DECISION OF AUDITOR – COUNSELS' FEES – CRIMINAL

DATE OF DECISION	09.05.97 P K
NAME OF CASE	HMA –V- [redacted]
CASE TYPE	Drugs Trial – High Court, Aberdeen
AUDITOR	J Haldane Tait, Court of Session
COUNSEL/SOLICITOR ADVOCATE	SC and JC
AMOUNT(S) AWARDED	£150 for 13.01.94 (SC) Preliminary Diet £450 for 20.01.94 (SC) Hearing seeking Letter of Request £850 per day (SC) Conduct of trial – subsuming all preparation £100 for 13.01.94 (JC) Preliminary Diet £300 for 20.01.94 (JC) Hearing seeking Letter of Request £500 per day (JC) Conduct of trial – subsuming all preparation
FEATURES	Trial commenced on 21.01.94 and lasted 11 days. Trial concluded on 07.02.94. Two separate reports have been issued by the Auditor, both on 09.05.97, in respect of SC and JC. The accused was a Belgium national who spoke little English. The Defence required to obtain full information regarding the accused's financial situation and the history of his involvement with the ship carrying the drugs. Frequent and regular contact with instructing solicitors in Aberdeen was required throughout the day and evenings. Many telephone calls occurred but this reduced the number of visits to Aberdeen. A unique case with many complex aspects. The case involved a substantial quantity of prohibited drugs with a very high street value. A conviction would have given rise to a very lengthy period of imprisonment. Special defence of incrimination was lodged. 100 prosecution witnesses, 14 defence witness.

FEATURES	Auditor identified added responsibility in view of the need to use an interpreter and translator in the preparation and conduct of the defence. Auditor notes that SC was engaged over a longer period of time in the preparation of the defence than was his JC. Auditor allowed increased trial rate fee to include preparation and no separate preparation fees were awarded. JC was instructed 3 weeks prior to the trial commencement date.

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
DOCUMENT EXCHANGE ED. 304
Tel. 0131 225 2595 Extn 309 6789
Fax 0131 220 0137

9th May 1997

Date and Tax Point

VAT Reg. No. 553 7981 04

VAT Invoice No. 14468

The Scottish Legal Aid Board
DX ED250

HMA v [redacted]
Taxation of Keith Stewart, Advocate's Fee
LA Ref No 83.210.0787293

The Auditor's Fee herein is £ 350.00

VAT thereon @ 17½ % 61.25

£411.25

The papers submitted are returned herewith ☐
by Document Exchange ☐
by post ☐

The papers submitted await collection from Room 111, Door 2, Parliament House.
Please return fee note with cheque.

The Auditor J. Haldane Tait, S.S.C.
Principal Clerk Mrs Janet P. Buck

AUDITOR OF THE COURT OF SESSION

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Fax 0131 220 0137

NOTE

re

FEES for KEITH D STEWART, Advocate

in

H M ADVOCATE v [redacted]

EDINBURGH. 9th May 1997

The Auditor has been requested, in terms of paragraph 3 of Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, as amended, to increase the fees set out in the Table of Fees contained in the Schedule ('the prescribed fees'), payable to Mr Keith D Stewart, Junior Counsel for [redacted] to provide reasonable remuneration for Counsel in preparing for and assisting in the conduct of [redacted] defence to an Indictment against him alleging that:

(1) between 20 September 1993 and 6 October 1993 on the ship known as "Ambrosia", registered in London, Great Britain in 1992, then on a voyage on the High Seas between Vilamoura, Portugal and a point 65.6 statute miles from Buchan Ness Light, Peterhead, on said ship then run aground at Scotstown Beach, St Fergus, at the Seaview Hotel, Boddam, on said ship elsewhere on the High Seas and at Morocco and Belgium he was concerned in the supplying of a controlled drug, namely Cannabis Resin.

(2) between 2 October 1993 and 6 October 1993 (i) on the Ambrosia he did have in his possession a controlled drug, namely Cannabis Resin, with intent to supply it to others and (ii) you did have in your possession a controlled drug, namely Cannabis Resin

and

(3) on 5 October 1993 and 6 October 1993 on the Ambrosia was knowingly concerned in the attempted fraudulent evasion of the prohibition in force with respect to the importation of Cannabis Resin.

The Scottish Legal Aid Board ('the Board') was represented at the diet of taxation by [redacted] Mr Stewart, Advocate, appeared personally.

Taxation had been necessary because, as the Board had been unable to agree the fees for Leading Counsel in the trial and these having been submitted to the Auditor for taxation, he was requested to allow appropriate fees for Junior Counsel having regard to the fees to be allowed to Leading Counsel.

The fees claimed by Junior Counsel are set out in the three Fee Notes as shown in the Schedule annexed hereto.

As both Leading and Junior Counsel sought fees greater than the prescribed fees, and fees for work for which there is no prescribed fee, it consequently fell to them to justify the fees claimed.

Before increasing a prescribed fee, the Auditor requires to be satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances of the case, such an increase is necessary to provide reasonable remuneration for the work done.

Where no fee is prescribed for an item of work the Auditor requires to be satisfied that a fee for such work is reasonable.

Both Counsel submitted that these various factors were present in this case.

BACKGROUND

The Panel, aged 34 years, who had captained the "Ambrosia" at the time of the alleged crimes, was a Belgian National who spoke little English. The yacht had run aground near Peterhead, and its cargo of controlled drugs had been washed ashore. The drugs were collected by H M Customs and Excise who interrogated the Panel who was alleged to have made a series of incriminating statements. These statement were seriously disputed having regard to the Panel's lack of comprehension of the questions asked of him.

The "Ambrosia" was found to have a tainted history. It had been known at one time as the "Nemo V", registered in Germany. A Company, Dime Properties Ltd, registered in Jersey, had bought her and had her re-registered in the United Kingdom but, as there was already a "Nemo V" on the British Register, she had to be renamed and was registered as "Nemo of Genoa". She required extensive repairs and these were carried out at a boatyard at Ipswich by a firm in which a Jonathan Pack had an interest. Repairs and alterations were carried out there including the fitting of a watertight, explosion-resisting, compartment for the containing of compressed air for diving purposes.

On completion of that work Jonathan Pack chartered the yacht and sailed her into the Mediterranean, where he received a cargo which was placed in the watertight compartment which was then closed and concreted over by [redacted] who was alone on the boat when all this was done.

The yacht required to put into an Italian port and was almost immediately boarded and extensively searched by Customs officials but no contraband was found. She sailed on but out of necessity had to sail into another Italian port where a further search was made resulting in the exposure of the drugs leading to [redacted] subsequent conviction and sentencing in Italy to three years' imprisonment in 1992.

The Panel held a Master's ticket but had given up sea-going for health reasons and was, shortly before the events leading to his prosecution, running a restaurant and public house which he owned.

In June 1993 he was approached by a [redacted] to sail the "Ambrosia" from Italy to the Netherlands along with him and another as crew. The Panel sailed the yacht to Dordrecht for the fitting of a new engine. Some weeks later he was engaged to sail the yacht to Vilamoura, Portugal, where [redacted] had chartered her to divers. The divers, however, were not there on the yacht's arrival and the Panel flew home. Shortly thereafter the Panel was asked to sail "Ambrosia" from Vilamoura to Oslo. He reluctantly agreed to do so as it was now the month of October when weather at sea was often bad. The weather, in fact, was so severe that the yacht was seriously damaged and, as it appeared to be in danger of foundering, it was to be abandoned. The Panel, Mr Everaert and the other crew member were taken off by helicopter, landed in Aberdeen and after a few days returned home to Belgium.

The Panel subsequently learned that the yacht had beached at Peterhead. He returned there to see if it could be salvaged. A few days after his return he was interrogated by officers of H M Customs and Excise and the Police and subsequently charged with the offences referred to in the Indictment.

The Panel's defence was one of total ignorance of the presence of drugs on board the yacht and, in that regard, he sought to establish that his whole actings were consistent with such ignorance and that statements alleged to have been made by him to the authorities were inaccurate by reason both of his misunderstanding as to the questions being put to him, English not being his native language, and the mis-interpretation of his answers by those taking the statements.

Fortuitously [redacted] who had meantime returned to live in England, telephoned [redacted] in Belgium to inform him of his liberation. In the

course of that conversation [redacted] mentioned that he had seen some reference in the Press to the "Ambrosia" and it's Captain being charged in connection with drugs and learned of the fate of the yacht. As [redacted] very much doubted that the Panel would have had any knowledge of "the secret compartment" far less that there were drugs on board, he contacted the Panel's solicitors and gave a very full statement to them. He explained that shippers of drugs worked on a "need to know" basis and that the drugs were usually put on board in the absence of Master and crew, those directly interested in the drugs taking great care to conceal their identity by a series of intermediaries. If the Master and/or crew knew of the presence of drugs on board and the size and quality of the cargo there would be a serious risk of it being re-directed to another port to the benefit of the Master and crew.

[redacted] further considered that it would be inconceivable for a Master to abandon ship in the knowledge that drugs were on board with any likelihood of these being discovered. He would either scuttle the ship or torch it just before being taken off, thereby destroying all harmful evidence. That he would leave the safety of his home country and return to the beached ship knowing that it contained drugs would likewise be incredible.

The Defence required the obtaining of the fullest information as to the Panel's financial independence and his involvement with the "Ambrosia" at any time, including information about the owners, and charterers, of the yacht and who was responsible for its ultimate destination.

The defence necessitated ascertaining the various ports of call of the yacht prior to her beaching.

Junior Counsel was first instructed in the defence in January 1994 some three weeks before the trial was due to commence in the High Court in Aberdeen.

In Counsel's submission, the case was unique and had many complex and difficult aspects. The case related to a very substantial quantity of prohibited drugs, having a very high street value, and on conviction would have resulted in a very lengthy period of imprisonment. Counsel submitted that the fees claimed both for preparation and assisting in the conduct of [redacted] defence were reasonable.

The Crown evidence, so far as depending on alleged incriminating statements made by the Panel had to be subjected to critical cross-examination, particularly as to whether these had been taken fairly and were truly voluntary statements. The Defence sought to show that the Panel had no knowledge that any contraband cargo was on board the ship under his command.

A Special Defence of Incrimination was lodged.

The Panel was acquitted.

Following upon two diets of taxation the Auditor read the precognitions, reports and papers made available to him by the Scottish Legal Aid Board, including the instructing solicitors' Legal Aid Account, and papers held by the Justiciary Office, and obtained some clarification from the instructing solicitors. There were some 100 prosecution witnesses and 14 defence witnesses listed, many of the former were precognosed, some of whose evidence was mainly of a formal nature. A number of the prosecution precognitions and all the precognitions of the defence witnesses required very careful consideration. No separate papers were submitted by Counsel.

In considering the proper reasonable fee to be paid to Counsel in any legal-aided defence in a criminal cause, the Auditor has initially to have regard to the relevant prescribed fees but if having regard to any factor which in his opinion makes such a prescribed fee inadequate, then he has to exercise his own

judgement as to what is a reasonable fee. See Geddes v Lothian Health Board 1993 GWD 11-767.

Lord President Cooper in Macnaughton v Macnaughton 1949 S.C. 42, considering what was a "proper fee" of "competent Counsel" for the conduct of a case of known magnitude and difficulty involving a stake of known importance, said (page 46):

> "The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature of the amount of the services given. the first approximation can be found by reference to the current practice of solicitors in instructing Counsel in an average case of the type in question presenting no specialities. But, if the case is abnormal in magnitude or difficulty, or in any other respect, a second approximation must be made to reflect these specialities, and this approximation may yield a substantially higher figure."

The Auditor refers to the annexed Schedule of Counsel's fees and comments on those fees which he has either abated or disallowed, as follows:-

Fee Note No. 8

The Auditor has taxed off two items in respect of advice given on 7th and 11th January, these being considered to form part of the work of general preparation and there being no information to suggest that they required separate consideration.

1994

Jan 13	Attendance at Preliminary Diet, High Court, Edinburgh	£400.00

The date in the Fee Note is erroneous. A diet was held on 11th January when only a Minute by the Crown for authority to destroy real evidence was considered and granted without opposition, and an interpreter was appointed for

the trial.

Counsel was unable to give the Auditor much information regarding this diet and, in the circumstances, the Auditor has allowed a fee of £100.00.

Note: There was a diet assigned for 14th January to consider a Minute of Postponement of Trial prepared by the Panel's agents, who by letter dated 11th January, withdrew it in consequence of an undertaking given by the Crown not to call the Indictment before Monday 24th January. No appearance of Counsel was required.

Fee Note No. 9

Jan 17/18	Drafting and Revising Letter of Request (Lengthy and Difficult)	£200.00

The Auditor has seen and read the proposed Letter of Request contained in the Justiciary Office papers. It follows the customary style and contains 40 questions to be put to the witness, some of these being of a formal nature. The witness, Everaert (mentioned above in **Background**) had crewed the "Ambrosia" (then named "Nemo of Genoa") when it had been the subject of attention by the Italian Customs authorities. The witness was to be asked about his belief as to the Panel being aware of any illegal drugs being carried on the "Ambrosia" while under the latter's charge and as to whether the Panel had said anything subsequently to the witness which might suggest relevant guilty knowledge. Such questions are ones to be expected to be asked of such a witness and in the Auditor's opinion were not unusually complex or difficult ones. The Auditor has allowed a fee of £150.00.

Jan 20	Hearing, High Court, Aberdeen	£500.00

The application for the granting of the Letter of Request after argument was

refused.

The solicitors' Account records an attendance time of 55 minutes, including 10 minutes waiting time.

The Auditor appreciates that such Letters are granted only very exceptionally and that full preparation and presentation would be required of Counsel if there was to be any likelihood of the application being granted. The Auditor, therefore, has allowed a fee of £300.00.

Fee Note No. 10

Daily Trial Fee (Aberdeen) £500 per day

Jan 24/Feb 7 Eleven days trial (difficult and complex).

On 27th January the Crown dropped charges 3 and 4.

Note: The then prescribed daily trial fee for Junior Counsel appearing with Senior Counsel in Aberdeen was £291.00.

Preparation Fee

12 Oct 1993 to 7th Feb 1994 - 20 days charged at £200.00 per day.

Counsel has charged a separate fee for preparation based on a flat rate of £200.00 per day, which is described as *"at the enhanced Edinburgh rate"*, and is for preparation to include weekends, and consultations before and after Court during the trial. The prescribed daily trial fee is regarded as containing an element in respect of preparation. There is no separate prescribed fee for preparation work and, although the Auditor has on occasions allowed such a separate fee at taxation, he more often takes into account any unusually substantial preparation when considering any enhancement of the daily trial fee, particularly in the absence, as in this case, of full details of the preparation work separately charged for. The Auditor has therefore taxed off the separate preparation fee claimed, but being of opinion that the case was of considerable

SCHEDULE of JUNIOR COUNSEL'S FEES

Date	Work	Prescribed Fee	Fee Claimed	Fee Allowed
Fee Note No. 8				
1994				
Jan 7	Consultation between Leading and Junior Counsel re case in general	None	50.00	£ 50.00
	Advising Solicitor re Preliminary Diet	None	50.00	Nil
11	Advising Solicitors re Minute for Postponement	None	50.00	Nil
13	Attendance at Preliminary Diet, High Court, Edinburgh	None	400.00	100.00
Note: Truly 11th				
	Consultation at HMP Craiginches	£203.00	200.00	200.00
14	Consultation in Aberdeen	£203.00	200.00	200.00
Note: Truly 13th and two consultations with solicitors, i.e. prior to and after consultation with Panel - a full day.				
	Examination of labelled productions	None	100.00	100.00
Fee Note No. 9				
Jan 17	Consultation at offices in Aberdeen	£203.00	100.00	100.00
17	to 18/01/94 - Drafting and Revising Letter of Request (Lengthy and Difficult)	None	200.00	150.00
19	Consultations in offices and advising on Transcripts	£203.00	200.00	200.00
20	Hearing in High Court, Aberdeen on Letter of Request and Interrogations (Lengthy, difficult & complex)	None - Trial Fee £291 per day	500.00	300.00
	Consultation with Accused	£203.00	200.00	200.00
Fee Note No. 10				
Jan 24	to 07/02/94 - Eleven days Trial at High Court, Aberdeen (Difficult & complex) - with Leading Counsel	£291.00	500.00 per day	500.00 per day

Date	Work	Prescribed Fee	Fee Claimed	Fee Allowed
12 Oct 1993 (sic) to 07/02/94	- Total preparation Fee to include weekends & consultations before & after Court during the Trial - 20 days charged @ £200 per day, ie *at the enhanced Edinburgh rate* (sic)	None	4000.00	Nil

AUDITOR OF THE COURT OF SESSION

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9th May 1997

Date and Tax Point

VAT Reg. No 553 7981 04

VAT Invoice No. 14467

The Scottish Legal Aid Board
DX ED250

HMA v [redacted]
Taxation of James Reilly, Advocate's Fee (SENIOR)
LA Ref No 83.210.0787293

The Auditor's Fee herein is £350.00

VAT thereon @ 17½ % 61.25

£411.25

The papers submitted are returned

herewith ☐
by Document Exchange ☐
by post ☐
☐

The papers submitted await collection from Room J11, Door 2, Parliament House.
Please return fee note with cheque.

The Auditor J. Haldane Tait, S.S.C.
Principal Clerk Mrs Janet P. Buck

AUDITOR OF THE COURT OF SESSION

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NOTE

re

FEES for JAMES REILLY, Advocate

in P K

H M ADVOCATE v [redacted]

EDINBURGH. 9th May 1997

The Auditor has been requested, in terms of paragraph 3 of Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, as amended, to increase the fees set out in the Table of Fees contained in the Schedule (the prescribed fees), payable to Mr James Reilly, Leading Counsel for [redacted] to provide reasonable remuneration for Counsel in preparing for and conducting [redacted] defence to an Indictment against him alleging that:

(1) between 20 September 1993 and 6 October 1993 on the ship known as "Ambrosia", registered in London, Great Britain in 1992, then on a voyage on the High Seas between Vilamoura, Portugal and a point 65.6 statute miles from Buchan Ness Light, Peterhead, on said ship then run aground at Scotstown Beach, St Fergus, at the Seaview Hotel, Boddam, on said ship elsewhere on the High Seas and at Morocco and Belgium he was concerned in the supplying of a controlled drug, namely Cannabis Resin.

(2) between 2 October 1993 and 6 October 1993 (i) on the Ambrosia he did have in his possession a controlled drug, namely Cannabis Resin, with intent to supply it to others and (ii) you did have in your possession a controlled drug, namely Cannabis Resin

and

(3) on 5 October 1993 and 6 October 1993 on the Ambrosia was knowingly concerned in the attempted fraudulent evasion of the prohibition in force with respect to the importation of Cannabis Resin.

The Scottish Legal Aid Board ('the Board') was represented at the diet of taxation by [redacted] Mr Reilly, Advocate, appeared personally.

Taxation had been necessary because the Board had been unable to agree Leading Counsel's fees and, in particular, those relating to a global preparation fee, in addition to a substantially enhanced daily rate in respect of attendance conducting the trial, and for his attendance in Amsterdam with the Panel's solicitor.

The fees claimed by leading Counsel are set out in seven Fee Notes as shown in the Schedule annexed hereto.

As Counsel sought fees greater than the prescribed fees, and fees for work for which there is no prescribed fee, it consequently fell to him to justify the fees claimed.

Before increasing a prescribed fee, the Auditor requires to be satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances of the case, such an increase is necessary to provide reasonable remuneration for the work done.

Where no fee is prescribed for an item of work the Auditor requires to be satisfied that a fee for such work is reasonable.

Counsel submitted that these various factors were present in this case.

BACKGROUND

The Panel, aged 34 years, who had captained the "Ambrosia" at the time of the alleged crimes, was a Belgian National who spoke little English. The yacht had run aground near Peterhead, and its cargo of controlled drugs had been washed ashore. The drugs were collected by H M Customs and Excise who interrogated the Panel who was alleged to have made a series of incriminating statements. These statement were seriously disputed having regard to the Panel's lack of comprehension of the questions asked of him.

The "Ambrosia" was found to have a tainted history. It had been known at one time as the "Nemo V", registered in Germany. A Company, Dime Properties Ltd, registered in Jersey, had bought her and had her re-registered in the United Kingdom but, as there was already a "Nemo V" on the British Register, she had to be renamed and was registered as "Nemo of Genoa". She required extensive repairs and these were carried out at a boatyard at Ipswich by a firm in which a [redacted] had an interest. Repairs and alterations were carried out there including the fitting of a watertight, explosion-resisting, compartment for the containing of compressed air for diving purposes.

On completion of that work [redacted] chartered the yacht and sailed her into the Mediterranean, where he received a cargo which was placed in the watertight compartment which was then closed and concreted over by [redacted], who was alone on the boat when all this was done.

The yacht required to put into an Italian port and was almost immediately boarded and extensively searched by Customs officials but no contraband was found. She sailed on but out of necessity had to sail into another Italian port where a further search was made resulting in the exposure of the drugs leading to [redacted] subsequent conviction and sentencing in Italy to three years' imprisonment in 1992.

The Panel held a Master's ticket but had given up sea-going for health reasons and was, shortly before the events leading to his prosecution, running a restaurant and public house which he owned.

In June 1993 he was approached by a [redacted] to sail the "Ambrosia" from Italy to the Netherlands along with him and another as crew. The Panel sailed the yacht to Dordrecht for the fitting of a new engine. Some weeks later he was engaged to sail the yacht to Vilamoura, Portugal, where [redacted] had chartered her to divers. The divers, however, were not there on the yacht's arrival and the Panel flew home. Shortly thereafter the Panel was asked to sail "Ambrosia" from Vilamoura to Oslo. He reluctantly agreed to do so as it was now the month of October when weather at sea was often bad. The weather, in fact, was so severe that the yacht was seriously damaged and, as it appeared to be in danger of foundering, it was to be abandoned. The Panel, [redacted]nd the other crew member were taken off by helicopter, landed in Aberdeen and after a few days returned home to Belgium.

The Panel subsequently learned that the yacht had beached at Peterhead. He returned there to see if it could be salvaged. A few days after his return he was interrogated by officers of H M Customs and Excise and the Police and subsequently charged with the offences referred to in the Indictment.

The Panel's defence was one of total ignorance of the presence of drugs on board the yacht and, in that regard, he sought to establish that his whole actings were consistent with such ignorance and that statements alleged to have been made by him to the authorities were inaccurate by reason both of his misunderstanding as to the questions being put to him, English not being his native language, and the mis-interpretation of his answers by those taking the statements.

Fortuitously [redacted] who had meantime returned to live in England,

telephoned [redacted] in Belgium to inform him of his liberation. In the course of that conversation [redacted] mentioned that he had seen some reference in the Press to the "Ambrosia" and it's Captain being charged in connection with drugs and learned of the fate of the yacht. As [redacted] very much doubted that the Panel would have had any knowledge of "the secret compartment" far less that there were drugs on board, he contacted the Panel's solicitors and gave a very full statement to them. He explained that shippers of drugs worked on a "need to know" basis and that the drugs were usually put on board in the absence of Master and crew, those directly interested in the drugs taking great care to conceal their identity by a series of intermediaries. If the Master and/or crew knew of the presence of drugs on board and the size and quality of the cargo there would be a serious risk of it being re-directed to another port to the benefit of the Master and crew.

[redacted] further considered that it would be inconceivable for a Master to abandon ship in the knowledge that drugs were on board with any likelihood of these being discovered. He would either scuttle the ship or torch it just before being taken off, thereby destroying all harmful evidence. That he would leave the safety of his home country and return to the beached ship knowing that it contained drugs would likewise be incredible.

The Defence required the obtaining of the fullest information as to the Panel's financial independence and his involvement with the "Ambrosia" at any time, including information about the owners, and charterers, of the yacht and who was responsible for its ultimate destination.

The defence had necessitated ascertaining the various ports of call of the yacht prior to her beaching.

Counsel informed the Auditor that he found it necessary in the preparation of the defence to have frequent and regular contact with the instructing solicitors

and others both during the day and in the evenings, which resulted in many telephone calls being made, but that this had reduced the necessity of more visits to Aberdeen.

In Counsel's submission, the case was unique and had many complex and difficult aspects. The case related to a very substantial quantity of prohibited drugs, having a very high street value, and on conviction would have resulted in a very lengthy period of imprisonment.

The Crown evidence, so far as depending on alleged incriminating statements made by the Panel had to be subjected to critical cross-examination, particularly as to whether these had been taken fairly and were truly voluntary statements. The Defence sought to show that the Panel had no knowledge that any contraband cargo was on board the ship under his command.

A Special Defence of Incrimination was lodged.

The Panel was acquitted.

Counsel submitted that the fees claimed both for preparation and the conduct of [redacted] defence were reasonable.

The Scottish Legal Aid Board submitted that, as they had sanctioned the engagement of a Junior Counsel to assist [redacted] in the conduct of the defence of an acknowledged difficult and serious case, no substantial enhancement of [redacted] daily trial fee was merited.

Following upon two diets of taxation the Auditor read the precognitions, reports and papers made available to him by the Scottish Legal Aid Board, including the instructing solicitors' Legal Aid Account, and papers held by the Justiciary Office,

and obtained some clarification from the instructing solicitors. There were some 100 prosecution witnesses and 14 defence witnesses listed, many of the former were precognosed, some of whose evidence was mainly of a formal nature. A number of the prosecution precognitions and all the precognitions of the defence witnesses required very careful consideration. No separate papers were submitted by Counsel.

In considering the proper reasonable fees to be paid to Counsel in any legal-aided defence in a criminal cause, the Auditor has initially to have regard to the relevant prescribed fees but if having regard to any factor which in his opinion makes such a prescribed fee inadequate, then he has to exercise his own judgement as to what is a reasonable fee. See Geddes v Lothian Health Board 1993 GWD 11-767.

Lord President Cooper in Macnaughton v Macnaughton 1949 S.C. 42, considering what was a "proper fee" of "competent Counsel" for the conduct of a case of known magnitude and difficulty involving a stake of known importance, said (page 46):

> "The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature of the amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing Counsel in an average case of the type in question presenting no specialities. But, if the case is abnormal in magnitude or difficulty, or in any other respect, a second approximation must be made to reflect these specialities, and this approximation may yield a substantially higher figure."

The Auditor refers to the annexed Schedule of Counsel's fees and comments on those fees which he has either abated or disallowed, as follows:-

Fee Notes Nos. 1 to 3

Apart from fees for four consultations and a Bail appeal, all of which have been allowed, the remaining charges have been taxed off, being considered to form part of the work of general preparation and there being no information to suggest that they required separate consideration.

Fee Note No 4.

1994

Jan 13	Attendance at Preliminary Diet, High Court, Edinburgh	£600.00

The date in the Fee Note is erroneous. A diet was held on 11th January when only a Minute by the Crown for authority to destroy real evidence was considered and granted without opposition, and an interpreter was appointed for the trial.

Counsel was unable to give the Auditor much information regarding this diet and, in the circumstances, the Auditor has allowed a fee of £150.00.

Note: There was a diet assigned for 14th January to consider a Minute of Postponement of Trial prepared by the Panel's agents, who by letter dated 11th January, withdrew it in consequence of an undertaking given by the Crown not to call the Indictment before Monday 24th January. No appearance of Counsel was required.

Fee Note No. 5

15/16	Attendance in Amsterdam (a) to consult with accused's Belgian attorney, and (b) to advise re precognitions of three defence witnesses.	1,000.00

(a) The personal attendance in Amsterdam of leading Counsel to consult with the accused's Belgian solicitor was not the subject of a prior request to the Scottish Legal Aid Board for sanction of expenditure, which in any circumstances would have been considered by the Board an unusual item of expenditure.

It was explained to the Auditor that the Panel's Belgian attorney was prepared to give the information only direct to the client's Scottish Counsel instructed in his client's defence. What information was imparted is not known to the Auditor, who was informed by Counsel that the nature of it could not be made known to the Auditor. The Auditor is of opinion that the accused's Belgian attorney had a professional obligation to make available for his client's defence all relevant information available and particularly to a solicitor then acting for his client on receiving an appropriate mandate to do so. No mention was made of any such mandate having been obtained.

The Auditor has been shown a copy of a Note, dated 19th October 1994, prepared by leading Counsel in support of the instructing Solicitor's retrospective request to the Scottish Legal Aid Board for sanction of the expense of the visit to Amsterdam. Counsel stated in the Note that he accompanied the solicitor at the latter's request! There is no mention in the Note that Counsel required to attend to receive personally any particular confidential information, but only as to the desirability of his presence to guide the precognoscing solicitor in the precognoscing of important witnesses.

The Auditor, in the absence of any further information to assist him, does not consider that the attendance of Counsel in Amsterdam has been shown to have been reasonably necessary.

(b) So far as the personal availability of Counsel to the precognoscing solicitor while in Amsterdam is concerned, the Auditor notes that such work is

traditionally carried out by the solicitor alone and who, if necessary, would be expected to have obtained from Counsel beforehand a note of the areas of information, if not immediately apparent, in respect of which an important witness should be precognosced, and an experienced solicitor (as was the case here) would be able to deal with any supplementary points arising out of the information obtained in the course of precognoscing a witness. It would be all the more expected of a solicitor, when aware of the difficulties and expense in obtaining a further opportunity to precognosce a witness, to be all-encompassing in his precognoscing, which might thereby take greater time than might ordinarily be expected in more favourable circumstances.

It is noted that the Panel's solicitor visited London a few days prior to the commencement of the Trial, to precognosce a key witness there, without the need to have Counsel in attendance.

The Auditor has not been persuaded that the attendance of Counsel "in the wings" during the precognoscing exercise is a reasonable and proper expense.

For the foregoing reasons the Auditor has taxed off the Fee.

Fee Note No. 6

Jan 17	Consultation at Offices in Aberdeen	£150.00

Note *As the solicitors' Account records the attendance of only Junior Counsel, the Auditor has disallowed this fee which appears to have been erroneously charged.*

Jan 17/18	Drafting and Revising Letter of Request (Lengthy and Difficult)	£300.00

The Auditor has seen and read the proposed Letter of Request contained in the Justiciary Office papers. It follows the customary style and contains 40 questions to be put to the witness, some of these being of a formal nature. The witness, Everaert (mentioned above in **Background**) had crewed the "Ambrosia" (then named "Nemo of Genoa") when it had been the subject of attention by the Italian Customs authorities. The witness was to be asked about his belief as to the Panel being aware of any illegal drugs being carried on the "Ambrosia" while under the latter's charge and as to whether the Panel had said anything subsequently to the witness which might suggest relevant guilty knowledge. Such questions are ones to be expected to be asked of such a witness and in the Auditor's opinion were not unusually complex or difficult ones. The Auditor has allowed a fee of £200.00.

Jan 20 Hearing, High Court, Aberdeen £750.00

The application for the granting of the Letter of Request after argument was refused.

The solicitors' Account records an attendance time of 55 minutes, including 10 minutes waiting time.

The Auditor appreciates that such Letters are granted only very exceptionally and that full preparation and presentation would be required of Counsel if there was to be any likelihood of the application being granted. The Auditor, therefore, has allowed a fee of £450.00.

Fee Note No. 7

Daily Trial Fee (Aberdeen) £750.00 per day

Jan 24/Feb 7 The trial lasted eleven days.

On 27th January the Crown dropped charges 3 and 4.

Note The then prescribed daily trial fee for a Senior Counsel appearing

with Junior Counsel in Aberdeen was £510.50.

Preparation Fee

12 Oct 1993 to 7th Feb 1994 - 20 days charged at £300.00 per day.

Counsel has charged a separate fee for preparation based on a flat rate of £300 per day, which is described as *"at the enhanced Edinburgh rate"*, and is for preparation to include weekends, and consultations before and after Court during the trial. The prescribed daily trial fee is regarded as containing an element in respect of preparation. There is no separate prescribed fee for preparation work and, although the Auditor has on occasions allowed such a separate fee at taxation, he more often takes into account any unusually substantial preparation when considering any enhancement of the daily trial fee, particularly in the absence, as in this case, of full details of the preparation work separately charged for. The Auditor has therefore taxed off the separate preparation fee claimed, but being of opinion that the case was of considerable complexity and there was an added responsibility on Counsel in view of the need to use an interpreter and translator in the preparation and conduct of the defence he has fixed the daily trial fee, to include all pre-trial preparation (as separately claimed) and on-going preparation and consultations during the trial, and in recognition that Counsel was leading Counsel, at £850.00 per day.

In allowing an enhanced daily trial fee the Auditor has taken account of the fact that leading Counsel was engaged over a longer period of time in the preparation of the Defence than was his Junior.

A Schedule of Counsel's fees as claimed and taxed is annexed hereto.

AUDITOR OF THE COURT OF SESSION

POSTSCRIPT/

POSTSCRIPT

The Auditor has noted that the respective fee notes of Leading and Junior Counsel echo each other, even as to mistaken dates, and, in the case of Junior Counsel, his identical number of preparation days to Leading Counsel included erroneously a period prior to his first being instructed in the case.

Annexation: /

SCHEDULE of LEADING COUNSEL'S FEES

Date	Work	Prescribed Fee	Fee Claimed	Fee Allowed
	There is no prescribed fee for Leading Counsel but fee for Senior Counsel is noted.			
Fee Note No. 1				
1993				
Oct 12	Initial consultation with G Wiggins, Solicitor re taking instructions (Aberdeen)	£361.50	£100.00	£100.00
14	Consultation with G Wiggins at Alloa and lengthy telephone call with G Mathers, Solicitor, re Bail Application	£361.50	100.00	100.00
19	Short consultation with Mrs McNeill, Drummond & Co. re Bail Appeal	None	50.00	Nil
20	Telephone consultation with G Mathers re Bail Appeal	None	50.00	Nil
Fee Note No. 2				
Oct 21	Lengthy Bail Appeal	None	50.00	50.00
Nov 8	Telephone consultation with G Mathers	None	50.00	Nil
11	Lengthy consultation at HMP Craiginches, Aberdeen	£361.50	250.00	250.00
Dec 1	Short consultation with G Mathers in Aberdeen	£361.50	100.00	NIl
10	Consultation with B G Douglas Advocate re Bail Review	None	50.00	Nil
16	Telephone consultation with G Mathers	None	50.00	Nil
21	Discussion with Clerk re progress	None	50.00	Nil
Fee Note No. 3				
Dec 24	Discussion with Clerk re progress	None	50.00	Nil

Date	Work	Prescribed Fee	Fee Claimed	Fee Allowed
23	Telephone consultation with G Mathers	None	50.00	Nil
24	Telephone consultation with G Mathers	None	50.00	Nil
30	Lengthy consultation in Aberdeen (half day)	£361.50	300.00	300.00
1994				
Jan 6	Discussion with Clerk re progress	None	50.00	Nil
7	Consultation between Leading and Junior Counsel re case in general	None	75.00	Nil
	Advising solicitors re Preliminary Diet	None	75.00	Nil
Fee Note No. 4				
Jan 10	Telephone consultation with G Mathers	None	50.00	Nil
	Evening telephone consultation with G Mathers	None	50.00	Nil
11	Advising solicitors re Minute for Postponement	None	75.00	Nil
12	Telephone consultations with G Mathers	None	150.00	Nil
	Discussion with Clerk	None	50.00	Nil
13	Attendance at Preliminary Diet - High Court, Edinburgh (25 minutes)	£315 per day	600.00	150.00
Note: Truly 11th				
Fee Note No. 5				
Jan 13	Consultation at HMP Craiginches	£361.50	300.00	300.00
14	Consultation in Aberdeen	£361.50	300.00	300.00
Note: Truly 13th and two consultations with solicitors, i.e. prior to and after consultation with Panel - whole day.				
	Examination of labelled productions (3 hr 20 min)	None	150.00	150.00

Date	Work	Prescribed Fee	Fee Claimed	Fee Allowed
15	to 16/01/94: Attendance in Amsterdam (A) To consult with Accused's Belgian attorney and (B) to advise on precognition of essential witnesses and to discuss their content while the witnesses (E Ghoos, Jacob Meyer & Julian Everaert) were present before they returned to Belgium thus obviating a 2nd trip by solicitors	None	1000.00	Nil
Fee Note No. 6				
Jan 17	Consultation at offices in Aberdeen	£361.50	150.00	Nil
17	to 18/01/94: Drafting and revising letters of request (Lengthy, complex & difficult)	None	300.00	200.00
19	Consultations in offices and advising on transcripts	£361.50	300.00	300.00
20	Hearing in High Court, Aberdeen on letters of request & interrogations (lengthy difficult & complex) (1 hr)	None - Trial Fee £510 per day	750.00	450.00
20	Consultations (sic) with accused	£361.50	300.00	300.00
Fee Note No. 7				
Jan 24	to 07/02/94: 11 days trial at High Court Aberdeen (difficult & complex)	£510.50 per day	750.00 per day	850.00 per day
1993				
Oct 12	to 07/02/94: Total Preparation Fee to include weekends & consultations before and after Court during the trial - 20 days charged at £300.00 per day, *ie at the enhanced Edinburgh rate* (sic)	None	6000.00	Nil

AUDITOR OF THE COURT OF SESSION

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Our ref: 14467/8/JHT
Your ref: JDH/AR

9th May 1997

The Scottish Legal Aid Board
44 Drumsheugh Gardens
EDINBURGH
EH3 7SW
DX ED250

Dear Sirs

P K

H M Advocate v [redacted] (Counsel's Fees)
83/21/307872/93

I refer to your letter of 24th December and would inform you that the Auditor has now completed taxation of Counsel's respective fees herein and a copy of each of the Auditor's Reports are sent herewith together with relative Fee Notes for your attention.

Please arrange to uplift the solicitors' Account and box of papers which were lodged for the taxation.

Yours faithfully

Principal Clerk

Encs