

AUDITOR OF THE COURT OF SESSION
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27 July 2012

SCOTTISH LEGAL AID BOARD
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Date and Tax Point

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SH [REDACTED] V HMA
COUNSEL'S FEES

The Auditor's Fee herein is	£20.00
VAT thereon @ 20%	£4.00
Posts & Incidents (incl VAT)	£0.00
	<hr/>
	£24.00

The papers submitted await collection
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Auditor Of The Court Of Session

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The Auditor Kenneth M Cumming W.S
Principal Clerk Mrs Sheila Muir

AUDITOR OF THE COURT OF SESSION

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██████████ V HMA
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EDINBURGH. 26 July 2012. At a diet of taxation on 18 July 2012 the Auditor heard representations by ██████████ on behalf of the Scottish Legal Aid Board and Miss Moira Mackenzie, Advocate, and ██████████ Counsel's Clerk. Having considered the business papers submitted to him, the Auditor now taxes at NIL (£00.00) the disputed fee, inclusive of posts and incidental expenses, due to Miss Moira Mackenzie, Advocate. The Auditor's fee, inclusive of VAT, is £24.00.



AUDITOR OF THE COURT OF SESSION

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs Sheila Muir

SOLICITOR REFERRAL – DIET OF TAXATION

Assisted Persons Name : [REDACTED]
LA Reference : **PP/1009670010**
Advocate's Name : **Moira McKenzie, Advocate**

Date of Taxation & Location: Auditor, Court of Session 18 July 2012 at 12.00noon

Type of Case : **Bill of Advocation – Appeal Court**

1. Nature of the case:

Counsel was instructed by the nominated agents, Stevenson & Marshall, Dunfermline, in respect of a sentence appeal. A regulation 15 grant was in place effective from 10 March 2011 with a full appeal certificate effective from 28 March 2011. There was an issue in relation to the Suspended Forfeiture Order that was granted prior to the sentence being imposed and counsel was of the opinion that a Bill of Advocation should be lodged.

2. Fees allowable to Counsel

Fees payable to counsel are detailed within Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ("1989 Regulations").

Part 2, Chapter 2 of Schedule 2 details the fees payable to junior counsel in appeal proceedings.

Regulation 10(1) of the 1989 Regulations provides that "*counsel shall be allowed such fee as appears to the Board, or at taxation the auditor to represent reasonable remuneration, calculated in accordance with Schedule 2 or 3, for work actually and reasonably done, due regard being had to economy*".

Taxation of fees and outlays is provided for in

Regulation 11. — (1) 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—

- (a) the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session;
- (b) the Supreme Court, the matter shall be referred for taxation to the Registrar of the Supreme Court; or
- (c) the sheriff or district court, the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place.

3. Nature of dispute:

The issue relates to only one charge. Counsels 3rd charge for an "opinion" as detailed in fee note 27-07-2011. Our view having considered the content of this is that it is *not* an opinion and as such the fee has not been charged on the correct basis. Although the fee is small in monetary terms this is an ongoing problem that we experience [REDACTED]

The following chronology provides additional detail.

Counsel's fee note was submitted under FS ref: S660/HY110006/1 (see Appendix 1) and received by us, via email, 19-12-2011 (offer sent 28-12-2011).

The fee note included charges for the following items of work:

1. A fee for an opinion on sentence appeal and procedural difficulties (opinion no.1 - see Appendix 2), entry dated 14-05-2011 and the fee charged £75. This opinion is *payable* in full.
2. A further opinion was provided, on the merits of a Bill of Advocation (opinion no.2 - see Appendix 3), entry dated 20-05-2011 and fee charged £125. This opinion is *payable* in full.
3. A third opinion (opinion no.3 - see Appendix 4) has been charged by counsel, entry dated 27-07-2011 and fee charged £125. This work has been subject to abatement and the fee for a 'necessary note' of £50 has been offered instead. It is this abatement (-£75) that is in dispute and the fee note has now been lodged for taxation. A fee for a "necessary note" is not specifically prescribed in the Table of Fees for Appeal Proceedings. A fee is however prescribed in the "first instance tables" at Part 1, Chapter 1 and 2, paragraph 6 and Part III, Chapter 1 and 2, paragraph 5. A standard prescribed fee of £50.00 is payable regardless of the court or status of counsel. This is a fee routinely charged by counsel where a necessary note is prepared. This is the fee that we allow in appeal proceedings in terms of paragraph 2 on the Notes on the operation of Schedule 2 "*Where the Table of Fees does not prescribe a fee for any item of work or category of proceedings the Board, or as the case may be the auditor, shall allow such fee as appears appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Table of Fees*".

An exchange of emails between myself and counsel's clerk, [REDACTED] then followed (Appendix 5).

12 January 2012 - I advised [REDACTED] that I was of the view the 'opinion' of 27-07-2011 was more akin to a necessary note and I would suggest a fee of £50 as reasonable.

12 January 2012 - [REDACTED] reply was to the effect that the 'necessary note' fee was only applicable to 'first instance' fees but that she could accept a reduced fee of £75, being the prescribed fee for an opinion (or note) in an appeal against sentence.

12 January 2012 - I confirmed that I did not share her view that the note fee was only applicable in first instance work and that paragraph 2 of the notes on operation allowed us to have regard to the general level of fees in the Table of Fees.

12/13 January 2012 - Emails between [REDACTED] and I whereby it was agreed that the principle difficulty between us was our differing views of what constituted an opinion. Lee-Anne to revert back to counsel to establish if she wishes to insist upon the full sum sought i.e. £125.

18 January 2012 - Email from Lee-Anne confirming that it is counsel's position that she has provided an opinion, is seeking payment in full and wishes to proceed to the Auditor.

24 January 2012 - I confirm that we may require to proceed to taxation but asking that counsel specifies the particular text which contains a legal opinion. I point out that "*...the first 3 paragraphs appear to be confirmatory in nature, the fourth is somewhat anecdotal and the final two paragraphs contain basic instructions to the agents*".

26 January 2012 - Response received from counsel, via [REDACTED] This advised the following:

"The basis of the opinion was to give the appellant advice as to how he might get out of a procedural "loophole" (outstanding appeal preventing him progressing in custody - applied only in some jails). In my opinion I set out my previous encounters of such problems and I should say it is a matter of regret to me how frequently solicitors / counsel do not seek to challenge what I regard as a manifest breach of the appellant's convention rights in terms of him being denied either a tag or moved to a low security status (and the open estate) simply because he has an appeal outstanding. Based on this experience and in an effort to effect a quick resolution I state:

I would suggest that his Agents fax a letter to HMP Perth asking for urgent clarification of his status confirmation as to the date when, it is anticipated, he will be moved to an open prison.

I could have reworded this "in my opinion the best course open to the appellant to seek to remedy the position he finds himself in would be for him to instruct his Agents to "

This is not a note setting out what should happen next. It is my opinion and it is only my opinion. I know other Counsel have given advice that the appellant should go straight to Judicial Review - I agree with that but in my opinion, based on experience in a number of cases, it is quicker and cheaper just to fax the jail in the first instance.

If Slab do not accept this then I would like to go to Taxation."

6 February 2012 – I advise [REDACTED] that I continue to have difficulty with payment of this ‘opinion’ for the reasons previously given. I go on to suggest that the content of the opinion itself regarding any move to an open prison has nothing to do with the appeal matter. This concerns prison rules and the remedy open to the Applicant would be to judicially review the prison authorities re their decision not to move him to an open prison. In my view it would therefore be inappropriate to fund an opinion addressing this matter under criminal legal aid when it is actually concerned with civil procedure.

7 February 2012 – Email from [REDACTED] confirming counsel will proceed to taxation.

4. Similar Taxations

The case HMA v [REDACTED] concerned counsel’s fee for an opinion which, under the circumstances, was disputed as not being reasonably chargeable.

The Auditor taxed the fee at NIL.

5. Appendices

Appendix 1 – Fee note, showing abatements.

Appendix 2 – Opinion no.1.

Appendix 3 – Opinion no.2.

Appendix 4 – Opinion no.3.

Appendix 5 – Exchange of emails between counsel’s clerk and I.

Referred by: [REDACTED]

Date: 27.06.2012
