

NOTE BY THE AUDITOR OF COURT AT DUMFRIES

TAXATION OF THE ACCOUNTS OF EXPENSES

For
MR A J KINROY, ADVOCATE
And
MR R HAYHOW, ADVOCATE
In causa
JW FREEING FOR ADOPTION

JW

1. The taxation which took place before me on 9th September 2003 related to the fees claimed by Mr Kinroy and Mr Hayhow, both advocates who represented J W the mother of two children who were the subject of an application for freeing for adoption held in Dumfries Sheriff Court.
2. Both counsel are in dispute with The Scottish Legal Aid Board (The Board) and the matter was referred to me by counsel in terms of Reg 12 of The Civil Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989 1490)
3. At the taxation counsel were represented by [REDACTED] Law Accountant; The Board was represented by [REDACTED]
4. I am grateful to both for their preparation for the Diet of Taxation.
5. Parties were in dispute over
 - (a) whether Mr Kinroy should be paid as Senior Counsel
 - (b) payment for preparation
 - (c) complexity and
 - (d) the rate of payment
6. The court sat on 29 days and Mr Kinroy's account includes 24 instances of preparation. His total claim, excluding VAT is £101,200. Mr Hayhow's claim is £47,310, excluding VAT but less 10 %.
7. Mr Kinroy - Senior or Junior?

This issue arises because The Board after several requests and only two weeks before the hearing sanctioned the employment of senior counsel. Senior could not be obtained but Mr Kinroy was able to accept instruction. While parties agree that sanction of senior counsel remained on the table at no stage was it agreed that remuneration to Mr Kinroy should be at a senior rate. He did however take the lead in the case and it was accepted by The Board that he should be given credit for that. However I take into consideration that two counsel were employed and before Mr Kinroy came to the case Mr Hayhow had already carried out substantial preparation. I was informed at the taxation that it is no longer the norm for counsel to be sanctioned in such cases.

[REDACTED] raised the general point of whether I could interfere with the rates claimed by counsel. [REDACTED] submitted that the instructing agent was best placed to judge what level of fee was appropriate as he was acting as "a

prudent man of business". This concept along with the level of counsels' fees was dealt with in the opinion of Lord Eassie in causa DINGLEY v CHIEF CONSTABLE to which I was referred. In support of his submissions ██████████ referred to McLaren, page 451 and MALPAS v FIFE COUNCIL. In MALPAS Lord Bonomy sustained the objection to the auditor's disallowance of the instruction of senior counsel. He refers to MACNAUGHTON 1949 SC 42 at 46

"the answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature and amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing counsel in an average case of the type in question presenting no specialities"

The opinion does however discuss what is reasonable

"so there may be a range of different ways of conducting a case that all might be described as reasonable"

Lord Bonomy also took into account the particular circumstances of the case.

██████████ referred to Regulation 9 of the Regulations

"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".

He further referred to MACNAUGHTON 1949 SC 42

"There is no objection to the employment of counsel, however eminent, in any case, however small, or to the payment of any fee, however large. But we have a plain duty to protect unsuccessful litigants against excessive charges, and not to permit the unavoidable risks of litigation to be enhanced by the added peril of possible liability for extravagant or unreasonable expenses"

It seems to me that The Board just like any other litigant have the right to enjoy the principle

"what is reasonable in the circumstances of any particular case"

It cannot be the case that an instructing agent will always be the best judge of what is the correct fee particularly where the costs are to be met by a third party.

I am satisfied that I can tax counsels' fees and that Mr Kinroy should be paid at a rate appropriate to senior junior.

8. PREPARATION

It was accepted at taxation that preparation was a legitimate charge but parties differed over the fee payable, the amount to be allowed and whether or not it should be subsumed into the daily rate. In this case Mr Hayhow prepared a few days in advance of Mr Kinroy. He was instructed on 31 October 2000. Mr Kinroy received late instruction and I have given him an allowance for this. I take into account that both counsel have undertaken considerable preparation. In my view there has to be some relationship between the amount of preparation and the actual court time and I have restricted the amounts claimed. I calculate court time to be approximately 106 hours – the preparation by Mr Kinroy is 172 hours (outwith court days).

I was asked by [REDACTED] to allow preparation time in addition to court time but in my view where there is an obvious link between preparation time and a court day then preparation should be subsumed into the daily rate which allows for an element of preparation. I have followed this view in the main with some exceptions.

The amount allowed should be reasonable in the circumstances of the case.

9. THE DAILY RATE/COMPLEXITY

In this case Mr Kinroy claims £2000 as a daily rate. Mr Hayhow claims £1250. I have arrived at what I consider to be a reasonable daily rate taking into account

- a) That two counsel were employed thus enabling the work to be shared
- b) That The Board sanctioned the employment of senior counsel – Mr Kinroy should be given some credit for taking the lead
- c) That Mr Kinroy was instructed late in the day – he then had to prepare within a short period of time
- d) The level of complexity – in my experience and taking into account reports from other taxations
- e) The fees allowed in other taxations
- f) The case was heard in Dumfries
- g) My own experience and skill as an auditor

REPORTS BY OTHER AUDITORS

- a) Auditor at Hamilton – Clarke/Cheyne – Hearing 1999/2000 – Taxation 2001 - £1500 fixed in a case conducted by senior junior alone. In his report the auditor comments

“this case was exceptionally complex and in many ways unique”

The fee of £1500 included preparation. In his report the auditor at Hamilton referred to other cases:

Cassidy – in 1994 - £1200 was paid to senior counsel but it was observed that in 2001 this figure would be in the region of £1450.

Munday – (WI-AP) 1997 Freeing Order – 12 days in court - £675 allowed.

Moir (JS) – Freeing Order – 4 days in court - £1000 allowed in 2000 including some preparation

- b) Report by F McConnell – SLAB - Jack £1100 allowed per day before deduction of 10 per cent.
- c) Report by Auditor at Glasgow – Kelly v Colquhoun- £1400 allowed in relation to work carried out in 2001 by junior counsel. In that case the sheriff’s judgment contained 200 findings in fact and the hearing lasted 48 days with the interests of 7 different parties being represented. From the description of the case in the auditor’s report the present case was not as complex.
- d) Report by the Auditor at Glasgow – McGinley - £1200 allowed for junior counsel – 5 days hearing plus 2 days preparation. The present case was more complex.
- e) Report by the Auditor at Arbroath – Mitchell v Anniston. This case was certified by the sheriff as exceptional – his judgment ran to 96 pages – 14 days of proof. £1395 allowed for senior counsel in a reparation action.
- f) Report by the Auditor at Inverness – Doohan – Social work referral – proof lasted 14 days - £1000 allowed to include accommodation and travel costs.

Having considered all the submissions, opinions, reports, considering this case on its merits but not in isolation and exercising my own discretion and knowledge as an auditor I fix the daily rate at £1300 for Mr Kinroy, £800 for Mr Hayhow which I consider to be fair and reasonable. Both rates to be reduced by 10 per cent.

In taxing the accounts therefore I have applied the following rates

| | | |
|-----------|------------------|----------|
| Mr Kinroy | Daily Rate | £1170.00 |
| | Preparation Rate | £ 877.50 |

| | | |
|-----------|------------------|----------|
| Mr Hayhow | Daily Rate | £ 720.00 |
| | Preparation Rate | £ 540.00 |

10. Mr Kinroy

I have taxed his account at £45,630 plus VAT amounting to £53,610. The taxation fee is £3000 which I apportion, £2000 to be paid by counsel and £1000 to be paid by The Board.

Therefore I find The Board liable to Mr Kinroy in the sum of £54,610.

Mr Hayhow

I have taxed his account at £26,100 plus VAT amounting to £30,667.50. The taxation fee is £1400, £1000 to be paid by counsel and £400 by The Board.

Therefore I find The Board liable to Mr Hayhow in the sum of £31,067.50.

Account

In the circumstances of this taxation I find each party responsible for their own expenses.



P. J. McEwan
AUDITOR OF COURT
DUMFRIES

6 October 2003

Dumfries and Galloway Council v [REDACTED]
(Proof 27.11.2000 to 25.1.2001)
Fee Note for A.J. Kinroy, Advocate

| DATE | WORK | FEE |
|-----------|--------|---|
| 21.11.00 | 877-50 | Working on papers c. 6 hours |
| 22.11.00 | 877-50 | Working on papers c. 6 hours |
| 23.11.00 | 877-50 | Working on papers 1100 – 1430; consulting with agents and client 1430-1800 |
| 24.11.00 | 877-50 | Working on papers 0830 – 1030; consulting with Dr. Hammond in Livingston 1030-1400; thereafter working on papers till 1800 |
| 25.11.00 | N/L | Working on papers c. 2 hours |
| 26.11.00 | 877-50 | Working on c. 7 hours 30 mins; thereafter driving to Dumfries |
| 27.11.00 | 1170 | In court moving for adjournment; consulting with agents in Dumfries (c. 30 minutes) thereafter returning to Edinburgh and working on papers till 2200 |
| 28.11.00 | 877-50 | Working on papers c. 9 hours; consulting with Dr. Hammond 1530 - 1800 |
| 29.11.00 | 1170 | Working on papers c. 9 hours; thereafter driving to Dumfries |
| 30.11.00 | 1170 | In court all day; thereafter discussions with agents c. 1 hour; thereafter working on papers c. 2 hours |
| 1.12.00 | 1170 | In court until 1pm; adjournment re objection to evidence; thereafter discussions with agents; leaving Dumfries c. 4pm and driving to Edinburgh |
| 2.12.2000 | / | Research on www – c. 1 hour |
| 3.12.2000 | 877-50 | Telephone conversations with psychiatrist re Factitious Disorder, and working on papers c. 9 hours; thereafter driving to Dumfries |
| 4.12.2000 | 1170 | working on papers c. 6 hours 30 mins; in court 10-1, 2-4 |
| 5.12.2000 | 1170 | working on papers c 5 hours 30 mins; in court 10-1, 2-4 |
| 6.12.2000 | 1170 | working on papers c. 10 hours; in court 10-11 (hearing adjourned); consulting by phone with Dr. Paul Johnstone (c. 45 mins) |

Preparation 1 day (£1250)
Preparation 1 day (£1250)
Preparation 3 days (£3750)
Consultation 23.11.00 (half day) £625
Consultation 24.11.00 (includes travelling) £500

~~£585~~
~~£585~~

5 days (£10,000)

Preparation one and a half days (£1,875)

5 days (£10,000)

Consultation (6.12.00) (c. 7.30 pm) £175

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|------------|--------|--|--|
| 7.12.2000 | 1170 | working on papers c. 6 hours 30 mins; in court 10-1, 2-4 | |
| 8.12.2000 | 1170 | Working on papers 1 hour, in court 10-1, 2-3; thereafter driving to Edinburgh | |
| 9.12.2000 | NIL | Working on papers c. 1 hour | Preparation 1 day (£1,250) |
| 10.12.2000 | NIL | Working on papers c. 4 hours; thereafter driving to Dumfries | |
| 11.12.2000 | 1170 | working on papers c. 2 hours 30 mins; in court 10-1, 2-4.30 | 5 days (£10,000) |
| 12.12.2000 | 1170 | working on papers c. 7 hours; in court 10-1, 2-3 | |
| 13.12.2000 | 1170 | working on papers c. 5 hours; in court 10-1, 2-4 | |
| 14.12.2000 | 1170 | working on papers c. 5 hours; in court 10-1, 2-3 | |
| 15.12.2000 | 1170 | working on papers c 1 hour; in court 10-1215, thereafter driving to Edinburgh | |
| 16.12.2000 | NIL | Working on papers 4 hours | Preparation 1 day (£1,250) |
| 17.12.2000 | NIL | Working on papers 3 hours | |
| 18.12.2000 | 1170 | Driving to Dumfries and back; in court 10-1, 2-4 | 5 days (£10,000) |
| 19.12.2000 | NIL | Working on papers 1 hour | |
| 20.12.2000 | 877-50 | working on papers almost all the time between 0800 and 1900, except when consulting with agents and client 1100-1400 | |
| 21.12.2000 | NIL | working on papers c. 7 hours | |
| 22.12.2000 | 1170 | Driving to Dumfries and back; in court 10-1, 2-4 | |
| 27.12.2000 | NIL | Working on papers 0900-1400 | Preparation four and a half days (£6,625) |
| 28.12.2000 | NIL | Working on papers 0930-1600 | |
| 30.12.2000 | NIL | Working on papers c. 6 hours | |
| 31.12.2000 | NIL | Working on papers c. 1 hour 30 mins | |
| 1.1.2001 | NIL | Working on papers c. 2 hours 30 mins | |
| 2.1.2001 | 877-50 | Working on papers c. 6 hours 30 mins; thereafter driving to Dumfries | |
| 3.1.2001 | 1170 | working on papers c. 7 hours; in court 10-1, 2-4 | 3 days (£6,000) |
| 4.1.2001 | 1170 | working on papers c. 4 hours 30 mins; in court 10-1, 2-4 | |
| 5.1.2001 | 1170 | in court 10-1, 2-3; thereafter driving to Edinburgh | |
| 7.1.2001 | NIL | Working on papers c. 7 hours 30 mins; thereafter driving to Dumfries | Preparation 1 day (£1,250) |
| 8.1.2001 | 1170 | working on papers c. 6 hours; in court 10-1, 2-3 | 5 days (£10,000) |
| 9.1.2001 | 1170 | in court 10-1, 2-2.30; thereafter driving to Edinburgh, and working on papers 1 hour | |
| 10.1.2001 | NIL | Working on papers c. 9 hours 30 mins | |
| 11.1.2001 | NIL | Working on papers c. 9 hours; thereafter driving to Dumfries | |

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|-----------|--------|--|-----------------------------|
| 12.1.2001 | 1170 | Working on papers 1 hour, in court 10-1, 2-3; thereafter driving to Edinburgh | |
| 13.1.2001 | NIL | Working on papers 1 hour | Preparation 1 day (£1,250) |
| 14.1.2001 | NIL | Working on papers 6 hours; thereafter driving to Dumfries | |
| 15.1.2001 | 1170 | In court 10-1, 2-4. Working on papers 2 hours 30 minutes | 5 days (£10,000) |
| 16.1.2001 | 1170 | In court 10-1, 2-4. Working on papers c. 2 hours 30 minutes | Consultation 18.1.01 £400 |
| 17.1.2001 | 1170 | In court 10-1, 2-4.15 Working on papers 1 hour; thereafter driving to Edinburgh | £=585 |
| 18.1.2001 | NIL | Working on papers c. 8 hours 30 minutes; thereafter driving to Dumfries; thereafter consulting with Dr. Johnston 2130-2300 | |
| 19.1.2001 | 1170 | In court 10-1, 2-4.15 Working on papers 1 hour; thereafter driving to Edinburgh | |
| 20.1.2001 | NIL | Working on papers c. 4 hours 30 minutes | Preparation 3 days (£3,750) |
| 21.1.2001 | 877-50 | Working on papers 12 hours ; thereafter driving to Dumfries | |
| 22.1.2001 | 1170 | In court 10-1, 2-4 Working on papers 3 hours | 5 days (£10,000) |
| 23.1.2001 | 1170 | In court 10-1, 2-4 Working on papers 3 hours 30 mins | |
| 24.1.2001 | 1170 | In court 10-1, 2-4 Working on papers 2 hours 30 | |
| 25.1.2001 | 1170 | Working on papers 1 hour, in court 10-1, 2-3; thereafter driving to Edinburgh | |

Note:-

Times are approximate.

On one or two occasions in addition to what is noted above, the case may have been adjourned in the afternoon before 4 pm; it is difficult to recall now.

The original instructions were for 27.11 to 8.12.2000, but on the first day of the proof the sheriff ordered that the proof would continue until it finished. This, and the demands of the case, made it impossible to accept instructions in other cases until 29.1.2001.

The case was extremely complex. The productions were estimated to amount to 4,000 sheets of detailed information, which all required thorough scrutiny and indexing. There were hundreds of pages of precognitions. There was insufficient time to read all the papers until about day eight of the proof. The preparation was almost always so time consuming that it was undertaken under great pressure of time. The submissions for the respondent took about eleven hours. By the end there were c. 2,700 pages of Notes of Evidence, all of which had to be read and indexed. The sheriff expected citation of page numbers in the submissions. The respondent's case was closed on 19.1.01 and the submissions began on 22.01. No adjournment was allowed for preparation of these.

45, 6.30

DUMFRIES & GALLOWAY COUNCIL v [REDACTED]

PROOF- DUMFRIES SHERIFF COURT

27 NOVEMBER 2000 -25 JANUARY 2001

R HAYHOW, ADVOCATE

I. PREPARATION

| DATE | WORK | FEE |
|------------------|---|-------|
| 17 November 2000 | working on papers 9-12.30; 1-5.30 pm | £=540 |
| 21 November 2000 | 12.35 - 6.15 pm | £=540 |
| 22 November 2000 | 12-1.40; 3.30-6.10; 7.45- 11.45 pm | £=540 |
| 23 November 2000 | 9.10 - 12.50pm | £=540 |
| 24 November 2000 | 9-10.15; 3.- 7.10pm | £=540 |
| 26 November 2000 | 11- 2.30; 3.30 - 5.30; | £=540 |

TOTAL PREPARATION : 40 hours 40 minutes

say, 5 days @ £700 per day

~~£3500~~

£=3240

The case was extremely complex. It involved an estimated 4000 sheets of productions. They contained detailed information which required thorough scrutiny. There were hundreds of pages of precognitions. The material was wide ranging in subject matter. It involved medical records, social work records, psychiatric reports, physiologist and child psychologist reports and contact records. The preparation was necessarily more time consuming and complex than in the normal case.

The foregoing fee is restricted to reflect the fact that instructions were accepted on a Legal Aid basis.

II. CONSULTATIONS

| DATE | WORK | FEE |
|------------------|--|--|
| 23 November 2000 | consulting with agent and client 2.30-6 pm (Edinburgh) | (half day) @ 90% of daily rate (Edinburgh)- £405 360 |
| 24 November 2000 | consulting with expert witness Dr Hammond at Livingston- 10.15 am -2 pm (to include travelling) | (half day) @ 90% of daily rate (Edinburgh)- £405 360 |
| 18 January 2001 | consulting with expert witness Dr Johnstone at Dumfries 9.30- 11pm | £250 |

TOTAL FOR CONSULTATIONS:

~~£1060~~

£720

III. ATTENDANCE AT DUMFRIES SHERIFF COURT

| DATE | WORK | FEE |
|--|---|--|
| <p>27 January 2000 to 1 December 2000 (inclusive)</p> <p>① £720 ② 540 ③ 720 ④ 720 ⑤ 720</p> | <p>On first day Court allowed adjournment to permit further preparation/consultation; consulted with Agents in Dumfries on 27/11; thereafter returned to Edinburgh and worked on papers 3.30-5.00 and 7-9pm; On second day worked on papers all day, say, 9 hrs including further consultation with expert witness Dr Hammond 3.30- 6pm; On third day worked on papers all day, say, 8 hours and then travelled to Dumfries; On the fourth day Court sat all day; (30th Nov) On the fifth day the court adjourned at 2.15 pm (1st Dec) following an objection re evidence; thereafter discussed matters with Agents and left Dumfries for Edinburgh at approx. 4.15pm</p> | <p>5 days @ 90% of daily rate (£1250) -being £1125 - £5625</p> |
| <p>4 December 2000 to 8 December 2000 (inclusive)</p> | <p>to include driving to Dumfries on 3 December 2000 and return on 8 December 2000 nb - hearing adjourned on 6 December at approx 11am - worked on papers in Dumfries for the rest of the day, say, 9 hours</p> | <p>5 days -£5625 £3600</p> |
| <p>11 December 2000 to 15 December 2000 (inclusive)</p> | <p>to include driving to Dumfries on 10 December 2000 and return on 15 December 2000</p> | <p>5 days -£5625 £3600</p> |

| | | |
|---|--|---|
| 18 December 2000 to 22 December 2000 (inclusive) | driving to Dumfries and back on 18 th and 22 nd December; in court all day on each of 18 th and 22 nd December 2000; court adjourned on 19, 20, and 21 December - spent working on papers, say, 8 hours per day (including consulting with client in Edinburgh on 20 December 11 am - 3 pm) | 5 days - £5625 18 TH - £720 19 TH - NIL 20 TH - NIL 21 ST - NIL 22 ND - £720 |
| 3 January 2001 to 5 January 2001 (inclusive) | to include driving to Dumfries on 2 January and returning on 5 January 2001 | 3 days - £3375 £=2160 |
| 8 January 2001 to 12 January 2001 | driving to Dumfries on 7 January; thereafter in court all day 8, 9, and 12 January 2001; court adjourned approx 3 pm on 9 th January due to absence of witnesses and reconvened on 12 January. Drove to Edinburgh on 9 th and returned to Dumfries on 11 th January; spent whole of 10 th and 11 th working on papers, say, 8 hours per day | 5 days - £5625 8 TH - £720 9 TH - £720 10 TH - NIL 11 TH - NIL 12 TH - £720 |
| 15 January 2001 to 19 January 2001 (inclusive) | to include driving to Dumfries on 14 January and returning on 19 January in court all day 15, 16, 17, and 19 January 2001; court adjourned after conclusion of business on 17 January due to absence of witnesses; drove to Edinburgh and worked on case all day on 18 th returned to Dumfries in early evening and consulted with Dr Johnstone as above | 5 days - £5625 4 DAYS £=2880 |
| 22 January 2001 to 25 January 2001 (26/1 charged) | to include driving to Dumfries on 21 January and return on 25 January case concluded at 3 pm on 25 th | 5 days 4 - £5625 £=2880 |

TOTAL FOR ATTENDANCE AT COURT

£42750

NOTE

The original instructions were for 27th November to 8th December 2000. On the first day the Sheriff directed that the proof was to be heard continuously until it finished. This, together with the complexity of the case and the time necessarily spent travelling, made it impossible to accept instructions in any other cases until 29th January 2001.

By the end of the case there were approx. 2700 pages of Notes of Evidence which had to be read and noted. The Sheriff required to be directed to specific page numbers in the course of submissions. No adjournment was allowed for preparation of the submissions. The respondents submissions lasted approximately eleven hours. The case required continuous preparation and revision throughout the course of the evidence.

TOTAL

£ 47310

✓ = 26100