

COURT OF SESSION, SCOTLAND

R E P O R T

By

AUDITOR OF THE COURT OF SESSION

In causa

THE ROYAL BANK OF SCOTLAND plc,
incorporated under the Companies Acts and having
its Registered Office at 36 St. Andrew Square,
Edinburgh, EH2 2BY

Pursuers and Respondents

Against



JS v FS

First Defender

And



Second Defender and Minuter

EDINBURGH. 13th August 2002

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Counsel for the Defender, I.G. Mitchell, Q.C.
2. At the taxation on 3rd April 2002 the Board were represented by [REDACTED]
[REDACTED] Law
Accountants, represented Counsel.
3. At the diet of taxation the Auditor had before him a note prepared by Senior Counsel which was headed up "Response to Proposed Legal Aid Abatement". The Board had lodged Points of Objection in respect of the level of fees charged by Counsel. Since the taxation, the Auditor has had the opportunity to consider the whole papers.
4. The fees in this case fall to be paid in accordance with Regulation 9 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, which states "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". That standard is set out by Lord Kyllachy in *Hood v. Gordon 1896 23R675* Lord Kyllachy in *Hood v. Gordon 1896 23R.675*: "I see no reason to doubt that the principle which we must follow in this case is that established in the case of *Walker v. Waterlow*, and also in the case of the *Wigtown Burghs*. That principle is, that while the taxation as prescribed by the statute be as between agent and client, yet as the expenses in a case like this have to be paid not by the client but by a third party, the principle of taxation, though not indeed identical with that between party and party, must

yet be different from that applied in the ordinary case of agent and client.” Then Lord McLaren’s opinion states, “when a statute authorises the taxation of expenses, as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed.”

In taxing Counsel’s reasonable fees the Auditor must follow the guidelines set out in *Uisdean McKay v. HMA SCCR 679 at p. 10* where the Lord Justice Clerk states: “It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind the Auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them. Para. 2 makes specific reference to the general level of fees in the Table of Fees as one of the circumstances to which the Auditor is to have regard. Where a case is of a type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work for which no fee is prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the Table. This points to the terms of para. 3, namely 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”. Thus in such a

situation the Auditor would be entitled under para. 2 to allow a higher fee than would have resulted from his allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3.” That case dealt with fees under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 but the Court draws no distinction between Civil and Criminal Legal Aid. In these circumstances, the Auditor must deal with Senior Counsel’s fees in terms of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. The Auditor is satisfied that Counsel’s fees are not based on what he might reasonably hope to recover on an agent and client fee paying basis and is satisfied the fees in Schedule 4 Chapter II form the starting point for Counsel’s fees

5. The Auditor is satisfied that this is a case of unusual complexity and importance. It concerns the procurement by the Bank of Mrs. Shanks’ signature on a Guarantee and Standard Security without fully explaining to her the consequences of her execution of these documents. A Procedure Roll hearing was reported in 1998 S.L.T.p 355 and an Appeal marked to the Inner House. The leading case of Mumford was decided by the House of Lords, the reclaiming motion was successful and the case sent back for Proof before Answer. Counsel was then involved in complex and novel investigations in attempting to save Mrs. Shanks’ dwelling house. Such a scheme was devised and agreement entered into but Mrs. Shanks was unable to adhere to it. The Bank perhaps

understandably took the view that Mrs. Shanks was duplicitous and further intense negotiations took place culminating in settlement after lengthy negotiations on the day of the Proof.

5. Applying "the prudent man of business test", the Auditor taxes Counsel's fees at the sum of £10,575.00, excluding VAT, as detailed in the Schedule attached hereto.

A handwritten signature in black ink, appearing to read "Prof. Lewis", with a flourish at the end.

AUDITOR OF THE COURT OF SESSION

FEE NOTE & DATE	DESCRIPTION	AMOUNT	AUDITORS DECISION
39 – 25/4/00	Pre proof con	£500	£350
45 – 27/5/00	Numerous telephone con. with agents & junior	£250	£250
45 – 28/5/00	Ditto	£250	£250
45 – 26/5/00	Lengthy con. with client followed by lengthy meeting with Junior and agents (6hrs)	£1000	£800
45 – 30/5/00	Proof (set down 4 days settled 6pm day1) 2 ½ days @ £1500	£3750	£3000
46 – 13/11/00	By order and opposing motion + prep	£300	£250
47 – 16/11/00	Con	£500	£350 agreed at taxation
47 – 16/11/00	Revisal of minute	£250	£200 agreed at taxation
48 – 11/12/00	Revisal of adjustment + joint note	£200	£150
48 – 12/12/00	By order ½ hr	£250	£125
51 – 5/1/01	Day 1 proof	£3500	£3250
51 – 8/1/01	Day 2 proof	£2000	£1250
53 – 17/10/00	Con	£600	£350
Total		£13,350	£10,575