

[REDACTED]

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

NOTE

by [REDACTED]

JOINT AUDITOR

in Remit by

Mr. John A. P. Moir 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. John A. P. Moir, Advocate ("Mr. Moir") in relation to the fees claimed by Mr. Moir for representing a parent, (whom I will not name in view of the details of the case which are mentioned in this Note), at Edinburgh Sheriff Court on 12th March 1999. A Children's Hearing had refused to allow the parent any contact with his daughter, who had been sexually abused. The social work department believed that the parent was responsible, but he maintained that it was another man who used to babysit for the family. Mr. Moir therefore presented an appeal to the Sheriff in terms of s. 51 of the Children (Scotland) Act 1995, hoping to show that the hearing's decision was based on incorrect facts as to the perpetrator, and hoping to persuade the Sheriff to hear evidence on the whole question. He was successful in the appeal, although it has now gone on by way of a Stated Case to the Court of Session.

2. For this work, Faculty Services Limited on behalf of Mr. Moir rendered a note of fee under four heads:

1999

Feb 25	an initial Consultation,	£300
Feb 28	a Note	£75
Mar 9	drafting a Minute	£100
Mar 12	presenting the Appeal, including preparation	<u>£810</u>
		<u>£1,285</u> plus VAT.

The Board did not challenge the fees charged for the Note and the Minute, but offered £200 for the Consultation and £675 for the Appeal hearing.

3. The Civil Legal Aid (Scotland) (Fees) Regulations 1989 provide by:-

Regulation 9 that "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", and

Regulation 10(2) that " Counsel's fees for any work in relation to Proceedings in the Sheriff Court ... shall be 90% 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."

4. [REDACTED] on behalf of the Board, invited me to allow whatever was the "going rate" in March 1999 for a case of normal complexity and then to deduct 10% in order to arrive at a "reasonable fee". He submitted that this was neither a case requiring a specialist member of Faculty nor was it a case of unusual complexity. He accepted that if a case required the employment of an Advocate with particular expertise in an area of work undertaken by only a limited number of Counsel, or if a case raised issues of unusual complexity, it would justify a fee above the "going rate". However, he qualified that concession by submitting also that just because a particular case turned out to involve more work than Counsel had assumed when accepting instructions, that did not in itself justify raising the fee because the "going rate" covered a broad range of typical cases and Counsel should be prepared to work within that band.

5. Mr Moir, assisted by his Clerk [REDACTED] opposed this approach for several reasons:

(a) that there is no "going rate" in cases proceeding under Legal Aid. Every case is different and has to be considered on its individual merits. Counsel confer with their Clerks, after the case is over, and invoice what seems a reasonable fee in light of the case as it 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.

(b) that if, contrary to point (a), one can establish a so-called "going rate" for fees paid to Counsel, Regulation 9 lays down the basis of "Solicitor and Client, Third Party paying", which is more generous than the party/party scale, and so any "going rate" must be more than the "going rate" on the "party paying scale".

(c) that if, again contrary to point (a), there is a "going rate", this present case should be distinguished on both of the grounds where [REDACTED] accepted that a higher fee might be justified. On the question of only a limited number of Counsel being available for specialist work, he pointed out that very few Counsel had expertise in the particular issues raised in this case, and that he himself had gained specialist knowledge in the Inquiries in Orkney and Ayr. On the complexity aspect, he produced his substantial files of papers and advised that sanction has been granted for both Senior and Junior Counsel to present the appeal to the Court of Session, because of the difficulty of the issues involved. There were, therefore, two factors to justify an increased fee above the "going rate", namely the specialist knowledge involved and the complexity of the case.

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

Cassidy v. Celtic Football and Athletic Co. Ltd. 1995 S.L.T. (Sh Ct) 95 at 97.

Elas v. S.M.T. Co. Ltd. 1950 S.C. 570, 1950 S.L.T. 397 at 571 - 2.

McNaughton v. McNaughton 1949 S.C. 42 at 46.

All of these were helpful, and focus on the two key phrases, namely "reasonable fees" and "solicitor and client, third party paying".

7. Appeal hearing on 12th March 1999

While it is true that every case should be feed in light of its own circumstances, in the Spring of 1999 (the date with which we are concerned here) I observed fees in civil cases on a party/party scale in Edinburgh Sheriff Court being paid to Junior Counsel, unchallenged, week in and week out, of between £800 to £900 for a day's appearance, including preparation. The very fact that the employment of Counsel had been authorised or sanctioned meant that the cases were of more than usual complexity. If these fees were accepted by experienced solicitors, challenging the account of the opponent charged on the party/party basis, it follows that a reasonable fee for a typical case on a "Solicitor and Client, Third Party paying" should be no less than £850. I have used that as a base from which to start assessing the fee in this particular case. If there had been no specialist knowledge or no undue complexity, that would have scaled down to £765 for the Appeal hearing, including preparation.

8. However, this was a complex case, raising a novel point on the hearing of evidence. Mr. Moir spent eight hours on further preparation on the file, considering the Agents' notes on the abandoned referral proof and of the hearing's decision appealed against, considering the supporting papers lodged by the Reporter and on drafting written submissions in respect of the motion to hear evidence and about the Section 1 motion. Late in the day prior to the Hearing, the Agents forwarded partial notes tendered in advance of the s. 1 motion about the interviews. These confirmed Mr. Moir's worst fears about the nature of these interviews, which seemed to breach accepted guidelines on the interviewing of children and in particular to breach specific Lothian Child Protection guidelines. Three further hours were spent in detailed consideration of these partial recoveries in the late evening prior to the Hearing. Accordingly the charge for the Hearing itself (six hours) has subsumed within it an additional eleven hours of preparation. The Sheriff's Stated Case ran to over thirty pages. The fee proposed by Faculty Services Limited for the Hearing (£810) is 90% of £900. That is for seventeen hours in all, eleven of preparation and six in court. That in my view takes the case into the category of abnormality in magnitude or difficulty, and justifies an uplift of fee. If I am correct that £850 (scaled down to £765) would have been reasonable for a case of normal complexity, then £900 (scaled down to £810) is reasonable for this case, and I sustain that fee as rendered. Indeed, in view of the narrative in this paragraph, it is probably on the light side. I do not propose to increase it, but I make that comment in case it is argued on another occasion that a complex case involving Counsel for seventeen hours is worth no more than £900.
9. Consultation
- An initial Consultation was arranged and substantial papers were delivered to Counsel shortly before it. The interviewing of the child was central to the issue and the records in the reports were inadequate. Counsel therefore met with the client for one hour, and then - the papers having been recently delivered - he had to work his way through the extensive social work files and reports in order to identify inaccuracies, changes of position and "spin" put on matters for the hearing. This took three more hours. He exhibited the files to me and explained what was required by way of preparation to take the case forward. If the sequence had been to peruse complex papers for three hours and then to consult with the client for one hour, I would not have regarded a charge of £300 (which is £334 scaled down) as excessive in the particular circumstances of this case which, as set out

above, involved both a degree of specialist knowledge and unusual complexity. The usual procedure was reversed here, and the meeting with the client took place before the detailed perusal of the papers, but the overall picture seems to me to justify the fee rendered in, as I say, the special circumstances of this case. I sustain the fee of £300 net.

10. Expenses.

Mr. Moir is entitled to some recompense for attending the taxation and the preparation for it - he prepared detailed written submissions and copied a bundle of papers for my benefit. A solicitor would receive a block fee of just over £100 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 £90 to the docquet of taxation and in terms of Regulation 12 (1) I adjudicate on the "dispute" as follows:

1999

Feb 25	Consultation		£300.00
Feb 28	Note		£75.00
Mar 9	Minute		£100.00
Mar 12	Appeal, including preparation		<u>£810.00</u>
			£1,285.00
	Faculty Services Limited for the taxation procedure	£	<u>90.00</u>
			£1,375.00
	VAT on all of these	£	<u>240.62</u>
			£ 1615.62
	Audit fee	£68.00	
	VAT on it	<u>£11.90</u>	£ <u>79.90</u>
			<u>£1,695.52</u>

Ian L.S. Balfour,
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26th October 1999.