



**SCOTTISH COURT SERVICE**  
*Sheriffdom of Lothian and Borders*  
Sheriff Clerk's Office  
Sheriff Court House  
High Street  
Linlithgow  
EH49 7EQ

[REDACTED]  
Scottish Legal Aid Board  
DX  
ED 555250  
Edinburgh 30

Your Reference: 2116960302

Our Reference: DGL

Date: 26 January 2005

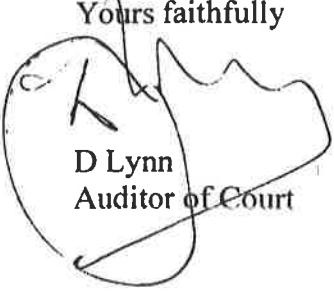
Dear Madam

Taxation - [REDACTED]

JC

I enclose a copy of my certificate and note in respect of the above. You will see in the note that I have made SLAB responsible for the taxation fee, which is now due and payable by the Board directly to myself.

Yours faithfully

  
D Lynn  
Auditor of Court



INVESTOR IN PEOPLE

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**Account of Expenses incurred to the Scottish Legal Aid Board by Mrs Mhairi Richards, Counsel, *in causa* Authority Reporter West Lothian v [REDACTED]**

Linlithgow 26 January 2005

Having examined the foresaid account of expenses, and having heard [REDACTED] for the Scottish Legal Aid Board and [REDACTED] for Mrs Richards thereon, I hereby tax the said account in terms of Regulation 12 (1) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 in the sum of Forty Thousand Three Hundred and Seven Pounds and Sixty Three Pence.

  
Auditor of Court

NOTE BY AUDITOR OF COURT, LINLITHGOW  
IN A TAXATION OF FEES TO COUNSEL MHAIRI RICHARDS  
in causa  
AUTHORITY REPORTER WEST LOTHIAN v [REDACTED]

**Introduction**

This taxation took place at Linlithgow on 14<sup>th</sup> December 2004. [REDACTED] appeared on behalf of the Scottish Legal Aid Board, and [REDACTED] Law Accountant appeared on behalf of Mrs Richards.

The dispute between the Board and Mrs Richards arose basically on two points: -

1. The daily rate payable to Counsel and
2. Whether preparation time (other than for submissions at the close of the case) was allowable.

Prior to the hearing, [REDACTED] had lodged written submissions with references to various authorities including *McLaren on Expenses*, an (apparently) unreported opinion of Lord Bonomy i.c. *Mary Malpas against Fife Council*, 15<sup>th</sup> January 1999, *Macnaughton against Macnaughton*, 1949 SC42, and *Ahmed's Trustee v Ahmed (No 1)* 1993 SLT 390. In the course of the taxation Mr Wilkinson also referred me to decision by the Auditor at Paisley in respect of an application for Freeing for Adoption (the "Mundy" case).

The Scottish Legal Aid Board had sent me copy authorities prior to the hearing, namely: -

1. The decision by the Auditor of Court, Glasgow 6<sup>th</sup> February 2003 ("Kelly/ Elliot/ Miller" case),
2. The decision by the Auditor of Court, Glasgow 26<sup>th</sup> September 2002 ("McGinley" case),
3. The decision by the Auditor of Court, Edinburgh 15<sup>th</sup> November 2001 ("Jack" case) and
4. The decision of the Auditor of Court at Hamilton 10<sup>th</sup> July 2001 in respect of a hearing on 22<sup>nd</sup> June 2001 ("McLeay" case).

In the course of the hearing, Ms Cuschieri for the Legal Aid Board also referred me to the case of *Nicholas Dingley against The Chief Constable of Strathclyde* (decision of Lord

2002) and also to a decision of the Auditor of Court, Dumfries at dated 6<sup>th</sup> October 2003 ("Kimberley – Hayhow" case).

### **The Case**

The referral in respect of which expenses were in dispute had been a long case, which ran over a period of 23 days where Counsel's attendance was required. The hearing commenced on 2<sup>nd</sup> September 2002 and concluded on the 28<sup>th</sup> February 2003, and thus the 23 days were not consecutive. The reasons for the referral were those specified in Section 52(2)(c) of the Children (Scotland) Act 1995, i.e. that the children were likely to suffer unnecessarily, or be impaired seriously in their health or development due to a lack of parental care. None of the children were actually children of [REDACTED]. Reference was made in the Statement of Facts to possible sexual abuse by [REDACTED] in respect of certain of the children. No criminal charges however were ever proceeded with against [REDACTED] and he was absolved entirely from the grounds in the Sheriff's decision in the case. From the Sheriff's note on his decision, a copy of which I was provided with, it is clear that most of the focus was on the mother of the children. She was represented by separate Counsel. The first day of the hearing could not commence because a number of productions (1,000 or thereby) had only been provided to both Counsel in the case just prior to that date. Accordingly, the Court adjourned the hearing on 2<sup>nd</sup> September until 5<sup>th</sup> September 2002, apparently for consideration of these documents.

### **The Submissions**

At the commencement of the taxation, [REDACTED] explained that the only things requiring taxation were (1) Counsel's daily rate and (2) whether preparation time was allowable and justifiable. Certain other matters had already been agreed between Mrs Richards and The Scottish Legal Aid Board. In so far as Counsel's fee was concerned, the Civil Legal Aid (Scotland)(Fees) Regulations 1989, Regulation 9 thereof, provided that

*"Counsel may be allowed such fees as are reasonable for conducting proceedings in a proper manner, as between Solicitor and client, third party paying".*

A proviso to that regulation was set out in Regulation 10, ie

*"Counsel's fees for any work in relation to proceedings in the Sheriff Court ... shall be 90% of the amount of fees which would be allowed for that work on a taxation of expenses between Solicitor and client, third party paying, if the work done were not legal aid".*

The daily rate claimed by Mrs Richards was £1,500, and the rate offered by the Scottish Legal Aid Board was £1,250. It was agreed by both parties that these sums were the actual sums which would be payable (i.e. these were in effect the 90% rates), depending on which figure, if either, I assessed as reasonable.

██████████ referred me to the authorities in his written submission and argued that these provided the Auditor a clear discretion to fix a market rate for Counsel's fees. His view was that the phrase *"Solicitor and client, third party paying"* was the highest rate payable other than Agent and Client. This had been a lengthy, complex and difficult case. Counsel in the case was of the view that the fee of £1,500 was fair and reasonable. Indeed, had this been a private case she would have charged somewhere in the region of between £1,750 to £2,000, even for junior counsel (Mrs. Richards is now senior counsel but had been a junior at the time).

On the issue of preparation, ██████████ submitted that in addition to length, complexity and difficulty, there had been numerous productions lodged, and a civil action by Mr ██████████ for a contact order had also been proceeding which required to be taken into account. ██████████ also observed that even in a "party and party" rate, in his experience Counsel were more frequently receiving preparation fees. No rate was actually fixed for this, but he stated that the practice of Auditor in the Court of Session was to remunerate preparation time on the basis of calculating the overall number of hours of preparation into a "court day" daily rate. The final rate chargeable for preparation was normally two thirds of that daily rate. ██████████ also noted in his submission that the Sheriff had acknowledged in his report the painstaking and crucial work undertaken by Mrs Richards and how her thorough preparation had been helpful in resolving the case. However, upon examining the Sheriff's note I was unable to find such a specific reference, although the Sheriff noted on page 1 that the mother of the children was *"...evasive and...frequently shifted her position especially under cross-examination by Ms Richards"*.

Replying on behalf of the Scottish Legal Aid Board, ██████████ submitted that the meaning of the expression *"Solicitor and client, third party paying"* was now determined by

the case of *Dingley*. In that case, Lord Eassie had considered a note of objections to a taxation by the Auditor of the Court of Session. [REDACTED] directed me to two sections of Lord Easton's opinion, firstly at page 24 Lord Eassie observes:

*"Where the particular tasks required of Counsel is eligible in a party and party taxation for recovery against the losing party there is, in my view, prima facie no good ground whereon the reasonable, ordinary fee recoverable from the losing opponent should differ to any significant extent from the fee payable by the third party who likewise has no direct control over the bargain eventually struck between the client's solicitor and counsel. In each case the measure is the ordinary reasonable fee".*

And, at page 23:

*"For that reason it appears to me that, for similar work performed pursuant to the same instruction, the amount of the fee to counsel recoverable under a party and party award ought not to diverge markedly from that recoverable on an agent and client, third party paying basis".*

[REDACTED] argued that this case now defined "*solicitor and client, third party paying*". In effect, she submitted, it was not within the discretion of the Auditor to simply fix a fee at a market rate. Rather, the fee payable where the Scottish Legal Aid Board is the third party, ought to be that fee which is the "ordinary and reasonable" fee. A taxation involving the Scottish Legal Aid Board was more akin to party and party taxation. She did not accept that it was standard procedure to pay separate preparation fees for this type of case, although she noted that this was the practice in criminal cases at the Auditor's discretion. However, this was not a criminal case.

So far as what a reasonable daily rate might be, she drew my attention to various cases of a similar nature which she had submitted prior to the hearing. In particular, she referred to the decision of the Auditor at Hamilton in what she described as the "*McLeay*" case. She stated that the "*McLeay*" case was now used as a benchmark by SLAB in determining the reasonable daily rate in this type of case. She pointed out that the daily rate fixed in "*McLeay*" included preparation time, other than for time allowed in preparation of submissions. The *inclusive* daily rate fixed in the "*McLeay*" case was £1,350. In the current case, SLAB was prepared to pay two thirds of what ever daily rate was fixed for the

preparation for submissions at the end of the case, but was not prepared to pay separate preparation fees for work done before the proof or during the evenings of the days on which the proof ran, as had been claimed. All preparation fees ought to be subsumed by the daily rate. She explained that the "McLeay" case had been a particularly unique case involving among other things a total of 48 days of court time, a substantial number of expert witnesses and also the calling of witnesses from abroad. [REDACTED] also contrasted the circumstances of the current case with the "Jack" case. In "Jack", there was again a significant distinguishing feature in that a charge of attempted murder was pending against the mother of the child. The daily rate set in that case was £1,000. She argued that the Cifuentes case could not be compared to either "McLeay" or "Jack". As she had previously observed, the grounds of the referral were not that an offence had been committed against the child (i.e. Children (Scotland) Act 1995 Section 52(2)(d)). The case was basically lack of parental care (Section 52(2)(c)). There were not going to be criminal charges pending against [REDACTED]

In another case to which she referred, the "McGinley" case, [REDACTED] pointed out that a daily rate of £1,080 had been allowed, again with all preparation time being subsumed by the daily rate. "McGinley" was also a social work referral case in which the subject of the referral had been accused of sexual molestation of his children, again a case which contrasted considerably from the current case.

[REDACTED] also drew my attention to an additional case at the hearing, viz. the "Kinroy" case, (a decision of the Auditor at Dumfries dated 6<sup>th</sup> October 2003. In this case the Auditor observed (at page 8):

*"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 in the main with some exceptions".*

[REDACTED] said that SLAB not dispute that there would have been some preparation time, but that the fee therefor, whether on the days of the proof or at any other time ought to be subsumed by the daily rate. Having regard to the decisions in the cases referred to which generally indicated that preparation in this type of case was subsumed into a reasonable daily rate, she contended that no separate preparation fee should be paid.

In reply [REDACTED] argued that if the Scottish Legal Aid Board was of the view that this type of account was more on a party and party basis, then it had to accept that preparation time was a reasonable claim and ought to be paid where it was merited. He submitted that in the current case there were a number of unusual features, including the fact that there was an issue of autism in respect of one of the children. Although this was not a Section 52(2)(d) case, the allegations made against [REDACTED] were nevertheless an extremely important issue for him. He also referred me to the "Mundy" case (decision of the Auditor at Paisley dated 23<sup>rd</sup> November 1997), specifically to page 6 where the Auditor comments:

*"I think that each case must be decided on its own merits at the time when Counsel services are required. Relevant circumstances are...the experience of Counsel, the difficulty of the case, having regard to complexity, novelty and other such factors, the importance of the case to the clients, the inclusion or otherwise in the daily rate of preparation and the travelling involved".*

In [REDACTED] view all of these factors were relevant to the current case.

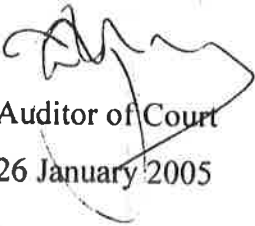
In reply, [REDACTED] said that she did not dispute that each case had to be taken on its merits, but cases should not be considered in isolation. SLAB acknowledged the importance of this case by sanctioning Counsel. It did not, she argued, compare otherwise with the other decisions to which she had referred.

In determining what rate might be appropriate for this I have had regard to the nature of the case itself, which was a long and in some respects unusual case. Despite the fact that there were no criminal proceedings pending against [REDACTED] the allegations of sexual abuse were serious and would of course have been of importance to him. But I feel I also have had to make some comparisons of this case with the circumstances of the other cases provided to me, in particular the *McLeay* case. The present case does not seem to me to fully match *McLeay* and indeed the other cases in terms of difficulty, complexity or novelty, particularly as the main thrust of the case was against the mother, who was not Mrs Richards' client. Accordingly I am persuaded in all the circumstances by the views taken by the Auditors in those cases on the question of a reasonable daily rate. It seems to me that the rate suggested originally as being chargeable (were this a private case) i.e.£1750 to £2000 is more likely to



be a rate closer to that for senior counsel. In this case junior counsel was instructed. SLAB is currently offering a net daily rate of £1250. Taking into account the 10% deduction element required by Regulation 10 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989, that would bring the gross rate to almost £1390. Having regard to that, and the rate fixed in *McLeay*, I am of the view that a daily rate of £1250 is a fair and reasonable rate for a case of this nature for junior counsel.

In relation to preparation, again the cases to which I was referred suggest to me that, subject to some exceptions, preparation time generally ought to be subsumed within the daily rate. However, I think there is one aspect of the progress of the current case that has to be considered. That is that the referral had to be adjourned on 2<sup>nd</sup> September because of the late lodging of a large number of productions, which had not previously been seen by counsel. That adjournment was for a period of 2 days. It seems to me that the only reason the Court allowed this adjournment was to provide counsel time to peruse these productions and thus prepare further. Preparation time therefore ought to be allowed for those 2 days. I observe in the account that SLAB allowed a two thirds daily rate for preparation for submissions at the rate of £835 per day. I will accordingly allow 2 days at £835 per day (£1670) for the additional preparation days. I also understood at the start of the hearing that SLAB had now agreed to pay an additional contested day (8<sup>th</sup> November 2002), and therefore a further £1250 falls to be added to the total. SLAB's final offer had been £30,255 excluding VAT. This therefore means that the new fee will be £ 30,255 + £1670 + £1250, viz. £33,175.00, but that will also be subject to the addition of VAT of £5805.62, making at total of £38980.62. Mr [REDACTED] submitted that his fee also ought to be paid by SLAB. In the light of my decision, with most of the success going to SLAB, I take the view that parties should be responsible for their own expenses, but I accept his submission that the taxation fee ought to be paid by SLAB in the first instance. This will be £1327, thus making the total sum £40307.62, with the said taxation fee payable directly by SLAB.

  
Auditor of Court

26 January 2005