

AUDITOR OF THE COURT OF SESSION
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Your Ref: 9339925499

19 February 2007

Date and Tax Point

SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

VAT Reg. No.: 699 7255 58

VAT Invoice No. 40230



HMA V [REDACTED]
COUNSELS FEES

| | |
|------------------------------|---------|
| The Auditor's Fee herein is | £494.00 |
| VAT thereon @ 17.5% | £86.45 |
| Posts & Incidents (incl VAT) | £0.00 |
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| | £580.45 |
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06056178 or cheque payable to The
Auditor Of The Court Of Session

The Auditor Neil J. Crichton w.s.
Principal Clerk Mrs Cynthia Cameron

COUNCIL.

2. At the Taxation on the 22 November 2004, the Board was represented by [REDACTED]
[REDACTED] Solicitor and Ms Laura Thompson, Trainee Solicitor. Mr Di Rollo, Q.C.
represented himself with assistance from his Clerk, [REDACTED] and Mr
Duguid, Q.C.

3./

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in the cause

(1) Procurator Fiscal, Dunfermline, and (2) Her
Majesty's Advocate General for Scotland

Appellants

against

[REDACTED]

Respondent

MB

EDINBURGH. 19 February 2007.

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mr Simon Di Rollo, Q.C. in relation to fees claimed by counsel for representing Margaret Brown in proceedings before the Judicial Committee of the Privy Council.

2. At the Taxation on the 22 November 2004, the Board was represented by [REDACTED] Solicitor and Ms Laura Thompson, Trainee Solicitor. Mr Di Rollo, Q.C. represented himself with assistance from his Clerk, [REDACTED] and Mr Duguid, Q.C.

3./

3. Background

The background to this case is set out in Mr Di Rollo's written submissions. The case involved the consideration by the Privy Council of two fundamental issues arising from the incorporation of the European Convention of Human Rights into domestic law and a consideration of the new United Kingdom constitutional framework post devolution. The first of which concerned an examination of the privilege against self-incrimination and the second considered the relationship between the Lord Advocate and the Court with a view to determining whether a devolution issue was raised. In addition a third issue concerning the retrospective effect of the Human Rights legislation was raised in the case for the United Kingdom Government and English Counsel made submissions on this subject.

The case lasted for three days before the Judicial Committee and full speeches were delivered by all five members of the court. The case was described by Lord Steyn as "the first real test of the Human Rights Act 1998" (2001 SLT 72 E-F).

4. Regulations and Authorities

This taxation proceeds on the basis of Regulation 11 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 which provides that "If any question or 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 in respect of legal aid in criminal proceedings in the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session".

Regulation 10 (1) of The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 states "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".

In the present case, the Table of Fees does not provide for fees payable to counsel in JCPC cases. This is recognised by the Board who following a recent Criminal Legal Aid

taxation have adopted the methodology of the Taxing Master to the Judicial Committee of the Privy Council, whilst also having regard to the House of Lords guideline fees for counsel in criminal appeals published in the Practice Directions applicable to judicial taxations in the House of Lords.

The Auditor is satisfied that there is no dispute between the Board and Mr Di Rollo regarding the Board's approach. The only dispute is whether Mr Di Rollo is entitled to be paid more than 50% of the fees which the Board has paid to Senior Counsel.

The Auditor is therefore content to proceed on the basis that Mr Di Rollo is entitled to be paid a percentage of the fees the Board has paid to Senior Counsel in the case, whilst having regard to the guidelines laid down in the House of Lords Practice Directions, and subject to the usual test "counsel shall be allowed such fee as appears to the Auditor to represent reasonable remuneration for work actually and reasonably done, due regard being had to economy".

5. Item in dispute

The only items of work in dispute are the Brief and Refresher fees. Counsel has charged £18000 & £3600 respectively.

6. SLAB's Objections

The Board object to counsel's fees on the basis that the sum claimed is grossly excessive having regard to what has been allowed on taxation to senior counsel in the JCPC appeals of [REDACTED] and *HMA v. [REDACTED]* where it is advised senior counsel in each case was allowed a brief fee of £14,000 and refresher fees of £2,250 per day. It is the Auditor's understanding that in the present case senior counsel has accepted and been paid by the Board the same level of fees as in those cases. The Board are therefore seeking a restriction of Mr Di Rollo's fees at 50% of the fees accepted by senior counsel. In support of the Board's written submissions, at taxation Mr Shearer argued that as two junior counsel were sanctioned in the case there was a three way division of labour. He

further argued that the 2/3rds rule did not exist. [REDACTED] did not dispute the gravity of the case. His main concern was that the Board had sanctioned the employment of two junior counsel to assist senior. [REDACTED] accepted that if only one junior counsel had been employed then he might accept counsel's point.

7. Mr Di Rollo's Submissions

Mr Di Rollo has provided the Auditor with helpful written submissions. The Auditor does not propose to repeat these here, but refers to them for their terms. Mr Di Rollo commenced work on the case mid September 2001 and carried out most of the work in October 2001. With the exception of an appearance on Friday the 3 November 2001 he did no other work in the three weeks prior to the case commencing. Counsel advises that the time spent was in excess of 175 hours, some of which, due to the timescale, included working in the evenings and at weekends. At taxation Mr Di Rollo explained that he dealt with the Devolution point and ECHR issues, drawing on his experience from his time at the Crown Office. He underlined the importance of the case on constitutional law. He refers to the divided opinion of the Privy Council in *Montgomery and Coulter (2001 SLT 37)*, which resulted in his having to prepare a supplementary case in relation to whether a devolution issue was raised. The Opinion became available on the 19 October 2000. The hearing before the Privy Council in the present case was on 6 November 2000. Mr Di Rollo submitted his involvement in the case went beyond that of an ordinary junior. In the period between Mr O'Neil Q.C. and Mr Duguid Q.C.'s involvement he had to deal with matters on his own.

8. Conclusion

At taxation the Auditor having heard submissions from the Board and counsel does not accept the Board's contention that in determining the level of fees he must have regard to the employment of a second junior counsel in the case. The Auditor has not had the benefit of taxing Mr Alonzi's fees, which have been agreed and paid by the Board and therefore has not had the opportunity of considering his level of input or the division of work undertaken by him.

In addition to Mr Di Rollo's oral submissions, the Auditor has considered the information produced in advance of the diet of taxation and is satisfied that his role in the case went beyond the involvement of an ordinary junior. The importance of the case is highlighted by Lord Steyn in the Judgement from the Privy Council where he describes it as "the first real test of the Human Rights Act 1998". It is clear that Mr Di Rollo had an important role and undertook a substantial amount of preparatory work primarily dealing with the Devolution and ECHR issues, an area in which he has a great deal of experience. The fact that he was required to speak at the hearing before the Judicial Committee of the Privy Council further underlines this. Taking these factors into consideration the Auditor is satisfied that an increase *pro-rata* the equivalent of the fees paid by the Board to Senior Counsel for the Brief and Refresher Fees is appropriate.

Accordingly, the Auditor taxes Mr Di Rollo's fees in the sum of £9350.00 and £3000.00, plus VAT, respectively.

A handwritten signature in black ink, appearing to read "Henry Breckan", with a horizontal line underneath the name.

AUDITOR OF THE COURT OF SESSION

**TAXATION REFERRAL: CASE OF [REDACTED]
AUDITOR OF THE COURT OF SESSION MONDAY 15 JANUARY 2007 @
2.10 p.m.**

Papers:

- 1. Taxation Referral;**
- 2. JCPC Judgement;**
- 3. Breakdown of Fees agreed/offered to counsel (Mr Di Rollos fees highlighted in blue);**
- 4. Correspondence with clerks adjusting/agreeing other seniors fees (2nd juniors fees still in process of adjustment but have not been lodged for taxation).**

TAXATION REFERRAL

AUDITOR OF COURT OF SESSION: HMA V [REDACTED] ON
MONDAY 15 JANUARY 2007 @ 2.10 p.m.

Assisted Person:

[REDACTED]

Legal Aid Reference:

9339925499

Nature of Proceedings:

Appeals before the JCPC

Fees to be Taxed:

Simon Di Rollo QC (Note: Mr Di Rollo was a junior at the time this case took place). The fees for Aidan O Neill QC have been agreed and will not proceed to taxation.

Last day for Points of Objection:

Wednesday 10 January 2007

Nature of Appeal:

Counsels note suggests that this case involved the consideration of the Privy Council of two fundamental issues arising from the incorporation of the European Convention of Human Rights into domestic law and a consideration of the new United Kingdom constitutional framework post devolution. The first issue concerned an examination of the privilege against self-incrimination and the second considered the relationship between the Lord Advocate and the Court with a view to determining whether a devolution was raised. In addition a third issue concerning the retrospective effect of the Human rights legislation was raised in the case for the United Kingdom and English Counsel made submissions on this subject.

It should be noted here that counsel acted for the respondent in the appeal. The appellants (PF Dunfermline and HM Advocate General) were successful with all 5 judges finding in their favour.

Although the House of Lords Practice directions recommends that a respondents fees should be less than an appellant we have made no discount in this case and applied the rates recently allowed by the taxing aster/registrar in the cases of Sinclair and McLean.

Nature of Dispute:

The issue in dispute is very straightforward.

Mr Di Rollo is seeking payment at the rate of 2/3rds the fee allowed to senior counsel primarily on the basis that there was a change of senior counsel and this resulted in a greater element of responsibility being placed on his shoulders. Mr Di Rollo was the one constant in this case and required to bring the second senior (Iain Duguid QC) up to speed.

We have refused to offer Mr Di Rollo 2/3rds of the fees agreed with Mr Duguid QC on the following basis:

- There is no 2/3rds rule and payment should be commensurate with input and experience;
- The recommended rate for junior counsel in the House of Lords is 50% of the fees paid to senior;
- Although there has been a change in senior in this case sanction was granted for **two** junior counsel so the additional responsibility in this case ought to have been shared;
- Counsel acted for the respondent which generally attracts a lesser fee.

In recognition that Mr Di Rollo does appear to have bent e constant in this case and may have had a more responsible role we have offered to pay him 50% of the combined fees that have been offered to senior counsel (two separate cases and statement of facts and issues have been prepared). Although this may appear to be generous we wanted to avoid a taxation fee which based on his claim could amount to over £1,000 and additional cost involved in Board solicitors preparing for and attending the taxation.

Fees Agreed:

The fees for both senior counsel in this case Iain Duguid QC and Aidan O'Neill QC have both been agreed. The fees for the second junior Mr. Alonzi are still in the process of adjustment – these fees were not lodged for taxation however.

Previous Taxation Decisions:

Philip attended the taxations of [REDACTED] although it does not appear any written judgement was ever produced.

[REDACTED]

[REDACTED]

[REDACTED] passed down two taxation referrals on Thursday 21 December which we had received from the auditor of the Court of Session in the JCPC cases of [REDACTED]. We have managed to agree ALL the fees in the [REDACTED] case and seniors in [REDACTED] but unfortunately we have reached an impasse with junior counsel fees and as such this case will require to proceed to taxation.

[REDACTED]

[REDACTED]

Thanks for that. I will work on getting all the additional payment I can processed this morning, and will let you know as soon as that is done.

It remains our view that the most recent compromise proposed of £13825.00 is quite generous as we were willing to allow 50% of the fees agreed with Senior for the whole of the case. I feel this has had regard to the addition work necessary. Additionally, there is of course a second Junior involved in this case, and I feel that must be taken into consideration when considering the fees here.

Therefore regrettably the only remaining route open does appear to be taxation as Counsel has indicated.

Thanks for your help.

[REDACTED]

I refer to our exchange of emails and our telephone conversation this afternoon.

I confirm Aidan O'Neill will accept the offer now made to him in this case which is £3125 plus vat making a total abatement of £2625 plus vat to Mr. O'Neill's fees.

Simon Di Rollo is not prepared to accept the increased offer of £13,825 plus vat. He is really looking for two thirds of seniors' fees in the particular circumstances of this case. Accordingly Mr. Di Rollo wishes to go to taxation on his fees.

I confirm however I have cancelled the taxation as far as Mr. O'Neill's fees are concerned but advised the Auditor that Mr. Di Rollo still wishes to have his taxed.

As in the Paul Stewart case Counsel wish to reserve their right to seek statutory interest on the fees.

Regards,

[REDACTED]

[REDACTED]

AUDITOR OF THE COURT OF SESSION

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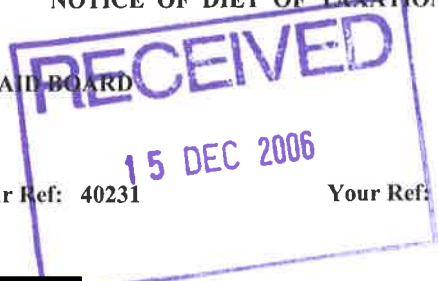
NOTICE OF DIET OF TAXATION

TO: SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

Date: 13 December 2006 Our Ref: 40231

Your Ref: PP 09 9277028199

Case: HMA V [REDACTED]
COUNSELS FEES



You are required to attend the Taxation of an Account of Expenses which will take place in the Auditor's Chambers, Door 11, West Wing, Parliament House, Parliament Square, Edinburgh

On: 15 January 2007 at 2.55 p.m.

On arrival, please report to Room J11. Any queries with regard to this taxation should be made to Mrs. Wilcher.

Attention should be paid to the requirements of Court of Session Practice Session Note (No. 3 of 1993).

Cynthia Cameron (Mrs.)
Principal Clerk

Intimation of the diet of taxation is being made to:

SCOTTISH LEGAL AID BOARD:
AIDAN O'NEILL ESQ., QC:

CHRISTINE M FERGUSON:
SIMON DI ROLLO ESQ., QC

1. Intimation of Diet

Intimation of the above diet is being given by the Auditor to the Solicitors who appear, from the Court Process, to be representing the paying party, which failing to the paying party. If the party presenting the Account knows of any change in representation, or change of address, of the paying party, the Auditor's Office should be informed of that immediately. The Solicitors presenting the Account should also take appropriate steps to inform the paying party of the date, time and place of the diet of taxation. If the Auditor is not satisfied with the steps taken to give intimation of the diet, he may adjourn the taxation to another date.

2. Objection to Account

If the party from whom payment is sought wishes to object to any items in the Account that party is required to lodge a written note of the specific points of objection to it NOT LATER THAN THREE WORKING DAYS before date of taxation [R.C. 42.2(1A)] and is also required to attend, or be represented at, the diet to speak in support of the objections.

PLEASE NOTE THAT NO FURTHER REMINDER REGARDING NOTE 2 WILL BE ISSUED FROM THIS OFFICE.

3. Withdrawal of Account

Should the party who has presented the Account no longer require it to be taxed, that party must notify the Auditor forthwith to that effect.

AUDITOR OF THE COURT OF SESSION

Parliament House, Edinburgh, EH1 1RQ
DX 549304 EDINBURGH 36
LP 5 EDINBURGH 10
Tel No. 0131 240 6796
Fax No. 0131 220 0137
e-mail maildesk@auditorcos.org.uk

NOTICE OF DIET OF TAXATION

TO: SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

Date: 13 December 2006 Our Ref: 40230

Your Ref: 9339925499

Case: HMA V [REDACTED]
COUNSELS FEES

You are required to attend the Taxation of an Account of Expenses which will take place in the Auditor's Chambers, Door 11, West Wing, Parliament House, Parliament Square, Edinburgh

On: 15 January 2007

at 2.10 p.m.

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