

**COURT OF SESSION, SCOTLAND**

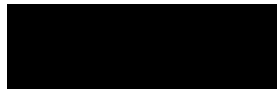
**REPORT**

**By**

**AUDITOR OF THE COURT OF SESSION**

**In the cause**

JVR




**Appellant**

**Against**

**HER MAJESTY'S ADVOCATE**

**Repondent**

**EDINBURGH. 17. December 2004**

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mr Jurjen Pen, Dutch Counsel and Mr John McLaughlin, Advocate in relation to fees claimed by counsel for representing Jan Van Rijs in Appeals against Conviction & Sentence and on Devolution Issues arising therefrom.
2. At the Taxation on the 22 November 2004, the Board was represented by Mr  Solicitor. Mr McLaughlin, Advocate and Mr Pen represented themselves. Dr Sjocrona, Mr Jahae and Mr Van Bavel (senior members of the Dutch Bar) who represented the co-accused in the case also attended, with their administrator Ms Van Strien.

### **3. Background**

The background to this case relates to charges, which were brought against four Dutch nationals including Mr Van Rijs and five British citizens in connection with drugs smuggling offences involving vessels in the North Sea. The case proceeded to Trial; Mr Van Rijs was convicted and received the maximum sentence of 14 years imprisonment. The Trial was the longest running Drugs Trial at that time and each of those convicted were also given severe sentences. It received considerable media interest.

Between the date of conviction and the start of the Appeal the Dutch nationals including Mr Van Rijs endured numerous changes of counsel. At the hearing at which it was sought to have the grounds of appeal received by the Court, Counsel who had initially prepared the draft Grounds of Appeal appeared as Advocate Depute. There was a clear conflict of interest, which was brought to the attention of the Advocate Depute. Mr Van Rijs and the other Dutch appellants lost confidence in the capability of the Scottish Bar to provide them with representation by experienced Senior Counsel for the Appeal. Understandably they turned to senior members of the Bar in their home country of Holland.

### **4. Status of Mr Pen**

██████████ sought clarification of Mr Pen's status. The Board had to be satisfied that payment should properly be made to reflect that status. The Auditor accepted the submissions made by Mr McLaughlin and Mr Pen that the Dean of Faculty was satisfied as to Mr Pen's nationality and status. Mr Pen explained he was welcomed by Lord McCluskey and later by Lord Rodger both of whom accepted his status as senior counsel representing Mr Van Rijs. The Auditor heard submissions that Mr Pen is an eminent member of the Bar of the Netherlands and is considered to be one of its

most senior members. This was supported by the other Dutch counsel in attendance, also senior members of the Dutch Bar. The Dutch counsel exhibited their curricula vitae to the Auditor for his perusal. The Auditor is satisfied that Mr Pen fulfils the criteria to be deemed the equivalent of senior counsel.

## 5. Status of Mr McLaughlin

In his submissions concerning his status in the case Mr McLaughlin referred the Auditor to various authorities in support of his fees, which included:

- The Criminal Legal Aid Board (Scotland) (Fees) Regulations 1989
- The Lord Justice Clerk's decision in the case of *Uisdean McKay v. HMA 1999 SC 670*
- The Rules for EEC Lawyers appearing in Scotland
- Article 48 of the Treaty of Rome

Whilst Mr McLaughlin accepted that his fees should be dealt with in accordance with the Lord Justice Clerks decision in *Uisdean McKay*, he argued that his fees should be more properly considered having regard to Article 48 of the Treaty of Rome for those parts of the proceedings where he was acting *qua* senior. The Board had granted authority for the employment of senior counsel and it was in this capacity that he was representing the appellant. Although he is a junior counsel, he is entitled to be paid as senior counsel where he represented his client on his own. Mr McLaughlin directed the Auditor to consider his fees in accordance with the Article and submitted he was entitled to equal pay for equal work and should not be discriminated against on the basis that the Regulations were out of date and were not compatible with EU Law.

The Auditor having carefully considered Mr McLaughlin's submissions on this point is not persuaded that he has the power to deal with his fees on the basis outlined by him.

The issue of whether the current regulations are incompatible with EU Law is not within the Auditor's remit. Taxation of counsel's fees can only proceed on the framework of existing regulations and court precedent (*Uisdean McKay v. H.M.A. 1999 SC 670*)

## 6. Regulations and Authorities

This taxation proceeds on the basis of Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 which 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".

Guidance to the Auditor was given by the Court in *Uisdean McKay v. HMA 1999 SC 670* and in particular where 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”.

██████████ also submitted the Auditor should have regard to the correspondence between John Carroll & Co and SLAB in letters dated as follows:

John Carroll & Co – letter dated 28 August 1999 – to the Board

*“We refer to the above case and communications that have passed between yourselves and our Edinburgh agents, Anderson Strathern.*

*You will doubtless appreciate why it was that Anderson Strathern made application for sanction to employ Mr Meijers from the Netherlands. Although a decision has been made by the State to deny our clients representation of their own choosing would appear to fly in the face of Article 6 of the European Convention on Human Rights, that is a problem that could be resolved. The special circumstances of this case, unique in our experience, almost cry out for action in accordance with that proposed by us, but you appear to have set yourselves against this.*

*Were we to instruct Dutch Counsel to appear on behalf of our clients, can we obtain written assurance from the Board that it will meet a proper claim for fees on the same basis as that in relation to other counsel who have been instructed in this case, and even other counsel who may be instructed on behalf of the co-appellants, Hendrick and Ronny Van Rijs. Since this would not involve any additional cost to the State, there would appear to be no reason why such an assurance should not be given.*

*It is a matter between the court and the legal profession as to who may appear on behalf of an appellant and if the court were to allow representation by a lawyer from Tasmania, that is not something that should concern the Board. We accept that the Board would be entitled to object to any claim for fees beyond those that might legitimately be claimed by a lawyer from Scotland”.*

Board's response dated 14 September 1999

*"I refer to my recent telephone conversations concerning the above mentioned case.*

*As indicated, the Board arranged for members of its Legal Services Committee to consider your request. This has now been done and the views of the Committee supersede those expressed to you in previous correspondence. Our letters of 18 and 30 August have therefore been retracted.*

*We have already granted sanction for the employment of senior and junior counsel. It is therefore not a matter for us but for you to engage counsel who have the rights of audience acceptable to the court. If you instruct counsel who have rights of audience and who are entitled to payment under the legal aid scheme – then counsel's fees will be assessed and paid in the usual way under and in terms of our legislation after taxation if necessary.*

*As you have stated, you accept that the Board would be entitled to object to any claim for fees beyond those that might be legitimately claimed by a lawyer from Scotland. We are content that this matter is therefore left to taxation in the normal way in accordance with our regulations".*

The Auditor may only allow items of work within the statutory framework and must disallow the Petitions to the Nobile Officium, which for the purposes of Legal Aid are separate and distinct proceedings; the travel costs incurred by both Mr Pen and Mr McLaughlin and any additional costs incurred as a result of Dutch counsel being instructed in the proceedings that would not otherwise have been incurred had Scottish senior counsel been instructed (which are not covered by the sanction granted by the Board).

**7. SLAB's Objections**

██████████ lodged Points of Objection to:

- Mr McLaughlin's status in the case, i.e. *qua* Senior
- the level of the fees claimed Mr McLaughlin
- items of work not covered by the Legal Aid Certificate or sanctioned by the Board
- the method of how Mr McLaughlin's fees have been calculated
- the additional costs incurred as a result of Dutch counsel being instructed, contrary to the sanction granted by the Board and the assurance of the nominated solicitor that no additional costs would be generated
- the status of Mr Pen and whether he was recognised by the Dean of Faculty as senior counsel for the purposes of the proceedings
- the level of fees claimed by Mr Pen

Note: The Board did not challenge the validity of the work done, but the level at which the fees had been submitted by both Mr McLaughlin and Mr Pen.

## **8. Mr McLaughlin's Submissions**

Mr McLaughlin had lodged detailed submissions which are of great assistance to the Auditor. The Auditor refers to them for their terms. He refers to the cases of *HMA v. Malcolm Baillie & Stuart Baillie, September 2000* and *Thomas Campbell & Joseph Steele v. HMA, January 2000*. Counsel's fees in both cases were subject to taxation before the Auditor.

In setting out the background both cases presented significant difficulties and complexities. ██████████ was the longest running case in the history of the Scottish High Court and involved novel points of law. The indictment ran to 36 pages and included 43 separate charges of fraud. The Crown lodged in excess of 14,000 pages of

productions. The trial of [REDACTED] was deserted *pro loco et tempore* and the trial of his co-accused lasted 117 days. This did not involve an Appeal.

The Auditor is fortunate in having taxed Counsels fees in [REDACTED]. This was a complex appeal and is therefore a relevant comparator. The appeal involved:

- the re-opening of a case, which had concluded many years beforehand
- the importance to the client who had been sentenced to life imprisonment with a minimum of 20 years imposed
- a huge number of documentation of some 30 volumes of evidence to be read and summarised for presentation of the appeal
- the public interest in the appeal
- complex issues of fact
- issues arising out of the grounds of appeal concerning the misdirection by the Trial Judge
- unique issues of law arising from the fact the grounds of appeal were based on the existence of new evidence and the application of the newly introduced legislation on appeals
- legal issues arising from discrepancies in the evidence of one of the witnesses at the Trial and in the Appeal;
- the introduction of new evidence from other witnesses
- the Crown employed a Procurator Fiscal and a Junior Counsel exclusively on the Appeal for six months and a Senior Depute to work exclusively on the Appeal in preparation for the Hearing for a period of one month
- the extensive Opinions of the presiding Judges reported in *Campbell v. HMA 1998 SLT 923*

The Auditor is satisfied that there are clear similarities in each case. For example:

- the grounds of appeal required to be urgently re-drafted
- there were changes in legislation, during the course of the appeals



- extensive written submissions required to be drafted
- the documentation that required to be read was (extremely) voluminous
- a considerable amount of preparation had to be done
- applications for interim liberation of the appellants were hotly contested by the Crown – in both cases the appellants were successful

In approaching counsels' fees in this case the Auditor accepts that there are additional aspects, which should be taken into consideration when deciding on the level of remuneration to Mr McLaughlin and Mr Pen. These include the length of the proceedings, the delays due to circumstances outwith the Appellant's and his representatives control, the manner in which the court decided to hear the case, the extensive authorities referred to, the number of areas of new law covered at each stage of the appeal, the setting aside of a decision by a senior High Court Judge and the circumstances which resulted in the Appellants instructing counsel outwith Scotland to represent them.

## **9. Conclusion**

The Auditor is satisfied the level of fees allowed to senior counsel in [REDACTED] should form the basis for the fees which the Auditor is minded to allow in this case.

The Auditor is further satisfied that this is a case of sufficient complexity to merit an increase in the scale rates set out in Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. In terms of the Schedule the Auditor has the power to increase any fee set out in the Table of Fees where he is satisfied 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. Where the Table of Fees in the 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 levels of fees in the said Table

of Fees. The Auditor is also satisfied that the fees sought are based on those set out in the said schedules and not what counsel might expect to be paid on a private basis.

This appeal gave rise to Devolution and ECHR issues. Both the Scotland Act 1998 and Human Rights Act were enacted in 1998 and at the time of the appeal introduced these new areas of law. Dutch counsel had a knowledge and experience of the application of ECHR, which was beyond that of any counsel in Scotland at that time.

The case was subject to many difficulties and delays. It involved some controversial aspects and in particular adverse comments concerning the application of EU Law made by a Senior High Court Judge and which were published in a newspaper. The comments were made after he had delivered a decision refusing the 'first' appeal. Subsequently this decision was set aside and a new bench proceeded to hear the appeal and the other issues it raised.

The appeal raised many novel issues of law, which were unusually complex and of wide significance. These were fully argued before the court with mixed success. There were some 20,000 pages of documentation read by counsel including, transcripts from the original trial and the appeal court and numerous authorities referred to by the appellant and the Crown in the course of the proceedings. The court decided to hear the case in seven separate parts over a period of more than three years. By the time the appeal concluded there were six reported decisions covering various areas of law and one decision reported in Greens Weekly Digest. The Auditor has considered the decisions and these are referred to as follows:

- Case No. 1 – 2000 SCCR 263
- Case No. 2 – 2000 SCCR 367
- Case No. 3 – 2000 SCCR 676
- Case No. 4 – 2000 SCCR 1121
- Case No. 5 – 2001 SCCR 121
- Case No. 6 – 2002 SCCR 135

- Case No. 7 – 21 March 2003 – Greens Weekly Digest (14-466)

The complexity of the case is further supported by Sir Gerald Gordon QC who has stated in the decision reported in Case No. 6 that,

*“This case is unprecedented in a number of ways: for example, the total length of the proceedings, their complexity, involving as they did an application to the Judicial Committee, the plethora of grounds of appeal, which ranged from the substantial to the trivial, and the fact that the setting aside of the decision in the first appeal gave a different bench the opportunity of reconsidering the decisions of the earlier bench on those matters, which were argued in both appeals, and also gave the appellants an opportunity to change or refine their grounds of appeal”.*

This case was undoubtedly of great importance to Mr Van Rijs who faced a period of 14 years imprisonment, which is the statutory maximum for drugs offences. During the course of his appeal Mr Van Rijs sought interim liberation to allow him to return to the Netherlands which was strenuously contested by the Crown. The application was successful and set an important precedent. At the conclusion of the Appeal Mr Van Rijs’s sentence was reduced to 11 years imprisonment.

Having taken all the various factors into consideration the Auditor allows an increase, which he considers appropriate to reflect Mr McLaughlin’s status as ‘leading’ junior for those aspects of the case where he appeared without senior, and to remunerate Mr McLaughlin by allowing an increase where he was junior to senior counsel, due regard being had to economy.

The Auditor is satisfied that Mr Pen is senior counsel and is entitled to be remunerated in the same way as a Scottish senior counsel, having regard to the particular circumstances,

complexities and merits of the case. Accordingly, the Auditor also allows Mr Pen a suitable increase for the work carried out by him, due regard being had to economy.

As each case must be considered on its own merits the Auditor cannot have regard to the cases referred to by Mr McLaughlin where he claimed anecdotally that counsel were paid more by the Board than in the cases of [REDACTED]. These cases were not presented to the Auditor for taxation and therefore he is unable to make any determination of any fee that might have been allowed had the fees been taxed.

In dealing with counsels' fees the Auditor does not propose to break each item(s) down line by line as shown individually on counsels' fee notes, as this would not be possible given that counsel did not specify what work was done on each individual day. Instead the Auditor has decided to deal with counsel's fees having regard to the overall circumstances of the case and the submissions made by counsel at taxation in support of the work done. This was the approach in [REDACTED].

### **Consultations**

The issue of what constitutes a 'consultation' has previously been canvassed before the Auditor. The Auditor is clear that informal meeting(s) between counsel and his instructing solicitor or with a party other than the client or expert witness is not deemed to be a consultation, but is more properly considered to form part of the preparation normally subsumed within counsel's daily rate. Consultations must be properly instructed and have a specific purpose. Consultations on a court day are subsumed within the daily rate and are not separately chargeable. As the consultations have been charged on an hourly basis the Auditor has converted the cumulative total of the hours to a daily fee (being six hours), for those consultations deemed to be properly chargeable. The Auditor therefore allows:

Mr Pen – 8 consultations at £750, per day to include all preparation = £6000

Mr McLaughlin – 9 consultations at £650, per day to include all preparation = £5850

## **Preparation**

The Auditor is satisfied that this is a case, which merits separate preparation. However, there are certain item(s) of work, which do not fall into this category and are more properly subsumed within the daily rate. This includes travel costs (not already dealt with in this report) and correspondence. Having taken into account all the circumstances, due regard being had to economy, the Auditor allows counsel preparation as follows:

Mr Pen – 36 days preparation at £950 per day = £34,200 (to include drafting)

Mr McLaughlin – 58 days preparation broken down = 38 days at £650 (junior with senior) & 20 days at £700 (leading junior) = £38,700 (to include drafting)

- An increased number of days in preparation is allowed to Mr McLaughlin to take into account the additional responsibility and work undertaken by him in the conduct of the proceedings and the additional number of days he was required to attend court to represent the appellant in the capacity of 'leading' junior.

## **Daily Rates**

The Auditor having considered all the circumstances allows counsel an enhanced daily rate to take account of the responsibility placed on counsel, the length of the proceedings, the impact of the decisions issued by the court and the work done, due regard being had to economy, as follows:

Mr Pen – 24 court days at £1400 per day = £33,600

Mr McLaughlin – 24 court days (junior counsel) at £950 per day = 22,800

14 court days (leading junior) at £1050 per day = £14,700

**Counsels Fees as Taxed**

The total fees lodged by Mr Pen amounted to £168,300 and included an increase of 10%. Mr McLaughlin submitted fees totalling £142,903.50.

The Auditor having set out the level of fees allowed to each counsel under the categories detailed above taxes Mr Pen's fees in the sum of £73,800 and Mr McLaughlin's fee in the sum of £82,050, plus VAT of 14,358.75.

Further, 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 "Mary Lister". The signature is written in a cursive style with a horizontal line underneath the name.

AUDITOR OF THE COURT OF SESSION