

Auditor of the Court of Session

Your Ref: SL/23327829
Our Ref: 33619

[REDACTED]
Solicitor,
Scottish Legal Aid Board,
LP 2
EDINBURGH 7

30th June 2004

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Dear Sir,

HMA v. [REDACTED]

AM

I refer to the above case and enclose, for your information, the Auditor's Report.

Yours faithfully,

Auno Wright

P.P. Principal Clerk
Enc.



The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in the cause

HER MAJESTY'S ADVOCATE

against



EDINBURGH. 30th JUNE 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Donald R MacLeod, Advocate, in relation to fees claimed by counsel for representing [REDACTED] at Trial in the High Court, Edinburgh, on a charge of Murder.
2. At the Taxation on the 14 June 2004, the Board were represented by [REDACTED] Solicitor. Mr MacLeod did not appear, but elected to exhibit written submissions for the Auditor's consideration.
3. The only Fee Notes in dispute are the fees for the Trial Days. All other Fee Notes have been agreed following negotiations between the 'Board' and Counsel.

4./

4. The Fees issued by Faculty Services Ltd., in dispute are as follows:

29.09.03 – Trial Day, Edinburgh - £1500.00

30.09.03 – Trial Day, - £1500.00

01.10.03 – Trial Day, - £1500.00

02.10.03 – Trial Day, - £1500.00

03.10.03 – Trial Day, Glasgow - £1500.00

06.10.03 – Trial Day - £1500.00

07.10.03 – Trial Day - £1500.00

08.10.03 – Trial Day - £1500.00

09.10.03 – Trial Day - £1500.00

- 5. In his submissions counsel outlined the background and the complexities of the case. [REDACTED] was indicted at the High Court in Edinburgh, on the charge of Murder. He admitted to killing his friend after watching a DVD of a film called 'Queen of the Damned'. He allegedly killed his friend for mocking a character in the film. Some time afterwards he contacted the police to confess what had happened and told them that he had simply followed orders implying the character had told him to kill his friend. He believed himself to be a vampire and was placed in the State Hospital at Carstairs for several weeks for observation. The conclusion of four Crown psychiatrists was that he was a psychopath who enjoyed violence, had a bizarre belief system and was sane and fit to plead. Their reports were lodged as productions. A defence psychiatrist held that the accused was a paranoid schizophrenic with diminished responsibility for his actions. Counsel undertook a significant amount of research into the symptoms of paranoid schizophrenia with a view to cross-examining the various psychiatrists as to the contents of their reports. Counsel sought to establish if**

there had been mental deterioration in the accused culminating in the development of paranoid schizophrenia. This involved the questioning witnesses on the events prior to the homicide. The evidence lead at trial on this issue was contentious. A joint minute was entered into, agreeing many of the facts of the case including the killing. The accused gave evidence claiming he had drunk the blood of the deceased after killing him. This resulted in the case attracting a great deal of media attention and made headline news. The accused was ultimately convicted of murder and sentenced to life with a punishment part of 18 years.

In support of his fees counsel states "The daily rate which has been charged in this case is intended to reflect the real difficulty in dealing with the evidence in this case. This factor, in counsel's view, made it a much more difficult case than the prosecution of [REDACTED] for the murder of his wife, a case which attracted enormous public interest, and which proceeded to trial recently in Edinburgh. It is my understanding that Senior Counsel was paid £1250.00 per day and a preparation fee..... It is my submission that this was a more difficult case to conduct. Further, it is my contention that to pay junior counsel less for this case than a senior would have been awarded is discriminatory and in breach of European Law."

Counsel goes on to refer to other cases where he claims that the counsel involved had been awarded similar sums to what he is claiming in this case, with comparable complexity and importance. He further refers to his submissions in the case of [REDACTED] also submitted for taxation and to a passage written by Lord Bonyon in Improving Practice – A review of the Practices and Procedures of the High Court 2002 at para. 5.27-8:

"There is increasing expectation that lawyers, like other professionals, should specialise in particular fields of work. A number of counsel largely confine their practices to criminal defence work. That tendency in my opinion

should be encouraged. Those counsel recognise that it is inevitable that work which is privately funded will tend to produce better rewards than that which is funded by legal aid. However, it is an important element in securing the continued commitment of able and experience counsel to criminal work that the scheme under which they are paid should be seen by them to be fair and correctly structured. That is not their current perception..... In recent times there has been a significant exodus of experienced counsel from the Bar to take up appointments as sheriffs. Taking up such an appointment is part of the normal career progression of many advocates, but the number of experienced counsel taking this path recently has been high. That exodus has increased the pressure of work on the remaining experienced criminal counsel. The regular influx of new counsel to the Bar is not reflected in an equivalent increase in the number of counsel appearing regularly in the High Court”.

6. [REDACTED] had lodged points of objection as follows:

This case called in the High Court, Edinburgh on 8 and 11 August 2003 and proceeded to trial in Edinburgh High Court on 29 September, 1, 2, 3, 6, 7 and 8 October 2003. The charge was one of murder. (It is presumed that the reference to “Glasgow Trial Day” at the entry dated 3 October 2003 is in error.)

The fees are prescribed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 Regulation 10 (1) (the “Criminal Fees Regulations”) which 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”.

The fee prescribed by Schedule 2 of the Criminal Fees Regulations for junior counsel in respect of "Trial per day" in Edinburgh is £242.50. The fee prescribed for a consultation in Edinburgh is £78.00 and in Glasgow is £133.50. Although Senior Counsel is automatically available for a murder case, counsel is junior and the fees are regulated by chapter I of the Table of Fees.

Claim

Counsel has claimed at various enhanced levels for meetings, locus visits and consultations. Counsel has claimed £1500.00 a day for conducting the proceedings in Edinburgh.

Counsel seeks to rely on the brief note attached to the fee note and also submissions, extending to three pages, submitted to the Board on 4 June 2004.

Offer

The Board has offered counsel:-

- in respect of all meetings, locus visits, consultations etc, the fees as claimed on the basis that these fees subsume a substantial element of preparation, particularly with regard to the medical evidence;
- £185.00 rather than £250.00 for two waiting days; and
- £1000.00 per day for all trial days inclusive of preparation

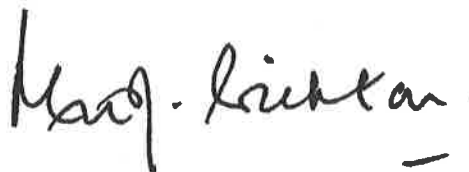
Whilst the Board is prepared to leave the offers in place for the waiting days, consultations, meetings and all other sundry items, the offer in respect of the Trial

days is *withdrawn*. Whilst counsel has indicated some of the difficulties and complexities which he considers exists in this case, he has not clearly indicated the basis of his fees in terms of the observations set out in *Uisdean McKay -v- HMA. 1999 SCCR 679*. The fees for a Trial per day are grossly excessive and not clearly referable to those prescribed in the schedule.

7. Having heard [REDACTED] and having considered Mr MacLeods submissions the Auditor is guided by the decision in the case of *Uisdean McKay v. H.M.A. Ref S.C.C.R. 679*. On page 10, 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 as that set out in Schedule 2. This rule binds 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 levels 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 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".

Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 provides that counsel shall be allowed "such fees as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy".

In arriving at his decision the Auditor in this case is satisfied that this was a complex, difficult and high profile case of great importance to the accused, which attracted a great deal of media coverage. However, the Auditor is not persuaded by counsel's submissions that it is appropriate to allow fees the equivalent of those that might be payable to a Senior Counsel on taxation. The Auditor can only allow junior counsel reasonable remuneration based on the Table of Fees in accordance with Chapter I of the Table of Fees. The Auditor approves of the Board's approach and taxes counsel's fees at £8920.00 plus VAT, allowing 8 days at £1,115.00.00 per day, to include all preparation undertaken.

A handwritten signature in black ink, appearing to read "Mary Lichten", with a horizontal line underneath the name.

AUDITOR OF THE COURT OF SESSION