

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

Decision

of

**ELIZABETH JARVIE, Queen's
Counsel, Sheriff of Lothian and
Borders**

in

Note of Objections for Counsel

in causa

HER MAJESTY'S ADVOCATE

against

**PETER CORSTORPHINE SMITH,
DAVID KELLY McGIBBON and
DAVID BIRRELL McGIBBON**

In terms of this Note of Objection under regulation 11(2) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, the three counsel representing the above named three accused at a criminal trial at Edinburgh Sheriff Court objected to the determination of the Auditor in two respects; (first) in respect that he misdirected himself in law in holding that he had no discretion to sanction payment of fees for those days on which the trial was scheduled to sit but for various reasons did not sit, and (second) in respect of his decision not to sanction Mr Brady's fee entitlement for 31 August 2002. Senior counsel for the Noters advised that agreement had been reached in respect of the second issue and senior counsel, representing the Scottish Legal Aid Board (hereinafter referred to as SLAB) confirmed that parties had agreed that Mr Brady's fee of £550 for 31 August 2000 would be sanctioned by SLAB. Senior counsel for the Noters contended that the Auditor had erred in law in holding that he had no discretion to allow the Noters' claims in respect of the days hereinafter referred to during which the trial had been adjourned due variously to illness of one accused, a sheriffs' training day and a number of days on which jurors had prior commitments. He invited the court to find that the auditor had misdirected himself in

law in so holding that he had no discretion, to allow the Note and to remit the case to the auditor for consideration. Senior counsel for SLAB invited me to allow the Note to the extent only of the agreed fee for Mr Brady and otherwise to repel it.

The circumstances are that counsel represented the accused in a criminal trial at Edinburgh Sheriff Court. The case came before a Sheriff and Jury on indictment on 6 September 2000 with verdicts being delivered on 30 October 2000. The case was adjourned until 13 November 2000 for sentence. The case proceeded on indictment libelling charges under the Misuse of Drugs Act 1971. The indictment contained 234 documentary productions, 237 labelled productions and 42 witnesses. During the course of the trial, submissions were made on behalf of all accused, regarding the undercover police operation. Substantial submissions were made during a "trial within a trial". Reference was made to the European Convention on Human Rights with 20 authorities being referred to. Counsel argued that the Crown had breached Article 6 and 8 of the Convention. This was the first occasion that such an argument had been presented to the Court.

At the conclusion of the trial, counsel submitted their fees to the Scottish Legal aid Board which accompanies this Note. At the diet of taxation on 5 November 2001, counsel instructed Messrs Alex Quinn & Partners, represented by Derek Wilkinson. The Scottish Legal Aid Board were represented by Philip Shearer, solicitor. Following submissions, the auditor's report dated 14 February 2002 (attached) was issued. Counsel wished to object to the auditor's report where no fee is allowed for the following days:- 25, 26, 27, 29 September, 4, 5, 16 to 20 and 23 October 2000.

The Court sat on 12 days, whereafter legal argument ensued with the matter being taken to Avizandum on 22 September 2000. Each counsel remained under instruction for 25 to 29 September inclusive and thereafter 4, 5, 6 to 20 and 23 October 2000. This case could not be called on the days due to sheriff training days, illness of one of the accused, and finally due to jurors' holiday arrangements.

It is submitted by senior counsel for the Noters that this is a case where the trial had commenced and counsel, accordingly, are entitled to "waiting day" fees. Accordingly it is submitted that it was unreasonable to expect counsel to be able to undertake any

disputed that counsel were instructed to provide representation for the accused and that in terms of regulation 33 were acting on behalf of the accused. They are, he submitted, therefore entitled in accordance with regulation 10 of the Act to remuneration and that in terms of section 2 thereof the fee charged is reasonable remuneration. Where schedule 2(2) is silent on the matter then the work referred to in regulation 10 and paragraph 2 of schedule 2 is the work of "representation". "Work" includes what is referred to in the table and anything else done in the representation of or acting for, a legally aided person. He further contended that so long as the Noters were properly representing the accused on the days in question, they were entitled to reasonable remuneration therefore. He maintained that on those days referred to above, the Noters were properly representing their respective clients and that accordingly the auditor was entitled to exercise discretion regarding payment of fees on these days.

Senior counsel for the Noters submitted that in the course of properly representing his client, counsel may be in court, may be involved out of court in preparation, consultation, negotiation or waiting. Under reference to *HMA -v- Birrell* 1994 SLT 480 at 484 I-K, he maintained that the auditor is entitled to regard attendance at court in readiness to conduct a trial which does not proceed as the performance of work whether the attendance is in Edinburgh or elsewhere. He contended therefor that such readiness to conduct a trial amounts to "work" and that therefor the auditor is entitled to exercise discretion as to counsel's fee.

Counsel for SLAB invited me to allow the note of objections to the extent of Mr Brady's fee of £550 plus VAT for 31 August 2000 and otherwise to repel the Note. He submitted that it had never been the case so far as SLAB were concerned, that days such as those disputed could be regarded as remunerated days because no work was involved. The disputed days should be distinguished from "waiting" days where counsel attended court to conduct proceedings. He contended that regulation 10 of the 1989 Act was the critical statutory provision regulating counsel's fees and was made under the power conferred by section 33 of the 1986 Act, subsection (3)(a) of which prescribed the work for which fees may be charged. Regulation 10 provides for payment of work "actually and reasonably done". Schedule 2 provides for fees to be charged by counsel in the Sheriff Court conform to the Table of Fees in that

schedule. Under reference to *HM Advocate –v- Birrell* 1994 SLT 480, senior counsel for SLAB contended that it is the positive act of attendance at court in readiness to conduct a trial that should properly be regarded as the performance of work, not the mere passive representation of the client. Under reference to *HM Advocate –v- Graham*, he contended that it was confirmed that the relevant question was not, what other work could counsel be expected to secure. The regulations prescribe payment only for work done. Section 4(1) of the Legal Aid (Scotland) Act 1986 provides *inter alia* that there shall be paid out of the Legal Aid Fund such sums as are, by virtue of the Act or any regulations made under it, due out of the fund to any counsel in respect of fees and outlays properly incurred by him, in connection with the provision of legal aid, advice or assistance. Regulation 10 of the Criminal Legal Aid (Scotland) (Fees) Regulations 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. Schedule 2 provides that fees shall be calculated in accordance with the table of fees set out in the schedule. Where the table does not prescribe a fee for any item of work, the auditor shall allow such a fee (for any item of work) as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances including the general levels of fees in the table of fees.

The critical issue is whether the auditor has discretion to award a fee in respect of the aforementioned disputed days during which the trial was adjourned. In the case of each of the days in question, counsel had advance notice, albeit limited, of the dates when their attendance would next be required in court in the conduct of the trial. Counsel were, in respect of the days in question "available" to undertake other work on these days although it must be conceded that given the limited notice they had on at least some of those days, it was unlikely that alternative employment would be obtained. In the circumstances it may well have been unreasonable to have expected them to secure such alternative employment for those days. However as much as one might sympathise with their plight, the question is not whether it is fair or reasonable to have expected them to secure alternative work during those days, but whether the legislation or authorities allow the auditor to exercise his discretion by allowing the payment to be made under the Legal Aid Scheme. While senior counsel for the Noters relied on the provisions of section 21 of the 1986 Act, it is clear from its terms

that that section simply defines the scope and narrative of criminal legal aid. It does not provide for fees and outlays of solicitors and counsel. In terms of subsection 4, criminal legal aid is defined as consisting of representation on the terms provided for by the Act. It is section 33 which provides for fees and outlays of solicitors and counsel and in particular the provisions of subsection 3(a) which prescribes the items of work in respect of which fees may be charged. In terms of section 4(2)(a) of the 1986 Act, the legislation requires that what shall be paid out of the fund are such sums as are due to any solicitor or counsel payments made in accordance with section 33(3A) of this Act in connection with legal aid or advice or assistance. Schedule 2 of the 1989 Act makes no provision for days when items of work were not carried out. While senior counsel for the Noters sought to rely on the decision of the court in *HMA –v- Birrell (supra)* in support of his submission, I am satisfied that it is clear from Lord Coulsfield's judgement at page 484 that what may be remunerated under the scheme is the positive act of actual attendance in court in readiness to present a case, albeit the case does not proceed, as distinct from non-active representation where no item of work is carried out for the client and no attendance made by counsel at court. Accordingly, the Auditor did not have discretion to make an award out of the Fund in respect of those days when no actual work was performed and where there was no attendance at court. I therefor allow the Note only to the extent of Mr Brady's preparation as agreed and otherwise repel the Note.

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

REPORT
(issued 14th February 2002)

by

THE JOINT AUDITOR

in Remit in terms of Criminal Legal Aid
(Scotland) (Fees) Regulations 1989, Reg'n 11(2).

Scott Brady Q.C.,
HMA V [REDACTED]
SL/ /91169732/99.

S.P. Ronnie, Advocate
HMA V [REDACTED]
SL/ /91170101/99

N.J. Beardmore, Advocate
HMA V [REDACTED]
SL/ /91169881/99

1. This taxation arose out of a dispute between the Scottish Legal Aid Board (the "Board") and the three Counsel named above, in relation to fees claimed by Counsel for defending their respective clients at Edinburgh Sheriff Court between 28th August and 13th November 2000 and, in the case of Mr. Ronnie only, for the earlier period of 1st December 1999 to 14th July 2000 as well. The case came before a Sheriff and Jury on Indictment on 6th September 2000. It was heard more or less continuously until 30th October, when verdicts were given. The case was then adjourned until 13th November for sentence.
2. The case was complex and the Indictment alleged four breaches of the Misuse of Drugs Act 1971. It is important for auditors to give some details of what makes a case 'complex or exceptional', so that comparisons may be drawn with other cases where enhanced fees

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are given. One factor here was the volume of documentary material - there were 234 Productions, 237 Labels and statements from 42 witnesses. The papers delivered to me, for the purpose of the taxation, filled two large crates. A second factor was the novelty, in Scots law, of several points of law which arose. Was the evidence of drug transactions between the accused and under-cover police officers admissible? Did the officers act as agents provocateur? The European Court of Human Rights was invoked, and while this may become increasingly common in future cases, even while this case was being heard, the Regulation of Investigatory Powers (Scotland) Bill, bearing on this case, went through the Scottish Parliament. In the course of their submissions, Counsel referred to 16 cases about Human Rights, from countries as far away as Canada, the United States, New Zealand and Australia. Thirdly, and although this is not unique, it was a major factor in this case, that the legal representatives of all four accused (the account for the fourth accused is not in issue) had to 'keep an eye' on what lines the other three accused were taking as the case went along. At least one sought to incriminate another, and tactics had to be reconsidered throughout the trial. All this led to lengthier than usual references to the documentation on nightly reviews of what had taken place in court that day, with a view to planning for the following day

3. At the taxation on 5th November 2001, the Board were represented by [REDACTED] Solicitor, and all three Counsel were represented by [REDACTED] of Messrs Alex Quinn, Law Accountants. I am indebted to both of them for the helpful arguments which were submitted and supported by references to reported cases. I will first of all set out the principles which I have used, and then I will apply these principles to the fees claimed. I issued a Preliminary Note to both parties on 9th November 2001 and invited comment on the nine aspects before this Report was finalised. The responses clarified all but two of the areas in dispute, namely those set out in paragraphs 16 and 18 below.
4. **Principle 1 - work within the Schedule**

Counsel's remuneration falls be calculated within the parameters of the Act of Sederunt

Criminal Legal Aid (Scotland) (Fees) Regulations 1989, (S.I. 1989 No.1491).¹ I note with interest that the Inner House have recently said that they 'are unable to endorse' the suggestion by Lord Prosser in an unreported decision of 17th February 1993 in Douglas Geddes v Lothian Health Board, that Legal Aid Schedules might not be appropriate to cover complex cases and that auditors might depart entirely from the Schedules and decide on 'reasonable remuneration' by exercising their own discretion. (Disapproved in Uisdean McKay v Her Majesty's Advocate 1999 S.C.C.R.679 at page 686B.). Even in a complex case like the present one, an auditor should start with the fixed fees in the Schedule, and, if need be, invoke the discretion which the Schedule allows to auditors in two areas, namely:

- (1) to create new categories under paragraph 2 of the Schedule for unusual or complex situations, if necessary work has been done outside the Schedule, i.e., where no block fee exists, and/or
- (2) to uplift the block fees in paragraph 3 of the Schedule, if circumstances justify this.

¹ 10 (1). 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.

SCHEDULE 2 - FEES OF COUNSEL

1. Subject to the following provisions of this Schedule, fees shall be calculated in accordance with the Table of Fees in this Schedule.
2. Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.
3. 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.
4. The auditor shall have power to reduce any fee set out in the Table of Fees in this Schedule where he is satisfied that, because of any particular circumstances, a reduced fee is sufficient to provide reasonable remuneration for the work.

5. **Principle 2 - creation of new categories under paragraph 2 of the Schedule for unusual or complex situations.**

(a) **'preparation fees'**

The Schedule does not provide for 'preparation fees' and [REDACTED] challenged the principle of a separate charge for 'preparation', on the basis that the fees in the Schedule for Consultation, Trial etc. already include an element for preparation, so there should be no separate charge for what has already been included - in other words, that 'preparation' had been taken into account when the levels of fees in the Schedule were set. That is so, but if extensive and exceptional preparation is required, auditors have sometimes allowed 'preparation fees' as a separate item. I say 'sometimes', because the previous Auditor of the Court of Session preferred to recognise the exceptional preparation element in [REDACTED] (11th December 1995) and [REDACTED] (9th May 1997) by increasing the daily rate. I allowed both a limited number of preparation fees and also an enhanced daily rate for both Senior and Junior Counsel in [REDACTED] (23rd February 1998), and the Auditor of the Court of Session has allowed 'preparation' as a separate item in [REDACTED] (15th September 2000) and [REDACTED] (11th January 2000) and [REDACTED] (14th January 2000) and the Sheriff Court auditor at Hamilton did so in (another) [REDACTED] (8th July 1993).

6. I am satisfied that this is a case where paragraph 2 of the Schedule should be invoked in order to create a category called 'preparation' for certain work which falls outside the Schedule. However, it should, in my view, be used only sparingly and certainly not as an additional item on a regular basis. Part of Lord Prosser's Opinion in Geddes, which was not, as far as I know, disapproved by the Inner House, and which I adopt as it sets out succinctly the basis on which Counsel are remunerated, is at page 5 of the unreported decision:

Ever since tables of this type were originally prepared, I have understood that those items described as 'Day in Court' were regarded as covering not merely the hours in Court, but the necessary preparation, and indeed ancillary work, such as incidental discussion with solicitor, client or expert witnesses around the time of the proof. Correspondingly, the fee for the 'Day in Court' in the Table contains within it remuneration for such preparatory or ancillary work.

Remuneration for most of the 'preparation' in a complex case should, in my view, be

dealt with by increasing the rate for the 'Consultation' or the 'Day in Court' and not, as has been suggested in this case, by regular separate fees called 'preparation'. I have covered most of the 'preparation' in this case by increasing the basic fees, but there are five situations, set out in the footnotes to the chart at paragraph 15, where I have allowed 'preparation' on its own. They are all in the early stages of the case, and only one has been allowed as a separate item after the Trial started.

7. There is another question to be addressed before putting a figure on the fees to be allowed in this case. Should they be based on an hourly rate or a daily rate? Although I applied an hourly rate in [REDACTED] I have now come to the view that a daily rate is more appropriate. If the work is less than a day, then generally it should be recognised in the enhanced rate given for the Trial and not as a separate item. I appreciate that this is a broad approach, but it is preferable to a proliferation of what are meant to be 'exceptional' items. The other point to bear in mind is that a 'Day of Preparation' should be noticeably less than a 'Day in Court' - probably about two-thirds of it.
8. So what is an appropriate daily rate for preparation? [REDACTED] (15th September 2000) was exceptional, both in its complexity and in being the longest running case in the history of the Scottish High Court. The fees awarded there must therefore be regarded as the absolute top end of the scale. The Auditor of the Court of Session allowed £840 per day for 106.5 days for an exceptionally experienced Senior Counsel, £750 per day for 28 days for a senior Junior Counsel (Senior by the time of the taxation) and £450 for 16.5 days for another Junior Counsel. [REDACTED] (11th January 2000) and [REDACTED] (14th January 2000) were dealt with by hourly (as opposed to daily) rates and in both of these cases Senior Counsel was allowed £150 per hour and Junior Counsel £100 per hour, which were the figures I allowed in [REDACTED]. In all the cases mentioned there was also an enhanced daily rate for the Trial itself. The Sheriff Court auditor at Hamilton in [REDACTED] (8th July 1993) gave ten days at £202.18 per day.
9. In this case I have allowed £550 per day for Senior Counsel and £365 per day for Junior Counsel in the five situations where I have allowed 'preparation' on its own. It does not compare in complexity with [REDACTED] and I assess it as a little less complex in matters of law than [REDACTED].

10. (b) 'days not in Court'

The decision of the Court in H.M. Advocate v Birrell, 1994 S.L.T. 480 makes clear that attendance in readiness to present a case, even when the case does not proceed on that day, may be remunerated under the Scheme - see pages 480H and 484J. When Birrell was remitted back to the Auditor of the Court of Session (20th December 1993), he allowed £150 per day, half of the rate for a day in court. The Auditor of the Court of Session in [REDACTED] *supra*, gave £550 to Leading (Junior) Counsel and £300 to Junior Counsel in a similar situation, where he was allowing £750 and £450 for days in Court - broadly two-thirds. In this case I will allow a basic fee of £315 for Senior Counsel for 4th September but nothing for 5th, on a 'broad axe' basis that generous fees for preparation have been given for other dates and another £200 has also been separately allowed for a visit to a police station on the 4th. (I would have allowed £242.50 to Junior Counsel for 4th September, but neither of them submitted a Note of Fee for that day.)

11. However, that was not the real issue argued before me in this case. [REDACTED] advanced an argument for fees for Counsel for all the days when the Court had adjourned and it was known that their services would not be required again until a defined date in the future. His argument was that they had blocked out the whole period of the trial in their diaries and so they could not accept instructions in advance for any other court appearances. As they 'were not available for work', they were entitled to a modest fee for being available, although not required, for this case. If other work did come along, no charge was made here.² He based his argument on the Report of the Auditor of the Court of Session in [REDACTED] page 6, paragraph 10, and the last four lines. The first two days mentioned there were before the trial started, and so are covered by the preceding paragraph of this Report, but the latter two were after it had started. All we are told is that 'Counsel were prepared for Trial but it did not proceed'. It is, in my view, a 'bridge too far' to jump from that bald statement to a claim for fees when it was known, before the

² For example Mr. Beardmore had blocked out Monday 16th to Friday 20th October, and had managed to secure other work for Thursday 19th and Friday 20th, so no charge was made for these two days, but for the Wednesday he claimed a fee of £242.50 - logically he should have done so also for the Monday and Tuesday, but he has not. That is of no consequence as I am not going to allow any of it.

Court rose, that it would not convene again until a given date in the future. The Schedule makes no provision - nor, as far as I am aware, does any Table of Fees for any judicial work in Scotland - for payment to Counsel on days when the Court has adjourned and when it is known in advance that the Court will not to be sitting on that particular day. For this argument to succeed, it is necessary for the fees to come within Schedule 2, paragraph 2, which provides:

Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.

I am not prepared to allow fees for the days on which it was known in advance that the Court would not be sitting. Apart from anything else, I am not persuaded that those days can be classified as 'work' within the meaning of Schedule 2.

12. In support of his argument, [REDACTED] supplied me with the Opinion of Lord Penrose in the City of Aberdeen Council v W.A. Fairhurst and Others, (unreported, 20th July 1999). I have carefully considered it but it deals with the consequences of a 'contract' between the parties to a civil case, and does not, in my opinion, assist in the question of 'idle days' in a Legal Aid account.

13. **Principle 3. Whether to uplift the block fees in paragraph 3 of the Schedule?**

Counsel were instructed, and accepted their instructions, within the Schedule of remuneration for criminal legal aid cases. I accept that there is provision to increase or to depart from the Schedule, but the Schedule must be the starting point - although not necessarily the finishing point. What Counsel should be allowed in this case is not the 'going rate' for non-Legal Aid cases, nor is it what they might have commanded in any particular private situation, but it is 'reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees' (Schedule 2, paragraph 2). I have underlined these words, because it has repeatedly been said by auditors and by the Court that all enhanced criminal legal aid fees must be related to the Table for ordinary criminal legal aid cases. This was stressed again by the Lord

Justice Clerk in the Opinion of the Court in Uisdean McKay (25th June 1999) at pages 10 and following. Another example of the way in which the Table differs from what might be paid in other situations is that Senior Counsel in the present case had no Junior to assist him, and yet the basic daily trial fee of £315 is the same, whether he is assisted or whether he appears on his own.

14. In the following paragraph, all figures are per day for a normal full day in Court. As the Tables lays down base rates of £315 and £242.50, and as these have not altered in the intervening years, neither inflation nor the 'going-rate' in private cases may be taken into account. In [REDACTED] I allowed £785 and £500 to Senior and Junior Counsel respectively, acting together as a team³ - one of the features of the case was the division of responsibility between them and each depended very much on the other. In the present case I have awarded £850 and £570 because although this case is (in my view, as stated already in paragraph 9) a little less complex than [REDACTED] all three Counsel in this case were acting alone and looking after the interests of their respective clients. It is important that there is some broad uniformity across the country, and my decision here and in [REDACTED] seems to be broadly in line with comparable cases. In [REDACTED] (disregarding the exceptional position of Mr. R.E. Henderson, Q.C., who was awarded over four figures per day for the trial), a senior Junior (who had taken silk before the matter came for taxation) was awarded £750 and his Junior was awarded £450. In the present case, there was no Senior-Junior partnership, and all three Counsel were representing separate interests. In [REDACTED] leading Junior Counsel was awarded £850 in Aberdeen, with no preparation charge in addition, but there seems to have been more fact and less law at issue in that 11 day trial, and law was a significant factor in the present case. In [REDACTED] Senior Counsel was awarded £625 for most days and £675 for two days in Glasgow, with no preparation charge in addition, but there was less complexity in that case. A drugs case - 'the largest in Scotland' (unnamed) - is mentioned in passing in the Report of the

³ When the first (aborted) [REDACTED] trial came before me for taxation (23rd February 1998), I was advised that Counsel and the Board had come to a commercial arrangement about Counsel's fees for the trial itself. I learned later what that figure was, but that is a matter between them. I had to adjudicate on the fees for the second trial, and in that trial I allowed £785 and £500 to Senior and Junior Counsel, for the reasons set out in the detailed Note for the second [REDACTED] taxation (16th July 1998).

Auditor of the Court of Session in [REDACTED] at page 6 as having been settled at £825 for Senior Counsel. This present case was complex, as set out in paragraph 2 above, but it was in Edinburgh. Another relevant factor is that it lasted for 27 days, and an enhanced rate multiplied by 27 (although I have not given the full figure for every day) is considerably better for Counsel than an enhanced rate multiplied by 10 or 15 days, because once the essentials of the case have been mastered and the relevant cases have been applied to the facts, there are likely to be fewer 'exceptional circumstances' and yet the enhanced rate runs on. Taking a broad view, as I must, I believe that £850 and £570 for Senior and Junior Counsel respectively is fair and reasonable to all concerned and pays due regard to the Schedule from which the fees stem.

15.

		Mr. Brady - claim	Mr. Brady - allow	Mr. Ronnie - claim	Mr. Ronnie - allow	Mr. Beard- more - claim	Mr. Beard- more - allow
1999							
Dec 1	Five days prepare			2,420.00	1,825.00 ⁴		
3	Consultation			200.00	86.50		
7	Trial commenced			727.50	570.00		
2000							
Feb 4	Consultation			200.00	86.50		
11	Visit police station			200.00	100.00 ⁵		
20	Preparation			485.00	242.50 ⁶		
22	Debate at first diet			450.00	242.50		
23	Debate at first diet			450.00	300.00		

⁴ Counsel prepared for this case on 1st, 2nd, 3rd, 5th and 6th December, totalling 30 hours over 5 days, which is reasonable in view of the complexity of the case. Five times £365 gives £1,825.

⁵ Agreed by parties.

⁶ This and the next seven items were agreed, on the basis that some (not necessarily all) of the 'preparation fee' on 1st December 1999 would be allowed in addition - which it has been.

24	Debate at first diet			242.50	242.50		
Mar 2	Debate at first diet			450.00	242.50		
6	Debate at first diet			450.00	242.50		
28	Debate at first diet			450.00	242.50		
Jun 27	Debate at first diet			450.00	242.50		
Jul 12	Prepare for appeal			242.50	0.00 ⁷		
13	Crown's appeal			450.00	400.00		
14	Crown's appeal			450.00	400.00		
Aug 28	Preparation	3,750.00	550.00 ⁸ (1100.00) ⁹				
29	Preparation			2,910.00	1095.00 ¹⁰		
30	Consultation	300.00	0.00 ¹¹				

⁷ This was claimed for researching a 'novel point of law', but it was the Crown's appeal and in my view the enhanced rate for the next two items covers all preparation.

⁸ The Note of Fee reads, '28th, 29th, 30th and 31st August and 1st September 2000 - preparation days'. £3,750 divided by 5 = £750 per day. I have allowed £550 per day for exceptional preparation, for the reasons set out in paragraph 9, and I would have allowed all five days here for perusing and preparing the initial papers, as the first and only preparation fee claimed by this counsel. However, sanction for the employment of Mr. Brady was not given by the Board until either 31st August or 1st September - see paragraph 17. On any view, 28th, 29th, 30th August cannot be a charge against the Board. The summation of the column assumes that it was 1st September, and in the summation only £550 has been allowed.

⁹ If parties agree, or if the Sheriff rules, that work done on 31st August is to be paid for by the Board, £550 plus Vat of £96.25 should be added to the figures in paragraph 19 below. There will be no additional audit fee in the circumstances.

¹⁰ Although this Counsel had been involved in the case for ten months, and has received a preparation fee for five days at the beginning of the case, the argument up until now had been on the 'trial within a trial' and it was now necessary to prepare to meet the Crown case with the disputed evidence admitted. Senior Counsel took five days, and the other Junior Counsel took four days, to prepare their cases from scratch. Mr. Ronnie spent six days 'preparation, reviewing all papers for trial to commence'. While I accept that he did spend that time, he had some background knowledge and I allow three days against the Legal Aid Fund at £365 per day - paragraph 9 - which is £1,095.

¹¹ I would have allowed £200 for this first Consultation from 6 pm to 8 pm with the client and solicitors, in addition to the preparation fee for the daytime work, but sanction for the employment of Mr. Brady had not yet been given by the Board and so this cannot be a charge against the Board.

Sep 1	Preparation					2,922.00	1,752.00 ¹²
Sept 1	Consultation			200.00	100.00 ¹³		
4	Diet	315.00 ¹⁴	0.00				
4	Visit police station	300.00	200.00 ¹⁵				
5	Diet	315.00	0.00 ¹⁶				
6	Trial Day 1	1000.00	850.00	727.50 ¹⁷	570.00	727.50	570.00
7	Trial Day 2	1000.00	850.00	727.50	570.00	727.50	570.00
8	Trial Day 3	1000.00	850.00	727.50	570.00	727.50	570.00
9-10	Preparation					1,212.50	0.00 ¹⁸
11	Trial Day 4	1000.00	850.00	727.50	570.00	727.50	570.00
12	Trial Day 5	1000.00	850.00	727.50	570.00	727.50	570.00
13	Trial Day 6	1000.00	850.00	727.50	570.00	727.50	570.00
14	Trial Day 7	1000.00	850.00	727.50	570.00	727.50	570.00

¹² First sight of the papers on Friday night for a trial to start on Wednesday. Urgent perusal of papers over next four days. No hours charged for Friday, then 4 hours, 3 hours, 8 hours and 10 hours, total 25 hours. Allow 4 days of 6 hours at £365 per day, equals £1,460, plus, for this item only, a 20% uplift of £292 because of the need to work over the week-end as a matter of extreme urgency. One further preparation fee has been allowed for this Counsel, at 18th September.

¹³ The principle of this Consultation was not challenged, only the amount. The basic fee is £78, but although the meeting lasted only 40 minutes, it was the first meeting with the client for seven months and the nature of the case justifies a modest uplift to £100.

¹⁴ For the reason explained at paragraph 10.

¹⁵ To view productions - 2 hours. £100 was agreed as reasonable for Junior Counsel for 1 hour on 11th February, so £200 allowed for Senior for two hours.

¹⁶ For the reason explained at paragraph 10.

¹⁷ The fee-note inadvertently says £720.50, which throws out the Faculty Services Limited's printed total by £7.00.

¹⁸ In view of four days given on 1st September for reading the papers, and enhanced fees for three trials days following that, there is nothing in the papers to persuade me that 7 hours on Saturday and 8 hours on Sunday were required for further preparation at the expense of the Legal Aid Fund. Further preparation is given for a specific item on the following week-end, 16th, 17th and 18th September.

15	Trial Day 8	1000.00	850.00	727.50	570.00	727.50	570.00
18	Court holiday - preparation over 16th, 17th and 18th					2,910.00	365.00 ¹⁹
19	Trial Day 9	1000.00	850.00	727.50	570.00	727.50	570.00
20	Trial Day 10	1000.00	850.00	727.50	570.00	727.50	570.00
21	Trial Day 11	1000.00	850.00	727.50	570.00	727.50	570.00
22	Trial Day 12 adjourn to 28/9	315.00	850.00 ²⁰ (increase)	727.50	570.00	727.50	570.00
22	Preparation over period 6 to 22 Sept			1940.00	0.00 ²¹		
25	Sheriff training ²²	315.00	0.00	242.50 ²³	0.00	242.50	0.00
26	Court not sit			242.50	0.00	242.50	0.00
27	Court not sit	315.00	0.00	242.50	0.00	242.50	0.00

¹⁹ Counsel spent 9 hours 'researching and reading cases on entrapment', 8 hours 'preparation' and 8 hours 'preparation - researching into law' on three consecutive days. The second and third days are covered by the enhanced daily trial rate, but the first day justifies a separate charge, not for researching the law, which Counsel are deemed to know, but for applying entrapment law to the facts of this particular case.

²⁰ Mr. Brady charged only £315, but I am satisfied that enough took place on this, the fourth and final day of submissions in the 'trial within a trial', to justify a full fee, which the others have charged.

²¹ It was explained that this was a global figure to cover preparation done as the trial progressed, between 6th September (commencement of trial) and this date. As a substantially enhanced trial fee has been allowed, there can be no further charge for general preparation - it is subsumed in the enhanced daily rate for the trial.

²² This is the first of twelve days when fees are claimed on the basis of 'cleared diaries'. For the reasons set out in paragraph 11, none of these have been allowed.

²³ This Counsel has designated his fee as 'preparation' and not simply, as the others have, as 'cleared diary'. As a substantially enhanced daily trial fee has been allowed, there can be no further charge for general preparation - it is subsumed in the enhanced daily rate for the trial.

28	Trial Day 13 ²⁴	1000.00	315.00	727.50	242.50	727.50	242.50
29	Court not sit	315.00	0.00	242.50	0.00	242.50	0.00
30	Preparation					485.00	0.00 ²⁵
Oct 2	Trial Day 14 ²⁶	1000.00	567.00	727.50	380.00	727.50	380.00
3	Trial Day 15 - adjourn to 6/10 ²⁷	1000.00	315.00	727.50	242.50	727.50	242.50
4	Court not sit	315.00	0.00 ²⁸			242.50	0.00
5	Court not sit	315.00	0.00			242.50	0.00
6	Trial Day 16	1000.00	850.00	727.50	570.00	727.50	570.00
9	Trial Day 17	1000.00	850.00	727.50	570.00	727.50	570.00
10	Trial Day 18	1000.00	850.00	727.50	570.00	727.50	570.00
11	Trial Day 19	1000.00	850.00	727.50	570.00	727.50	570.00

²⁴ The only business for this day was to attend court when, at 10:32 am, the Sheriff gave his decision on the 'trial within a trial' - the disputed evidence was admissible and the main trial was to proceed. The trial was immediately adjourned to 2/10/00 due to the illness of 3rd accused. However, Counsel were not to know this and came prepared to proceed that day, if necessary. Furthermore, some of them took the opportunity of discussions with the fiscal and among each other, so the basic Table fee for a full day is justified, but not a full day at the enhanced rate.

²⁵ The £485 is described as 'reviewing all evidence - 6 hours - 1 day', and as such is covered by the enhanced daily trial fee.

²⁶ As soon as the Court sat at 10 am, Mr. Brady moved to adjourn to 9th October because of the illness of his client, the third accused. The Fiscal asked that the accused be examined by a Police Surgeon and the case called again tomorrow, with the jury standing by to come at 2 pm tomorrow. At 10.30 am the Sheriff adjourned until the following day, and told the jury to phone in at mid-day to see whether they would be required at 2 pm. This is a difficult day to fee, because Counsel would have come prepared for a full day, but in the event were finished by 10.45 am. By definition, there was no further preparation which they could make for the following day, which they would not have made already for this day, so I will allow two-thirds of the enhanced rate for today, because of the preparation which they would have made, and only the basic fee for the following day, because the preparation element cannot be duplicated and the case was immediately adjourned again, with nothing taking place.

²⁷ For explanation of the fee allowed, see the footnote for 2nd October. As mentioned there, the jury were not required to attend Court, and all that took place was a submission on the implications of the doctor's certificate and the arrangements for resuming the trial on 6th October. The agents were to advise the Court on Thursday 5th October if the third accused was not better, otherwise the trial would resume on Friday 6th (which it did).

²⁸ See paragraphs 11 and 12.

12	Trial Day 20	1000.00	850.00	727.50	570.00	727.50	570.00
13	Trial Day 21- full day, then adjourn to 24/10	1000.00	850.00	727.50	570.00	727.50	570.00
16	Court not sit			242.50	0.00		
17	Court not sit	315.00	0.00	242.50	0.00		
18	Court not sit	315.00	0.00	242.50	0.00	242.50	0.00
19	Court not sit	315.00	0.00	242.50	0.00		
20	Court not sit	315.00	0.00				
23	Court not sit	315.00	0.00	242.50	0.00	242.50	0.00
24	Trial Day 22	1000.00	850.00	727.50	570.00	727.50	570.00
25	Trial Day 23	1000.00	850.00	727.50	570.00	727.50	570.00
26	Trial Day 24	1000.00	850.00	727.50	570.00	727.50	570.00
27	Trial Day 25 - speeches	1000.00	850.00	727.50	570.00	727.50	570.00
30	Trial Day 26 - Sheriff's charge and verdicts ²⁹	1000.00	567.00	727.50	380.00	727.50	380.00
Nov 7	Consultation - prison ³⁰			200.00	86.50		
13	Sentence Day 27 ³¹			727.50	242.50	727.50	242.50
	TOTALS	33,445.00	21,214.00	35,394.5	20,774.50	29,112.00	16,144.50

16. **31st August 2000**

With reference to footnotes 8 and 9, Mr. Brady's solicitors maintain that telephone sanction was given by the Board on 31st August 2000 for his employment as Senior Counsel. The Board's position is that the formal letter was issued on 1st September and

²⁹ The final speech to the jury was concluded, the Sheriff charged the jury at 11.20 am, and verdicts were delivered that afternoon. There was not much which any of the Counsel could do from 11.30 onward, except to listen attentively to the 'charge' and then await the verdicts. In that situation, two-thirds of the enhanced daily rate is allowed.

³⁰ Once the verdicts had been delivered, there was nothing, not even in the likely sentences, to take this case out of the ordinary, so the basic rates have been allowed for the consultation and pleas in mitigation.

³¹ See previous footnote.

they object, or at least they objected at the diet of taxation, to paying for work done on 31st August. If the date for the granting of sanction cannot be agreed between the parties, it is, in my submission, for the Court, and not for the Auditor, to determine the date from which Senior Counsel may be paid. It is a question of fact, and questions of fact are for the Court to decide. As there is a dispute, I have presented this Report subject to footnotes 8 and 9, and either party may take the matter to the Sheriff for decision, if so advised.

17. Expenses.

██████████ moved for the expenses of his preparing for 4 hours and appearing at the taxation for 1.5 hours, at £80 per hour, say £400 in all (that figure was his suggestion). The principle has been debated in other cases, and it seems that the principle is no longer in dispute. The total of £400 is reasonable for all that has been done and I sustain it, plus VAT.

18. ██████████ reserved his position about the consequences of a challenger at a taxation being successful in having one-fifth or more taxed off an account. I am not persuaded that the so-called 'one-fifth rule' applies in cases like this. An audit fee of 4% is usually payable by the party lodging a judicial account, based on the fees as rendered, not on the fees as taxed, so the sanction for over-stating an account is the loss of the 4%. However, when the parties are as far apart as they usually are when these Legal Aid cases come to taxation, it seems to me equitable that everyone should have their say and that the paying party should be liable for 4% of the net outcome, without apportioning audit fees or attendance fees among the parties. In Legal Aid taxations, I base the audit fee on the final figure, as taxed, not on the fees as rendered. That is my present position, but I reserve the right to charge fees on accounts as submitted if the issue of expenses is decided in some other way.

19. I appreciate that the Board make their own calculation of VAT, but the Notes of Fee rendered by Faculty Services Limited have VAT added, so I will do likewise and the final summation is as follows: /



summation is as follows:

<u>Item</u>	Fee	VAT thereon	Totals
Mr. Brady	£ 21,214.00 ³²	£ 3,712.45	£ 24,926.45
Mr. Ronnie	£ 20,774.50	£ 3,635.54	£ 24,410.04
Mr. Beardmore	£ 16,144.50	£ 2,825.29	£ 18,969.79
Mr. Wilkinson	£ <u>400.00</u>	£ <u>70.00</u>	£ <u>470.00</u>
	£ <u>58,533.00</u>	£ <u>10,243.28</u>	£ 68,776.28
£			
Audit fee, 4%, rounded up to nearest £100		£ 2,752. 00	
Vat thereon		£ <u>481.60</u>	£ <u>3,233.60</u>
			£ <u>72,009.88</u>

20. Further procedure

Although the taxation took place on 5th November 2001, parties have been supplying further information, so this Report is being issued on 14th February 2001. I mention this because there is a period of only fourteen days from the issue of the Report for stating objections to the Sheriff, if either party wishes to take the matter further.



Ian L.S. Balfour,
Joint Auditor, Edinburgh Sheriff Court,
58 Frederick Street, Edinburgh EH2 1LS.

14th February 2002

³² If work done on 31st August is to be paid for by the Board, add £550 plus Vat of £96.25 - no additional audit fee.