TAX - 48

RECEIVED
22 DEC 2015

Auditor of the Court of Session

Your Ref: 3940256613
Our Ref: 64709

The Scottish Legal Aid Board
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Edinburgh 7

Parliament House
Edinburgh EH1 1RQ

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21 December 2015

SM

Dear Sirs

Fees of Blackwater Law in the Appeal against Conviction of [redacted]

I refer to the above matter which was heard before the Auditor at the diet on 17 August 2015 and enclose herewith the Auditor's Note and invoice. Please do not hesitate to contact this office should you require any further information.

Yours faithfully,

Sheila Muir

Principal Clerk
Encl.

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs Sheila Muir

NOTE

1. In the opinion of the Auditor, when a solicitor is considering an appeal, he ought reasonably to have an idea of the potential grounds, derived from involvement in the trial proceedings and/or from information obtained after the trial.

2. Having identified potential grounds of appeal, it is then reasonable for the solicitor to consider in detail the relevant papers from the trial proceedings to establish the prospects of success of the potential grounds. What would be considered to be the relevant papers from the trial would depend on the potential grounds of appeal.

3. Having considered the papers before him and the submissions made at the diet of taxation, the Auditor is persuaded that the information presented to Messrs Blackwater Law after the trial led to the identification by them of a large number of potential grounds of appeal and that it was accordingly reasonable, in order to establish the prospects of success of those potential grounds, for them to consider all the papers from the trial proceedings.

TAX-48

AUDITOR OF THE COURT OF SESSION

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RECEIVED
24 JUL 2015

NOTICE OF DIET OF TAXATION

TO: SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

Date: 23 July 2015 Our Ref: 64709 Your Ref: 3940256613

Case: [redacted]
SLAB DISPUTE

A diet of taxation in this case will take place in the Auditor's Chambers, 120 The Cowgate, Edinburgh, EH1 1JN.

On: 17 August 2015 at 2.00 p.m.

Any queries with regard to this taxation should be made to Mrs. Wilcher.

Sheila Muir (Mrs)
Principal Clerk

Intimation of the diet of taxation is being made to:

SCOTTISH LEGAL AID BOARD: BLACKWATER LAW LTD

1. Intimation of Diet
Intimation of the above diet is being given by the Auditor to the Solicitors, who appear, from the Court Process, to be representing the paying party, which failing to the paying party. If the party presenting the Account knows of any change in representation or change of address of the paying party, the Auditor's Office should be informed of that immediately. The Solicitors presenting the Account should also take appropriate steps to inform the paying party of the date, time and place of the diet of taxation. If the Auditor is not satisfied with the steps taken to give intimation of the diet, he may adjourn the taxation to another date.

2. Objection to Account
If the party from whom payment is sought wishes to object to any items in the Account that party is required to lodge a written note of the specific points of objection and to intimate the note to the party presenting the Account NOT LATER THAN 4.00 PM ON THE FOURTH BUSINESS DAY BEFORE THE DIET OF TAXATION [R.C. 42.2.1A], and is also required to attend or be represented at the diet to speak in support of the objections.

PLEASE NOTE THAT NO FURTHER REMINDER REGARDING NOTE 2 WILL BE ISSUED FROM THIS OFFICE.

3. Withdrawal of Account
Should the party who has presented the Account no longer require it to be taxed, that party must notify the Auditor forthwith to that effect.

SOLICITOR REFERRAL - DIET OF TAXATION

Assisted Persons Name : [redacted]

LA Reference : 3940256613

Solicitor's Name : Blackwater Law (formerly Mann & Co.)

Date & Location of taxation: 17 August 2015, Court of Session at 2.00pm

Type of Case : Criminal Legal Aid (Appeal against Conviction)

1. Nature of the case:

Background

[redacted] was convicted of murder after trial at the High Court of Justiciary in Edinburgh. The final determination of those proceedings was 3 June 2013. He was sentenced to life imprisonment with a punishment part of 18 Years.

The agents did not act in the first instance proceedings, at that time the client was represented by Ian McCarry, Solicitors.

Full legal aid for the appeal proceedings was granted 3 July 2013, Ian McCarry were initially instructed to act in the appeal proceedings.

A transfer request was received 12 July 2013 from Blackwater Law in the following terms: At the time of the transfer request, the incoming agents advised us of the following:

"The client did attempt to instruct this firm during the original case but we chose not to do it at this time as there was (sic) ***no obvious advantages in the client doing so. He has instructed separate representation from those currently instructed. In the course of the appeal proceedings matters may be compromised if they continue to act due to the fact that they handled original proceedings. The client no longer wishes them to act and has instructed this firm".***

The certificate was subsequently transferred 18 July 2013, to Graham Mann of Blackwater Law.

Basis of appeal

Miller's only ground of appeal was founded upon the ***"no reasonable jury"*** point (s.106(3)(b) of the Criminal Procedure (Scotland) Act 1995) in that a principle source of evidence came from the witness Dominic Long who, it was submitted, may have misunderstood the terms of a conversation between himself and the appellant.

The appellant argued that in the course of his conversation with Long he had simply reported what the police had alleged against him as opposed to "*bragging*" about what he had done to the victim. He suggested that the misunderstanding on the part of Long was as a consequence of his ADHD and use of valium.

The appeal court **refused** the appeal (29 October 2014), ruling *inter alia* at [10] that the ***"...jury is entitled to accept parts of a witness's evidence and reject other parts and issues of credibility and reliability are normally matters entirely for a jury's assessment...there was clearly a satisfactory base line of evidence which would properly entitle the jury to carry out their task. This is fundamentally a circumstantial case where the various pieces of evidence, if accepted and viewed as a whole, entitled the jury to be satisfied beyond reasonable doubt that the appellant was guilty as libelled. The appeals will therefore be refused"*** **(see APPENDIX 1).**

2. Nature of dispute:

Blackwater Law's account was received 23 February 2015 **(see APPENDIX 2).** The sums sought totalled **£11,294.16** (ex VAT). Of that figure, **£9342.74** relate to fees.

The majority of the fee element, **£7196.56** (142 hours of qualified time, 77% of the fee claimed) relates to time engaged perusing material relevant to and originating from the original trial proceedings.

No offer of payment has such been made to date. Given our concerns, a payment was made, and intimated to the agents 24 April 2015, of £3131.80 fees and £1944.55 outlays.

We are not of the view that it has been demonstrated the fees sought in respect of perusal time, in line with regulation 7 of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989, reflect ***"...reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy"***. While it is not necessarily disputed that the work was *actually done*, and the file notes provided by the agents would appear to reasonably support that, we question whether the work was *reasonably undertaken*.

The matter ultimately heard before the appeal court was singular i.e. the ***"no reasonable jury"*** ground. However, at the stage leave to appeal was sought (26 September 2013), it was on the basis of 3 grounds of appeal, the ***"no reasonable jury"*** ground (ground 1, see above), a ***"misdirection of jury"*** ground, made up of grounds 2a and 2b and a ***"fresh evidence"*** ground (ground

3) **(see APPENDIX 3)**. Ground 2a was based on the failure of the trial judge to adequately direct the jury as to how the evidence of two witnesses should be considered. Ground 2b was based on there being an insufficient adjournment to allow the appellant to properly prepare his defence in respect of these witnesses. Ground 3 was based on the work of the ***"review group"***, a collection of individuals from the Lewis community who were convinced that both accused were innocent of the offence. However, prior to the decision of the sift, the 3rd ground was not insisted upon by the appellant. Reference is also made at this stage to the fee note from Paul Brown, Advocate (M440/MI140191/2) where he makes reference, in the context of a consultation with the client 14 April 2014 to the effect that the ***"...review group material...does not constitute real evidence and is in the nature of speculation hearsay and conjecture..."*** **(see APPENDIX 4).**

It would appear from both the account and from consideration of the agent's file that while there were no particularly obvious or clear grounds of appeal from the outset, there are indications from the earliest of the file notes that at the very least there was a "germ" of an idea that any appeal would be concerned with the evidence of [redacted] Ultimately the grounds that were lodged were indeed restricted to that.

Bearing in mind the guidance now provided in respect of appeal proceedings, it is fair to say that this would in all likelihood be a case where the more appropriate cover for the majority of the work in dispute would be under A&A, certainly if it was the case that there were no clear grounds identified at the outset. That would suggest that much of the perusal undertaken could perhaps be described as a "fishing exercise". However, if it was the case that there was a particular focus on the evidence of certain witnesses, then this begs the question why was it necessary to consider *all* the first instance papers? I would suggest that because the solicitor was not involved in the trial proceedings he perhaps felt compelled to consider all the trial material. In fact, Mr Mann confirms as much in his letter of 26 May 2015, page 5, when he states that ***"once the papers were available it was incumbent on me as the last line of this young man's defence to consider every piece of evidence, every statement, and every witness in the event that there existed evidence supporting a miscarriage of justice"***: He also suggests (page 6) that ***"...it is essential that you view the case as a whole at the start..."*** and ***"...you must as a solicitor engage with the case and the evidence, before restricting your focus to what is left in the end as viable before the appeal court..."*** **(See APPENDIX 5).**

Our response to this position has been to the effect that while it is not disputed that the perusals were undertaken and were done so with the right reasons in mind, it would appear that the majority of work in question ought to have been done so under cover of A&A, subject to increases. As indicated above, there

being a focus from the outset as to the basis for any appeal being restricted to a narrow basis, why was it necessary to consider all material. Reference is also made to Claire Mitchell's opinion of 22 June **(see APPENDIX 6)** which makes the observation at the outset that ***"despite there being a large number of folders in relation to the case, these related to statements taken, rather than the evidence at trial"***. This suggests, it could be argued, that leading counsel herself was of the view that the relevant paperwork requiring consideration was in respect of evidence heard at trial as opposed to disclosure etc. In terms of the assessment of the account, no issue has been taken with the consideration of evidence from the trial proceedings.

Chronology of appeal

28 August 2013 - Application for extension of time lodged.

26 September 2013 - Note of appeal lodged 26 September 2013, 3 grounds of appeal.

> *(There was a delay in the report from the trial judge becoming available. This led to the Edinburgh agents writing to the Deputy Principal Clerk of Justiciary on 7 February 2014 enquiring if he would be prepared to send papers to sift without judge's report).*

7 March 2014 - Judge's report becomes available **(see APPENDIX 7)**, papers sent to sift.

13 May 2014 - Leave to appeal partially granted in respect of grounds 1 and 2a. only, the 3rd ground having been dropped (see Paul Nelson's fee note referred to above).

23 October 2014 - Opinion of Claire Mitchell, Advocate to the effect that ground of appeal 2b is not arguable (*this is presumably a typo and should refer to 2a, 2b having failed to pass the sift - 13 May 2014*).

29 October - Judgement of court - appeal refused.

3. Similar Taxations

N/A

4. Appendices

1. Court judgement
2. Agent's account
3. Note of appeal
4. Paul Brown Advocate's fee note

5. Blackwater Law's letter of 26 May 2015 and our letter if 19 May 2015.
6. Claire Mitchell's opinion of 22 June 2014
7. Lord Kinclaven's report

Referred by: [redacted] **Date: 28.07.2015.**

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

for

THE SCOTTISH LEGAL AID BOARD

in the case of

[redacted]
3940256613

regarding the fees of

Graham Mann, Solicitor

Assisted Persons Name : [redacted]

LA Reference : 3940256613

Solicitor's Name : Blackwater Law (formerly Mann & Co.)

Date & Location of taxation: 17 August 2015, Court of Session at 2.00pm

Type of Case : Criminal Legal Aid (Appeal against Conviction)

1. Nature of the case:

Background

[redacted] was convicted of murder after trial at the High Court of Justiciary in Edinburgh. The final determination of those proceedings was 3 June 2013. He was sentenced to life imprisonment with a punishment part of 18 Years.

The solicitor did not act in the first instance proceedings. At that time the client was represented by Ian McCarry, Solicitors. The Judge's report states that [redacted] was represented at trial by Ms. Frances McMenamin, Q.C. and by Mr. Michael Meehan".

Legal aid for the appeal proceedings was granted 3 July 2013, Ian McCarry were initially instructed to act in the appeal proceedings.

A transfer request was received 12 July 2013 from Blackwater Law. The certificate was transferred on 18 July 2013 to Graham Mann of Blackwater Law.

Basis of appeal

The only ground that proceeded to appeal was founded upon section106(3)(b) of the Criminal Procedure (Scotland) Act 1995 (the "no reasonable jury" point) in that a principal source of evidence came from the witness Dominic Long who, it was submitted, may have misunderstood the terms of a conversation between himself and the appellant.

Section 109(3)(b) states:

3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—

...(b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.

The appellant argued that in the course of his conversation with Long he had simply reported what the police had alleged against him as opposed to "*bragging*" about what he had done to the victim. He suggested that the misunderstanding on the part of Long was as a consequence of his ADHD and use of valium.

The appeal court **refused** the appeal on29 October 2014, ruling *inter alia* at paragraph [10] that the "*...jury is entitled to accept parts of a witness's evidence and reject other parts and issues of credibility and reliability are normally matters entirely for a jury's assessment...there was clearly a satisfactory base line of evidence which would properly entitle the jury to carry out their task. This is fundamentally a circumstantial case where the various pieces of evidence, if accepted and viewed as a whole, entitled the jury to be satisfied beyond reasonable doubt that the appellant was guilty as libelled. The appeals will therefore be refused*" (see APPENDIX 1).

2. Nature of dispute:

Blackwater Law's account was received by us on 23 February 2015 (see APPENDIX 2). The sums sought totalled **£11,294.16** (ex VAT). Of that figure, **£9342.74** relate to fees.

The majority of the fee element, **£7196.56** (142 hours of qualified time, 77% of the fee claimed) relates to time engaged perusing material relevant to and originating from the original trial proceedings.

Regulation 7(1) of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989 state:

"Fees allowable to solicitors:

7. (1) Subject to the provisions of regulations 4, 5, 6 and 9, a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy. The fees allowed shall be calculated in accordance with Schedule 1."

We do not consider that it has been demonstrated that the fees sought in respect of perusal time, substantially in respect of perusal of all the statements and productions relating to the proceedings at first instance, reflect "*...remuneration for work actually and reasonably done,...due regard being had to economy*". Whilst the work may have actually *been done*, and file notes have been provided by the agents to support that, we question whether the work was reasonably done, on the information before us.

Given our concerns, a payment on offer was made and intimated to the agents on 24 April 2015, in the sum of £3131.80 fees and £1944.55 outlays. No offer has been made in respect of the abated perusal charges.

As indicated, the matter ultimately heard before the appeal court was singular i.e. the "*no reasonable jury*" ground. However, at the stage leave to appeal was sought (on 26 September 2013), it was on the basis of 3 grounds of appeal: the "*no reasonable jury*" ground (ground 1, see above), a "*misdirection of jury*" ground, made up of grounds 2a and 2b, and a "*fresh evidence*" ground (ground 3) (see APPENDIX 3). Ground 2a was based on the failure of the trial judge to adequately direct the jury as to how the evidence of two witnesses should be considered. Ground 2b was based on there being an insufficient adjournment to allow the appellant to properly prepare his defence in respect of these witnesses. Ground 2b did not pass the sift process. Ground 2a did not proceed on the advice of counsel. Ground 3 was based on the work of the "*review group*", a collection of individuals from the Lewis community who were convinced that both accused were

innocent of the offence. However, prior to the outcome of the sift process, the third ground was not insisted upon by the appellant.

It would appear from both the account and from consideration of the agent's file that whilst there were no particularly obvious or clear grounds of appeal from the outset, there are indications from the earliest of the file notes that at least there was a "germ" of an idea that any appeal would be concerned with the evidence of [redacted] Ultimately the Grounds that were lodged were indeed restricted to these issues.

If it was the case that there was a particular focus on the evidence of certain witnesses, then it remains unclear as to why it was thought necessary to consider *all* the first instance papers? Mr. Mann, in a letter of 26 May 2015, at page 5, states that *"once the papers were available it was incumbent on me as the last line of this young man's defence to consider every piece of evidence, every statement, and every witness in the event that there existed evidence supporting a miscarriage of justice"*. He also states (at page 6) that *"...it is essential that you view the case as a whole at the start..."* and *"...you must as a solicitor engage with the case and the evidence, before restricting your focus to what is left in the end as viable before the appeal court..."*.

A fee note from Paul Brown, Advocate (M440/MI140191/2), in connection with the matter states, in the context of a consultation with the client 14 April 2014, that the *"...review group material...does not constitute real evidence and is in the nature of speculation hearsay and conjecture..."*.
Also, reference is made to the Opinion of Claire Mitchell, advocate of 22 June (see APPENDIX 4) which makes the observation at the outset that *"despite there being a large number of folders in relation to the case, these related to statements taken, rather than the evidence at trial"*. This suggests that counsel was of the view that the relevant paperwork requiring consideration in connection with an appeal was in respect of evidence heard at trial, as opposed to disclosure etc.

In terms of the assessment of the account, no issue has been taken with the consideration of evidence from the trial proceedings.

<u>*Chronology of appeal*</u>

28 August 2013 - Application for extension of time lodged.

26 September 2013 - Note of appeal lodged 26 September 2013. There were three grounds of appeal.

(There was a delay in the report from the trial judge becoming available. This led to the Edinburgh agents writing to the Deputy Principal Clerk of Justiciary on 7 February 2014 enquiring if he would be prepared to send papers to sift without judge's report).

7 March 2014 - Judge's report becomes available (see APPENDIX 5), papers sent to sift.

13 May 2014 - Leave to appeal partially granted in respect of grounds 1 and 2a only, the 3rd ground having been dropped (see Paul Nelson's fee note referred to above).

23 October 2014 - Opinion of Claire Mitchell, Advocate to the effect that ground of appeal 2b is not arguable (*this is presumably a typographical error and should, we believe, refer to "2a", 2b having failed to pass the sift process - 13 May 2014*).

29 October - Judgement of Court - appeal refused.

4. Appendices

1. Court judgement;
2. Agent's account as assessed;
3. Note of appeal;
4 Claire Mitchell's Opinion of 22 June 2014
5 Lord Kinclaven's report

IN RESPECT WHEREOF

[redacted]

Solicitor
Scottish Legal Aid Board
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Solicitor for the Scottish Legal Aid Board

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Blackwater Law
Solicitors
LP 23
GLASGOW - 1

Your Ref:

Our Ref: JDH/cs
Please quote the department above an our reference

3 March 2016

Dear Sirs

NOTE OF OBJECTIONS: HMA -v- [redacted]
MISCELLANEOUS APPLICATION: 1/2016

I refer to previous correspondence and to my telephone conversation with Celia to the effect that the Board is not proceeding with this Note of Objections.

The outstanding balance on this legal aid account has been passed for payment.

In your letter of 23 December 2015, you seek confirmation that the Board will be responsible for your fee of £150 plus VAT for preparation and attendance at the diet of taxation. I am unable to give you that confirmation in that, from my recollection, no motion was made for the expenses of preparation and attendance at the diet. Even if my recollection is incorrect, no award has been made by the Auditor in his Note.

[redacted]

Head of Legal Services - Technical & Criminal