

DECISION OF AUDITOR – COUNSELS’ FEES – CRIMINAL

DATE OF DECISION

15.09.00

NAME OF CASE

HMA –V- [REDACTED] AH

CASE TYPE

Murder Retrial – Edinburgh High Court

AUDITOR

Neil Crichton, Court of Session

COUNSEL/SOLICITOR ADVOCATE

Solicitor Advocate (acting as Junior to Senior Solicitor Advocate)

AMOUNT(S) AWARDED

£360 per day – conduct of trial

FEATURES

Trial took place in 1999 (fee note received September 1999).

Auditor stated that it was reasonable to follow the common practice to allow JC an increase pro rata to that paid to SC.

Auditor stated case was “difficult” and “novel”.

Murder happened 15 years previously and the original trial took place 11 years previously.

Allowed 75% uplift on the prescribed rate of £203.50.

Auditor of the Court of Session

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Our Ref: 24473

[REDACTED]
Solicitor
Scottish Legal Aid Board
DX ED 250
EDINBURGH

15th September 2000

Dear Sir,

HMA v. [REDACTED] 83/806/7898

I refer to the above action and now enclose, for your information, the Auditor's Report. I am also enclosing his Note of Fee and shall be pleased to receive your remittance in settlement.

Yours faithfully,

C. Cameron

Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

R E P O R T

by the

AUDITOR OF COURT

in causa

HER MAJESTY'S ADVOCATE

Against

[REDACTED]

EDINBURGH. 15th September 2000

Diet of Taxation: 14th August 2000

In attendance: Mrs. R. Cameron of Messrs. Anderson Strathern, W.S. and

[REDACTED] of Scottish Legal Aid Board.

The Auditor has been asked to provide this Note following a taxation of Mr. Paul Burns', Solicitor/Advocate's fees which took place on 14th August 2000 and at which [REDACTED] [REDACTED] of the Scottish Legal Aid Board and Mrs. R. Cameron of Messrs. Anderson Strathern, W.S. attended. At the taxation the Auditor had detailed Points of Objection from [REDACTED] and a letter dated 15th June 2000 from Messrs. Anderson Strathern,

W.S. The first matter for the Auditor to consider is the 300% uplift to his fees claimed by Mr. Burns. The status of Solicitor/Advocates is set out in Regulation 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1999 para. 1(A). Their fees are prescribed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 regulation 10(1) which provides that Counsel shall be “allowed such fee as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy.” Chapters 1 and 2 of Schedule 2 set out the basis on which the Auditor taxes Counsels’ and Solicitor/Advocate’s fees. Paragraph 2 of Schedule 2 gives the Auditor discretion to allow a fee for an item of work not prescribed in the Table of Fees and para. 3 gives the Auditor power to increase the fees prescribed in the Schedule. In the Auditor’s opinion he has no power to award a percentage increase to fees claimed. The Auditor must be satisfied that the claims for additional remuneration fall within paragraphs 2 and 3 and any increase is applied to the fees detailed in the Schedule. This is the approach set out by the Lord Justice Clerk in Uisdean MacKay v. H.M.A. (25th June 1999).

In this trial, Mr. Burns had acted as Junior to Mr. Michael McSherry, Senior Solicitor/Advocate. Mr. McSherry had come to a separate agreement with Scottish Legal Aid Board and the basis of his remuneration which includes a substantial uplift on the prescribed fees, is set out in [REDACTED] Points of Objection (page 2). Mrs. Cameron argued eloquently that Mr. Burns’ fees should be looked at separately from Mr. McSherry’s. This was an important and novel matter. She had been totally committed to this case for three months and had been closely involved with Mr. Burns throughout.

She did not think it reasonable that Mr. Burns should, as a matter of course, accept the same level of increase as his Senior. There might be personal reasons why Mr. McSherry dealt with Scottish Legal Aid Board which did not apply to Mr. Burns. Whilst the Auditor has considerable sympathy with Mrs. Cameron's views, he has determined in all the circumstances of this difficult and novel case that it is reasonable to follow the common practice to allow Junior Counsel (or Solicitor/Advocate) an increase pro rata to that paid to Senior Counsel (or Senior Solicitor/Advocate).

Scottish Legal Aid Board have offered £5000.00 to Mr. Burns. In the Auditor's opinion this is reasonable remuneration and he taxes Mr. Burns' fees at £5000.00.

A handwritten signature in black ink, appearing to read 'W. J. Burns', with a horizontal line underneath.

AUDITOR OF THE COURT OF SESSION

220 3908

234

Anderson Strathern
Solicitors
DX ED53
EDINBURGH

RMC

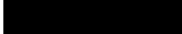
JC/IB

29 June 2000

Dear Sirs

 8380617898

I thank you for your letter of 19 June enclosing copy letter to the Auditor of 15 June.

In respect of your penultimate paragraph of the letter to the Auditor, neither  nor I have any correspondence from yourself requesting return of the papers in this case. Perhaps you would be good enough to contact this office to arrange for the return of the papers.

I look forward to hearing from you in due course.

Yours faithfully


Accounts Division

Please note that from 1 October 1999 the Board's new DX addresses are:

General mail should be sent to Scottish Legal Aid Board DX 555250 General Mail EDINBURGH 30	Applications mail should be sent to Scottish Legal Aid Board DX 555251 Applications only EDINBURGH 30
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220 3908

234

The Auditor of the Court of Session
Parliament House
DX: ED306
EDINBURGH

JC/IB

29 June 2000

Dear Sirs

 **8380617898**

I enclose for your attention copy correspondence recently sent to Messrs Anderson Strathern in connection with the above action.

Yours faithfully


Accounts Division

Please note that from 1 October 1999 the Board's new DX addresses are:

General mail should be sent to Scottish Legal Aid Board DX 555250 General Mail EDINBURGH 30	Applications mail should be sent to Scottish Legal Aid Board DX 555251 Applications only EDINBURGH 30
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IANB.

ANDERSON STRATHERN WS
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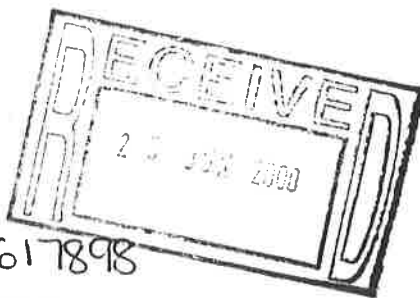


RMC

19 June, 2000

Dear Sirs

**PAUL BURNS
TAXATION OF ACCOUNT
HAM -v- [REDACTED]**



8380617898

We enclose herewith a copy of a letter which we have submitted to the Auditor in connection with this matter.

Yours faithfully

LITIGATION PARTNERS
Robert Carr WS
Robert D.M. Fife WS
C.T. Ruari MacNeill WS
Fiona M. Stephen WS

LITIGATION ASSOCIATES
Aileen A. Cameron
Catherine M. Karlin
Judy A. Williamson

PARTNERS
John W. Blair WS
Jean F. Broadwood WS
Simon T.D. Brown WS
Robert Carr WS
James C. Drysdale WS
Michael J. Essery WS
Robert D.M. Fife WS
Alasdair G. Fox WS
Fiona H. Gibb WS
Colin B. Henderson WS
David W. Hunter WS
John N. Kerr WS
C.T. Ruari MacNeill WS
Jonathan MacQueen WS
Alan S. Menzies WS
(Chairman)
Andrew J. Morris
Lynda E. Pennel WS
D. McKenzie Rigg WS
George R. Russell WS
Neil F. Smith
Fiona M. Stephen WS
Robin M. Stimpson WS
Managing Partner:
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Alasdair McKie
Dana M.A. Reid
Karen L. Schofield
Diana Thurston Smith WS
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CONSULTANTS
Nigel W. Buchanan WS
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Kenneth R. Grimston WS
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INVESTOR IN PEOPLE

The Auditor of the Court of Session
Parliament House
Parliament Square
EDINBURGH

Our Ref: RMC/NEW.In

Your Ref:

Date: 15 June 2000

Dear Sir

PAUL BURNS
TAXATION OF ACCOUNT
HMA -V- [REDACTED]

We acted as principal agents in the above trial instructing M T McSherry, Solicitor Advocate and Paul Burns, Solicitor Advocate as Senior and Junior respectively.

We would support Mr Burns' fees at the level sought because this case was one of particular complexity, of great difficulty with unique features.

As background, we can inform you that Alexander Hall was convicted in 1988 of a murder which had been committed in 1984. [REDACTED] had spent 11 years in prison protesting his innocence. An Appeal had been unsuccessful and after many attempts, the Secretary of State referred the matter to the Appeal Court. There was additional evidence which cast doubt on the veracity of one of the witnesses at the original trial. The Crown were granted authority to raise a fresh prosecution and bail was refused.

On 17th February 1999, an indictment was served on [REDACTED] in prison. Mr Hall was anxious that the team which had represented him successfully at the Appeal continue to act in his defence in the re-trial. Mr McSherry did not wish to deal with the matter other than as a Solicitor Advocate and Anderson Strathern lodged an application for Legal Aid as the nominated Solicitors. Mr McSherry and Mr Burns were instructed as Counsel. Although the Appeal had been successful on the basis of fresh evidence, the Crown considered that they had an even stronger case this time round as they had a statement from a witness who was an inmate in prison with the accused who spoke to a confession by the accused in prison several years after his conviction. They also had available to them as a witness the accused's ex-wife. At the time of the original trial he had been married and his

wife had declined to give evidence. She was now a compellable witness, having been divorced from the appellant a few years after his conviction.

Extensive preparation was required. There were 95 witnesses for the Crown and 12 witnesses for the defence. There were 74 Crown productions and 25 defence productions, running in all to several thousand pages. The transcript of the original trial had been partially destroyed but part of it had been preserved. The photographs in the case were a feature of the Crown case.

The particular complexity related to the fact that the crime had been committed 15 years before and the trial had taken place 11 years before. The new trial was held in Edinburgh because of the enormous public interest in the local area of Bellshill. It was necessary to examine the original precognition of the case 15 years before and re-precognose the witnesses and then if the transcript of their evidence from the original trial was available, compare all three documents. The Crown sought to lodge statements from 1984 to be adduced as evidence. There was legal argument in relation to this matter.

There was also legal argument in connection with the Crown's attempt to elicit evidence of attacks of a similar nature by the accused on his wife and the defence were successful in having this struck out.

During the course of the investigation by the defence the matter of incrimination was raised at several key stages. The decision not to incriminate was accompanied by careful analysis of the information, taken together with the experience of Trial Counsel and long and careful explanation to the client.

The unique features of the trial were that each leg of the prosecution case was successfully broken down by the defence and each element of this required intense application and analysis of the information obtained.

The Crown Case

1. The Military Involvement

The Crown contended that the murder had the features of a "sentry taking manoeuvre". The accused had been a Royal Marine. They maintained that the type of injury and the position of the body indicated that her throat had been cut from behind while upright. The witnesses contacted were Royal Marine Commando Training Officers who completely contradicted that presentation by the Crown. Further enquiries by the defence elicited information that the injury was more likely to have been inflicted by some sort of hunting or fishing blade and a witness was called who gave evidence that he had replicated the injury on the neck of a roe deer and it was a "garroloching" injury.

2. The Forensic Evidence

The original forensic evidence had been destroyed. There were two reports made at the time of the death available. The pathologist for the Crown had prepared reports but had not carried out several critical investigations (all of which are standard practice nowadays). However, having the photographs of the body enlarged and specific portions of the injuries and in particular the feet, it was established that the injury, far from being two cuts, was in fact one injury and that what appeared to be second cut was an exit wound from a long blade, rather than two cuts with a short blade. The aspect of the girl's clothing being cut was a feature of the defence that she had been threatened prior to her death and her feet, which were bare when she was found (the accused was charged with removing her boots) pointed to the involvement of a car. The debris shown on the soles of her feet indicated that she had walked on the rough ground barefoot rather than having had her boots removed after death. This was of critical importance in relation to the incrimination element considered on several occasions throughout the investigation of the case.

3. The Photographic Evidence

At the original trial, which took place 4 years after the murder, photographs were produced. There were photographs showing the body and photographs showing a clear line of sight and passage between the accused's house and the site where the body was found across waste ground. In the years after the trial, a supermarket had been built on the site but the site where the body was found was accessible and intact. However, the photographs produced at the trial showed hard-standing with some rubble but a completely accessible area. The Crown's case was that the girl had disembarked from the train, walked to the accused's house, he had marched her from the house, across the hard-standing to the lane and cut her throat. However, the accused's recollection was that, at the time of the death, there were old factories on the site and they were not demolished until about 2 years after the murder. All of the pictures were examined. All of the photographs which were available at the Police Laboratory were examined. They were all removed and enlarged. It was accepted that the photographs of the body were taken on the day the body was found but none of the photographs showed the body and the clear site. It was established by the defence that a video existed which had not been lodged. That video was obtained and it was clear that on the day the body was found, there were buildings on the site. Further, when the photographs were developed in enlargement, one of the photographs showing a clear line from the accused's house to the murder site but not showing the body also showed a car whose number plate was such that it could not have existed until 3 years after the date of death and so it was established that the photographs lodged at the original trial had not all been taken on the same day and that, at the time of the death, the accused could

not have walked from his house across the deserted hard-standing to the locus. As there had been factories, derelict but not demolished on the site.

The work involved in persevering to obtaining from the Crown authority to examine the photographs available - the examination of them which was conducted only by Junior Counsel and Agents and ascertaining that there was, in fact, a video in existence which had not been produced and rebutting the Crown's denial that the photographs were taken on differing days and in fact years apart was only established after all the photographs were enlarged and the registration number of the vehicle was disclosed.

4. The Confession (No1)

Prior to the first charge of murder, the accused was arrested on a road traffic matter. While in the back of the police car he, apparently, confessed to the murder of [REDACTED] and the police notebooks containing the confession were obtained. It was established that these notebooks had not been made available to the defence at the previous trial but that only photocopies of the relevant pages had been issued. The accused denied making the confession. The original notebooks were examined and one of them was noted to have two pages missing. A handwriting expert was instructed and he examined the notebooks. He was able to establish that the missing pages had been torn out rather than having fallen out through age. Photographs and ultra-violet testing and esda testing were used on the notebooks and an analysis of the entries prior to the confession and afterwards was made. Analysis of the notebooks showed that there were entries post-dating the times of the supposed confession in the notebooks and the confession contained in the notebook with missing pages had, apparently, been written to dictation. In evidence, the Constable (by then a Sergeant) broke down in the witness box and agreed that he had written the confession to the dictation of a Senior Officer to coincide with that Senior Officer's notebook and that he had not been present when any of the incidents contained in the narrative had occurred.

5. The Confession (No.2)

This was a confession, supposedly, made to an inmate of Perth Prison. The statement containing the details of the confession pre-dated the date of the Appeal being successful. Enquiries were made and it was established that the inmate to whom the confession had, supposedly, been made was a [REDACTED] who had been convicted of murdering his fiancée (a Policewoman) setting fire to her body and her house and attempting to pervert the course of justice. [REDACTED] had been conducting an Appeal at the same time as [REDACTED] and [REDACTED] case had been successful and [REDACTED] case had not. In fact a five-judge bench had been convened in respect of [REDACTED] case and the case of Church was overturned and thereby [REDACTED] Appeal did not succeed (it was on the basis of fresh evidence also). [REDACTED] had been negotiating with the Crown and the Prison Authorities for early release and it was established

that he had provided "confessions" against two other inmates in the hope of receiving favourable reports and securing early release. It was further established that this information, had the Crown placed any reliance upon it, could have been brought before the Appeal Court during [REDACTED] Appeal but this was not done. The Crown's position that they did not relate the items one to another was overcome when it was established that the prosecutor in [REDACTED] Appeal was the same person who had represented [REDACTED] at his Appeal.

6. The Wife

At the original trial, [REDACTED] wife had declined to give evidence. However, she was called as a witness at this second trial and was obliged to answer the Crown's questions. However, the legal argument in respect of the evidence relating to crimes not narrated on the indictment (the incidents of a similar nature) were excluded.

7. The Last Sighting

The train from Drumchapel arrived in Bellshill at 10.45pm. About 10.55pm, [REDACTED] was seen walking towards the car park of the site close to where she was found dead with a man. In his original statement, the eye witness who saw them declared that the man was shorter than [REDACTED] (she was 5' 11") and that he was clean-shaven but perhaps had a moustach with short hair. His original statement was not available but a statement taken prior to the fresh prosecution indicated that he now could not say whether the man was shorter or taller than the girl and that he looked "unkempt". On precognition by the defence, he continued in this vague way. It was understandable in that it had been 15 years - he was not sure. However, by complete fluke, one page of his evidence was preserved as the forerunner to the transcript of evidence relating to another witness. That witness's evidence started at the foot of a page and three-quarters of the page was taken up with the evidence of the last sighting witness. It showed clearly that his evidence at the time of the trial had been that the man she was with was shorter than her and that he had short hair and was clean-shaven. At the time [REDACTED] was murdered, [REDACTED] had shoulder-length hair and a large bushy beard and he stands 6' 2" in height. Photographs taken at the funeral of the girl a week after her death show [REDACTED] with tidy hair and a moustache. It was established in evidence from his wife that the night before the funeral she had insisted he tidy himself up. She had cut his hair and made him shave off his beard.

The Fresh Evidence on Appeal

This evidence related to a witness who spoke to seeing an argument at about 11 o'clock at night between the accused and the victim outside the accused's house

on the night of the murder. He gave a description of the accused being with bushy hair and a beard and the girl wearing white. These descriptions fitted the accused and the victim. However, evidence from witnesses subsequently, a brother of the witness showed that at 11 o'clock at night the witness had been at another location on the other side of Bellshill and could not have made the round trip journey in the time allowed to see an argument at 11 o'clock at night opposite the Bellshill Miners' Club beside the accused's house. There were witnesses speaking to the principal witness' location, some distance from the Bellshill Miners' Club at that time of night which was available to the Court but, by an unexpected twist, there was additional evidence over and above that.

The New Witnesses

In late February/early March, the precognition of all the witnesses was put in hand and one of the witnesses was woman who lived two doors down from the accused. In her statement, she recollected that the house next door to the accused had been occupied by a family called [REDACTED] at the time of the murder. The night of the murder, there had been a fight amongst the [REDACTED] family and she thought that it might be significant. From the beginning of March to the beginning of May, great efforts were made to trace the [REDACTED] family (they had moved from their previous address). Only after the trial commenced were the [REDACTED] family traced. When they were precognosed, it was established that all the occupants of every house in the street had been precognosed at the time of the murder and they had informed the Police that, on the night of the murder, young [REDACTED] had had a fight with his mother and he and his girlfriend had been thrown out of the house. He and his girlfriend had stood in the garden at the side of the house with a common driveway with the house next door (the accused's house). [REDACTED] had been shouting at his mother who was inside the house. He had sworn. His girlfriend had tugged his arm and he had shouted at her. He was a young man with shoulder-length unkempt hair and a bushy beard and she was wearing a white coat. Photographs of them were taken from the house at that time. The Crown were called on at the beginning of the second week of the trial to produce these statements and photographs and a list of additional witnesses was presented to the Court. The Crown resisted both motions and eventually the judge ruled that the List of Witnesses should be allowed and that if the Crown had the documentation, they should produce it. Subsequently, two photographs were produced and two statements. The whole point of the new evidence and these new witnesses was that this argument took place at about 9.30 on the Sunday night, because the young couple then, after having been thrown out of the house, walked into Bellshill in time to get the last bus to Airdrie. The train carrying [REDACTED] did not arrive in Bellshill until 10.45pm.

The Importance to the Client

The client had served nearly 12 years imprisonment and had protested his innocence all that time. His Appeal had failed and the Secretary of State had

been petitioned and took many years to consider the petitions before the matter was remitted to the Appeal Court. The Appeal having been successful he, of course, faced a re-trial and the possibility of a further sentence of life imprisonment and although that would not have meant another 12 years in prison, he had, by the time the Appeal was successful, declined release on parole and a further conviction would have meant appalling anguish for him. The importance to this client cannot be stressed highly enough. The difficulties and anxieties in bringing together all of the factors in the case and trying to keep the client apprised of them without unreasonably raising his hopes but also trying to prevent him from despairing completely was an enormously stressful element of the work in addition to the difficulties of pulling together the information uncovered and formulating legal argument where appropriate to represent the client's best interests.

The public interest in the trial was enormous. The victim was an exceptionally lovely 18 year old girl who had just become engaged to be married and the murder was astonishingly brutal. The Police were under great pressure to obtain a conviction and 4 years after the murder, they succeeded. Thereafter, [REDACTED] wife and brother campaigned relentlessly to establish his innocence and feelings were running high throughout Bellshill in connection with the Appeal being successful and the fresh prosecution and the public interest was such that the Crown transferred the trial to Edinburgh.

We trust that the foregoing, although not utterly exhaustive of the work required in this case, will give you some idea of the novelty and complexity of the whole matter and you will be able to assess the level of remuneration for Junior Counsel.

The papers are with our Account with the Scottish Legal Aid Board and we have requested their return but, as of today's date, they have not yet arrived. We do not wish to delay submitting this letter to you any longer and if the papers arrive within the next day or so, we will have them delivered to your office.

Please do not hesitate to contact Rosemary Cameron if any further information is required.

Yours faithfully

[REDACTED]
[REDACTED]
From: [REDACTED]
Sent: 01 June 2000 16:57
To: [REDACTED]
Subject: [REDACTED] - TAXATION OF SOL/ADVOCATE FEES

It looks as if this one will have to reconvene at a later date.

Rosemary Cameron was there from Anderson Strathearn representing Paul Burns. The crux of her argument was that the uplift accepted by senior (McSherry) was not binding to them and the relevant factor was the uplift claimed for. She effectively said that what senior accepted was not relevant. [REDACTED] argued that it had to have some relevance and did not appear unreasonable for a figure which leading counsel felt to be reasonable remuneration to be applied to junior.

It was clear that the auditor was none too impressed with the narrative detailed on the fee note supporting the claim by counsel and made reference to the paper provided by senior counsel G.C. Bell supporting his claim in the [REDACTED] case. He advised that this ran to some 8 pages and clearly went into some detail whereas what had been provided to justify a 300% uplift in this case did not. Rosemary apologised for not having a written note to present but was intending to give an oral submission. The auditor suggested that Rosemary go away and have Paul Burns provide a written note justifying his fee and providing specific relative details of the case in order for him to be in a position to consider the claim.

[REDACTED]
[REDACTED]
[REDACTED] with their argument and he is obviously looking at G.C. Bell's note as the benchmark for cases claiming a comparable fee. Of course counsel now have the opportunity to put together a strong argument but I suppose that is not really our concern.

[REDACTED]

AUDITOR, COURT OF SESSION

COPY

POINTS OF OBJECTION

in the case of

HMA -v- [REDACTED]

relating to fees incurred by

PAUL BURNS, SOLICITOR ADVOCATE

This was a murder retrial in the High Court, Edinburgh. The murder happened 15 years ago and the original trial some 11 years ago. Mr Michael McSherry acted as senior solicitor advocate and Mr Paul Burns acted as junior.

In terms of regulation 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 a 'solicitor advocate' means a solicitor, whether instructed by another solicitor or not, when and only when he is exercising his right of audience or acting in connection with the exercise of such a right and 'junior solicitor advocate' and 'senior solicitor advocate' shall be construed in accordance with paragraph (1A)...

Paragraph (1A) states:-

(1A) For the purposes of these regulations, a solicitor advocate shall be –

- (a) a senior solicitor advocate, where he is undertaking work equivalent to that which would be done by senior counsel in a case where the proceedings relate to a prosecution or conviction for murder or where the Board has authorised the employment of senior counsel under regulation 14(1)(a) or (2) of the Criminal Legal Aid (Scotland) Regulations 1997;
- (b) a junior solicitor advocate, where he is undertaking work equivalent to that which would be done by a junior counsel, whether or not the Board has authorised the employment of senior counsel in the case.

Accordingly solicitor advocates are treated as counsel when exercising their right of audience in the Supreme Courts. Therefore, their fees are prescribed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, regulation 10(1) which provides that counsel shall be 'allowed such fee as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy.

The fees prescribed by Schedule 2 for a 'trial – per day' in Edinburgh are £315 for senior and £172 for junior with senior. The equivalent rates in Glasgow are £369 for senior and £203.50 for junior with senior. The reason reference is made to the Glasgow rates is because of a peculiarity of.../

of the way in which solicitor advocates are paid. As the Auditor is aware, counsels' (i.e. members of the Faculty) place of business is Edinburgh. The Table of Fees proceeds on this basis providing higher fees the further one travels from Edinburgh. Solicitor advocates are not similarly based in Edinburgh and have places of business throughout the country. In this case Mr McSherry and Mr Burns both have places of business in Glasgow. Although the regulations provided that solicitor advocates should be treated as counsel no provision was made in the prescribed tables of fees to accommodate their different situation. Bearing in mind that it would be a nonsense to pay a senior solicitor advocate based in, say, Inverness £510.50 for remaining in Inverness and £315 for travelling to Edinburgh, a practice has been devised whereby the 'Edinburgh' rate applies to a solicitor advocate in the city or town where he is based and the corresponding rate for appearing in other courts. This is done by application of paragraphs 3 and 4 of Schedule 2, the 'particular circumstances' being the fact that the solicitor advocate is based in Glasgow or Inverness, and not in Edinburgh.

Applying this formula to the present case Mr Michael McSherry was entitled to the 'Glasgow' rate of £369 per day and Mr Paul Burns was entitled to the 'Glasgow' rate of £203.50 per day. Mr Michael McSherry, senior solicitor advocate claimed fees for all work at scale rates and then sought a 300% enhancement (the explanation contained in Mr McSherry's fee note was in identical terms to that contained in the fee note submitted by Mr Paul Burns). The sequence of events was as follows:-

- Mr Paul Burns' fee note received 17/9/99 (£3,586 + 300% = £14,344).
- Payment to account made 30/9/99 (£3,414).
- E-mail to Mr Paul Burns on 2/12/99 confirming that agreement had been reached with senior (Mr McSherry) and the same uplift agreed with Mr McSherry had been applied to Mr Burns' fee (just over 75% on trial diets only i.e. approximately 40% overall).

The actual uplift to Mr Burns' fee gave a total of £4,810 which was rounded up to £5,000.

A question or dispute has now arisen between the Board and Mr Paul Burns and the matter has, accordingly, been referred to the Auditor for taxation in terms of regulation 11(1) of the said Criminal Legal Aid (Scotland) (Fees) Regulations 1989. The issues in dispute are as follows:-

- After agreement was reached with senior solicitor advocate, Michael McSherry, the same percentage uplift in fees payable was applied to the fees claimed by junior counsel, Mr Paul Burns. What had been agreed was an uplift on the daily trial rate in excess of 75%. This resulted in a fee payable to Mr Burns of £360 per day (£203.50 prescribed rate). The overall adjustment to the account submitted resulted in an uplift of approximately 40%. The account was paid, in line with senior, on that basis. It is the Board's position that parity is had between the level of fees claimed by both senior and junior counsel in this and any other case where similar work is undertaken. Although junior counsel is not bound by any agreement with senior, it would appear reasonable, and is common practice, for junior to receive the same increase in fees on a *pro rata* basis as senior counsel, unless the work carried out by junior counsel can be distinguished as being out of proportion to a straight application of the enhanced prescribed fees.
- The Board does not consider that the note annexed to the fee note justifies an uplift of 300% nor does the Board consider any overall percentage uplift covering every item including consultations.../

consultations, perusal and locus inspections to be appropriate simply by virtue of the nature of the case. It is considered that the uplift of 75% or thereby in respect of court days only is sufficient and is, in any terms, a significant uplift against a norm.

- In any event, the prime responsibility for addressing and dealing with the difficulties and complexities referred to in the fee note lay with the senior solicitor advocate, Michael McSherry whom Mr Paul Burns was assisting.

[REDACTED]

Sent: 02 December 1999 17:19
To: 'PAULDBURNS@AOL.COM'
Subject: [REDACTED] 8380617898

Dear Mr Burns

I simply write to confirm that agreement has been reached with Mr McSherry regarding his fees.

Accordingly, the same uplift has been applied to your fees resulting in a fee payable of £4810.00. I have rounded this up to £5000 and would hope you find this to be acceptable. Therefore the net payment which I have authorised is £1586.00 and should reach you on 8/12/99.

I would appreciate confirmation of your position at your earliest convenience.

Yours Sincerely

[REDACTED]