Taxation Report

3rd January 2001

KOB

Wardlaw Stephenson & Allan

Fixed Payment

Trial Diet

SHERIFF CLERK'S OFFICE

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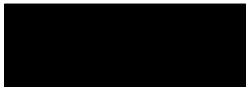
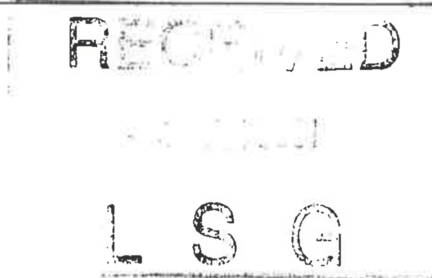


Scottish Legal Aid Board
DX ED 250
EDINBURGH

Your Reference:

Our Reference:

Date: 3 January 2001



Dear Sir

NOTE OF OBJECTIONS TO REPORT BY THE JOINT AUDITOR

I refer to the above and now enclose a copy of the Judgment by Sheriff Stephen in respect of same.

Yours faithfully

for info

M D Baird
Sheriff Clerk Depute

COPY

2B2831/00

JUDGMENT OF SHERIFF STEPHEN

on Objections by The Scottish Legal Aid Board to the report by the Joint Sheriff Court Auditor

In Remit by

Messrs Wardlaw Stephenson & Allan, Solicitors, Edinburgh

in causa

P.F. (Edinburgh) v Kenneth O'Brien

Edinburgh 29 December 2000

The Sheriff, having resumed consideration of the Note of Objections to the Report by the Joint Sheriff Court Auditor by The Scottish Legal Aid Board, opposed by the respondents, repels the Note and approves the Report of the Joint Auditor taxing the remuneration due to the solicitors for the respondents in the sum of £4,100 together with the audit fee of £206.80.

Mhairi M. Stephen

NOTE:

The Note of Objections to the Report by the Joint Sheriff Court Auditor arises from the taxation of the solicitors' account relating to summary criminal proceedings brought by The Procurator Fiscal, Edinburgh against *inter alia* Kenneth O'Brien who was represented by Messrs Wardlaw Stephenson & Allan, Solicitors.

The procedural history to the summary criminal proceedings was indeed unusual and this has been fully dealt with by Mr McConnell the joint auditor in his detailed report. It is sufficient to note that three accused including Mr O'Brien appeared from custody on 22 June 1999 charged with assault and robbery. As the complainers were visitors to Edinburgh and were due to return home shortly, the trial commenced later the same day 22 June 1999. Evidence was part led and the trial adjourned to 24 August 1999. Indeed the trial was further adjourned on 24 August 1999 without evidence being led and indeed on seven further occasions until 21

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January 2000 when evidence for the Crown was concluded and further evidence led on behalf of Mr O'Brien who was found not guilty.

In a nutshell evidence was led on 22 June 1999, thereafter there were eight adjourned diets when no evidence was led for a variety of reasons culminating in a diet on 21 January 2000 when further evidence was led and proceedings concluded. The proceedings were unusual for a variety of reasons. (Firstly) the trial commencing on the day of the accused first appearance in court was unusual but necessary as a number of witnesses were tourists and were due to leave the country. This factor led to the likelihood of an adjournment being necessary as indeed was the case. (Secondly) the number of adjournments was unusual after the trial had commenced. The minutes record the adjournments but I was not advised as to the reason for these adjournments. The Auditor's Report was not challenged in respect of the history of proceedings.

At the hearing before me both parties the objectors, The Scottish Legal Aid Board and the respondents, were at one in stating that the issue before the court and indeed the issue that had been before the Joint Sheriff Court Auditor was what constituted "conducting a trial" in terms of Schedule 1 of the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999. Both parties agreed that the trial had commenced with the leading of evidence on the 22 June 1999 and the remit to taxation was to determine the remuneration due to the solicitors acting for Mr O'Brien at the eight intervening diets.

The regulations referred to came into force in April 1999 and as has been noted in the report they brought about a fundamental change to the basis of charge for solicitors in summary criminal proceedings. Previously charging of fees in criminal legal aid had been governed by the Criminal Legal Aid (Scotland) (Fees) (Regulations) 1989. These regulations still govern the charging arrangements in non-fixed payment cases. Basically the 1989 regulations set out the rate for the solicitor charging on a time and line basis. Solicitors are allowed fees "as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy". Similar considerations apply to outlays thus there is a two-fold approach to remuneration under the 1989 regulations, that is the work had to be "actually and reasonably done" and "with due regard to economy". Thereafter the fees allowed would be determined in terms of reasonable remuneration.

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It was common ground that the 1999 regulations changed the basis upon which fees would be allowed to solicitors. For the purpose of these proceedings reference should be made to regulation 4 of the 1999 regulations and schedule 1.

> Regulation 4 states "4(1) There shall be made to a solicitor who provides relevant criminal legal aid in summary proceedings, in respect of the professional services provided by him and outlays specified in paragraph (2) below, and in accordance with the provisions of this regulation, the fixed payment specified in schedule 1".

Schedule 1 states nine categories of work and in table format gives a specified fixed payment for each category of work in three different court situations. This case is concerned with the second category, namely proceedings in the Sheriff Court, that is the Sheriff Court other than those specified in schedule 2.

The first five categories of work in schedule 1 and the relevant fixed payment are as follows.

1. All work up to and including (i) any diet at which a plea of guilty is made and accepted or plea in mitigation made; (ii) the first 30 minutes of conducting a proof in mitigation other than in the circumstances where paragraph 2 below applies and (iii) the first 30 minutes of conducting any trial together with any subsequent or additional work other than that specified in paragraphs 2-9 below - £500
2. All work done in connection with a grant of legal aid under section 23 1(b) of the act including the first 30 minutes of conducting a proof in mitigation - £50.
3. Conducting a trial or proof in mitigation for the first day (after the first 20 minutes) - £100.
4. Conducting a trial or proof in mitigation for the second day - £200.
5. Conducting a trial or proof in mitigation for the third and subsequent days (per day) - £400.

Thus category 1 sets down the core payment of £500. That payment applies in this case up to the first 30 minutes of conducting the trial. It was accepted by those appearing before me that the proceedings on the first day of the trial went beyond the first 30 minutes and therefore the

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solicitors were entitled to a category 3 payment of £100 in addition. The objectors accepted that the solicitors concerned were entitled to a category 4 payment of £200 in respect of the final trial diet when evidence was further led on the 21 January 2000 (incidentally the solicitors were also to be paid £100 being a fixed fee to reflect the fact that the client was in custody but this payment had no bearing on the issue before the court).

Mr Haggerty for the objectors, The Scottish Legal Aid Board, submitted that the various appearances made on behalf of the accused by his solicitors, eight in all, at diets where no evidence was led did not constitute "conducting a trial". That would require some advocacy and although something did happen on these occasions mainly of a procedural nature what happened did not constitute "conducting a trial". Of the eight adjournments which were in dispute three are referred to as notional diets in the court minutes and although Mr Haggerty did not draw any distinction between a notional diet and a diet at which no evidence was led he did point out that on two of the three notional diets there were no accused and no witnesses present and furthermore on two occasions the case had called before Sheriffs Penman and Bell, namely Sheriffs other than the Sheriff who was conducting the trial and who had to continue with the trial having commenced the trial. Mr Haggerty appeared to accept that all these diets were diets of trial but did not constitute part of the trial for the purpose of the regulations in that the solicitors in appearing on the accused behalf at these diets were not conducting a trial. Effectively there must be evidence or something more substantial than a procedural hearing before you can have a trial.

The solicitor for the Board relied heavily on the case of Ruxton against Borland 2000 SCCR 484. The solicitor for the Board sought to rely on certain dicta from Lord Prosser's opinion dealing with certain other procedural matters commonly arising before a trial is said to commence. In other words the solicitor for the objectors adhered to the submissions previously presented before the Joint Auditor at taxation.

The submissions made on behalf of the solicitors and respondents were essentially to the effect that Ruxton v Borland provided no assistance whatsoever in this case since the issue to be decided here were quite different from the issue in Ruxton against Borland, namely when a trial commenced. It is common ground that the trial had commenced here on 22 June 1999 and the issue was what constituted "conducting a trial" and therefore Ruxton against Borland provided no assistance.

It was a submission of the respondents that all diets between 22 June 1999 and 21 January 2000 were trial diets and no distinction should be made between such diets and the notional trial diets which had no statutory validity.

Regulations had been provided to give a mechanism for payment of solicitors and The Scottish Legal Aid Board were bound by the terms of the regulations. There was no issue of what was fair and reasonable but merely whether an event had occurred which triggered one of the fixed payments. This was essentially an all or nothing situation either the payment was due or not and each and every calling of the case for trial triggered the fee due to the solicitor whatever was done on the client's behalf; the trial having commenced on the 22 June 1999 the trial did not at any stage stop and that to argue that one was conducting a trial only when evidence was led was far too restrictive an interpretation.

Dealing with the submissions made on behalf of parties I found that Ruxton against Borland provided little assistance in the present case where the issue is what constituted "conducting a trial". It is abundantly clear that the five Judge bench dealing with the issue raised in Ruxton against Borland were dealing with the issue of when a summary trial commenced and there was no dispute in this case as to that matter, this trial having commenced on the 22 June 1999 when evidence was part led. Accordingly the decision in Ruxton against Borland can be distinguished and I find that it provided little assistance in the present case.

As has been noted above the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 remove the previous basis of charging provided for by the 1989 regulations. They apply to relevant criminal legal aid which is defined as being "criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings". Accordingly the regulations providing for fixed payments apply to the present proceedings. Irrespective of what work is carried out by the solicitor he or she will receive a fixed payment for appearing in respect of certain categories of work. Furthermore the payment is fixed both in respect of work carried out by a solicitor and outlays incurred on the client's behalf by the solicitor. Accordingly no regard is had to the amount of work carried out by the solicitor or the cost of outlays or whether these outlays are required. Indeed the outlays alone could swallow the entire payment. A solicitor travelling a distance could use the payment solely to travel to and from court. The solicitor has no discretion whatsoever as to the basis upon

which he can charge if he is acting in summary proceedings to which the regulations apply as these proceedings are.

It seems to me that this radical departure from the previous system of remuneration of fees and outlays to solicitors engaged in summary criminal legal aid work must have conferred certain benefits or advantages to the public purse mainly by limiting or capping the amount of fees which could be paid to solicitors including outlays; minimising time and expense in the administration of legal aid by reducing the need for adjusting accounts and taxing accounts and such like. These benefits however have to be considered along with the disadvantages created by the regulations, namely the arbitrary nature of payment without any regard to the work actually done, outlays actually incurred and the reasonableness of same. These considerations now have no place whatsoever in the implementation of the 1999 regulations. A consequence of the regulations is that there is no requirement to measure work done and indeed the bizarre result that flows from that is that the solicitor need not do any work apart from an appearance in court to obtain payment of the fixed fee for the various categories of work. To an unscrupulous solicitor it might encourage the solicitor concerned to minimise outlays incurred on behalf of a client and to minimise work actually done on behalf of the client in order to maximise the fee element obtained and therefore profit. I make these comments obviously looking at the regulations compared with the previous basis of remuneration of solicitors and these comments are not intended in any sense to reflect the specific circumstances of the present case but the observations which I make only serve to underline the complete absence of any minimum requirements of work which the solicitor must achieve before payment can be secured. Accordingly it is my view that the regulations themselves provide no guidance regarding payment and no basis for suggesting that the Auditor either misdirected himself in law or that he failed to exercise his discretion properly.

Turning to the issue in question namely what constitutes conducting a trial, firstly it is clear that the 1999 regulations provide for an escalating rate of payment namely £100 for the first day of trial, that is beyond the first 30 minutes; £200 for the second day of trial and £400 subsequently. Now clearly the regulations relate to summary criminal proceedings which encompass a very wide variety of complaints ranging from common law complaints, breach of the peace, assault and such like to statutory charges including complex fraud and health and safety at work charges. Again the regulations provide no guidance, there is no differentiation to be made on grounds of complexity, duration, number of witnesses,

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productions and such like. All we know is that the fee payable increases as the length of the trial increases. Of course the number of days of trial do not indicate in itself complexity *per se* but in the absence of any other guidance must include allowance for preparation for trial, reading previous notes of evidence, preparing cross-examination and preparing any examination of defence witnesses.

Conduct is in my view wider than "lead evidence". Obviously it would include submissions on evidence, objections to evidence but may include steps taken to bring about the cessation of a trial perhaps by a plea of guilty or aborting the trial, for example a prosecutor may still conduct a trial when he or she seeks to desert simpliciter.

Accordingly it is my view that conducting a trial is not restricted to the leading of evidence or cross-examining and includes attending at a trial diet, appearing for a client at a trial diet whether or not the trial proceeds at that diet. It would include dealing with any motion for adjournment and associated application for bail or continuation of bail. I therefore see no reason to interfere with the decision of the Joint Auditor as set out in his report.

I have considered carefully the position of the three trial diets which are called notional trial diets in the court minutes. These are of course trial diets, there being no special diet known as a notional diet authorised by the Criminal Procedure (Scotland) Act 1995. That being the case diets are frequently called notional diets when there is no intention of leading evidence and which are commonly used by the parties to assist in the determination of further procedure in summary criminal proceedings or to allow the prosecutor and defence the opportunity of considering whether a plea is to be tendered and indeed accepted and indeed whether proceedings are to be continued with. It was conceded by those appearing that at the three so-called notional diets either there were no witnesses present, no accused present or indeed the case was calling before a Sheriff other than Sheriff Robertson who had presided at the commencement of the trial. That being so and having considered the issues relating to the regulations and what constitutes the conduct of a trial I am of the view that no distinction should be drawn between the adjourned trial diets and the so-called notional diets with regard to these proceedings and with regard to the specific question of whether the solicitor in appearing at the diets was conducting a trial.

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Accordingly I am of the view that there is no basis for suggesting that the Joint Auditor misdirected himself as to the law to be applied, namely the application of the 1999 regulations nor that he exercised his discretion unreasonably.

I am not persuaded that the objections are well founded and I will repel the Note of Objections. I was not addressed on the question of expenses relating to the Note of Objections and will make no order unless and until either party requests a hearing on expenses.

[signature]