

Auditor of the Court of Session

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MW

HMA v [REDACTED]
Edgar Prais QC, Edith Forrest, Advocate and Steven Borthwick, Advocate
Legal Aid Reference SL/9370760109

EDINBURGH. 14 March 2013

At a diet of taxation on 17 January 2013, the Auditor heard representations on behalf of Mr Edgar Prais QC, Ms Edith Forrest, Advocate, Mr Steven Borthwick, Advocate, and the Scottish Legal Aid Board in respect of separate preparation fees claimed by Counsel. Having considered the information provided and the submissions made, the Auditor now taxes (a) the total separate preparation fees allowable to Senior Counsel at the sum of THIRTY SIX THOUSAND SIX HUNDRED POUNDS (£36,600), (b) the total separate preparation fees allowable to Junior Counsel at the sum of EIGHTEEN THOUSAND THREE HUNDRED POUNDS (£18,300), (c) the total fees allowable to Senior Counsel for the 15 all day consultations held on 23, 24, 25, 26 and 27 November 2009, 5, 6, 7, 8 and 9 July 2010 and 22, 23, 24, 25 and 26 November 2010 at the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY POUNDS (£3,750), and (d) the total fees allowable to each Junior Counsel for the 14 all day consultations held on 23, 24, 25 and 26 November 2009, 5, 6, 7, 8 and 9 July 2010 and 22, 23, 24, 25 and 26 November 2010 at the sum of ONE THOUSAND EIGHT HUNDRED AND NINETY POUNDS (£1,890). To the said sums there falls to be added VAT at the appropriate rates and the Auditor's fee, inclusive of VAT, £2,905.92



AUDITOR OF THE COURT OF SESSION

NOTE/

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs Sheila Muir

NOTE

1. The diet of taxation in this case took place on 17 January 2013. Mr Steven Borthwick, Advocate appeared and made submissions on behalf of Mr Edgar Prais QC, Ms Edith Forrest, Advocate and himself. [REDACTED] [REDACTED] appeared and made submissions on behalf of the Legal Aid Board. Counsel's Clerkess, [REDACTED], was also in attendance.
2. The issues which have been raised in this taxation are (a) how to determine the level of fees to be allowed for separate preparation work by Counsel, (b) the allocation of those fees amongst the Counsel who represented or carried out work on behalf of the accused, and (c) the level of fees to be allowed for certain consultations.
3. The relevant provisions for purposes of determining the level of fees to be allowed for separate preparation work by Counsel in this case are paragraphs 12-15 in the Notes on the operation of Schedule 2 to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, and in particular paragraphs 13(a), 14(a)(ii), 15(d), 15(e) and 15(f)(i) .
4. It was agreed that the total sheetage in this case for purposes of paragraph 15 was "35,000+". Accordingly, in terms of paragraph 15(e), Counsel are entitled to "*a fee in respect of the total preparation reasonably undertaken having regard to all the circumstances, including the general level of fees prescribed in this paragraph*".
5. The Legal Aid Board has made offers to Counsel based on allowing a total of 30 days (ie, nothing for the first 7,500 sheets and 2.5 days for each 2,500 sheets, or part of 2,500 sheets, thereafter). In doing so, the Board has, in the opinion of the Auditor, had proper regard to the general level of fees prescribed in paragraph 15. The Board is required by paragraph 15(d), however, to have regard to "*all the circumstances*", not just the general level of fees prescribed in paragraph 15.

6. The Regulations provide no guidance as to the meaning of "*all the circumstances*", but it seems to the Auditor that it is reasonable to infer that they should include the novelty, complexity and importance of the proceedings in question. These issues are addressed in two Joint Notes by Senior and Junior Counsel dated September 2009 and October 2009. Having carefully considered those Notes and the rest of the documentation produced by Counsel for purposes of this taxation, the Auditor has concluded that it would be reasonable to allow an additional 25 days of separate preparation over and above the 30 proposed by the Board to reflect the novelty, complexity and importance of the proceedings.
7. As regards the work carried out by the two Junior Counsel, it all clearly formed part of the preparation for trial by the team of Counsel instructed by the accused. The provisions of paragraph 2 in the Notes on the operation of Schedule 2 accordingly do not apply. Nor is the Auditor persuaded that, because the employment of two Junior Counsel was specifically sanctioned by the Board, the work carried out by each or either of them falls to be treated, in the context of fees, separately from the preparation work carried out by the other Counsel instructed by the accused. In the opinion of the Auditor, the meaning and effect of paragraph 13(a), in a case in which Senior and Junior Counsel are involved, is that a fee for separate preparation is allowable only once to Senior Counsel and once to Junior Counsel, regardless of how many Senior or Junior Counsel represent or are sanctioned to carry out work on behalf of an applicant or assisted person during the course of the case.
8. The Auditor has, however, concluded that the fact that the Board accepted that it was necessary to sanction the employment of a second Junior Counsel in addition to the Senior and Junior Counsel already sanctioned to act for the accused is another '*circumstance*' to which regard ought to be had in terms of paragraph 15(e) and in the light of which it would be reasonable to allow a further additional 6 days of preparation.

9. Accordingly, the total number of days which the Auditor considers reasonable to allow is 61, resulting in separate preparation fees of £36,600 for Senior Counsel and £18,300 for Junior Counsel.
10. Turning to the allocation of the separate preparation fee for Junior Counsel between the two who represented or carried out work on behalf of the accused, the submission made on behalf of the Board was that that is not a matter which the 1989 Regulations or the Notes on the operation of Schedule 2 require the Board or indeed the Auditor to determine, and that it is instead a matter for Junior Counsel to resolve. Mr Borthwick's position seemed to be that no allocation or split was required.
11. The Auditor agrees that the Regulations do not expressly require the Board to allocate or apportion separate preparation fees. Regulation 11(1), however, allows "*any question or dispute ... between the Board ... and counsel ... as to the amount of fees allowable to counsel*" to be referred for taxation to the Auditor, whether at the instance of the Counsel concerned or of the Board. The Auditor's view therefore is that the allocation or apportionment of separate preparation fees is, in principle, a question which could competently be referred to him for determination. In this case, however, it is by no means clear to the Auditor that any of the parties actually wish him to make such a determination.
12. The Auditor has accordingly continued the diet of taxation in this case for clarification as to whether the Board or either of the Junior Counsel involved wish him to determine the allocation or apportionment of the separate preparation fees and to allow such further submissions as the Board or either of the Junior Counsel involved might wish to make in that connection.
13. In the meantime, in case it would assist any further discussions between Junior Counsel or between Junior Counsel and the Board, the Auditor is prepared to indicate at this stage that his preliminary view, in the absence of and subject to full submissions, is that it might be considered reasonable and consistent with the general scheme of paragraphs 12-15 to allocate or

apportion the separate preparation fees in accordance with the sheetage considered by each Junior Counsel. Proceeding on the basis that both considered all the documentation would accordingly result in the separate preparation fee being apportioned equally between them.

14. Finally, the Auditor agrees with the Board's interpretation of the Notes on the operation of Schedule 2 and the Table of Fees regarding consultations. Each of the all day consultations for which fees are claimed appears to have been attended by the same people and to have served the same purpose. There is nothing in the relevant provisions to support the notion, for feeing purposes, of splitting all day consultations into separate half day consultations, and the prescribed fees of £250 for Senior Counsel and £135 for Junior Counsel are payable regardless of the length of the consultation.