Glasgow Sheriff Court 

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

NOTE

By

K. Carter, Auditor of Court

From

Taxation Diet at Glasgow

On 14th August, 2014

On

S.L.A.B. fees disputed by Counsel G. Gebbie, Advocate

Instructed by Messrs McClure Collins, Solicitors,

139 Allison Street, Glasgow

In Glasgow Criminal Legal Aid case

of FC

HMA v [redacted]

L.A. Ref No. SL/08/2595476112

Solicitors' Case Ref No M059CA 120334

This being a reference to the Auditor in terms of Regulation 11.1(c) of the Criminal Legal Aid (Scotland) (Fees) Regulations, 1989, (referred to in this note as CLASFR 1989) to decide a question of the fees payable under chapter 1 of part 3, of Schedule 2, (Fees of Counsel for proceedings in the in the Sheriff and District Courts).

Decision /

Decision /

Glasgow, 30th September, 2015. The Auditor of Court taxes the Advocates fee notification dated 11th December 2012, within said Solicitors' Account for four Devolution Issue Minutes all of which are claimed under date 14th March 2012, at the sum of £150 and therefore abates the sum claimed by £450.

Notes by Auditor

1. At the Diet on 14.8.2014, Parties were represented as follows:
   Act. for Messrs McClure Collins appeared Mr G Gebbie, Advocate with [redacted] Advocates Clerk.

   Alt for S.L.A.B. appeared [redacted] Solicitor.

2. S.L.A.B. had provided me with 4 pages of written submissions prior to the diet and these have been appended at the end of this Report as an Annexe. Their written submissions were supplemented by oral submissions at the diet.

3. The single point in dispute was whether Issues (plural) which procedurally require to be raised by Devolution Issue Minute(s) referred to in this report as DIMs, can be raised in a single DIM or whether each Issue required a separate Minute meriting a payment by S.L.A.B. for each Minute. The fee appropriate at the time was £150 for each Minute.

4. Mr Gebbie's 2 two sets of separate oral submissions (one before and one after SLAB's) were extensive, lasting over an hour all told. Amongst the cases he referred to were Mills v HMA; and Cochrane v HMA with Respondents in both being H. M. Advocate General for Scotland, 2001 – SCCR 821. He submitted that those 2 cases set out the need to lodge separate DIMs for each and every Issue raised. He referred to Act of Adjournal (Devolution Issue Rules) 1999, (S.I. No. 1346 – S. 101) which introduced new Criminal Procedural Rules by adding a new Chapter 40. He particularly referred me to Rule 40.2 thereof, '*…where a party to proceedings on Indictment proposes to raise a devolution issue…*' . Mr Gebbie sought to emphasise the importance of the singular by virtue of the use of the words 'a' and 'the' within these new Rules and explained that this was the reason for drafting four DIMs to raise four distinct Issues, thus seeking four fees of £150 for the work necessarily done in preparing them. He also referred to ECHR case of Steel and Morris v UK (Appn. 68416/01) final decision issue 15.5.2005 at paras 71 and 72, page 26,…*'More importantly if legal aid had been refused or made subject to stringent*

financial or other conditions, substantially the same Convention issue would have confronted the Court, namely whether the refusal of legal aid or the conditions attached to its granting were such as to impose an unfair restriction on the applicant's ability to present an effective defence.
72. In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable ***inequality of arms*** *(my emphasis) with McDonald's. There has, therefore, been a violation of Article 6 : 1 of the Convention…'*
He submitted that this ECHR authority was significant because the Scotland Act and the subordinate legislation of Regulations set out <u>how</u> to deal with DIMs, and the form of these. He submitted that he had 'a duty' to raise 4 DIMs and accordingly this merited reasonable fees for his work in doing so. By S.L.A.B.'s resistance to paying 4 x £150 fees they are contravening the 'inequality of arms' point described in the ECHR case above.
Mr Gebbie here referred to another matter he considered was supportive of his submissions on this point (no precise reference was given to the source of this at the Diet), but he referred to comments made by a former Dean of the Faculty of Advocates (Mr R Keane, QC) relating to this ECHR issue of 'inequality of arms' in which he apparently had expressed an opinion or his view that Advocates are not properly instructed without appropriate remuneration.
Mr Gebbie throughout his own submissions remained firmly of the view that one Issues means one Minute and one fee. He expanded that the Crown did not have to endure such restrictions in terms of funding prosecutions, given the resources available to them from the State and he considered that this imbalance of resources was fundamentally unfair. Mr Gebbie also intimated in support of his position , that in his experience at least one Judge had previously indicated that one DIM per Issue was preferred.

5. [redacted] written submissions (see Annexe) were developed by his oral submissions with emphasis on the Auditor's duty to apply Regulation 10 of the C.L.A.S.F.R. 1989...*'Fees allowable to Counsel …such fee as appears….to represent reasonable remuneration …for the work actually and reasonably done, due regard being had to economy..'.* [redacted] was emphatic that the use of the singular words 'a' and 'the' founded on by Mr Gebbie as a crucial reason for lodging four DIMs is unambiguously countered by legislation namely the Interpretation and Legislation Reform (Scotland) Act 2010 (ILRSA 2010), in particular section 22, *entitled, 'Number'*, which says*…"(a) words in singular include the plural, and (b) words in the plural include the singular.. ".* He also specifically referred to section 1(5)(c) of that Act *re 'Regulations'* which he said therefore includes the Regulations governing DIMs which are the subject

of this taxation. He referred to the fact that many Counsel do include multiple Devolution Issues within 'combination' DIMs, and also that the Courts had historically and still do, accept these without any question having arisen as to their competence. He referred to a reported case in 2012, HCJAC 47 of J. Barclay; W. Bain, D. McLean and HMA, in which Mr Gebbie acted for 2nd Minuter (Bain), and in which another Minuter (McLeod) had lodged a single DIM. That Opinion at page 2 refers to differing approaches to raising DIMs i.e. .. "*..in the first process several DIMs were lodged and in the second several Issues were combined in just one DIM..* ". [redacted] conceded that it is competent to lodge a DIM for each Issue and that there may be cases where use of more than one is justified , with a fee also justified, but that S.L.A.B.'s position in this case is that(i) all 4 DIMs were prepared (as detailed in Counsel's fee note) on the same day, i.e. 12.3.2012, (ii) that there is substantial commonality between them and (iii) that S.L.A.B. were therefore entitled to form the view that a single DIM and a single fee of £150 was appropriate for the work actually and reasonably done, due regard being had to economy. It is worth noting here that S.L.A.B. had at one stage offered a compromise of 2 fees of £150 (i.e. Total of £300 to the defence representatives) in this fee dispute negotiation exercise in written exchanges before the taxation diet was fixed, but that SLAB offer had later been withdrawn due to the taxation option being insisted upon by their opponents. [redacted] referred to this in verbal submissions and confirmed that the £300 offer did not still stand at the diet of 14/8/14. He emphasised the importance of an Auditor applying the phrase '.."*due regard being had to economy'.."* in General Regulation 10(1) of CLASFR 1989, and referring me to all of the factors detailed in S.L.A.B.'s written submissions annexed to this report.

6. In coming to my decision to restrict the fees claimed from £600 to £150 for one DIM, I did carefully consider Mr Gebbie's submission on the 'Inequality of arms' point in his ECHR reference but as Auditor of Court my restricted function is to apply General Regulation 10(1) of CLASFR 1989… *"..what I consider to … 'represent reasonable remuneration …for the work actually and reasonably done, due regard being had to economy..'*. In making that judgement I have also had regard to CLASFR 1989 Gen Reg. 10A which directs me to… *"deem that Counsel be as up to date with the substantive and procedural (my emphasis) law of the field…etc…*" . Mr Gebbie is very experienced in DIMs and ECHR and has been an Advocate since 1987 (some 25 years at the time of the [redacted] procedure in 2012). His Chambers' website describes this type of work as an area of practice for him. That being so, when combined with S.L.A.B.'s written submissions, I am of the view that it would have been reasonable for an Advocate of Mr Gebbie's experience and expertise in this

area of the Law to draft a single, global DI Minute in the circumstances of this case, all the more so given that all the work on all 4 DIMs appears to have been done contemporaneously on 14.3.2012 as detailed in Mr Gebbie's own fee Notification to his instructing Agents. In all the circumstances of this case I do not think that S.L.A.B. could be considered to have 'refused legal aid or made it subject to stringent financial or other conditions to the extent that this contributed to an unacceptable inequality of arms (my emphasis),

7. I therefore consider on balance that S.L.A.B.'s submissions at the Diet which are fully supported by the Interpretation Act (ILRSA 2010) outweigh Mr Gebbie's submissions on the 'inequality of arms' point on the necessity, as Mr Gebbie sees it, in this case to draft 4 separate DIMs. I therefore support S.L.A.B.'s decision to abate the account/fee Note relating to 3 of the 4 DIM's fees by £450 and allow one single fee of £150.

K Carter
Auditor of Court, Glasgow and Strathkelvin.

Report issued on 30th September 2015.

ANNEXE TO REPORT BY GLASGOW AUDITOR
DATED 30/9/2015 IN HMA V [redacted]

ANNEXE TO REPORT BY GLASGOW AUDITOR
DATED 30/9/2015 IN HMA V [redacted]

Written submission from SLAB, received by Auditor Glasgow on 12 August 2014.

HMA V [redacted]
TAXATION OF COUNSEL'S FEES

I refer to the taxation assigned for 14 August 2014. I now write to give advance notice of the Board's position in the hope that it assists in restricting attention to the matter in issue as far as possible at the diet on.

The issue is in relation to four devolution issue minutes prepared by counsel in the case.

By virtue of a fee note issue by Faculty Services Limited on behalf of counsel date 11th December 2013 and under reference M059/CA120334/001, a charge was made in respect of preparation of each of the four minutes.

Chapter 1 of Schedule 2, Part 3 (Fees of Counsel for proceedings in the Sheriff Court) prescribes a fee of £150.00 in respect of preparation of a devolution minute.

The fees regulations are, however, subject to certain general overriding provisions, and of particular relevance is regulation 10. This provides:

> **Fees allowable to counsel**
> 10.(1) 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.

The Board's position is that the charges made by counsel for production of four devolution issue minutes are not allowable as charged. The Board's position is that one preparation charge of £150.00 could and should be allowed, in the prevailing circumstances.

In support of the Board's position the following observations are made:

1. The procedural position in relation to devolution issue minutes is governed by Chapter 40 of the Act of Adjournal (Criminal Procedure Rules) 1996. These provide that the appropriate mechanism for raising a devolution issue is by way of a minute. We understand that counsel relies upon a literal interpretation of the procedural rule. We understand that counsel's position is that the provision of Chapter 40, to the effect that a devolution issue shall be raised by way of a

minute, in turn suggests a separate minute is required for separate devolution issues, so that where there is a second devolution issue, a second minute be used, and so on, with the consequence that the number of "devolution issues" to be raised directly dictates the number of minutes to be prepared.

The Board's position is that Chapter 40 does not impose a procedural requirement that a separate minute is, as a matter of competency, required for any separate devolution issue. Nor does Chapter 40 actually specify that where there is more than one devolution issue to be raised, a separate minute is required for separate devolution issues. The Board accepts it is perfectly competent to use a separate minute for separate devolution issues. The Board accepts that there may or will be cases where the use of more than one minute is justified (and in that connection, see 3. below). However, the Board does not accept that it is a procedural necessity to have separate minutes.

2. Quite apart from the foregoing point, there is a well established practice accepted by the courts whereby counsel and solicitors can and do include and combine more than one devolution issue is a single minute, particularly if the points to be made are similar, or are not unrelated. There is no procedural or tactical penalty by proceeding with a single minute. (And frankly, if there were circumstances where there were circumstances where such a procedural or tactical penalty arose, that would be a factor justifying the use of separate minutes. Again, see 3, below). The Board sees these minutes in its daily work.

3. The Board's position is that there will be circumstances where it is appropriate for separate minutes to be prepared, and for separate charges to be made. Factors which would point to separate minutes and separate charges being made would include issues being completely distinct and unrelated, being novel and linked neither to other issues in the case, or not having arisen in previous cases. The converse of that is that issues which have substantial linkage to other issues in the case, or which have substantial linkage to work which has been carried out previously may be more difficult to allow under paragraph 10 where charged in separate minutes. The Board's position is that paragraph 10 is a strong factor, in a legally aided case, pointing to the use of a combined minute unless there are good, cogent reasons not to.

4. Counsel indicates, per the fee note, that the preparation work in relation to which the charges are made, was carried out on 12th March 2012, and that four minutes were prepared. The Board's position is that due regard to paragraph 10 would involved the preparation of a single minute, albeit with four issues or elements:
    a. As can be seen from a perusal of the minutes there is substantial commonality to the background and content of the four minutes in the [redacted] case, particularly minutes 2, 3 and 4. In the interest of brevity, no detailed narrative of the full extent of that commonality is offered here, and reference is made to the terms of the minutes. The Board submits that the extent of commonality rendered the subject matter capable of being included in a single minute.

b. Quite apart from the commonality across the four points taken in the [redacted] case, counsel had previously prepared minutes in similar terms for previous cases. The Board quite accepts that in a situation like this counsel could and should use material which has been developed previously (leaving the issue of number of minutes aside). In the context of Carberry, however, the relevance is that the work was not novel, and novelty is not a factor that can be applied in support of the use of separate minutes or the fees claimed.

c. Counsel prepared similar minutes in the case of HMA v Bain & Others[1]. This case is of interest and relevance in the current context in several respects. Apart from it representing an example of the issue dealt with at 4b above, the case is also an example of a case in which counsel for the co-accused raised similar devolution issues, but did so by incorporating several devolution issues in one minute. See paragraph [1], page 2. The hearing on the devolution issues in the Bain case took place, as we understand it, on 21st and 22nd February 2012, and the Court of Appeal took no issue with the use of a "combination" minute by the co-accused in which the several issues raised by the co-accused were contained in a single minute. In that way counsel was, at the very least aware, that there was no procedural necessity to proceed be separate minute when, some three weeks or so later, he undertook the work in the current case relation to the preparation of the four minutes.

In all these circumstances the Board is of the view that an assessment of reasonable remuneration having regard to work reasonably done with due regard to economy would properly proceed on the basis that a single combination minute utilising and as necessary adapting the material which was available to counsel from work in earlier case could and should have been used, and that given that that would have attracted a single minute preparation fee of £150.00 that this is the appropriate amount to allow.

I trust this is of assistance in explaining the Board's position.

Yours sincerely

[1] http://www.scotcourts.gov.uk/search-judgments/judgment?id=1c9286a6-8980-69d2-b500-ff0000d74aa7