100 per hour for senior and junior respectively. The Auditor stated in his report that £42 per hour was manifestly too low, adding: "I am persuaded that I should exercise my discretion in the exceptional circumstances of this case to uphold hourly rates charged by senior and junior". In their Note of Objections the Board contended that the Auditor had provided inadequate reasons as to the basis on which he was prepared to allow the fee and on which he assessed its level. In any event he had failed to indicate that he had had regard to para. 2. In his minute the Auditor stated that he had done so, and that he had been assisted by the fact that the Joint Auditor of the Sheriffdom of Lothian and Borders had allowed such hourly charges for preparation in the case of *H.M. Advocate* v. *Gielty* (on 23 February 1998).

For the Board, Mr. Clarke accepted that the onus was on them to demonstrate that the Auditor had gone wrong. He submitted that it was important to bear in mind that the taxation of fees operated in the context of a statutory scheme. Counsels' fees were primarily based on a daily rate. One possible approach to the work of preparation was to

regard it as being an element in the daily rate for appearing in court. He referred for this purpose to the discussion of the subject by Lord Prosser in *Geddes* v. *Lothian Health Board* 17 February 1993, unreported. However, as an alternative to uplifting the daily rate, the Board occasionally allowed a preparation fee where the circumstances were exceptional and the preparation would not be adequately covered by the daily rate. In his report the Auditor had made no mention of para. 2, and the lack of reasoning made it impossible to know whether he had had regard to the general levels of fees in the Table. What he had arrived at was manifestly out of line with those levels. His hourly rate for senior counsel was about one half of the daily rate for appearance in court, while it was equivalent to more than half a day in the case of junior counsel. The case of *Gielty* was, as the Auditor recognised, concerned with a complex fraud indictment. Mr. Clarke emphasised that while the Board had conceded that a fee should be payable in respect of 25 hours of preparation work, that was as far as the concession extended. Whatever had played a part in the Auditor's thinking in arriving at the rates per hour which he selected did not appear in any reasoning. It was impossible to know what he had considered to be relevant and, if so, what part it played in arriving at an hourly rate for preparation. He also emphasised that the Board was not suggesting that the rate should be based on extrapolation. The calculation which they had put before the Auditor had been intended to do no more than raise a query. In the circumstances Mr. Clarke submitted that the Auditor had misdirected himself. At any rate he had failed to explain how the rates selected by him were arrived at with regard to the general level of fees in the Table of Fees.

For counsel, Mr. Sutherland emphasised that under para. 2 an Auditor was not required to carry out a mathematical calculation. The idea that one could derive an hourly rate in respect of preparatory work from any of the figures in the Table should be rejected. The actual time taken for the hearing of an appeal could bear little relationship to the length of a day in court. Different rates were set out in respect of stated cases and appeals against sentence. If it had been intended that one could derive a rate for preparation from the Table that could have been said. The Auditor had a wide discretion in the fixing of appropriate remuneration (*Shaw & Shaw* v. *J. & T. Boyd Limited* 1907 S.C. 646 and *Wood* v. *Miller* 1960 S.C. 86). The fact that the Auditor in *Gielty* had allowed £150 and £100 as the hourly rates for preparation was useful.

Mr. Sutherland went on to emphasise the responsibility which counsel had been required to undertake in the present case, which was unlike the normal situation in which counsel could be released if their advice was rejected. There had been a great deal of preparatory work. The Auditor had before him the detailed accounts submitted by counsel, which showed far more than the normal type of preparation. The existing grounds of appeal had been drafted by the appellant himself. However, he raised a number of other issues, including the question of fresh evidence, which required research and advice. The appellant claimed, *inter alia*, that he had not been properly represented at the trial. In this respect he had a list of 21 complaints. This included the failure to lead evidence of a psychiatrist and an expert in firearms. He also claimed that there had been irregularities during the course of the trial. It was alleged that copies of prior inconsistent statements by a main Crown witness had been handed to the jury without the knowledge of the defence. There had been prejudicial publicity, leading to a finding of contempt of

court. There was concern in regard to the behaviour of a number of witnesses, including the Crown witness already referred to. There were questions relating to forensic evidence, and the fact that the appellant's interview by the police took place while a solicitor was not present. Mr. Sutherland pointed out that an initial stage in the taxation had taken place before the present Auditor's predecessor. He had called for further information which was supplied in a letter dated 27 January 1998, to which we were referred. The Auditor was peculiarly well qualified to assess the appropriate hourly rate.

The second matter at issue relates to counsels' fees for consultation and the conduct of the appeal. Para. 3 of Schedule 2 to the 1989 Regulations states:

> "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".

In his report the Auditor stated that he agreed with a submission made on behalf of the Board that counsel should be remunerated for this work in accordance with chapters 1 and 2 of the Table of fees, and that to pay their fees at an hourly rate would be *ultra vires*. However, he went on to state:

> "In the particular circumstances of this case, I am persuaded that I may exercise the discretion conferred by section 3 (sic) by increasing counsel's fees for the work done for consultations and the appeal. Accordingly, I am prepared to allow senior and junior counsel a 100% increase in their fees for the first consultation and a 50% increase for subsequent consultations, excluding the consultation on 23 April 1996 which I shall leave at the prescribed rate. As regards counsel's fees

for attendance at the appeal, I shall similarly exercise my discretion and increase the fees set out in chapters 1 and 2 by 100% in respect of the appeal hearings".

In their Note of Objections the Board stated *inter alia* that the Auditor had given no adequate reasons for allowing these very substantial uplifts. He had failed to identify any "particular complexity or difficulty of the work or any other particular circumstances". He had misdirected himself as to the basis upon which he could increase the fees by failing to have regard to para. 3. In his minute the Auditor claimed that his report had given clear and concise reasons for the significant uplift in the daily rates.

Mr. Clarke submitted that, given that a generous allowance had already been made for preparation, it was questionable whether there was any additional preparation or exceptional features in regard to the consultations. The Auditor should have asked himself whether the element of preparation in the prescribed daily rate was clearly inadequate. It was not enough merely to say that the case was an exceptional one. The Board were entitled on behalf of taxpayers to have from the Auditor a reasoned explanation along with an account of the submissions which were made to him. The fact that counsel had not been involved in the trial was not unusual. The fact that four senior counsel had declined to appear for the appellant did not necessarily mean that the client had to pay more. The Auditor had to give a reasoned justification for departing from the prescribed rate in the Table of Fees. It was important to bear in mind, as the Joint Auditor had observed in *Gielty*, that counsel who were to be remunerated under the legal aid scheme must be taken to have accepted the constraints or the rules set out in Schedule 2. It would be wrong for the Auditor to apply rates which would be appropriate in the private sector without reference to the general level in the Table of Fees.

Mr. Sutherland emphasised that the taxation involved a summary procedure. In the present case the Auditor had made it clear that he took into account factors such as the direction given by the Dean of Faculty, the volume of work involved, and the fact that counsel had not previously been involved in the case. The allowance of an appropriate rate for consultations and appearances in the appeal was distinct from the question of what should be allowed for preparation. The need for an uplift of the rate in the present case was made out by the accepted fact that this was an unusual and exceptional case. If so, the amount of that uplift was a matter of quantification within the discretion of the Auditor. For this reason the Auditor did not need to go into much detail. He founded on the views expressed by Lord Prosser in *Geddes* in regard to the equivalent regulations in respect of civil legal aid, where he said that where some minor increase appeared to be justified, the figure in the table of fees would no doubt be a true starting point.

> "But where the circumstances are seen by the Auditor as utterly different from the 'ordinary' circumstances catered for by the Table, the fact that he is granting an 'increase' on that fee may afford no guidance at all to what the appropriate fee, to provide reasonable remuneration, ought to be" (page 13).

Mr. Sutherland submitted that the Auditor was entitled to take private rates into account, as Lord Prosser had observed in *Geddes*. The Table of Fees covered only the run of the mill type of case. Why should what would otherwise be "reasonable remuneration" be reduced by reason of what the Table contained?

The third matter in dispute related to the Auditor's allowance of the fee of £650 plus VAT in respect of the work done by the law accountant who represented counsel at the taxation. In his report the Auditor stated that he found his presentation of the case to

be very helpful. In their Note of Objections the Board observed that the Auditor had not stated the basis on which he was prepared to award "expenses". He had not stated whether the award followed success in the taxation, the basis on which an award should be made to a representative who was neither a solicitor nor counsel or, this being the case, the rate of remuneration considered appropriate in the circumstances. The Auditor had misdirected himself in allowing an award of expenses and in respect of the level of that award. In response the Auditor stated that the presentation of the case for senior and junior counsel was not easy. The law accountant had made the position clear and concise. From the nature of his work he was fully cognisant of the Law Society's attitude to payment of fees to counsel in similar cases. His attendance had avoided the need for counsel to attend. In the particular circumstances of the case the Auditor had held it was reasonable for him to attend and that the sum allowed was a reasonable charge for his preparation and attendance at the taxation.

Mr. Clarke submitted that there was no authority for what the Auditor had done. Under the legal aid scheme only counsel and solicitors were entitled to fees. So far as experts were concerned sanction for their employment required to be obtained under other regulations. Mr. Clarke accepted that in *Gielty* the Joint Auditor had allowed a similar fee to the law accountant. However, he submitted that the wrong approach had been adopted. Mr. Sutherland submitted that the answer to the Board's submission was that fees for litigation should be distinguished from fees awarded in a taxation dispute between counsel and the Board. In practice the Auditor would award expenses to the successful party. In the past an award of expenses was made to advocates' clerks who represented their counsel. Accordingly there was no reason in principle why the same

approach should not be adopted in regard to awarding expenses in the form of a fee to the law accountant.

We can deal shortly with the fee allowed to the law accountant. There is in our view a clear distinction between fees charged for the conduct of proceedings and an award of expenses in respect of the taxation itself. The practice of auditors has been to make such an award in favour of a party to the taxation who was successful. This applied to counsel in the present case. We see no reason in principle why an award of expenses should not take the form of an allowance of a fee to the representative of the successful party. Accordingly we do not consider that the Board's attack on the allowance of a fee to the law accountant in the present case is well founded.

So far as concerns the fees allowable to counsel, it is plain that this court would not be justified in interfering with the Auditor's decision unless it were plain that he had misdirected himself or had reached a result for which there was no reasonable explanation. So long as he did not adopt a wrong approach, the quantification of the fee to be allowed was a matter for him in the exercise of his discretion, and it is not a proper function of this court to substitute its own view.

It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind the Auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them.

Para. 2 makes specific reference to the general levels of fees in the Table of Fees as one of the circumstances to which the Auditor is to have regard. Where a case is of a

type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work for which no fee was prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the Table. This points to the terms of para. 3, namely 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". Thus in such a situation the Auditor would be entitled under para. 2 to allow a higher fee than would have resulted from his allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3.

Para 3 limits the power of the Auditor to increase any fee set out in the Table of Fees to cases where he is satisfied that the test set out in the paragraph is met. By implication he is then expected to select a fee which will "provide reasonable remuneration for the work". The word "increase" does not in our view entail that he has necessarily to proceed by using some form of incremental calculation. It simply means that he can allow a higher fee. The case may be such that an incremental approach is unrealistic, because it is so different from any type of case for which the Table of Fees is appropriate. However, that does not mean that the Table of Fees can simply be ignored. Thus if the Auditor allowed a fee which was so high as to imply that the "ordinary" fee prescribed in the Table (i.e. the fee allowable where there were no particular circumstances to warrant an increase or a reduction) was too low, it would be clear that something had gone wrong. In short, on the footing that a fee set out in the Table of Fees is otherwise prescribed, there requires to be a reasonable relationship between that fee

and any higher fee which the Auditor is minded to allow, having regard to the features of the case which he considers to justify that higher level. In so far as certain observations by Lord Prosser in *Geddes* may suggest otherwise, we are unable to endorse his Lordship's views.

In the present case the Auditor stated in his report that he was persuaded that he should exercise his discretion "in the exceptional circumstances of this case" to uphold the hourly rates for preparation which had been charged by senior and junior counsel. It is plain that in so doing he approved a level of fee for preparation which was well above anything which was deducible from the general level of fees in the Table. He made no reference to the terms of para. 2 or para. 3. The "exceptional circumstances" were unspecified, but appeared to include one or more of a number of extremely general references to the work which was expected of counsel, namely, that they had been directed by the Dean of Faculty to argue the appeal after four senior counsel had refused to act, that they had not been involved in the trial and that the appeal involved a great deal of work, far exceeding what counsel would normally carry out where they had been involved in the trial. The Auditor provided no explanation as to how he came to approve the hourly rates which had been charged by counsel. It is impossible to know what factors he regarded as relevant and what weight he attached to any of them. It is plain that he had been addressed at some length but, apart from the reference to the Board's extrapolation of £42 per hour, there is no summary of the factors which each side invited him to take into account. Throughout it is important to bear in mind that what was in issue between the parties was not the amount of work which had to be done but the hourly rate at which it should be charged. We recognise that in his minute the Auditor

states that in exercising his discretion to award reasonable fees he had regard to paras. 2 and 3, but even there he gives no reasons for his decision. He was required to adjudicate between the parties, and he had a general duty to give reasons, at least by the stage of his minute. Fairness required that the parties, especially the losing party, should be left in no doubt why they had won or lost. Without reasons the losing party would not know whether he has a case to pursue on appeal. We would add that where there are substantial matters in dispute between the parties to a taxation it is appropriate, as well as helpful to them, if the Auditor's reasons for his decision on those matters are set out in his report. In this connection we note the full discussion of the issues in the Auditor's report in *Wood* v. *Miller* and *H.M. Advocate* v. *Gielty*.

As regards the fees for consultations and appearances many of the same observations apply. The Auditor applied uplifts by various percentages to the fees set out in the Table. His report was devoid of any indication as to the way in which he had arrived at these percentages. There was no trace of his having taken into account the fact that he had already allowed additional fees in respect of preparation. It is not in dispute that separate fees for preparation were appropriate in the present case. However, that could not be done without taking into account the extent to which the fees for consultation and appearances included an element in respect of preparation. The Auditor gave no indication of the factors which he regarded as relevant, what order of importance he attached to them and what was his response to the various submissions which were made to him on behalf of the parties. He made no particular reference to the terms of para. 3. There is no suggestion that the level of fees which he adopted was because of any particular complexity or difficulty of the work. If it was due to "any other particular

circumstances" he appears to have said nothing, apart from the repeated reference to "the exceptional circumstances". The observations in his minute do not significantly advance matters. Our remarks in regard to the need for reasons in the Auditor's report apply here also.

Having regard to the statutory framework within which the Auditor was required to operate it should have been unmistakable that his taxation had been carried out in accordance with its rules. We are not satisfied that he correctly directed himself to that framework in carrying out his task. Even if we had not come to that conclusion, we would have taken the view that in any event his adjudications were so lacking in reasoning for his decisions in regard to important matters in dispute that his adjudications could not stand. At the same time we should make it clear that we do not say that a reasonable Auditor could not have come to the same conclusions as the Auditor in this case.

In the circumstances we will sustain the Board's objections in respect of the fees allowed to senior and junior counsel in respect of preparation, consultations and appearances in court and remit taxation of these fees to the Auditor for him to reconsider in the light of this opinion. It would be appropriate for him to afford the parties a further opportunity to be heard by him before he reaches a fresh determination with supporting reasons.