

**COURT OF SESSION, SCOTLAND**

**REPORT**

by

**AUDITOR OF COURT**

IM

**in causa**

**HER MAJESTY'S ADVOCATE**

**Against**



**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 [REDACTED] in a case which proceeded to the High Court of Justiciary on a devolution issue.
  
2. At the Taxation on the 6 September 2004, the Board were represented by [REDACTED] Solicitor. Mr Gebbie represented himself.
  
3. The fees issued by Faculty Services Ltd, in dispute are detailed as follows:  
  
26.06.00 – Consultation at solicitor's office (2hrs) - £200  
29.06.00 – Consultation at solicitor's office (2hrs) - £200  
06.07.00 – Hearing on Bail Review - £850  
11.07.00 – Hearing on Bail and Devolution Minutes - £850

17.08.00 – Considering authorities; framing/drafting/sending 3<sup>rd</sup> Devolution Minute for Mr Monterroso (5hrs 30 mins) - £550

25.08.00 – Hearing on Devolution Issues and Bail Review – 3 Judge Bench – £850

30.08.00 – Hearing on Devolution Issues and Bail Review – 3 Judge Bench - £850

31.08.00 – Counsel & client at Glasgow High Court - £200

01.09.00 – Trial Diet, Glasgow High Court - £850

06.09.00 – Consultation at solicitor’s office re productions (1.5 hrs) - £200

11.09.00 – Consultation at Glasgow re Disclosure & Article 8 (1hr 25 mins) - £200

19.09.00 – Trial Diet at Kilmarnock High Court - £850

22.09.00 – Considering/Framing/Drafting & Faxing Disqualification Minute (5hrs) - £500

24.09.00 – Consultation at solicitors office receiving fresh papers and instructions – perusing and considering same and discussing matters by telephone (4hrs 30mins) - £450

25.09.00 – Continued Hearing at Parliament House – 3 Judge Bench - £850

29.09.00 – Continued Hearing at Parliament House – 3 Judge Bench - £850

19.10.00 – Consultation with Client, Co-Counsel, Solicitor and Interpreter at Kilmarnock Prison (4hrs) - £400

23.10.00 – Waiting day at Glasgow High Court - £600

24.10.00 – Continued Hearing at Parliament House – 3 Judge Bench - £850

28.11.00 – Consultation at Counsel’s Home - £300

29.11.00 – Hearing at Parliament House (Lord Bonomy) on S.72 Minute - £850

30.11.00 – Continued Hearing at Parliament House - £850

4. In his submissions counsel sets out the background to the case. He explains that this was an extremely difficult and complicated case involving a Guatemalan national with little or no grasp of English who required Spanish interpretation services. The case was further complicated in that it related to an alleged importation of drugs into Scotland from Guatemala via the

Netherlands. This meant that the legal implications of the involvement of these three jurisdictions had to be considered and dealt with in the light of ECHR, the Human Rights Act 1998 and the Scotland Act 1998.

The matters relating to [REDACTED] detention pending trial were further complicated by the fact that they straddled in time the transition from the Bail Judicial Appointments etc. (Scotland) Bill becoming an act. They also raised matters of apparent conflict between UK and Scots Authorities, which constituted further devolution issues and matters of great complexity in our developing constitutional law.

The difficulty and complexity of this case was recognised from the outset by SLAB, which granted sanction for senior and junior counsel in this case. Mr Gebbie was acting in the capacity of the senior counsel in this case.

Mr Gebbie continued his submissions as follows:

- a. The papers already lodged are referred to for their terms and in particular reference is made to the "Note" to accompany the fee notes in the case of *HMA v.* [REDACTED]
- b. 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 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.

This is paralleled in this case and in the case of [REDACTED]. The new (Scotland) Act was also at issue as was the Bail, Judicial Appointments etc, (Scotland) Act whose coming into force was straddled by this case. Such was

the complexity of this matter that at one hearing the Crown's position was represented by the Advocate Depute then in Court was that this Act was a nullity. At the next hearing of the case, another Depute stated that the Crown's position was not that previously advanced but rather that the answer to the points raised was predicated upon the Act being fully in force. The case was further complicated by the language difficulties of the client who required the support of an interpreter, at all material stages in the proceedings. The complexity of the case was acknowledged by SLAB which granted sanction for senior and junior counsel to be instructed. Mr Gebbie was instructed *qua* senior.

The instruction of counsel who is not a Queen's Counsel to act for a client *qua* senior is well established as is the entitlement of that counsel to charge accordingly. In this regard, reference is made to the decision of the Auditor in the case of ██████ dated 15 September 2000. In that case the leading counsel was specifically selected for the trial. The same as is in this case. Reference is made to the letter from Mr Carroll dated 26 June 2000 instructing his Edinburgh correspondent to instruct senior counsel with an understanding of ECHR jurisprudence. Further reference is made to the attendance note of the same date recording that Mr Carroll asked Mr Gebbie to act in this capacity and that Mr Gebbie agreed to do so. Once Mr Carroll and Mr Gebbie were no longer acting in the case, Mr Ogg QC was instructed to fill the role previously undertaken by Mr Gebbie.

In ██████ 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.

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 by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 10(1) 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 the work actually and reasonably done, due regard being had to economy”.

The fees prescribed by Schedule 2 for junior – 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 notes 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.

*Daily Rate*

Counsel has charged £850 a day on the basis that Mr Gebbie “was acting in the capacity of the senior counsel in this case”. It is indicated on documentation in support of the claim that sanction had been granted by the Board for the employment of senior counsel and, as Mr Gebbie fulfilled this role, remuneration should be on the same level as senior counsel. Particular reference was made to fees apparently paid to Mr Derek Ogg QC in the same case only at a later stage. The Board does not accept this as a sound basis for charging a fee to the Board in terms of the prescribed Table of Fees and has stated this in correspondence. Mr Gebbie is not senior counsel and is not entitled to charge as senior counsel given the structure envisaged in the

regulations. To the extent to which the fee claimed by Mr Gebbie is based on the misapprehension that he is entitled to do so, the fee is inappropriate and excessive.

The Board has, in light of information provided by counsel's clerk, allowed counsel the same pro-rata increase on the fees which were apparently allowed to Mr Derek Ogg QC, resulting in an offer of £450 per day in Edinburgh and £560 for the entry of 1 September in Kilmarnock Sheriff Court.

Although, in support of the enhanced fee, the broad nature of the work has been indicated to the Board, the actual level of preparation has not.

#### *Waiting day*

As regards the fee claimed for a "waiting day" on 23 October confirmation has been received from counsel's clerk that counsel did attend court on this day although there seems some doubt as to whether there is a corresponding entry for the instructing solicitor. A waiting day is only payable in the event that counsel attends court and this view has recently been upheld in judgements issued by Sheriff Pender (Paisley) in the case of *HMA v. [REDACTED]* and Sheriff Jarvie (Edinburgh) in the case of *HMA v. [REDACTED]*

#### *Consultations*

The following consultations have been claimed:-

<u>Date</u>	<u>Consultation</u>	<u>Time Engaged</u>	<u>Claimed</u>	<u>Offered</u>
26/06/00	with John Carroll & Co	2hrs	£200	£133.50
29/06/00	with John Carroll & Co	45mins	£200	£133.50
06/09/00	with John Carroll & Co	1hr 30mins	£200	£133.50
11/09/00	at Glasgow re Disclosure & Article 8	1hr 25mins	£200	£133.50
24/09/00	at John Carroll & Co			

	receiving papers & instr.	4hrs 30mins	£450	£133.50
19/10/00	with client, co-counsel agent & interpreter at Kilmarnock Prison	4hrs	£400	£150
28/11/00	at counsel's home	3hrs	£300	£78

All these consultations have been offered at the standard rate given differing views on what a "consultation" is. It is recalled and this has been indicated to counsel's clerk that a taxation on various cases took place before the Auditor concerning the issue of consultations in Parliament House prior to the commencement of appeal proceedings. Counsel (it is thought the then Treasurer of the Faculty) addressed the Auditor and stated the view that a consultation was a formal meeting between counsel and solicitor and also either the client or an expert witness. Counsel did not press one particular case which was before the Auditor when it became apparent that the client had not attended court. There seems to some doubt as to what a "consultation" is. Certainly the Board's view is that a consultation is a formal meeting usually with a client or expert witness in attendance and the term cannot imply be applied to all meetings between solicitor and counsel. A meeting which is not a consultation can be subsumed within the standard provision for payment of counsel: the daily rate.

#### *Devolution and Disqualification Minutes*

The Board considers the fees claimed by counsel without what it considers to be a sufficient level of information on the level of work actually carried out to justify them, to be excessive. It is not clear from the documentation on file whether all the minutes are available and this will be clarified at or prior to the taxation.

6. Having heard Mr Haggerty and Mr Gebbie, Advocate the Auditor must be guided by the principles set out by the Lord Justice 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”.

Having fully considered the submissions made by counsel and the Board the Auditor in arriving at his decision is satisfied that this was 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. The case was novel and involved the raising of devolution issues, which at the time the work was done, was a



relatively 'new' and untested area of the Law the various Acts only having come into effect in 1998. Matters were made all the more difficult in that the accused was a foreign national with little grasp of the English language who required the assistance of Spanish interpreters.

Daily Rate

In determining the level of fees the Auditor is not persuaded that Mr Gebbie should be remunerated at a rate the equivalent of that, that may have been payable to a senior counsel, had senior counsel been instructed. Mr Gebbie is not a senior counsel and is therefore not entitled to be remunerated as such. However, the Auditor in terms of the Schedule 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. The Auditor having taken all the circumstances into account in this case is satisfied that such an increase is appropriate to reflect Mr Gebbie's status as 'leading' junior and the work done, due regard being had to economy. The Auditor therefore remunerates counsel for the court days as follows (inclusive of preparation):

06.07.00 – Hearing on Bail Review - £560  
11.07.00 – Hearing on Bail Review & Devolution Issues - £560  
25.08.00 – Hearing on Devolution Issues and Bail Review – 3 Judge Bench - £850  
30.08.00 – “ £850  
31.08.00 – Attendance at Glasgow High Court - £200  
01.09.00 – Trial Diet at Glasgow High Court - £850  
19.09.00 – Trial Diet at Kilmarnock High Court - £560  
25.09.00 – Continued Hearing – 3 Judge Bench - £850  
29.09.00 - “ £850  
23.10.00 – Waiting Day at Glasgow High Court - £560  
24.10.00 – Continued Hearing – 3 Judge Bench - £850

25.10.00 -	“	£850
30.11.00 -	“	£850

### Consultations

The issue of what constitutes a ‘consultation’ has been canvassed before the Auditor previously. 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. In this regard the Auditor agrees with the Board that these meetings are not separately chargeable and disallows the following entries as set out in counsel’s fee notes:

- 26.06.00 – Consultation at John Carroll & Co - £200
- 29.06.00 – Consultation at John Carroll & Co - £200
- 06.09.00 – Consultation at John Carroll & Co - £200
- 11.09.00 – Consultation at Glasgow re Disclosure & Article 8 - £200
- 24.09.00 – Consultation at John Carroll & Co - £450
- 28.11.00 – Consultation at counsel’s home - £300

### Disqualification Minute

From the information available the Disqualification Minute was not proceeded with and therefore it was never put out for a hearing. While counsel is entitled to feel aggrieved at the way he was treated, the Auditor is not satisfied that this fourth minute falls within the principles set out in Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and in particular that this was not reasonable nor necessary to protect his client’s position. Accordingly the Auditor disallows counsel’s fee of £500 for drafting the Minute.

Other

In addition to the above the Auditor allows a fee of £450 for the work undertaken by counsel in considering the relevant authorities and drafting the Devolution Issue Minute on the 17 August 2000. The Auditor also allows the consultation at Kilmarnock High Court with the client, co-counsel, the instructing solicitor and the interpreter present on the 19 October 2000, at the sum claimed of £400.

The fee for the attendance at Edinburgh High Court on the 27 June 2000 appears to have been agreed and the Auditor assumes that this is not in dispute.

Accordingly the Auditor taxes the remainder of counsel's fees in the sum of £10,940.00, plus VAT of £1914.50 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 "Mary Linton". The signature is written in a cursive style with a horizontal line underneath.

AUDITOR OF THE COURT OF SESSION