

# Auditor of the Court of Session

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HMA v [REDACTED]  
Shelagh McCall, Advocate and Jillian Martin-Brown, Advocate  
Legal Aid Reference SL/8543991908

EDINBURGH 14 March 2013

At a diet of taxation on 17 January 2013, the Auditor heard representations on behalf of Ms Shelagh McCall, Advocate, Miss Jillian Martin-Brown, 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 FOURTEEN THOUSAND NINE HUNDRED AND THIRTY THREE POUNDS AND TWENTY PENCE (£14,933.20) and (b) the total separate preparation fees allowable to Junior Counsel at the sum of EIGHT THOUSAND ONE HUNDRED AND THIRTY THREE POUNDS AND TWENTY PENCE (£8,133.20). To the said sums there falls to be added VAT at the appropriate rates and the Auditor's fee, inclusive of VAT, £1,107.36.



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 Martin Richardson, Advocate appeared and made submissions on behalf of Ms Shelagh McCall, Advocate and Miss Jillian Martin-Brown, Advocate. Mr [REDACTED] appeared and made submissions on behalf of the Legal Aid Board. Ms McCall and her Clerkess, [REDACTED] were 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, and (b) the allocation of those fees amongst the Counsel who represented or carried out work on behalf of the accused.
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 26,348. 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*". (The Auditor understands that the total of 26,348 sheets includes the 14,000 sheets on which Miss Martin-Brown's claim for separate preparation fees is based).
5. The Legal Aid Board has made offers to Counsel based on allowing a total of 20 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 a Note by Mrs Scott QC (now Lady Scott) dated 1 May 2012. Having carefully considered that Note 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 15 days of separate preparation over and above the 20 proposed by the Board to reflect the novelty, complexity and importance of the proceedings.
7. As regards the work carried out by Miss Martin-Brown, the Auditor is of the view that it clearly formed part of the separate 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 Miss Martin-Brown to carry out the work in question was specifically sanctioned by the Board, her work 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 Miss Martin-Brown as 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 5 days of separate preparation.
9. Accordingly, the total number of days which the Auditor considers reasonable to allow is 40, resulting in separate preparation fees of £14,933.20 for Senior Counsel and £8,133.20 for Junior Counsel.
  10. Turning to the allocation of these separate preparation fees amongst the Counsel 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 Counsel to resolve. Mr Richardson's position seemed to be that no allocation or split was required. As he also pointed out, he was only appearing on behalf of two of the five Counsel who represented or carried out work on behalf of the accused during the course of the case.
  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, and it would in any event be inappropriate for him to do so without having allowed an opportunity for all Counsel involved to make submissions on the matter.
  12. The Auditor has accordingly continued the diet of taxation in this case for clarification as to whether the Board or any of the 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 any of the Counsel involved might wish to make in that connection.

13. In the meantime, in case it would assist any further discussions amongst Counsel or between 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 Counsel. It is suggested in the documentation produced by Counsel for this taxation that the sheetage considered by Mr Donald Findlay QC and Mr Tony Lenehan, Advocate was 13,283, while the sheetage considered by Lady Scott and Ms McCall, Advocate was 26,348, of which 14,000 were also considered by Miss Martin-Brown. Applying those equations to the total separate preparation fees would result in the following payments:-

Mr Findlay QC	£5,005.12
Lady Scott	£9,928.08
Mr Lenehan	£2,014.38
Ms McCall	£3,995.70
Miss Martin-Brown	£2,123.12