

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

in the cause

[REDACTED]

Pursuer

TW v PF

against

[REDACTED]

Defenders

EDINBURGH. 23 May 2007

This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mr James A Peoples Q.C. and Mr Archibald MacSporran, Advocate, in relation to fees claimed by Counsel for representing [REDACTED] in an Appeal to the Inner House of the Court of Session.

At the Diet of Taxation on the 16 April 2007 the Board was represented by [REDACTED] [REDACTED] solicitors. Mr Peoples and Mr MacSporran were accompanied by their Clerk, [REDACTED] and made their own representations.

Background

The background to this dispute arises out of the fees submitted to the Board by Mr Peoples and Mr MacSporran for representing ██████████ in an Appeal to the Inner House of the Court of Session.

██████████ raised an action against his former solicitors alleging negligence in the conduct of his defence in a Criminal Trial. He claimed that errors had been made about the date of the offence casting doubt on his credibility and resulting in his not receiving a fair trial. An Appeal followed and his conviction was quashed by the High Court of Justiciary on 11 April 2000. ██████████ claimed that as a result of the defenders fault and negligence he had suffered loss and damage. He thereafter raised proceedings against the defenders claiming Professional Negligence. The action proceeded in the Outer House of the Court of Session and was defended on the basis that the solicitor who represented ██████████ ██████████ was immune from suit in the conduct of the Trial and also raised the issue of the relevancy and specification of the claim for loss. Following debate on the parties' preliminary pleas, the Temporary Lord Ordinary sustained the Defenders immunity plea and dismissed the action. ██████████ reclaimed and the Respondents cross-appealed the Temporary Lord Ordinary's finding as to the relevancy and specification of ██████████ averments of loss. They argued that ██████████ did not claim that he would have been acquitted if the negligence had not occurred and that such a claim was an essential element of a relevant case.

The Appeal Hearing was not continuous and was heard in three tranches, lasting eleven days in total between December 2004 and September 2005.

The First Division of the Inner House upheld the Respondents' relevancy argument and allowed their cross-appeal. They considered it unnecessary to rule on the immunity argument although did make comment. Ultimately, the Division dismissed ██████████ motion on the basis that it was irrelevant as he did not aver, but for the alleged negligence

of the solicitor who conducted his criminal defence, he would not have been convicted and sentenced to imprisonment.

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 (1) states, “Counsel’s fees in relation to proceedings in the Court of Session shall be calculated in accordance with schedule 4.”

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 is referred to the Auditor for determination.

Authorities

The Auditor is guided by the Lord Justice Clerk’s decision in the case of *Uisdean McKay –v- HMA 1999 SCCR 679*. Although this is concerned with criminal legal aid fees the court’s general direction is that the auditor is required to tax counsel’s fees within a “statutory framework”... “The rules bind 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”. The Statutory Framework is set out in Regulation 9 above. The standard of taxation is set out by Lord Kyllachy in *Hood v. Gordon 1896 23R.675*, “I see no reason to doubt that principle which we must follow in this case is that established in the case of *Walker v. Walker*, 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, "where 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." 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.

SLAB's Submissions

██████████ lodged written points of objection. The Auditor does not intend to repeat these here but attaches them to his report for reference. In summary the crux of the dispute is the level of fees claimed by senior and junior counsel for separate preparation, conducting the reclaiming motion and a joint note on the prospects of success of appealing to the House of Lords.

The Board does not dispute that an increase in the daily rate stipulated in the table of fees is reasonable having regard to the circumstances of the case. The objection is the basis on which preparation is being charged and the level of fees claimed by counsel for conducting the reclaiming motion. The Board refers to its regulations and the fees prescribed in the table of fees applicable to counsel in Legal Aid cases. In particular the Board objects to counsel being paid separate preparation fees, which they consider should be properly subsumed within the daily rate as this is not an item of work separately provided for in the table.

Senior Counsel's Submissions

At Taxation, Mr Peoples submitted that in the context of the regulations the Auditor had the power to allow more than the fees stipulated in the tables and referred to Regulations

9 and 10 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, which were also referred to by the Board. Regulation 9 deals with basis of taxation and Regulation 10 gives the Auditor the power to increase any fee set out in the Table of Fees. (The regulations are referred to for their terms earlier in this report).

In summary, Counsel explained to the Auditor the complexities of the case and the extensive authorities which required to be considered. The case involved a full consideration of the historical development of solicitors' immunity in Scotland and impact of the House of Lords cases of Rondell (1967), Saif Ali (1980) and Arthur Hall (2002) on Scots Law. The judgements were lengthy and in the cases of Rondell and Hall extended to more than one hundred pages. A comparative exercise was carried out and the absence of immunity in other European member states was considered as well as the positions in Canada, the USA, New Zealand and Australia. Sixty three authorities were initially copied and produced to the Court, followed by a further twenty. This was in part due to the court intervening as the case progressed. During the course of the proceedings decisions in the New Zealand and Australian cases were issued in the period between the hearings and these decisions had to be considered for [REDACTED] response in the final part of the appeal.

Opinion

It is clear that this is an important case of significant complexity, which is reflected in the decision of the First Division of the Inner House extending to 85 pages with 184 paragraphs. The Auditor is grateful to counsel for the information produced in support of the preparation undertaken which underlines the significance and complexities of the case. In particular the Auditor refers to the ring binders of the Authorities considered, counsel's extensive notes on preparation and the notes taken by counsel during the course of the reclaiming motion.

Preparation/

Preparation

In determining what represents reasonable remuneration to counsel the Auditor, in addition to the authorities previously referred to in this report, has also given consideration to the following decisions, *Kathryn Jane Jarvie v. Greater Glasgow Primary Care Trust* [2006] CSOH 41 and *Ahmed's Trustee v. Ahmed* [1993] CSOH 390. These decisions support the allowance of separate preparation depending on the circumstances of the case and the work done by counsel. Having taken all of the factors of this case into account the Auditor is satisfied that separate preparation is appropriate here. Based on an eight hour day, senior counsel has charged the equivalent of 10 days preparation at £1000 per day. In the Auditor's experience, this fee is considerably less than senior counsel might expect to receive on an agent and client basis and falls well below the fees allowable on party and party taxation. This leaves the question of whether 10 days preparation for the reclaiming motion which lasted 11 days in total is reasonable. The reclaiming motion was heard in three stages. The first part of the appeal lasted 4 days from the 7 – 10 December 2004, then a further 4 days from the 28 June – 1 July 2005 and the final 3 days from 27 -29 September 2005. It is reasonable given the delay between each stage of the reclaiming motion that counsel undertake some preparation between each hearing. It is clear this is an exceptional case which placed great demands on counsel to be fully prepared not least by the court. For example the timing of the decisions issued in the New Zealand and Australian cases during the second part of the Respondents cross examination raised issues resulting in additional preparation being required for the third part of [REDACTED] appeal. In the Auditor's experience and applying the test set down in the authorities seven days separate preparation is reasonable.

Turning to junior counsel's fees the Auditor will deal with these on a daily basis as opposed to the hourly rate claimed. This works out at approximately 23 days based on an 8 hour day. Whilst this is in contrast to senior counsel who has charged for 10 days preparation the Auditor is satisfied, having regard to the responsibility placed on junior counsel in this particular case that a greater number of days than that allowed to senior

counsel for separate preparation, is reasonable. It is clear that junior counsel had a very demanding role. In particular, junior counsel 'opened' the reclaiming motion and his speech lasted for three and a half days of the first four days. He was also tasked with drafting a detailed written Note of Arguments in support of the appeal. Senior counsel subsequently opened his submissions by adopting the submissions made by junior counsel. The Auditor considers that fifteen days separate preparation is reasonable remuneration for the work done by junior counsel. However, the Auditor is not persuaded that junior counsel should achieve a rate equivalent to or higher than that allowed to senior counsel. The Auditor therefore allows junior counsel's preparation pro-rata of the rate allowed to senior counsel as reasonable remuneration for the work done and awards a daily rate of £650.

Daily Rate

The Auditor is satisfied that the fees sought by senior and junior counsel in this case bear no relation to what they might reasonably expect to charge in an Agent and Client fee paying case. The daily rates claimed by counsel bear no relation to the fees charged by counsel on an agent and client basis and are less than those awarded or sought on a party and party basis in a case of such novelty, complexity and importance. The Auditor, having applied the relevant test is therefore satisfied that the daily rates claimed by counsel are "those expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed."

Joint Note

The Auditor has considered the Joint Note produced. Each counsel has claimed a fee of £2,500.00. The Auditor accepts the Board's submission that this is excessive. In the Auditor's experience a fee of £1,750.00 to each counsel represents reasonable remuneration for this work.

Conclusion

The Auditor taxes Senior Counsel's fees at £36,250.00 plus VAT of £6,343.75, totalling £42,593.75 and Junior Counsel's fees at £30,750.00 plus VAT of £5,381.25, totalling £36,131.25.



AUDITOR OF THE COURT OF SESSION

Date	Work	Sum Claimed £	Sum Offered £	Counsel Compromise £	Sum in Dispute (Diff claim & offer) £
30 Nov 2004 onwards	Preparation for summar roll hearing 48.5 hrs (first 4 days); Preparing for continued hearing 16 hours; Preparing for continued hearing 16 hours (Total time 80.5 hours)	10,000	6,350		
7 Dec 04-29 Sept 2005	11 day hearing	27,500	19,250		
22.02.06-9.03.06	Joint Note	2,500	No offer just received		
	TOTAL	40,000	25,600	31,625 (excl Joint Note)	6,025 (excl. Joint Note)

* Global offer allowed to senior counsel in the sum of £25,600 and the sums "offered" reflect broadly the sum we would be prepared to offer to avoid taxation.

Date	Work	Sum Claimed £	Sum Offered £	Counsel Compromise £	Sum in Dispute (Diff claim & offer) £
3 Nov 2004	By Order	50.00	£50.00	n/a	-
Nov/Dec 04	Preparation for 4 day Summer Roll Hearing (131 hrs @ £150 per hour or 21.83 x 6 hours per day at £900	19,650.00	£6,000 for all prep (10 days at £600 circa 1 per each day of appeal)	24,000.00	
7-10 Dec 2004	4 Day hearing (£1,750 per day)	7,000.00	£4,000	Included in above fee	
Apr-Jun 05	Preparation for continued diet 39 hours. Restricted to 3 days at £900.	2,700.00	-	£8,500.00	
28 Jun-1 Jul 05	4 Day hearing (£1,750 per day)	7,000.00	£4,000	Included in above fee	
Sept 05	3 day Hearing (£1,750 per day)	5,250.00	£3,000	£6,000.00	
Sept 05	Preparation 15 hours	900.00	-	Included in above fee	
March 06	Joint Note on prospects of appeal 26 hours	2,500.00	£1,050	£2,000.00	
	TOTAL	45,050.00	£18,200*	£40,500.00	£26,850.00

* Global offer allowed to junior counsel in the sum of £18,200 and the sums "offered" reflect broadly the sum we would be prepared to offer to avoid taxation.