

COURT OF SESSION, SCOTLAND

R E P O R T

by

RM

AUDITOR OF COURT

in the cause

[REDACTED]

Appellant

against

ADVOCATE GENERAL FOR SCOTLAND

Respondent

EDINBURGH 19 October 2005

This taxation arose out of a dispute between the Scottish Legal Aid Board (“the Board”) and Aidan O’Neill, Esq., Q.C., and Ms. Ailsa Carmichael, Advocate, in relation to fees claimed by Counsel for representing [REDACTED] in an Appeal to the House of Lords.

At/

At the Taxations on 15th November 2004 and 12th August 2005 the Board was represented by [REDACTED] Solicitor. Mr. O'Neill, Q.C., and Ms. Carmichael, Advocate, attended in person and made their own representations.

Background

Senior Counsel lodged full and detailed "Submissions to the Auditor of the Court of Session on Fees rendered by Senior Counsel for the Appellant in respect of the Appeal before the House of Lords." This is attached and marked No. 1. On page 11 *et seq* he sets out the background to the Appeal and its novelty and complexity. The Auditor refers to these submissions and their Lordships' judgement.

Regulations

The Statutory Framework is set out in Regulation 9 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. "Subject to the provisions of Regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying."

Regulation 10(2) states, "Counsel's fees for any work in relation to proceedings in the sheriff court, House of Lords, Restrictive Practices Court, Employment Appeal Tribunal, Lands Valuation Appeal Court, Scottish Land Court or Lands Tribunal for Scotland shall be 90 per cent 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."

Regulation 12(1) states, “If any question of dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund under these Regulations, other than Regulation 11 above, the matter shall be referred for taxation by the Auditor.” A dispute has arisen and the matter referred to the Auditor for determination.

Authorities

The standard of taxation is set out by Lord Kyllachy in *Hood v. Gordon 1896 23R.675*: “I see no reason to doubt that the principle which we must follow in this case is that established in the case of *Walker v. Waterlow*, and also in the case of the *Wigtown Burghs*. That principle is, that while the taxation as prescribed by the statute be as between agent and client, yet as the expenses in a case like this have to be paid not by the client but by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client.” Then Lord McLaren’s opinion states, “when a statute authorises the taxation of expenses, as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed.” In *Park v. Colvilles Limited*, 1960 SC 143 per Lord Patrick at 153, Lord Patrick confirms the test as “all expenses are allowed which would be incurred by a prudent man of business without special instruction from his client in the knowledge that the account would be taxed.” It is generally accepted that expenses awarded on the scale will be nearer to those recoverable on a party and party basis rather than on an agent and client basis (*Dingley v. Chief Constable of Strathclyde 2002 SCLR 160* per Lord Eassie). In this

case, however, the House of Lords awarded expenses on the basis of none due to or by either party. There was, therefore, no party and party taxation to give any guidance to the Auditor. In light of Senior Counsel's written submissions, submissions at taxation and their Lordships' Opinion, the Auditor is satisfied that the prudent solicitor would be entitled to judge this case as of "abnormal magnitude or difficulty" and assess fees at a level "in order to command the services of competent counsel in cases of similar character" (*Caledonian Railway Company v. Greenock Corporation* 1922 S.C. 299 per Lord President Clyde at 311 and *MacNaughton v. MacNaughton*, 1994 SC 42, IH per Lord President Cooper at 46.) Although *McKay v. H.M. Advocate*, 1999 SCCR 6799 at 686 dealt with Criminal Legal Aid Fees, the Auditor must bear in mind the Court's General direction that Counsel's fees require to be taxed within "a statutory framework".

SLAB's Objections

██████████ had lodged Points of Objection which are referred to. This is attached and marked No. 2.

In submission he referred to "Practice Directions Applicable to Judicial Taxation" dated 27th November 2003. For the first time "Guidelines on Fees Allowed" are introduced in Section 25 and 25(7) sets out figures for Counsel, both Junior and Senior, in Civil Appeals. He conceded that this was not in force at the time Counsels' fees were incurred in this case but the Auditor should pay close attention to it. The fees were considerably less than Counsel seek to recover and there is no separate charge for the Case. The sums offered to Counsel prior to taxation were based on this table. The Guidelines introduced a new approach.

██████████ was concerned that an offer of £80,000.00 had not been disclosed to the Board. No cost/benefit analysis had been made by Mr. MacDonald's advisers. Had that offer been accepted the settlement might have been "cost neutral". He did not think that enough consideration had been given to protection of the Legal Aid Fund, which was facing a bill of some £200,000.00 for this matter. He did not think that the prudent man of business would have committed to such expenditure and overlooked the cost benefit of settlement in December 2002 when the offer was made.

██████████ referred to *King v. Bristow Helicopters*. In his view, this was a much more important case. It dealt with rights under the Warsaw Convention where the Inner House had applied the wrong test. The fees claimed here are unreasonable under reference to those allowed in that case.

Senior Counsel's Response

The Auditor should take no heed of the November 2003 Practice Directions. They were not in force during the case. Counsels' fees had been rendered under the guidelines set out by Mr. James Vallance White, the House of Lords Taxing Master in a letter to ██████████ dated 23rd May 2001. This is referred to for its terms and is attached hereto (No.3). This was the only guidance available to Scottish Counsel. In particular, it indicates that a separate fee is exigible for the Case. Counsel's fee notes accurately reflect the time spent.

Mr. O'Neill had prepared "Further Submissions on matters of Consultations and the Offer." This is referred to for its terms and is attached hereto (No. 4). The

instructing agents had produced the Consultation Notes which show that the offer of £80,000.00 was discussed at Consultation on 8th January 2003 at which Mr. [REDACTED] was present. The offer included the expenses of the Employment Tribunal and Employment Appeal Tribunal but the Inner House expenses were to be paid. Counsel and agents valued the claim at approximately £300,000.00 and any offer which included the Employment Tribunal and Employment Appeal Tribunal expenses would have been unattractive to [REDACTED]. This offer was not converted into a Tender. He referred to Lord Prosser's Judgement and the Ministry of Defence's apparent concession that [REDACTED] rights under the Convention had been breached and it was unclear in those circumstances why the Ministry of Defence was "insisting upon the merits of the present appeal". An individual has to exhaust his national domestic remedies before recourse to the European Court of Human Rights. The offer was clearly inadequate and could not be recommended by Counsel. The prudent Solicitor would have been satisfied it should be rejected and the matter proceed.

Senior Counsel rejected any comparison with *King (supra)*. There was only one narrow point for decision and, to a large extent, the work of English Counsel had been adopted. An award of expenses had been made where none was made here.

Opinion

The Auditor is satisfied that Counsels' fees have been correctly rendered under the Guidelines set out by Mr. Vallance White. The Practice Directions were not in force at the time. The matter of the offer of £80,000.00 has caused the Auditor some concern. The documents provided by Senior Counsel and the agents clearly show

that the offer was given very full consideration and, from the valuation, it is clear that after taking irrecoverable expenses into account, [REDACTED] would have received virtually nothing. To that extent it could be argued that the case would have been cost neutral. On the other hand, in the light of the concession made by the MOD at the Inner House Appeal and the passage in Lord Prosser's Judgement, the prudent solicitor, after considerable hesitation, would have continued with the Appeal so that [REDACTED] domestic remedies could be exhausted and the question of quantum fully canvassed before the European Court of Human Rights where it may be relevant to include [REDACTED] legal fees as an element of the claim. The Auditor is satisfied that the prudent solicitor would have continued with the Appeal to the House of Lords.

Senior Counsel's Notes of Fee

1. 10.12.2001 Petition for Appeal £350.00

Senior counsel should not be involved with the Petition for Appeal and the fee of £350.00 is disallowed.

2. Items 2 to 5. The purpose of the Consultation on 21st March 2002 was to consider the terms of the Statement of Facts and Issues with proposed revisions by the Advocate General and to consider what was to be lodged by way of Appendix and put in a chronology. A fee of £600.00 has been charged and the Auditor is satisfied that a prudent solicitor would incur this fee.

No notes have been produced for the Consultation on 21st May 2002 and the fees for this Consultation are disallowed.

The purpose of the Consultation on 5th August 2002 was to consider the possibility of settlement, the conjoining of the Pearce case and the preparation to be done for the House of Lords Hearing. A fee of £600.00 has been charged and the Auditor is satisfied that a prudent solicitor would incur this fee.

The consultation on 8th January 2003 was to discuss the offer of £80,000.00 and final preparations for the House of Lords Hearing. A fee of £600.00 has been charged and the Auditor is satisfied a prudent solicitor would incur this fee.

Senior Counsel has charged £7500.00 for the adjustment of the Facts and Issues and items 6 to 13 set out details of Senior Counsel's work. He has charged £1500.00 per day for five days. The adjustment of the Statement of Facts and Issues is crucial. It is on this document that their Lordships will consider the Appellant's case. The Auditor is satisfied that the prudent solicitor would incur a daily fee of £1500.00 and that five days work for adjustment of the Statement of Facts and Issues and the ancillary work thereto would be reasonable.

Thereafter, Senior Counsel has charged £12,000.00 for the work in connection with the Statement of Case which is referred to in Mr. Vallance White's letter. Again, he has charged a daily rate of £1500.00 for eight days. Senior Counsel stated that there would be no duplication between the work done for the Statement of Facts and Issues and the Case. The Auditor is clear that the prudent solicitor would not accept that this is the case and while he would accept that the daily rate of £1500.00 is reasonable he would only authorise six days work.

Senior Counsel has then charged £6,000.00 for four days work at £1500.00 per day in connection with the List of Authorities. Senior Counsel explained that the bulk of this work was done by him and not by Junior Counsel. Mr. Shearer referred to the case of "D" v. *Grampian Regional Council* where the Auditor only allowed Junior Counsel to carry out this work. The Auditor is satisfied, however, that in a case of this nature where international authorities were to be referred to, the prudent solicitor would instruct Senior Counsel. A daily rate of £1000.00 for three days is reasonable.

Senior Counsel has charged £20,000.00 in respect of the Brief Fee which includes a first day fee of £3000.00 ; the prudent solicitor would incur a fee restricted to £2500.00 for the first day. Within the Fee Notes Counsel has detailed work of a largely administrative nature in which the prudent solicitor would not expect Senior Counsel to be involved (e.g. work regarding time tabling, interlocutory petition for wavier of security.) The Auditor is satisfied that the prudent solicitor would, at this stage of the case, incur fees at £1750.00 per day for Senior Counsel. This work is essential for his preparation for the Hearing before their Lordships. Taking out the administrative work in which Senior Counsel should not have been involved, the prudent solicitor would instruct Counsel for 7.5 days work at £1750.00 per day and £2500.00 for the first day of the Hearing giving a total brief fee of £15,625.00.

The refresher will be £2500.00

Senior Counsel has charged two items of work on 2nd and 5th February 2003. These post date the Hearing. There is nothing in the letter from Mr. Vallance White which

covers work done after the Hearing and, accordingly, the Auditor is treating these as forming part of the Brief Fee. The prudent solicitor would not incur these charges.

Junior Counsel's Notes of Fees

Counsel has submitted a very helpful Note of Submissions to the Auditor. This is attached and marked No. 5. The Auditor refers to this and all the other documentation produced.

The Auditor is satisfied that this is a case which merits the instruction of Senior and Junior Counsel.

1. The Petition for Appeal - £350.00.

This is largely a formal document and the prudent solicitor would incur a fee to Counsel of £200.00.

2. Consultations.

The Auditor has discussed the Consultation on 21st March 2002 when dealing with Senior Counsel's fees and is satisfied that the prudent solicitor would incur Junior Counsel's fees and a fee of £400.00 is reasonable. The Consultation on 8th January 2003 was in connection with the offer of £80,000.00 and the Auditor is satisfied that the prudent solicitor would incur Junior Counsel's fee at £400.00 for the Consultation.

3. The Auditor is satisfied that the prudent solicitor would instruct Junior Counsel for a quantification of the claim but, bearing in mind the Consultations which have taken place, the prudent solicitor would incur a fee of £250.00.

4. Statement of Facts and Issues

The prudent solicitor would incur a daily fee of £1000.00 for 3.5 days to Junior Counsel for this work. He would not incur the expense of a redraft “in the light of objections raised by Respondents’ relatives.”

4. Statement of Case.

The Auditor is satisfied there would be duplication between the work in connection with the Statement of Case and the Statement of Fees and Issues. The prudent solicitor would incur fees of £1000.00 per day for six days.

5. List of Authorities.

As the bulk of this work was done by Senior Counsel and English Junior Counsel, the prudent solicitor would incur no fee to Junior Counsel.

6. Brief Fee

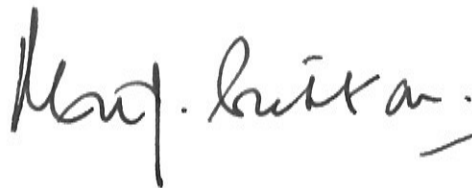
The prudent solicitor would incur a fee of £2000.00 for the first day’s Hearing. The prudent solicitor would incur daily fees of £1250.00 in respect of the remainder of the work and as Junior Counsel was closely involved with Senior Counsel, the prudent solicitor would incur fees for 7.5 days.

The Refresher will be £2000.00.

There are fees incurred after the conclusion of the Hearing and for the reasons stated with regard to Senior Counsel's fees, the prudent solicitor would not incur these and they should be treated as forming part of the Brief Fee.

Conclusion.

The Auditor taxes Senior Counsel's fees at £39,425.00 plus VAT of £6899.38 and Junior Counsel's fees at £24,125.00 plus VAT of £4221.88, totalling £46,324.38 and £28,346.88 respectively.

A handwritten signature in black ink, appearing to read "Mary Linton". The signature is written in a cursive style with a horizontal line under the final letter.

AUDITOR OF THE COURT OF SESSION

