Taxation Report

10th November 1999

[redacted]

8149326698

Virgil m Crawford

Summary Time and Line

Waiting Time

1999

.ation in terms of the Criminal Legal Aid (Scotland)(Fees) Regulations 89

SL

[redacted] – Legal Aid Reference no SM/8149326698

STIRLING: 10 November, 1999
Act: Crawford Alt: [redacted]

The Auditor having heard parties, and having been advised by them that the only point in dispute in the account is the fee claimed for "waiting time" for 1st October, 1999, makes avizandum.

GLYNIS MCKEAND
AUDITOR OF COURT

STIRLING, 10 JANUARY, 2000
The Auditor having resumed consideration of the Account of Expenses finds same to have been fair and reasonably assessed by the Scottish Legal Aid Board.

GLYNIS MCKEAND
AUDITOR OF COURT

NOTE:-

At the commencement of the taxation parties intimated that the account was agreed but for the issue of the fee claimed for "waiting time" on 1 October 1998, between the hours of 12.37 and 2.15pm. Although it was not clear from the account or from any other source, both parties seemed to agree that the Court had adjourned for lunch between the hours of 1pm and 2pm. The Scottish Legal Aid Board in their assessment of the account had abated the fee of £52.75 by £42.20. The abatement was negligible but the matter at stake was one of principle.

In support of his argument that the fee claimed should be allowed **Mr Crawford** referred me to:

- Criminal Legal Aid (Scotland)(Fees) Regulations 1989 regulations 4 & 7;
- Code of Practice in relation to Criminal Legal Assistance paragraph 4.2.2;
- Scottish Legal Aid Board Legal Aid Fees and Taxation Guidelines 1992 Section B paragraphs 1 &
- Scottish Legal Aid Board Criminal Fees and Taxation Guidelines 1998 paragraphs 1.1, 1.1.2 & 2.2;
- Mitchell v Vannet 1999 SCCR 547;
- Caldwell v Normand1993 SCCR 624; and,
- Ferguson v Normand 1994 SCCR 812.

[redacted] then addressed me. He advised that the standard of taxation was that set out in paragraph 7 of the Criminal Legal Aid (Scotland) (fees) Regulations of 1989. In addition to this statutory instrument there are regulations which are for the guidance of the Scottish Legal Board in considering what fees should be allowable.

In 1992 when the Scottish Legal Aid Board came into being there were grave concerns about the taxation practices which had grown up over the years, but the Board decided to let all remain until they were successfully challenged. Some of these taxation practices were not consistent with the 1992 regulations e.g. unqualified individuals were being paid qualified rates. This was challenged in HMA v Moffat which resulted in a determination that applied the principle that remuneration should be considered in the light of the "nature of the work being undertaken and according to circumstances".

The Scottish Legal Aid Board Legal Aid Fees and Taxation Guidelines 1992 were drafted in such terms as to let people know what the Board did, i.e. what it had inherited on its coming into being, regardless of whether those now in authority considered the inherited practices to be right, wrong or indifferent. The 1998 Guidelines were as a result of the Scottish Legal Aid Board going through and considering the terms of Statutory Regulations, Auditors' decisions and Court decisions etc. In considering the terms of these new regulations the draftsmen had taken into consideration areas in which they considered the former practice to be wrong and had corrected it.

In so far as "waiting time" is concerned, the Board accepts solicitors must wait. In general, solicitors are not paid "waiting time" before 10am, it being assumed that they do not need to be there. Often, however, solicitors do work prior to 10am, e.g. meeting with client at 9.45am, and where such work is claimed the Board normally pays for it. When the Court rises for the day and time is claimed by the solicitor for work done thereafter, e.g. attendance with client or looking over the evidence, again the Board will normally meet this charge.

Where the Court adjourns for lunch, if solicitors go out for lunch it is the Board's view that they are not working and therefore are not entitled to either "advocacy" or "waiting time" rates of remuneration. If the solicitor chooses to go back to the office, or to remain in the Court building and do other private work (even when the Court is still sitting), then they could and should be otherwise remunerated for that work and in these circumstances should not be remunerated by the Board in relation to the case still to proceed or proceeding before the Court. The Board has to view claims subjectively.

[redacted] submitted that the cases referred to by Mr Crawford were of little relevance to the point at issue here. He also pointed out that by virtue of Schedule 2 to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Counsel were statutorily entitled to be paid a full day's waiting time where a trial did not commence whereas solicitors had no such statutory right. He referred me to the case of HMA v Birrell 1994 SLT Page 480, in which Lord Coulsfield had addressed the question of the appropriateness of "waiting time" for Counsel involved in trials in Edinburgh, but suggested that what Lord Coulsfield had to say in that particular case was of no relevance to the issue of solicitors, who had a statutory right to time for preparation etc by virtue of Schedule 1 of the 1989 Regulations.

In looking at the relevance of the HMA V Birrell case **Mr Crawford** noted the powers granted to the Auditor in paragraphs 3 & 4 of Schedule 2 of the 1989 Regulation which

esses "Fees of Counsel" only. [redacted] also drew to Mr Crawford's notice the vers contained in paragraph 2 of that Schedule.

Mr Crawford found Mr Haggarty's arguments to be illogical. He didn't know if Mr Angus had gone for lunch on the day in question. He was, however, certain that if he had done other work the account would have been interrupted. He pointed out that having a coffee during "waiting time" did not interrupt entitlement to remuneration. Although not relevant to the point at issue in this particular case he suggested that the Board, in the light of the cases of Mitchell v Vannet and Hannly v Pirrie and their relevance to the issue of "when a trial is deemed to commence", should give consideration to their interpretation of when "advocacy rates" should commence. He asked the question, are you then "conducting" the trial?

Merely for clarification [redacted] advised that the Board would pay for fees claimed if consulting a client during the lunch adjournment or reading productions regardless of whether "advocacy" or "waiting time" fees were appropriate at the time.

Mr Crawford submitted that the waiting time involved over the lunch time adjournment should be considered under the heading of "time necessarily spent" and referred to Regulation 7(2) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. He submitted it was unreasonable to expect Mr Angus to go back to his Bannockburn office to do work. He accepted he could have gone to a local office to do work or could have done work from a briefcase, but even in that respect he suggested it was unreasonable of the Board to expect Court practitioners to carry other work around with them. It was also unreasonable to expect anyone to return to their office to attend other appointments during the lunch time adjournment.

At the conclusion of their addresses I asked whether practitioners would charge a private client for the time of the lunch adjournmnet. Mr Crawford advised that private clients were usually engaged on a fixed fee basis but that otherwise solicitors would be bound by the Law Society Table of Fees.

[redacted] further submitted that in considering the matter I should concentrate on the issue of the appropriateness of claiming fees for the lunch adjournment and that alone. In this particular case we don't know when the Court arose, nor when it sat again. We don't know what Mr Angus did during the lunch adjournment. If he did work in relation to this case during the lunch time adjournment then all he has to do is tell SLAB what that work was and he will be paid for it.

Because of the absence of information in this particular case, I find myself in the position of considering what is, in effect, a hypothetical question. I do not know when, or even if, the Court adjourned for lunch on 1st October 1998 and I do not know what Mr Angus did during the lunch adjournment, which parties to the taxation are agreed took place. What I am certain of is that if Mr Angus had done other remunerative work in relation to any other case during the period of time in question, then the fee claimed would not have appeared in this account.

Assuming that the Court did adjourn for lunch and that Mr Angus, having no other work to do in relation to this case or any other, proceeded to partake of lunch, I am of the view that he would not be entitled to claim the Scottish Legal Aid Board for "waiting time" during that lunch adjournment. There is no statutory provision for the payment of such a fee.

Crawford submitted that since the Criminal Legal Aid (Scotland)(Fees) Regulations 1989 had come into force, "waiting time" had been paid for periods including the lunch adjournment. Similarly, if the trial had commenced, the "advocacy rate" of remuneration had been paid. The abatement of these fees by the Legal Aid Board had only recently become practice.

Prior to the issuing of the Scottish Legal Aid Board Criminal Fees and Taxation Guidelines 1998, the Legal Aid Board had relied upon the Guidelines of 1992. Mr Crawford referred me to the terms of paragraph 1.1.2 thereof which, it was accepted, specifically addressed the issue of the "advocacy rate" and not "waiting time".

The new 1998 regulations he contended had no statutory foundation and I, as Auditor, was thus not bound by them. He referred me to the terms of paragraph 2.2 thereof (Page 18) which addressed the subject of "waiting time" and in particular to the words "Any period set aside for luncheon is not usually chargeable as waiting time." He further referred me, however, to the principle set out in that paragraph, to the effect that waiting time should only be charged "where other chargeable work is not being carried out" and submitted that in considering the issue I should take into consideration that, because of the nature and the extent of the Court's lunch adjournment, it was not possible to do anything else chargeable during that time. He then referred me to page 9 of the Code of Practice in Relation to Criminal Legal Assistance. He submitted that the last 3 subparagraphs of paragraph 4.2.2 thereof set out what is expected of practitioners and that in order to achieve what is set out in the penultimate paragraph, it would be impossible for a practitioner to carry out other work during the lunch adjournment.

He contended that as I was not bound by the terms of the 1998 Regulations I should disregard the statement "Any period set aside for luncheon is not usually chargeable as waiting time" but apply the principle that "waiting time" should only be charged "where other chargeable work is not being carried out" and conclude that in all the circumstances it would not be reasonable for the Board to expect a practitioner to do other chargeable work during the lunch adjournment.

He then referred me to the case Mitchell v Vannet 1999 SCCR 547 but accepted that this case was not directly on point, as in the case currently being considered the accused was not present and the diet to be called was merely a preliminary one.

He then referred me to Ferguson v Normand 1994 SCCR 812 in which a solicitor had been found in contempt of court for not being present. This case had been overturned on appeal on the basis that the solicitor's absence had not been wilful but the case, Mr Crawford submitted, lent weight to his argument that solicitors could not be expected to do other work during the lunch adjournment.

He also addressed me on Caldwell v Normand but in the course of his address conceded that this case was of little relevance to the issue at stake.

In closing, he informed me that although he accepted that taxation of Counsel's fees were a matter for another auditor, it was his understanding that Counsel were paid for full days when awaiting the commencement of trial.

gulations 7(1) and (2) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, ovide that solicitors should be allowed "such amount of fees as shall be determined to be easonable remuneration for **work actually and reasonably done**, and travel and **waiting time actually and reasonably undertaken or incurred**", including time "spent at the Court on any day in waiting for the case... to be heard, where such time has not been occupied in waiting for, or conducting another case". Had the Court sat on through lunch, Mr Angus would undoubtedly have been entitled to remuneration. But it is reasonable to expect that on most days of the week the Court will rise for lunch at some time. In these circumstances local solicitors could reasonably be expected to go back to their offices to do deskwork if they wished or more realistically to have lunch. It is my understanding that Health and Safety Regulations and more recently the European Working Time Directive, require that workers have a lunch time break entitlement.

Looking to the Law Society Fees for Conveyancing and General Business, Chapter 9 and the Sheriff Court Table of Fees, Chapters II and III as applied by that Chapter, I am also of the view that an auditor would not allow a private client to be charged at either the "advocacy" or "waiting time" rates for the time involved in the lunch adjournment, in circumstances where a solicitor could reasonably be expected to return to his place of business to do other remunerative work, or alternatively, to take lunch in the normal course of events. It is therefore equitable in my view that the same standard should apply where the Scottish Legal Aid Board is meeting the cost of the litigation. Different circumstances might well apply where the solicitor involved is not a local agent.