

DECISION OF AUDITOR – COUNSELS’ FEES – CRIMINAL

DATE OF DECISION

20.02.04

NAME OF CASE

HMA –V- J

JB

CASE TYPE

Rape, Glasgow High Court

AUDITOR

Neil Crichton, Court of Session

COUNSEL/SOLICITOR ADVOCATE

JC

AMOUNT(S) AWARDED

£680 per day – conduct of trial

FEATURES

Trial took place March 2003.

Experienced junior counsel who at time of taxation had taken Silk.

Described by Auditor as a Senior Junior, a criminal specialist with 9 years of experience as counsel.

Fee calculated by Board at half way between those set out in Chapters 1 and 2 – deemed reasonable by Auditor particularly under the test of “due regard being had to the economy”.

Counsel submitted case was complex, sensitive and important.

Board did not conclude case was exceptional in any way.

Auditor of the Court of Session

Parliament House
Edinburgh EH1 1RQ

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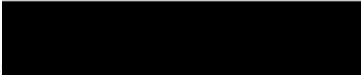
Telephone: 0131-240 6789

Fax: 0131-220 0137

E-mail: maildesk@auditorcos.co.uk

Your Ref: SL/2183055102
Our Ref: 33132

Scottish Legal Aid Board,
LP 2
EDINBURGH 7



20th February 2004

REC
20 FEB 2004

Dear Sir,

HMA v. 

I refer to the above case and enclose herewith the Auditor's Report.

Yours faithfully,

C. Campbell

Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

IN THE COURT OF SESSION

R E P O R T

by

AUDITOR OF THE COURT OF SESSION

in the cause

H.M.A V. [REDACTED]

EDINBURGH. 20th February 2004.

At the diet of taxation which took place on 9th February, 2004, Counsel, Martin Jones, Advocate, was represented by [REDACTED] Law Accountant, and [REDACTED] Solicitor, attended on behalf of the Scottish Legal Aid Board (hereinafter referred to as "the Board").

This dispute between Counsel the Board was referred to the Auditor for taxation in terms of Section 11-(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (hereinafter referred to as "the Regulations"). Regulation 10-(1) allows Counsel "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 Sections 2 empowers the Auditor to allow a fee for work

not prescribed in the schedule and Section 3 empowers the Auditor to increase any fees where he is satisfied that such an increase is necessary to provide reasonable remuneration for the work.

██████████ explained that legal aid had been granted for the accused to be represented by Senior Counsel. The agents instructed Mr. Jones, who was at the time Junior Counsel, although he has now taken silk. Mr. Jones was called to the bar in 1994 as a specialist in criminal law and he had some nine years practice as a Solicitor. He could be described as a Senior Junior. Mr. Jones had provided the Auditor and ██████████ with detailed submissions on the complexity, sensitivity, importance and length of the case and ██████████ took no exception to these arguments. The Board must act in accordance with the regulations and apply the test of "due regard being had to economy". In this case, the Board had calculated the base figure for Counsel's fees at half way between those set out in chapters 1 and 2 and, in effect, Mr. Jones had been offered an increase of 225% over the fees set out in chapter 1. This was a reasonable fee for Counsel bearing in mind Counsel's submissions on the case and the statutory basis of taxation. He submitted that the fees offered to Mr. Jones were reasonable. He did not feel that this case was really exceptional. This is what arises in rape cases and there were no specialities. Junior counsel having been instructed, the Board had no alternative but to base his fees on chapter 1.

██████████ was concerned that it was unreasonable to use the mid point between chapters 1 and 2 as the base for calculating Counsel's fees. This was an unusual and

important case as set out in Counsel's Note. Counsel's fees were based on what was reasonable bearing in mind the figures shown in chapters 1 and 2. Counsel had not based his fees on the level he might expect to earn had the case proceeded without legal aid. The nature of the case as set out in the written submissions confirmed that Counsel's approach was reasonable. He understood that the Board should be mindful of public funds but he did not think that the Board's approach was reasonable in all the circumstances of this case.

The Auditor is satisfied that the Board's approach is reasonable particularly when assessing Counsel's fees under the test of "due regard being had to economy". Counsel was, at the material time, a Junior Counsel and in accepting instructions he would know that his fees would be based on chapter 1 of the Table of Fees. A significant increase has been offered by the Board to recognize the factors raised in Counsel's submissions. Accordingly, the Auditor taxes Counsel's fees at THREE THOUSAND FIVE HUNDRED AND FORTY POUNDS (£3540.00).

Henry Linton

AUDITOR OF THE COURT OF SESSION'

Note by Senior Counsel

For

Quinns, Law Accountants

Re

Taxation

In

HMA -v- [REDACTED]

Introduction and History of the Case

[REDACTED] was indicted along with a co-accused in the High Court at Glasgow on a charge of raping a 14 year old girl. The Scottish Legal Aid Board granted sanction for the employment of Senior Counsel to represent [REDACTED] at his trial. The Solicitors acting for his co-accused also obtained such sanction. Although I am now a Queen's Counsel, at the time of [REDACTED] trial I was instructed as junior counsel acting as senior. The co-accused was represented by a solicitor advocate who also had sanction to act as senior.

Both accused in this case were young men and in particular [REDACTED] was a young man in full-time employment living with his family. The allegation against him was extremely serious and had he been convicted he would have faced a lengthy custodial sentence and would have been placed on the Sex Offenders Register for a protracted period of time.

The case itself contained difficult legal issues surrounding questions of consent. In addition a detailed and complicated notice in terms of section 275 of the Criminal Procedure of Scotland Act 1995 had to be lodged and argued in due course. The case involved an attack upon the character, both generally and particularly about the previous sexual history, of a 14 year old complainer who was alleging that she had been simultaneously raped both orally and vaginally by the two accused. The offence was said to have been committed when alcohol had been consumed by all the parties concerned in the presence, at least initially, of friends of both the accused and the complainer. There were a number of young male and female witnesses in the case who were reluctant to give evidence.

The case called in court on a number of occasions all as detailed in the fee notes already provided to the accountant. Counsel first consulted with [REDACTED] on 9th of January, 2003 and the case concluded after trial, which took place between the 11th of March and 14th March 2003 when both of the accused were acquitted.

Issues Arising

As can be seen from the correspondence between the Scottish Legal Aid Board and Counsel's clerk there is a dispute as to the level of payment in this case. The accountants may be aware that the level of fees paid to Counsel by the Scottish Legal Aid Board has not been formally increased for some very considerable time. However, the Board has been paying increased/

/increased rates to Counsel to reflect such matters like the complexity of the case, the length of the case and other pertinent factors. The difficulty is that no two account assessors reach the same conclusion in different cases. What happens is that there is a widely differing approach, which in some cases, cannot be resolved by negotiation. This is one of those cases.

The first issue, which arises is the level of the fee charged. Firstly, the Board maintain that junior counsel should be paid midway between the junior and senior level of fees. I have always argued that a junior counsel acting as senior should be paid the same fee as senior Counsel because he bears the responsibility acting as senior in the case. Indeed, when one makes a comparison with the public and private sector it is normal practice for individuals acting in a capacity above that which they are normally employed to do are paid at the level for the work which they carry out. There is therefore no justification in my view for the board to reduce the fee paid to a junior counsel acting as a senior on such an arbitrary basis.

Secondly, the actual fee offered in most cases is an enhanced fee, which the board assesses according to the usual criteria such as complexity, sensitivity and the length of the case. However, inevitably cases involving sanction for senior Counsel are normally complex sensitive and in some cases lengthy. With the introduction into Scottish law of the provisions relating to the prohibition upon the reference to the sexual character of a complainer in every case these cases have become infinitely more complex. The charge of rape is, it is argued, second only to the charge of murder and is therefore very serious. In this case I am of the view that the fee offered is too low. For the reasons I have explained I consider that a fee of £750 per day (approximately 250% increase on junior counsel's rate of £300 per day) for the court days is reasonable having regard to the factors that I have referred to.

There is however a further complication in this case. The solicitor advocate who appeared for the co-accused claimed and was paid £900 per day for his court days. I accepted that as he travelled from Dumfries to Glasgow he would be entitled to add travel allowance to the fees, which he charged. Apparently the fee paid to him was in accordance with the regulations which the board say are different from the regulations which apply to Counsel. The board's position is that a solicitor advocate whom acts as senior Counsel is paid the full senior Counsel rate. In my view there is no justification (apart from the travel element of the fee) for the differential in the way in which Counsel and solicitor advocates appearing in the same case both acting as senior are paid. This is the matter which is contentious and upon which Counsel and the board cannot agree.

Additionally, while the board is happy to pay an enhanced daily rate in respect of court days charged by Counsel the board maintains that any percentage increase, which they apply to the fee notes does not apply to any other aspects of the case such as consultations and preparation. The accountants should be aware that I have been in dispute with the board over this matter for some considerable time. The practice is not uniform and some account assessors do allow some percentage increase to other aspects of the case. However, it appears and I would argue that there is no justification for restricting the percentage increase to court days only. As I understand that the position in cases (certainly in civil cases) where percentage increases were allowed these were applied to the case as a whole. Indeed, as I recall, the legal aid regulations which were previously in force when an application was made to the court for an increase in both solicitors and Counsel's fees the percentage was applied/

3.

/applied to all of the work carried out.

It does not make sense that the board should only be allowed to apply the increase to the court days when obviously in hand straight applied to the case as a whole. It is not just the court days, which are complex lengthy and sensitive but the whole case and I would argue that the percentage increase granted or applied by the board should be applied throughout the whole of Counsel's fee. Therefore in the preparation of my fee notes I applied the 250 percentage increase to all the fees which I charged including preparations and consultations.

I hope that this note is of assistance to the accountant and I am grateful to him for agreeing to represent me at the forthcoming taxation. If I can be of any further assistance to [REDACTED] then he should not hesitate to contact me or my clerk.

Martin Jones, QC.
Parliament House, Edinburgh
20 January 2004

SOLICITOR REFERRAL – DIET OF TAXATION

Assisted Persons Name : [REDACTED]
L.Aid.Reference : SL/2183055102
Name of Counsel : Martin Jones, Advocate
Date of Taxation & Location: 20/11/2003, Court of Session

Type of case : Rape

Case Background & Nature of Dispute:

This was a case where a 14 year old girl was alleging that she had been raped by two 18 year olds. The basic strategy used by both defence teams was to attack the character of the girl as a credible complainer or witness and Section 275 Notices were lodged, which included fairly lengthy narratives to suggest that she was a full and willing participant. The case was sensitive given the nature of the charges and the ages of the protagonists.

As for the dispute regarding the fees, Martin Jones has indicated that he wishes a higher percentage uplift than that agreed with William McVicar, the solicitor/advocate who represented the co-accused. He also wishes to challenge the fact that we allow enhanced rates to incorporate preparation for complexity etc for the trial days but not for the consultations and other work. In other words he wants a percentage uplift for his consultations regardless of their length simply because of the complexity of the case.

Martin Jones is seeking £750.00 per day for a 3-day trial at Glasgow High Court and we have offered £680.00. He is also seeking £375.00 for each of 5 consultations throughout. We have restricted these on the basis of the length of time spent and also because of Mr Jones' status as a junior counsel acting as senior.

William McVicar for the co-accused was paid £900.00 per day, principally because he is based in Dumfries and also because his enhanced rate is based on *senior* counsel's fees as opposed to a junior counsel *acting* as senior.

Previous Taxation Decisions or Similar Cases Which May Be Relevant:

I don't think there are any previous taxations that have sought to allow counsel a percentage uplift on *all* work undertaken simply because of the nature of the case.

In the case of HMA v [REDACTED] junior counsel sought to obtain a greater percentage increase than that agreed by senior but the taxation ultimately went in our favour.

Additional Information

Having corresponded at some length with counsel's clerk on this matter and also having spoken to Martin Jones directly, I know that he is very much aggrieved about solicitor/advocates being able to charge as a full senior when he may only charge as a junior *acting* as senior. The regulations governing the instruction of solicitor/advocates have been fully explained to his clerk, [REDACTED] but he may challenge our basic position on solicitor/advocates' fees before the Auditor. His principal bone of contention, however, concerns parity, in terms of an uplift, with counsel for the co-accused but he does truly believe he should be able to charge as a full senior if a solicitor/advocate can.

William McVicar was paid a higher fee than that offered to Martin Jones and this is down to the fact that (a) he could charge as a full senior counsel and (b) because he is based in Dumfries. The geographical aspect has also been explained to counsel's clerk.

The clerk has indicated that either an Office Bearer (whatever *that* is) or a member of the Criminal Bar Association may represent counsel at the taxation. She has alluded to the fact that a solicitor/advocate may now take silk and that the Board have made no concession to that in considering counsels' fees.

One final point. Martin Jones has actually *been* offered a higher percentage uplift on the daily rate than that agreed with Mr McVicar simply because the Assessment Officer was unaware that the solicitor/advocate was based as far away as Dumfries. Technically, Mr McVicar's fees should probably have been agreed at a slightly higher level but this wasn't noticed until after he had been paid. This has also been explained to counsel's clerk.

Referred by : [REDACTED]

Date: 10/11/2003

AUDITOR OF THE COURT OF SESSION

Parliament House, Edinburgh, EH1 1RQ DX 549304 EDINBURGH 36
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NOTICE OF DIET OF TAXATION

TO: SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

Date: 13 January, 2004

Our Ref: 31775

RECEIVED
14 JAN 2004
Your Ref: 2183055102

Case: HMA V [REDACTED]
COUNSEL'S FEES

You are required to attend the taxation of an Account of Expenses which will take place in the Auditor's Chambers, Door 11, West Wing, Parliament House, Parliament Square, Edinburgh

On Monday, 09 February 2004

at 2.00 p.m.

On arrival, please report to Room J11. Any queries with regard to this taxation should be made to MRS. WILCHER.

Attention should be paid to the requirements of Court of Session Practice Session Note (No. 3 of 1993).

Cynthia Cameron (Mrs.)
Principal Clerk

Intimation of the diet of taxation is being made to:

[REDACTED]
MARTIN JONES ESQ

SCOTTISH LEGAL AID BOARD

1. Intimation of Diet

Intimation of the above diet is being given by the Auditor to the Solicitors who appear, from the Court Process, to be representing the paying party, which failing to the paying party. If the party presenting the Account knows of any change in representation, or change of address, of the paying party, the Auditor's Office should be informed of that immediately. The Solicitors presenting the Account should also take appropriate steps to inform the paying party of the date, time and place of the diet of taxation. If the Auditor is not satisfied with the steps taken to give intimation of the diet, he may adjourn the taxation to another date.

2. Objection to Account

If the party from whom payment is sought wishes to object to any items in the Account that party is required to lodge a written note of the specific points of objection to it not later than THREE working days before date of taxation [R.C. 42.2(1A)] and is also required to attend, or be represented at, the diet to speak in support of the objections.

PLEASE NOTE THAT NO FURTHER REMINDER REGARDING NOTE 2 WILL BE ISSUED FROM THIS OFFICE

3. Withdrawal of Account

Should the party who has presented the Account no longer require it to be taxed, that party must notify the Auditor forthwith to that effect.

Auditor of the Court of Session

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TO WHOM IT MAY CONCERN

Dear Sirs,

Diet of Taxation

With reference to the enclosed intimation of Diet of Taxation, please note that should the Auditor's office be advised of settlement of this Account within seven days of the diet of taxation, the Auditor may still charge a proportion of his fee [see Table of Fees for General Business, Chapter 2(4)].

Yours faithfully,

"Cynthia Cameron"

Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron