

DECISION OF AUDITOR – COUNSELS’ FEES – CRIMINAL

DATE OF DECISION	15.09.00
NAME OF CASE	HMA –V- [REDACTED]
CASE TYPE	Fraud – Edinburgh High Court
AUDITOR	Neil Crichton, Court of Session
COUNSEL/SOLICITOR ADVOCATE	Junior Counsel – Irwin “Senior” Counsel – O’Grady Senior Counsel – Henderson
AMOUNT(S) AWARDED	£750 per day (O’Grady) – conduct of trial £450 per day (Irwin) – conduct of trial £500 per day (O’Grady) – when trial did not proceed £300 per day (Irwin) – when trial did not proceed £500 per day (O’Grady) – preparation £300 per day (Irwin) – preparation £840 per day (Henderson) – pre trial preparation £840 per day (Henderson) – preparation during trial £840 per day (Henderson) – consultation fee £1260 per day (Henderson) – conduct of trial £840 per day (Henderson) – when trial did not proceed
FEATURES	Trial ran from 16.11.98 to 21.07.99 (longest running case in history). 36 Page Indictment spanning the years 1987 to 1992 including 8 Schedules and 43 separate fraud charges. Trial Judge issued 5 complex written Judgements on points of law. 14,000 pages of Crown productions. Lord McEwan “The case was unique in the experience of most of who were involved” and he stated that it was complex, required extensive preparation and nightly consultation with counsel on both sides.

FEATURES

Auditor states it was as complex and difficult as the [REDACTED] Case and distinguishes it from the [REDACTED] Case by reference to counsel being involved here in the "cut and thrust" of examination and cross examination.

Auditor states that it is inappropriate to charge an hourly rate for preparation.

Auditor states that counsel is entitled to charge a daily rate commensurate to his experience.

O'Grady – specifically selected for trial, AD for 4 ½ years – considerable criminal experience – now a QC – Auditor allowed payment at Senior Rates.

Auditor states that the daily rate for preparation must be related to the amount allowed for advocacy.

Henderson – "enormously" experienced counsel – conducted trial on his own – total commitment to case for nine months – joint minute produced saving significant court time.

Auditor allowed separate daily preparation rates due to the "exceptional circumstances of this case".

COURT OF SESSION, SCOTLAND

R E P O R T

by the

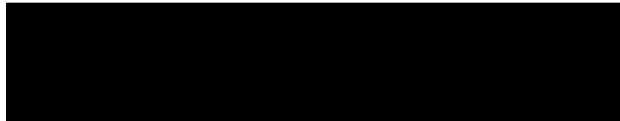
AUDITOR OF COURT

in causa



HER MAJESTY'S ADVOCATE

Against

MB & SB



EDINBURGH. 15th September 2000

1. This Taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Counsel for the First Accused, Mr. M.G. O'Grady, Advocate, and Mr. H.C.G. Irwin, Advocate, and Counsel for the Second Accused, Mr. R.E. Henderson, Q.C.
2. At the Taxation on 19th April 2000, the Board were represented by 
 Law Accountants, represented Counsel, Mr. O'Grady, Q.C., was also in attendance.

3. Faculty Services Limited had rendered fees on behalf of Counsel for the First accused, which are shown in Appendix A hereto. Mr. Henderson's fees are shown in Appendix B.

4. At the diet of taxation, the Auditor had before him a Note prepared by Mr. R.E. Henderson, Q.C., dated September 1999 and a Note by Temporary Judge Robin G. McEwan (now Lord McEwan) dated 14th April 2000. The Board had lodged Notes of Objection in respect of the fees charged by Counsel for both accused. These are set out in the Appendices C, D and E hereto. Since the taxation, the Auditor has had the opportunity to consider the whole papers.

5. The fees in this case fall to be paid in accordance with Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and must, therefore, "represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy". The areas of dispute are: (1) The status of Mr. O'Grady at the time of the Trial; (2) Whether a preparation fee is justified under the Regulations and whether the fees claimed are excessive; (3) Whether an enhanced fee is appropriate for trial day and (4) Using an hourly rate for the Consultations. The main objections to Mr. R.E. Henderson, Q.C.'s, fees are identical to Nos. 2, 3 and 4 above with, in addition, Counsel claiming for a "Consultation" when the Solicitor was not present and Counsel's fees in respect of consideration of Jury verdict, Judge's

sentence, drafting Grounds of Appeal as the work is not properly charged against the Criminal Legal Aid Certificate relating to the proceedings in the first instance.

6. It is appropriate at this stage to consider the nature of this Trial and here the Auditor relies on the Note by the Trial Judge, Lord McEwan, the Note by Mr. R.E. Henderson, Q.C., Counsel for the Second Accused, the submissions made at the Taxation the relevant papers and, in particular, the charge to the jury. The Trial commenced on 16th November 1998 and concluded on 21st July 1999. This made it the longest running case in the long history of the Scottish High Court. The Indictment ran to 36 pages spanning the years 1987 to 1992. It included eight Schedules broken down into 43 separate charges of fraud. During the Trial, the Presiding Judge issued five complex written Judgements on points of Law, some of them novel, which had been the subject of argument during the evidence. The Crown had lodged Productions which extended to some 14,000 pages. Lord McEwan states, "The case was unique in the experience of most of who were involved. It was very long in Court time and the details of the paper work made it complex. It must have required extensive preparation before hand and I know needed nightly consultation with Counsel on both sides." The trial of Malcolm Baillie was deserted *pro loco et tempore* on 10th December 1998. The Auditor is satisfied that this case equiperates to that of [REDACTED] in complexity and difficulty. The Auditor has also taken into account that, unlike that case, Counsel here were involved in the cut and thrust of examination and cross examination.

7. Against this background, Counsel for both accused seek to recover reasonable remuneration for the extensive preparation necessary to prepare a defence to an Indictment of such importance and complexity. When Counsel for the First Accused's Fee Notes were submitted to the Board they maintained that this was not a complex case. However, at the time of the Taxation, [REDACTED] conceded that some preparation was reasonable. Even if this concession had not been made, the Auditor would have determined that this was a case where Counsel should be entitled to be paid for preparation under para 2 of Schedule 2 to Regulation 10. The concession, having been made, the Auditor must determine "reasonable remuneration for work with regard to all the circumstances, including the general level of fees in the said Table of Fees."
8. Para 3 of Schedule 2 to Regulation 10 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." For the reasons stated *supra* the Auditor is satisfied that the particular complexity or difficulty of the work and any other particular circumstances justifies an increase in fees to provide reasonable remuneration for the work done.
9. Having satisfied himself that he is entitled to exercise his discretion, the Auditor must proceed along the lines set out by the Lord Justice Clerk in *Uisdean McKay*

v. H.M.A. (25th June 1999) at page 10 *et seq*; “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 level.” Against this background the Auditor will now deal with the fees rendered by Mr. O’Grady and Mr. Irwin, the Counsel for the First Accused. There appears to be a dispute on Mr. O’Grady’s status as “Temporary Senior Counsel”. [REDACTED] maintained that Mr. O’Grady is a Junior Counsel and that the fees to be charged by him are set out in Schedule 2 Chapter 1 of the Regulations. [REDACTED] took exception to Mr. O’Grady’s claim for 167.5 hours for preparation. There was a lack of detail in the form of file notes and the Board found it difficult to satisfy itself, as it must, that the length of time in each entry and collectively to peruse the various documents was appropriate. Mr. [REDACTED] objected strongly to the charge of preparation at an hourly rate. There is nothing in the Table of Fees to justify this charge. Chapters 1 and 2 of Schedule 2 to Regulation 10 do not allow Counsel’s fees to be charged at an hourly rate. The Auditor agrees with this proposition. Whilst it is useful to have a note of the hours spent in preparation, it is, in the Auditor’s view, inappropriate to charge an hourly rate for preparation. [REDACTED] gave examples of charges in similar matters: [REDACTED] *in 1993*. In this case there were 20,000 pages of Productions and 49.5 hours of preparation. [REDACTED] a British railways fraud, where there were 80,000 sheets of documents and 100 hours of preparation. He also mentioned the largest drugs case in

Scotland where Senior Counsel's fee had been settled at a rate of £825.00 per day. Having accepted [REDACTED] premise that Counsel are not entitled to charge on an hourly basis, the Auditor must decide whether the number of hours claimed is reasonable and then convert those hours into daily rates and apply an appropriate payment to those days. Having heard submissions on behalf of Mr. Irwin and Mr. O'Grady and read the documentary evidence produced by them at the taxation, the Auditor is satisfied that in the particular circumstances and difficulties of this case, that the sums charged by way of hours of preparation are reasonable. Allowing these at a six hour day the number of days claimed by Senior is 28 and Junior is 16.5.

10. The Auditor must now determine what is a reasonable rate of remuneration for the conduct of the Trial. Whilst the status of Mr. O'Grady is important, the Auditor is satisfied that he is entitled to charge a daily rate commensurate to his experience. He was specifically selected for this Trial. He had been an Advocate Depute for four and one-half years and had considerable experience as a criminal Advocate. He is now a Q.C. Bearing in mind the difficulties of this case, and for the reasons already stated, the Auditor is satisfied that the rate of £750.00 per day for conducting the Trial is reasonable remuneration for Mr. O'Grady. There were, however, four days (16th and 30th November and 4th and 9th December) where Counsel were prepared for Trial but it did not proceed. For those days it is reasonable to allow a daily rate of £500.00 for Senior and £300.00 for Junior. The Auditor is also satisfied that there is a reasonable relationship

between the fees and the fees prescribed in Schedule 2 and, furthermore, that had Mr. O'Grady been proceeding on a private basis his fee for this work would have been very considerably higher.

11. Having satisfied himself that the sum of £750.00 for Senior and £450.00 for Junior per day is reasonable for Court work, the Auditor must decide the rate at which Counsel should be remunerated on a daily basis for preparation. In his view, this must be related to the amount allowed for advocacy. Accordingly, he allows Mr. O'Grady £500.00 and Mr. Irwin £300.00 for preparation per day.

The reasonable fees for Counsel in this trial are:

Mr. O'Grady

Pre trial preparation : 28 days @ £500.00 per day:	£14,000.00
Fees conducting Trial: 15 days @ £750.00 per day:	11,250.00
4 days @ £500.00 per day:	2,000.00
4 Notes	450.00
Meeting with Advocate/Depute	65.00

Mr. Irwin

Pre trial preparation: 16.5 days @ £300.00 per day	£ 4,950.00
Fees conducting Trial: 14 days @ £450.00 per day	6,300.00
4 days @ £300.00 per day	1,200.00
1 day (as claimed by Mr. Irwin)	172.00
Consultations: 2 days @ £300.00 per day	600.00

12. Turning to Mr. R.E. Henderson, Q.C., Counsel for the second accused's fees, the findings in paragraphs 9 and 10 have even greater significance. Mr. Henderson is an enormously experienced Counsel. At considerable risk he conducted the Trial on his own. Reading Mr. Henderson's Fee Notes (Appendix B) and Note (Appendix C) shows a total commitment to this case for a period of some nine months (16th November 1998 to 21st July 1999). By entering into a Joint Minute, Mr. Henderson saved a significant amount of Court time (see Lord McEwan's Note and charge to the Jury p. 48). The Crown proceeded against the second accused on all the charges in the indictment. Mr. Henderson claims £1260.00 per day for the Trial. In all the circumstances, the Auditor is satisfied that this is reasonable. The sheer number of trial days confirms the difficulty and complexity of the matter. As with the first accused, the Auditor has not allowed fees for 16th and 30th November and 4th and 9th December at the full rate and has restricted the fee to £840.00 per day. In reaching this figure the Auditor has satisfied himself that there is a relationship between the fee and that prescribed in Chapter 2 and that the fee is not based on what Mr. Henderson might receive on a private basis. The fees for conducting the Trial shall be £150,780.00.
13. In dealing with Counsel for the First Accused's fees, the Auditor determined that it was inappropriate to charge work at an hourly rate and the same applies to Mr. Henderson's fees for preparation. Mr. Henderson claimed 453.5 hours pre-Trial preparation and 198 hours preparation during the Trial. Allowing six hours per day, this breaks down to 75.5 and 33 days. Mr. Haggarty argued that the daily

rate for the trial should include preparation, but in the exceptional circumstances of this case, the Auditor is persuaded that it is reasonable that 33 days be charged separately.

██████████ took exception to the 75.5 days of pre Trial preparation on the basis that as Mr. Henderson had given advice to the second accused prior to the grant of Criminal Legal Aid, there would be an element of duplication. ██████████ conceded this but any duplication would be minimal. In the circumstances, the Auditor allows 73.5 days preparation. ██████████ was concerned that the sentences in paragraph 4 of Mr. Henderson's Note "as a result, Counsel had to engage in a considerable amount of additional investigatory work during the course of the Trial." gave the impression Mr. Henderson was carrying out work which was the Solicitor's responsibility (see *HMA v. ██████████* 27/04/1990). Mr. ██████████ explained that the phrase "investigatory work" should be construed as work in an "investigatory manner". Mr. Henderson required to prepare to put hypotheses to witnesses based on the Crown's productions ██████████ "investigatory work". ██████████ as in his objections to Mr. O'Grady's fees, took exception to the number of hours (now days) spent in preparation. This was excessive and not justified by written records. The Auditor has seen Mr. Henderson's records which are based on a detailed diary system. The Auditor has given these close scrutiny and is satisfied that the hours (now days) claimed are reasonable. Mr. Henderson had to deal with all the charges in the indictment

and the vast number of productions lodged by the Crown in what may be described as a haphazard manner.

14. Mr. Henderson has claimed 20 Consultations over a period of 13 months totalling 62.75 hours.. These are charged on an hourly basis and the Auditor, for the reason stated earlier, has converted these to a daily basis. Because of the continuing nature of the preparation, the Auditor is unable to identify the specific work for each Consultation. The number of Consultations is reasonable as is the number of days charged in such a complex matter. The Auditor has allowed the same rate for Consultations as for preparation. [REDACTED] objected to some of the Consultations as they appear to have taken place outwith the presence of the Agents. There may have been occasions when the Agent was absent for part of the Consultation but the Auditor is satisfied that Mr. Henderson's records are accurate. The Auditor makes no comment on the advisability of an Agent absenting himself from Consultation. Mr. Haggarty also took exception to a Consultation on 21st November 1998 at which an alleged Legal Aid fraud may have been discussed. The Auditor is satisfied that no charge should be made for this Consultation but he has satisfied himself, from the papers and from Mr. Quinn's submissions, that it is reasonable to remunerate R.E. Henderson, Q.C. on a daily basis for the other Consultations. The reasonable rate for daily preparation shall be £840.00 the same rate as awarded for the non-advocacy days in November and December 1998. It is reasonable that the Consultations are charged at the same rate.

The reasonable fees for Mr. Henderson in this Trial are:

A.	Pre Trial preparation: 73.5 days at £840.00 per day:	£ 61,740.00.
B.	Preparation during Trial: 33 days at £840.00 per day:	£ 27,720.00. £ 27,720.00
C.	Consultations over 13 month period: 9 days at £840.00 Per day	£ 7,560.00
D.	Fees for conducting the Trial:	
	117 days @ £1260.00 per day:	£147,420.00
	4 days @ £840.00 per day:	£ 3,360.00

15. Finally, the Auditor has been requested to tax Mr. Henderson's fees for the Appeal. [REDACTED] objected on the ground that this fell outwith the Legal Aid Certificate for the trial. The accused has been granted a separate Criminal Legal Aid Certificate to pursue the Appeal (reference PP/9103540499) and it is under that grant of Legal Aid that this work will be taxed. It is clear that the Appeal is unlikely to be heard in the near future. The documentation will be colossal and there will be a significant amount of Court time required. However, the question of payment for the Appeal work is a matter for the Board and Mr. Henderson. The Board's Points of Objections (Appendix E) take no specific objection to the charges for this work. In reaching his findings, for the Appeal work the Auditor has applied the objections set forth in the Note and at taxation, to Mr. Henderson's fees for the trial and is satisfied that they may be applied mutatis mutandis to these charges.

Mr. Henderson has charged a total of 8.5 days in July and October 1999. In the Auditor's view, there is bound to be duplication between the work done in July and October. It is reasonable to allow 7.5 days for this work and it should be charged at the rate previously allowed for preparation of £840.00 per day. This gives a total of £6300.00 Mr. Henderson has charged £1260.00 for his appearance in moving for *interim* liberation. This was vigorously opposed by the Crown. Bearing in mind Lord McEwan's sentence and the importance of the outcome of the motion to the client, the Auditor is satisfied that the fee sought is reasonable. The fees for the Appeal work and hearing on *interim* liberation shall be £7560.00.

16. [REDACTED] Law Accountant, submits that his fees for the work he has carried out and his attendance at the taxation should be allowed. The Auditor found his presentation of the case for Counsel for both the accused to be very helpful. His fee is reasonably stated at £1500.00 plus VAT.

Accordingly, the Auditor taxes Counsels' fees as follows:

A/

A.	Mr. M. O'Grady, Q.C.	£ 27,765.00
B.	Mr. H.C.G. Irwin,	13,222.00
C.	Mr. R.E. Henderson, Q.C. (to include fees of £7560.00 for the Appeal)	255,360.00



AUDITOR OF THE COURT OF SESSION