

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in causa

HER MAJESTY'S ADVOCATE

Against

BM

EDINBURGH. ---29TH SEPTEMBER 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mhari Richards, QC, in relation to fees claimed by counsel for representing [REDACTED] on a charge of Armed Robbery to further the cause of Terrorism in Northern Ireland.
2. At the Taxation on the 30 August 2004, the Board were represented by Mr [REDACTED] [REDACTED] from Alex Quinn & Partners Law Accountants represented Miss Richards.
3. The only fee(s) issued by Faculty Services Ltd, which remain in dispute is the preparation. Counsel is seeking 4.5 days preparation at a daily rate of £665.
4. In her submissions counsel sets out the basis for referring her fees to the Auditor for taxation "Counsel's Fees in the above case are referred to the Auditor for Taxation in terms of Section 11 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989".

Miss Richards advises that the only fees in dispute between Counsel and the Scottish Legal Aid Board that relate to the fees for the Trial days are the charges claimed in respect of separate preparation. In that regard the following fees are in dispute:-

19 May 2003

Preparation – 30.5 hours, restricted to 27.5 hours equalling 4.5 days @ £665 per day - £2999.

20 May 2003

Trial day - £1000

21 May 2003

Trial day - £1000

22 May 2003

Trial day - £1000

12 June 2003

Trial day - £1000

17 June 2003

Trial day - £1000

Background

The accused in this case would face charges of assault and robbery and two charges under the Terrorism Act 2000. It was alleged that the accused had taken part in the robbery in the Mains of Claverhouse Public House in Dundee, that the accused professed to belonging to the Red Hand Commando, a terrorist organisation and the proceeds of the robbery were

used to fund the Red Hand Commando and were being used for the purposes of terrorism.

Counsel explains that this was a highly sensitive and complicated case involving allegations and links to terrorist organisations in Northern Ireland. This required substantial preparatory and investigative work into the workings of the Red Hand Commando Unit in Northern Ireland. Counsel had to be fully conversant with and fully prepared to lead evidence in respect of the complex set up and workings of Paramilitary Terrorist Organisations. Counsel explains that by its nature this information was not readily available. The Crown had cited one of the most Senior Terrorist Officers in the Force Intelligence Bureau, in Northern Ireland Police. As he was a key witness and due to the sensitive and complex nature of the information required, counsel had to make arrangements to meet and be in attendance at the meetings with him to ensure that all the relevant information was extracted and properly understood.

Counsel sets out the other factors as follows:

- The case attracted huge public interest
- The legal complexities were recognised by the Crown at various lengthy meetings, which took place with the various counsel involved
- There were 784 pages of documentary productions, including Transcripts of police interviews
- There were 50 photographic productions
- 104 labelled productions and;
- 56 witnesses evidence to consider

In addition there were questions of admissibility of evidence which required to be fully prepared. The accused had been spoken to by a Senior Police Officer outwith the presence of other officers and his evidence required to be fully considered. There were suggestions that the accused was in fear of his life and

evidence suggested that threats had been made on the life of his wife had he not taken part in the robbery. He denied that he was aware that the theft from the Public House was a proposed armed robbery and that his involvement in the alleged theft was peripheral.

Counsel required to spend a considerable amount of time going through the transcripts of the Police interview at considerable length to extract various possible admissions with a view to countering the Transcript and explaining the position of the accused and substantial preparation was required in respect of admissibility of evidence.

Counsel accepts that her fees should be considered in line with Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

In terms of paragraph 3 thereof the Auditor is given the discretion, any fees set out in the Table of Fees where he is satisfied that the Cause 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.

At the material time, Miss Richards' QC was in fact Junior Counsel. It is accepted therefore that Chapter 1 is appropriate though in Counsel's submission an increase of 300% on the standard rate is appropriate to reflect the following issues:-

1. The Scottish Legal Aid Board in this case sanctioned the employment of Senior & Junior Counsel. Miss Richards in this case was a Senior & Junior Counsel who had previous knowledge in the case. Her Agents elected to continue to employ her as the lead Counsel as a result at which she took on the additional work and responsibility associated with Senior Counsel in what was an extremely sensitive and fraught case.
2. The preparation of this case was based on multiple defences including coercion, circumstantial evidence and admissibility of evidence.

3. The ingathering and understanding of the evidence in relation to paramilitary organisations in Northern Ireland and in particular the “Red Hand Commando” was extremely complex and time consuming.
4. The matter, insofar as it related to acts of terrorism was of huge public interest and the outcome of this Trial and work undertaken has been of a considerable use in subsequent cases arising under the Terrorism Act involving paramilitary organisations in Northern Ireland.
5. This matter was of considerable importance to the Client who was undoubtedly facing a custodial sentence. The accused had considerable concerns for the welfare of his wife and mother not to mention his own welfare and indeed the accused and his family are now under this protection scheme. This increased pressure on counsel to achieve the appropriate result.

All in all it is submitted that the rate claimed is fair and reasonable.

Counsel accepts that the Auditor is guided by previous case law as to the basis which an increased daily rate should be best applied. Counsel accepts that the rate set out in the Table of Fees is the base figure upon which any increase should be applied and in that regard referred to the Auditor to the case of *Uisdean MacKay v. Her Majesty's Advocate SCCR679* and refers to page 10 of the Lord Justice Clerks decision.

Counsel refers the Auditor to Schedule 2 and in particular paragraph 2 thereof which states as follows:

“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 level of fees in the said Table of Fees”.

Counsel again refers the Auditor to the case of Uisdean MacKay which sets out the basis upon which preparatory work might be allowed in addition to the daily trial rate and refers to preparation following within the species of paragraph 2 of Schedule 2.

It is submitted that in this particular case the preparatory work required was exceptional. Counsel has restricted her daily rate to two thirds of her full trial rate to reflect non-advocacy work and to reflect duplication if any between preparation for the Trial, preparation for Consultations and ongoing preparatory work undertaken throughout the Trial.

In the particular circumstances of this case, the Auditor is requested to approve the fees charged by Counsel.

Costs of Taxation – In the event of success, Counsel seeks payment of her expenses of the Diet of Taxation which include the costs to Messrs Alex Quinn & Partners for preparation and attendance at the Diet of Taxation.

5. [REDACTED] lodged points of objection as follows:

This case proceeded to trial in Edinburgh High Court on 20, 21 and 22 May, 12 and 17 June 2003. There were five accused. The case involved an allegation of a robbery involving the use of firearms to obtain funds to further the cause of terrorism in Northern Ireland.

The fees are prescribed in 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 the "Trial per day" is £242.50. The fee prescribed for a consultation in Dundee is £133.50. The Table of Fees attached to the Schedule is divided into Chapter 1 which prescribes fees for junior counsel, and Chapter 2 which prescribes fees for senior counsel.

At the time counsel was junior counsel, taking silk on 29 September 2003 although sanction had been granted for senior counsel.

In its report in the case of HMA v. [REDACTED] the Auditor noted that "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".

Claim

Counsel's claim for two notes on 17 March and 19 May 2003 has been agreed. Counsel has claimed £400 for a consultation in Dundee and an offer has been made in the sum of £350, an abatement of £50, which is considered to be a reasonable fee for a lengthy consultation. The locus of the consultation has already been subsumed within the prescribed fee.

Daily Rate

Counsel has claimed £1000 a day together with 4.5 days at £665. The Board has made an offer of £885 inclusive of preparation. This is considered to be a reasonable fee in terms of the observations set out and used in *McKay v. HMA 1999 SCCR 679*.

6. Having heard [REDACTED] for Miss Richards QC the Auditor must be guided by the principles set out by the Lord Just Clerk in *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 is satisfied that this was a complex, and sensitive high profile case attracting a great deal of public interest. The Auditor is in no doubt as to the responsibility placed on counsel to achieve the best result for her client who was facing a custodial sentence, which was compounded by serious concerns as to the client’s own welfare and the welfare of his family who are now under a protection scheme. The case was novel in so far as it related to acts of terrorism and counsel advises that the work carried out has been of

considerable use in subsequent cases arising under the Terrorism Act involving paramilitary organisations in Northern Ireland. Taking these factors into consideration and the level of work undertaken by counsel which included various lengthy meetings with the other counsel involved the Auditor is satisfied that this case does merit a separate fee for preparation. However, the Auditor is not inclined to agree with [REDACTED] suggestion "that had the Trial gone on its full length then the Board's approach might have been acceptable", the inference being to the daily rate offered by the Board is reasonable only if the Trial had ran its anticipated length. The Auditor does not consider it appropriate to remunerate counsel for work that might have been done and is only inclined to take into consideration actual work done, the test being due regard to economy. In determining the level of fee for the preparation the Auditor has taken account of the enhanced daily fee understood to have been offered by the Board in the sum of £885 to reflect preparation. The Auditor further refers to the letter dated 6 May 2004 from counsel's clerk advising that counsel is happy to accept a daily rate for the Trial days at £850. Accordingly, based on a daily rate for the "Trial" days of £850, the Auditor taxes counsel's fees for the Trial at £4250, plus VAT and the preparatory work at £1200, plus VAT allowing 2 days preparation at £600, plus VAT. The total amount as taxed is therefore £5450, plus VAT.

In considering counsel's submissions regarding expenses, as there has been limited success the Auditor finds each party liable in their own expenses for the attendance at the diet of taxation and any related work.



AUDITOR OF THE COURT OF SESSION