

Jan

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in causa

HER MAJESTY'S ADVOCATE

Against


AG



17/10

Fer 1000 # 1

EDINBURGH. 14 OCTOBER 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mr George Gebbie, Advocate in relation to fees claimed by counsel for representing Annie Gourlay in a case which proceeded to the High Court of Justiciary on a devolution issue.
2. At the Taxation on the 30 August 2004, the Board were represented by Mr  Solicitor. Mr George Gebbie, Advocate made his own representations.
3. The fees issued by Faculty Services Ltd, in dispute have been claimed as follows:

06/08/99 – Consultation @ Glasgow (inc. preparation) - £200

16.08.99 – Waiting day @ Glasgow (consultation) - £215

18.08.99 – Trial 7 days @ £1000/Day - £7000 *Tare 2 @ £350/Day = £ 5200*

28.02.01 – Consultation @ Edinburgh - £200

06.03.01 – Consultation @ Glasgow - £250

13.03.01 – Court of Appeal Hearing - £1000	Tax @ £1000
14.03.01 – Court of Appeal Hearing - £1000	"
10.05.01 – Court of Appeal Hearing - £1000	Tax @ £500
17.05.01 – Court of Appeal Hearing - £1000	" £850

4. In his submissions counsel sets out his position as follows:
- a. The fees claimed between the 18 and 23 June 99, have been paid in respect of an earlier fee note and are therefore not in dispute.
 - b. SLAB has abated the consultation on the 6 August 99 by £50 allowing a fee of £150. If the same percentage uplift that was applied to the Trial day was applied to the scale fee for the consultation this would amount to a fee of £200.25. Counsel is of the view that the proposed uplift by SLAB is totally inadequate for the work involved in the case and the fee claimed by Counsel is modest.
 - c. The “waiting day” at Glasgow Court (consulting the Advocate Depute etc.) has been restricted from a fee claimed of £215 to £133.50. It is clear from the fee note that the work done was in fact a consultation, but the fee also included other work. Given the passage of time, counsel is unable to remember the exact nature of the ‘other work’ but this may be apparent from the documentation already provided to SLAB by the solicitor. Standing that, even on the scale a fee of £133.50 would be the sum due for that consultation alone and that other work was done on that occasion, the fee claimed seems to counsel to be fair and reasonable.
 - d. SLAB has restricted the fee of £1000 for the Trial days to £450 allowing a mark up on the scale fee of 50%. Around the same time as this case, counsel was involved in another case involving a devolution issue. In that

case SLAB agreed an uplift of 100%. If the same uplift was applied in this case the daily rate would be in the region of £600. That said, it should be clear to SLAB from the note attached to the fee note that what occurred in this case was that the trial judge required to convene a bench of two other judges in the middle of the trial to deal with the question of a devolution issue that arose in the case. Not only did the submissions before and deliberations of this three judge bench occupy a considerable part of the case but also in the event the reasons for its decision in the matter were not made available to those conducting the trial while the trial was ongoing. The difficulties that this caused in conducting the trial in ignorance of these reasons while endeavouring to preserve the client's position were very considerable as was alluded to by the full bench which considered the appeal in this case.

Counsel refers to taxation decisions in *Gausen and Baillie*, where junior acting with senior, and junior acting as leading junior were paid higher fees than in this case. Both cases were recognised to be complex but neither required a High Court Judge to convene a bench of three judges in mid-trial. Counsel further advises that Sir Gerald Gordon QC who it is suggested is the main authority on Criminal Law in Scotland sat along with the two other judges to consider the matter reflecting the novelty and complexity of the situation. The exceptional nature of the case involving issues raised under the new (Scotland) Act is further emphasised in that it ultimately was heard before a full bench of five judges of the Court of Appeal who took the case to *avizandum*. For these reasons, Counsel considers the fee claimed of £1000 per day to be reasonable having regard to the circumstances of the case, the scale of the fees of 1992 and the Auditors previous decisions in the cases referred to.

Counsel makes further submissions in respect of the Appeal as follows:

- a. The fees claimed for the consultations on 28 February and 7 March 2001 are reasonable and have to be seen in the context of a hearing by a full bench of the Court of Appeal and necessary level of preparation and work required at each and every stage. The fees claimed of £200 & £250 respectively include preparation.

- b. In respect of the daily rate claimed of £1000 per day in the Court of Appeal counsel refers to his earlier comments and references to the taxation decisions. With regard to the continued hearing on the 10 & 17 May 2001 Counsel advises that by Paragraph 13 of Schedule 6 to the Scotland Act 1998, an appeal shall lie to the Judicial Committee but only with leave of the Court concerned. This meant that at the time it was a clear possibility that Counsel's only opportunity to move for leave to appeal a decision against the client would be after judgement was given on 10 May 2001 and had to be as prepared as he could for that. In any event the Court was persuaded by Counsel that it should continue the hearing to 17 May 2001 to enable the contents of the Court's judgement to be fully considered and made the subject of submissions on leave to appeal on that date. This is in fact what happened.

In respect of the issue of relating the fees claimed to the Scale fixed in 1992 as required in terms of the case of *Uisdean McKay*, reference is also made to the decision of the Auditor in the case of [REDACTED] dated 14 January 2000. That was the first appeal under a new Act of Parliament, which had come into effect during the Appeal. The novelty made the Appeal complex and difficult and placed great responsibility on Counsel.

In [REDACTED] the Auditor was satisfied that the novelty, complexity, difficulty and responsibility of the work justified the fees charged. It is submitted that the application of the same criteria applies to this case.

For all the above reasons the abatements referred to above as proposed by SLAB are not accepted.

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

This was a case which proceeded to the High Court of Justiciary on a devolution issue. Mr George Gebbie, Advocate acted on behalf of the Panel.

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. Mr Gebbie is junior counsel.

A question or dispute has arisen in respect of the assessment of counsel's fee note and the matter has, accordingly, been referred to the Auditor for taxation in terms of regulation 11(1) of the said Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

Fee note

Various fee notes are on file. For the avoidance of doubt, if the fee note before the Auditor includes entries between 18 June 1999 and 23 June 1999,

these form no part of this taxation. They have been paid and accepted by counsel, as abated.

Counsel

Counsel claimed £200 for a consultation on 6 August 1999. The offer was £150.

Waiting day at Glasgow (consulting)

The entry on 16 August 1999 is claimed as a waiting day. A waiting day is a day in which counsel attends court in the expectation of the case proceeding but it does not. From information received subsequently from counsel, or his clerk, it appears that this was not actually a waiting day but a meeting with the procurator fiscal. Such a meeting could not be said to be a "consultation" and the view of the Board has been that this is an item of work for which there is no prescribed fee and which should be subsumed within the daily rates charged. Counsel has charged 7 days @ £1000 a day.

Daily rates

As indicated, counsel has charged £1000 a day on a prescribed fee of £242.50. The Board does not consider the fee to be appropriate for junior counsel in Edinburgh in this case. Counsel has referred the Board to other cases which, in the view of the Board, are not in point.

Although counsel has broadly indicated the nature of the case and what counsel considers to be the importance of it, there is little information as to the level or the nature of the preparatory work carried out.

Whatever is considered to be an appropriate fee for the conduct of the case, and the fees claimed are not considered to fall within this category, it is considered that the fees claimed for the attendances on 10 and 17 May should be considerably less. The information the Board has received is that the

appeal lasted for two days before a bench of 5 judges. Those dates were 13 and 14 March. Advising was on 10 May, when counsel move for leave to appeal to the Judicial Committee of the Privy Council. Further advising was on 17 May. These attendances were of a formal nature and of short duration. All other attendances, it is understood, were procedural.

6. Having heard [REDACTED] and Mr Gebbie, Advocate 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 novel case of complexity raising issues in connection with the new Scotland Act. A Bench of three judges was convened in mid trial and due to the complexities of the issues the matter was then required to be dealt with by a full bench of five judges who ultimately took the case to *avizandum*. Reference was made to ECHR case law and the European Convention Human Rights provisions in addition to criminal and constitutional law. There was also the possibility of the matter being referred to the Judicial Committee of the Privy Council.

In determining the daily rate the Auditor is satisfied that counsel should be paid an enhanced rate having regard to those fees set out in Chapter 1 of the Schedule to reflect the actual work done, due regard being had to economy. However, the Auditor is not inclined to have regard to what has been paid in other cases and considers each case on its own merits. The Auditor therefore allows the following fees for the court work, inclusive of preparation:

18.08.99 – 7 Trial days at £850, per day = £5950

13.03.01 – Court of Appeal Hearing - £1000

14.03.01 – Continued Appeal Hearing - £1000

10.05.01 – Continued Appeal Hearing - £560

17.05.01 – Continued Appeal Hearing - £850

In addition to the above the Auditor allows the consultation at Glasgow inclusive of preparation at the sum claimed of £200. However, the Auditor disallows the consultations on 28 February 2001 and 6 March 2001 on the basis that counsel's submissions do not disclose that these were formal consultations, but simply meetings, the fees for which are included in the enhanced court rate.

The Auditor also disallows the 'waiting' day at Glasgow Court on the 16 August 1999. From the information available this was not a waiting day but a meeting with the Advocate Depute. The Auditor agrees with the Board that this work is properly subsumed within the enhanced daily rate and is not separately chargeable in the context of a consultation.

Accordingly, the Auditor taxes counsel's fees in the sum of £9560.00, plus VAT of £1673.00 and finds each party liable in their own expenses for the attendance at the diet of taxation.

A handwritten signature in black ink, appearing to read 'Prof. Linton', written in a cursive style.

AUDITOR OF THE COURT OF SESSION