DECISION OF AUDITOR – COUNSELS' FEES – CRIMINAL

DATE OF DECISION	16.07.98 (2nd Report)
NAME OF CASE	HMA –V- [redacted] G
CASE TYPE	Fraud – Sheriff and Jury Trial, Edinburgh Sheriff Court
AUDITOR	Ian Balfour, Edinburgh Sheriff Court
COUNSEL/SOLICITOR ADVOCATE	SC and JC
AMOUNT(S) AWARDED	£785 per day (SC) trial £150 "perusal" charge (SC) £150 and £225 consultation charges (SC) Auditor awards different specific amounts for preparation namely £225, £300 and £392. £500 per day (JC) trial £100 "perusal" charge (JC) £100 consultation charges (JC) Auditor awards different specific amounts for preparation namely £150, £200 and £250.
FEATURES	25 day trial commenced on 06.11.97 after serving fresh indictment – same counsel involved in 1st Report by Auditor on 23.02.98 (refer thereto). Same "complex" factors accepted by the Auditor to be present in this trial as in the original trial detailed in the 1st Report dated 16.07.98 (refer thereto).

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

NOTE

by

JOINT AUDITOR

in Remit by

Messrs. E.G.M. Targowski Q.C. and P.G.L. Hammond, Advocate in terms of Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 11(2).

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1. This taxation arose out of a dispute between the Scottish Legal Aid Board (the "Board") and two Counsel (Messrs. Edward G.M. Targowski Q.C. and Peter G.L. Hammond, Advocate) in relation to fees claimed by Counsel for defending a [redacted] on charges of fraud at Edinburgh Sheriff Court between January and July 1997. The case came before Sheriff and Jury on Indictment on 23th June 1997. After 15 days of Trial, the case was deserted because of a possible threat to a juror. A fresh Indictment was served and the same Counsel conducted a Trial which lasted for 25 days, ending with a Not Proven verdict.

2. The case was complex, and was a test case about the liability of an individual, as opposed to agricultural workers with whom he had a business relationship, for PAYE. The offences were said to have taken place being April 1988 and April 1992. The Board had recognised the importance of the case by sanctioning the employment of both Senior and Junior Counsel.

3. At the taxation on 18th February 1998, the Board were represented by [redacted] Solicitor, and [redacted] Team Leader. Mr. Hammond was present, and both Counsel were represented by [redacted] Law Accountant and [redacted] Only the fees for the first Trial came before me for taxation, although parties expressed the hope that if the principles for that could be established, agreement might

then be possible on the further fees rendered for the second Trial. I have, therefore, endeavoured to set out in some detail my response to the helpful arguments which were submitted to me by both parties.

4. Faculty Services Limited, on behalf of Counsel, issued Notes of Fee which may be summarised as follows. This list is in chronological order - some of the entries on the Notes of Fee are not.

Date 1997	Work done	Mr. Targowski	Mr. Hammond	Paragraph below
Jan 15	Preparation 1	£ 750	-	29
Jan 17	Consultation 1	£ 150	£ 100	30
Mar 21	Consultation 2	£ 300	£ 200	31
"Jan"(Mar)24	Consultation 0	£ 300	£ 200	32
Mar 24	Discussion 1	£ 150	£ 100	24
Apl 16	Attending PF office	£ 300	£ 200	33
Apl 22	Consultation 3	£ 150	£ 100	35
Apl 25	Consultation 4	£ 150	£ 100	36
Apl 25	Discussion 2	£ 300	£ 200	25
May 6	Attending PF office	-	£ 350	34
May 8	Consultation 5	£ 825	£ 550	37
May 9	Consultation 6	£ 300	£ 200	38
May 14	Discussion 3	-	£ 25	39
May 20	Considering docs	£ 150	£ 100	40
May 27	Preparation 2	£ 225	-	29
May 27	Meeting Proc. Fiscal	-	£ 50	40
May 28	Consultation 7	£ 300	£ 200	41
Jun 2	Attending court	-	£ 600	5
Jun 2	Discussion 4	£ 75	£ 50	42
Jun 3	Telephone discussion	-	£ 15	42
Jun 3	Preparation 3	£ -	£ 400	29
Jun 6	Preparation 4	-	£ 800	29
	Sub-total	£ 4,425	£ 4540	

Jun 7	Preparation 5	£ 800	-	29
Jun 9	Meeting Proc. Fiscal	£ 150	£ 100	34
Jun 9	Discussion 5	£ 75	£ 50	23
Jun 9	Preparation 6	-	£ 400	29
Jun 10	Discussion 6	£ 450	£ 300	26
Jun 10	Discussion with agents	-	£ 50	23
Jun 10	Discussion 7	-	£ 10	23
Jun 10	Inspecting productions	-	£ 50	34
Jun 11	Meeting Proc. Fiscal	-	£ 150	34
Jun 11	Preparation 7	£1,200	£ 500	29
Jun 12	Preparation 8	-	£ 800	29
Jun 12	Consultation 8	£ 150	£ 100	44
Jun 13	Preparation 9	£ 600	£ 400	29
Jun 13	Preparation 10 & research	-	£ 300	29
Jun 15	Consultation 9	£ 150	£ 100	46
Jun 16	Attending court	£ 750	£ 500	29
Jun 17	Preparation 11	-	£ 250	29
Jun 18	Preparation 12	£ 600	-	29
Jun 19	Telephone discussion	£ -	£ 25	48
Jun 19	Preparation 13	£ 750	£ 200	29
Jun 20	Telephone discussion	£ 75	£ 50	48
Jun 22	Preparation 14	-	£ 100	29
Jun 20	Consultation 10	-	£ 100	47
Jun 23	Trial - day 1	£ 900	£ 600	5
Jun 24	Trial - day 2	£ 900	£ 600	5
Jun 25	Trial - day 3	£ 900	£ 600	5
Jun 26	Trial - day 4	£ 900	£ 600	5
Jun 27	Trial - day 5	£ 900	£ 600	5
Jul 1	Trial - day 6	£ 900	£ 600	5
Jul 2	Trial - day 7	£ 900	£ 600	5
	Sub-total	£16,475	£13,275	

Jul 3	Trial - day 8	£ 900	£ 600	5
Jul 4	Trial - day 9	£ 900	£ 600	5
Jul 7	Trial - day 10	£ 900	£ 600	5
Jul 8	Trial - day 11	£ 900	£ 600	5
Jul 9	Trial - day 12	£ 900	£ 600	5
Jul 10	Trial - day 13	£ 900	£ 600	5
Jul 11	Trial - day 14	£ 900	-	5
Jul 13	Discussion 8	£ 225	£150	45
Jul 14	Trial - day 15	£ 900	£ 600	5
	TOTAL	£23,900	£17,625	

5. At the taxation:

(a) I was advised that the parties had reached agreement about the fees payable to both Counsel for the fifteen days of the trial itself, that this would now be dealt with privately between the Board and Faculty Services Limited and that I was not required to comment on them or to include anything in my taxation to do with them. As for the two appearances before the trial commenced, namely Junior Counsel on 2nd June and both Counsel on 16th June, I was not told of any agreement but, on the other hand, the fees in the invoices were not challenged by [redacted] so I have allowed them, as part of this Note, without further comment.

(b) Mr Shearer raised four objections of principle to the approach which Faculty Services Limited had chosen to adopt in feeing this particular case, and he then raised sixteen points of detail on the invoices themselves.

(c) [redacted] explained the basis on which Faculty Services Limited had prepared their invoices in the special circumstances of this case, and he then answered the sixteen specific points.

6. [redacted] four points of principle may be summarised as follows:

(a) that remuneration for Counsel should be calculated within the parameters of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. The Regulations themselves provided for unusual or complex situations, by allowing auditors to create new categories, if work fell outside the Schedule, and/or to increase a fee within the Schedule if circumstances so justified. [redacted] acknowledged the wide discretion given to auditors, but argued that this discretion should be exercised within the framework of the Regulations and not, as had happened here, by creating a new framework which bore no resemblance to the Statutory instrument.

(b) that the charges for:

the ten separate consultations with the agents,
a further eight discussions between Counsel, and
three discussions with the agents

should, at least cumulatively, be reduced for two reasons, first because there were too many, even allowing for the complexity of the case, and secondly because discussions between Counsel and between Counsel and the agents were not a proper charge under the Scheme. Under this heading [redacted] also challenged the charges for telephone calls, as a category unknown to the Scheme.

(c) that since the Schedule did not provide for "preparation fees", it followed that the fees in the Schedule for Consultation, Trial etc. included an element for preparation. It was therefore not permissible to charge separately in full, if at all, for something which had already been taken into account when the levels of fees in the table had been set.

(d) that the taxation was premature, because parties could probably have reached agreement if certain information, which the Board had requested, had been supplied earlier.

7. [redacted] responded to these points of principle, and commented on the sixteen specific objections. Mr Hammond also made submissions, based on his personal involvement in the case. I will deal initially with the first three points of principle, because rulings on the detailed objections depend largely on the view taken of the principles. Only at the end, after the issues have been decided, is it possible to rule on [redacted] fourth objection of principle.

THE MOST APPROPRIATE BASIS FOR TAXATION.

8. In answer to the first main objection to the Notes of Fee, namely that remuneration for Counsel should be calculated within the parameters of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, [redacted] explained that Faculty Services Limited had, after consultation with him, deliberately departed from the tables of fees set out in the Schedule to the Regulations, as being inappropriate and inadequate for a case as complex as this. He detailed the exceptionally technical nature of the Indictment, the preparation which both Counsel had put into the case, the number of documents involved, the number of both lay and expert witnesses, whose evidence had to be scrutinised and understood, and the high value of the money at stake - [redacted] was accused of fraudulently understating his tax liability by £401,138. [redacted] drew attention to the List of Authorities, which set out forty cases, mostly technical Tax Decisions and mostly English. He left with me a crate of papers, which included five bound volumes of productions, numbering respectively 268, 275, 332, 477 and 291 pages, a total of 1,643 sheets to be digested and used in defending the accused. An additional complication was the inability of the accused, despite his business ability, to read printed documents.

9. Having advised Faculty Services Limited that Counsel should depart from the Schedule, [redacted] had gone on to suggest that they should, instead, charge for the time actually spent on the case, Senior Counsel at £150 per hour and Junior Counsel at £100 per hour. [redacted] pointed out that the fees listed in the Schedule had not been updated since 1992, and that because of the hours actually spent in this case, Counsel would be remunerated at about £13 per hour if the Schedule was applied without any uplift. He argued that neither a percentage increase in the fees in the table nor the creation of new categories of fee within the table would, to quote Schedule 2(2), "provide reasonable remuneration for work with regard to all the circumstances".

10. [redacted] submission was that since an auditor has discretion, in an exceptional situation like this, *either* to increase the fees in the Schedule *or* to depart from the Schedule altogether, I should adopt the latter approach and tax the fees as set out in the Faculty Services invoices. In support of that, he referred me to passages in:-

Elas v. S.M.T. Co. Ltd. 1950 S.C. 570, 1950 S.L.T. 397 and

Douglas Geddes v Lothian Health Board (unreported, Lord Prosser 17 Feb 93)

and he also referred to a decision of 4th February 1998 by the Sheriff Court auditor in Aberdeen, who had, in taxing fees for Counsel in H.M.A. v Masson and Cruickshank, also an Indictment alleging fraud, "departed from" the Schedule and "having exercised my own skilled discretion to determine what is fair and reasonable", awarded one omnibus fee for each Counsel, to cover all work done by that Counsel in the case.

11. As I am not going to follow that approach, it is proper that I should set out fully the argument which [redacted] presented in support of it, not least so that I can indicate why and where I have taken a different approach. From the case of Elas v S.M.T. Co Ltd, [redacted] quoted from the Opinion of Lord Mackintosh:

> "In my opinion it was the duty of the Auditor in the exercise of his own skilled discretion to determine what was a fair and reasonable fee to be paid to Counsel in this particular case. ... In taxing the present Account therefore the Auditor in my opinion should have had in his consideration not any supposed scale of fees propounded by the Faculty of Advocates or any other body or person which in my view was an irrelevant consideration - but first and foremost the amount of the fee which the pursuer's Solicitor had seen fit to send to his Counsel and in the second place the view which his (the Auditor's) own skill and experience in taxing Accounts m similar cases had led him to form upon the question whether the fee was in all circumstances of the case a reasonable fee or an extravagant one."

While respecting the guidance given in that quotation, it is proper for me to point out that the scale of fees, which the auditor in that case had chosen to disregard in favour of his own discretion, was an informal Table propounded by the Faculty of Advocates, prepared and used by Counsel's Clerks. I remember it well from my earliest experiences of instructing Counsel in the Court of Session in 1952. That Table had nothing like the authority of the Schedules in the Statutory Instrument, which should be (on [redacted] submission) the starting point for taxation in the present case.

12. [redacted] next referred to an unreported decision of Lord Prosser on 17th February 1993 in Douglas Geddes v Lothian Health Board. That is helpful to some extent, because it is broadly analogous to the present case; it related to the level of Counsels' fees in a Civil

Legal Aid case, which has a Schedule of fees in a format similar to the Criminal Legal Aid Schedule with which this case is concerned. From it, [redacted] urged that I should exercise my discretion, as the auditor had in [redacted] disregard the framework of the Schedule as inappropriate for a case as complex as this, and fix Counsels' fees on the basis set out in the Faculty Services invoices. As [redacted] has not been reported, I will reproduce in full the paragraphs on which [redacted] founded. On Page 13, Lord Prosser stated:

> "Where some minor increase appeared to be justified, the figure in the Table would no doubt be a true starting point, and the Auditor might decide that some specific additional figure was the best way of producing reasonable remuneration. But where the circumstances are seen by the Auditor as utterly different from the "ordinary" circumstances catered for by the Table, the fact that he is granting an "increase" on that fee may afford no guidance at all to what the appropriate fee, to provide reasonable remuneration, ought to be. In the present case, in his determination of 27 July 1992, the Auditor expresses the opinion that the fees prescribed in the Table "are intended to be fees for what can be termed 'ordinary' or 'run of the mill' cases". Counsel for the Board did not suggest any mechanism or ratio or other way in which one would work from that run of the mill fee to the type of fee that would be appropriate in a case such as this. I find it difficult to imagine any process by which one would move from the one to the other."

[redacted] quoted also from page 14 of the Opinion:

> "As I have indicated, the Auditor did have "regard" to the "Table" fee for a day in Court. He appears to have found it of no assistance. I see no misdirection in that. As for his reference to the non-Legal Aid cases, I again see no misdirection. His general approach appears to me to be correct. He is endeavouring, in his own judgement and discretion, to assess reasonable remuneration for the work covered by the Fee Note. That is his function in Legal Aid cases, as in private cases. It would indeed be wrong for him (as the matter was put in <u>Elas v SMT</u>) to be "deflected from that aim either by reference to any scale of fees ... or by waiting for some direction from the Court or general consensus of opinion. ..." It is not being said in that case that he must shut his eyes to these outside indications of what might be thought to be a fair and reasonable fee. Nor does it appear to me that his determination indicates that he did shut his eyes to anything. But the figure in the Table, even if it was a notional stating point for an increase, and even if it would have been competent for him to use it, was apparently something which he did not find useful. In my opinion, that was very much a matter within his discretion, and I do not consider that he misdirected himself in this respect. As he puts it in the note attached to his Minute, he is not "fettered" by consideration of the fee for a day in Court in the Table. That is in my opinion correct, and I regard his reference to <u>Elas</u> the other cases as perfectly sensible in indicating the general need for him to exercise his own discretion, whatever the available material may be.

> I would note that in Paragraph 2 of the note attached to his Minute, the Auditor indicates that unless specifically enjoined to do otherwise, his responsibility and obligation is to fix a reasonable fee "without reference" to any scale. I think that this is something of a misdescription, in as much as it might be read as indicating that he was not entitled to look at any scale. I would regard that as wrong, but it does not appear to me to reflect what he did in this case. He appears merely (and I should have thought perhaps inevitably) not to have found any real link between fees at the level dealt with in the table, and fees at the levels appropriate for highly complex cases."

[redacted] referred also to page 18 :

> "Equally, he is aware of the reasons for this, the most obvious of which is that preparation has not just been some minor evening work or the like, but has been on a scale which is quite abnormal. Taking that into account, and the further substantial work also mentioned by the Auditor, the need for a fee which is substantially greater than a normal fee becomes plain. I see no misdirection in the Auditor's approach to this matter. Some cases will require relatively little preparation, even for a long time in Court. Other cases may be disposed of briefly in Court, but require long preparation. As soon as one leaves the world of the run of the mill case, covered by the Table itself, I can see no basis for expecting the fee for a day or days in Court (inclusive of preparation) in one case to bear any relationship at all to the fee for that same item in another. Everything will depend on how many days there are in Court for the fees to absorb or "subsume" the period or preparation, if it is apportioned amongst them.
>
> It may be that the regulations should make it clearer, whether Legal Aid work is to be done at lower fees than other work. It may be that the whole question of preparation could be dealt with differently, either by providing for a brief fee, or by taking the time of preparation specifically into account, along with days in Court. But on the rules as they stand, the Auditor appears to me here to have produced what he is meant to produce - an exercise of his discretion. I find his explanation of what he has done clear, and the criticism confused. I repel the Note of Objections."

On the basis of that comparatively recent guidance from the Court, [redacted] urged me to decide that the Schedule was not appropriate to cover the complex situation here, to depart entirely from it and to decide on "reasonable remuneration" by exercising the wide discretion described in <u>Geddes</u>. [redacted] pointed out that Lord Prosser did not seem to favour "mix and match".

13. It is proper that I should respond to that lengthy submission. While it is helpful up to a point, it is not truly analogous. What Lord Prosser had to decide was whether the auditor

had mis-directed himself in law by departing from the Schedule and substituting his own discretion. At page 4 of the Opinion he states:

> "The Board had accepted before the Auditor that the case was of particular complexity and difficulty, and that an increased fee would be appropriate. It was however emphasised that what was appropriate was indeed an "increased" fee, the Auditor's power being conferred upon him by paragraph 4 of Schedule 4. Since he was "increasing" a fee set out in the Table of Fees, the Auditor must have regard to the fees fixed for a "Day in Court" in the Table. It was submitted that he had not had regard to those fees. That the Auditor had thus misdirected himself, and disregarded the "Table" fee which should have been his starting point was evident in particular from the fact that he had apparently relied upon the case of Elas v Scottish Motor Traction Co Ltd 1950 SLT 397. He had approached his task as if he had merely to decide, in his discretion, what was "reasonable remuneration for the work". That was to equiparate the case with a private one. It was the wrong approach in considering an increase under paragraph 4."

That was the argument of the Board, and Lord Prosser rejected it. I read the Opinion as doing no more than upholding the discretion which the auditor had exercised in that case. It does not preclude me from using the Schedule as a base, onto which to build both increases and new heads, if, in my discretion, I prefer to do it that way. In other words, Lord Prosser was not directing auditors how to assess fees in complex Legal Aid cases, but he was upholding the freedom of auditors to approach every individual case as its merits require. In particular, I do not read the Opinion as precluding me from "mixing and matching".

14. [redacted] responded by taking me back to the Act of Sederunt Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (S.1. 1989 No.1491), and reiterating that I could equally well cover an unusual and complex situation by exercising the two discretions given to me within the Schedule, namely an uplift on the block fees under paragraph 3 and, where no block fee existed, to allow additional remuneration under paragraph 2. The relevant paragraphs are:

> *Fees allowable to counsel*
>
> 1O (1). Counsel shall be allowed such fee as appears to the auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy.

SCHEDULE 2
FEES OF COUNSEL

> 1. Subject to the following provisions of this Schedule, fees shall be calculated in accordance with the Table of Fees in this Schedule.
>
> 2. Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.
>
> 3. The auditor shall have power to increase any fee set out in the Table of Fees in this Schedule where he is satisfied that, because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work.
>
> 4. The auditor shall have power to reduce any fee set out in the Table of Fees in this Schedule where he is satisfied that, because of any particular circumstances, a reduced fee is sufficient to provide reasonable remuneration for the work.

DECISION ON THE MOST APPROPRIATE BASIS FOR TAXATION.

15. There are two ways of approaching any unusual or complex case, which this undoubtedly was, where the normal framework for fees does not meet the circumstances of the case. One way is to make a *fundamental* change, starting from scratch and having no regard to the foundation document. The other way is to make an *incidental* change, adapting what one has as best one can. While recognising the right of the three auditors mentioned in paragraph 10, to disregard all known tables and to start from scratch, that seems to me to be unnecessarily drastic. The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 provide a basic framework for drafting and revising documents, providing opinions, holding consultations and appearing in court. The Regulations also provide for unusual or complex situations, by allowing auditors to increase fees where necessary and even to create new categories for work which falls outside the Schedule.

16. If we can achieve the result called for by Regulation 10, namely:

> Counsel shall be allowed such fee as appears to the auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy.

and do so within the general framework of the Regulations, there will be two benefits:

(a) Counsel will be reasonably remunerated within the terms of the foundation document, which is surely preferable if it can be achieved, in other words the unusual situation will be met by making *incidental* changes to the framework, instead of *fundamental* changes, and

(b) some guidance will be available to the parties for similar cases in future - not least the second instalment of this case involving Mr Gielty.

17. On the other hand, the Regulations give no specific guidance as to how auditors should approach the "exceptional situations" described in the preamble to Schedule 2. While I reject the principle of an "hourly rate" for Counsel, particularly when it comes down to part-hours for telephone calls and incidental discussions, I was assisted by the detailed information in the Notes of Fee provided by Faculty Services Limited. I would encourage them to give as much detail as possible, in a situation like this, so that auditors can see at a glance whether a consultation can reasonably be remunerated by the single block fee of £118 for Senior Counsel and £55 for Junior Counsel appearing with Senior, or whether some increase is justified. A note of the hours involved is helpful, especially if the fee claimed is not a simple multiplier of time by hourly rate. In other words, while I have preferred the basic submission of Mr Shearer, (that I should work within the parameters of the 1989 Regulations) to the basic submission of Mr Quinn (that I should depart from the Schedule altogether), I have drawn heavily on the details provided by Mr Quinn in deciding how to apply the various discretions which the Regulations give. I was indebted to both of them for their helpful submissions in this complex situation.

<u>THE NUMBER OF CONSULTATIONS AND DISCUSSIONS</u>

18 [redacted] second objection of principle was twofold - that ten consultations were "unreasonable" in themselves and that eight further charges for Discussion between Counsel, in addition to the formal consultations, were not only "unreasonable" but a category of charging not recognised by the Schedule. With this he linked his objection to specific charges for two telephone discussions and one personal discussion with the agents. He pointed out that there were a further fourteen charges for "preparation", which was his third objection in principle, to be considered later at paragraph 29.

19. I have taken three guidelines into account in coming to a decision on this. First, Mr Hammond explained that the two Counsel worked as a team with complementary roles, Senior dictating the policy and relying on Junior to carry out the research. This meant

constant conferring together as documents were examined. Both had worked together in similar trials and believed that this method of working provided not only the best service for the accused but also the most cost-effective way of getting through an enormously complex case. While that does not in itself justify a charge for Counsel conferring together, it might become a relevant additional head of fee if the circumstances of the case made it a reasonable and necessary part of the case for which the employment of both Counsel had been certified.

20. Secondly, this is an appropriate point to comment on the "hourly rate" of £150 and £100 suggested by [redacted] as the appropriate method of calculating fees for Senior and Junior Counsel respectively. The whole approach to remunerating *solicitors* for work done under the Criminal Legal Aid scheme is based, under Schedule 1 of the Regulations, on a "time and line" basis, as is common among solicitors in non-legal aid cases. Solicitors are encouraged to have an "hourly charging rate". On the other hand, *Counsel* are to be remunerated for legal aid work under Schedule 2, and this reflects the general practice, indeed tradition, of Counsel submitting a block fee for each heading of work. I reject the concept of Counsel being remunerated by arithmetically multiplying the exact time spent on each item by an "hourly rate". Having said that, the noting of time on the Notes of Fee was extremely helpful in this case, as mentioned already, and is to be encouraged.

21. Although parties had reached an agreement as to what Counsel should receive for the fifteen days in court, and I am not concerned with that, it may be helpful to pick up some other comments from Lord Prosser's Opinion in <u>Geddes</u>, because they illustrate the general question canvassed in paragraph 20, about how Counsel should be remunerated. Speaking of court appearances, Lord Prosser said at page 5:

> Ever since tables of this type were originally prepared, I have understood that those items described as "Day in Court" were regarded as covering not merely the hours in Court, but the necessary preparation, and indeed ancillary work, such as incidental discussion with solicitor, client or expert witnesses around the time of the proof. Correspondingly, the fee for the "Day in Court" in the Table contains within it remuneration for such preparatory or ancillary work.

It follows, as a more general principle, quite apart from days in court, that incidental matters like telephone calls should not be remunerated separately, but should be rolled up into block fees. This is specially so in criminal legal aid work, where the guidelines are "to provide reasonable remuneration for work with regard to all the circumstances, <u>including the general levels of fees in the said Table of Fees</u>" (Schedule 2, paragraph 2). I have underlined these words, because Counsel were instructed, and accepted their instructions, within the known Schedule of remuneration for criminal legal aid cases. I accept that there is provision to increase or even to depart from the Schedule, but in my view (contrary to the approaches of the three auditors mentioned in paragraph 10) the Schedule should be the starting point - although not the finishing point. It proceeds on the basis of defined blocks of fees, not "time and line" charges. To say that is not, I repeat, to discourage the provision of as much information as possible about the work done, but the end product should be an inclusive fee, not a series of detailed charges.

22. Thirdly, as to Discussion between Counsel being a category of charging not recognised by the Schedule, this is the very situation where auditors have to consider the exercise of their discretion under paragraph 2 of Schedule 2, if they find that such discussion was necessary and reasonable. On the other hand, and for the reasons set out in the previous two paragraphs, the basic approach to Counsels' fees, both under the Criminal Legal Aid scheme and elsewhere, is usually the broad approach described by Lord Prosser in the passage just quoted. While I am prepared to listen to explanations about the necessity of consultations, discussions and even the occasional lengthy telephone call in general terms, and while that is helpful by way of background, I do not consider it appropriate for an auditor to try to fix *Counsels'* fees on the basis of individual time charges for short discussions and similar pieces of preparation. Counsel should be remunerated by reasonably broad fees, which may seem generous in themselves but which take account of all incidental matters like - to take an example discussed at paragraph 42 below - crisis discussions on whether or not to "do a deal" with the prosecution. This is the other side of the coin, to be borne in mind when criticism is made of apparently generous fees allowed to Counsel for recognised broad categories of work. That is the basis on which both the Faculty of Advocates in general and the Schedule in the present Regulations in particular assume that Counsel will be remunerated.

DECISION ON THE NUMBER OF CONSULTATIONS AND DISCUSSIONS

23. Applying these three guidelines to the ten consultations, eight Discussions between

Counsel, two telephone discussions and one personal discussion with the agents, I have:

(a) allowed nine of the ten consultations in principle, although I have reduced the fees in four of these, for the reasons given in paragraphs 31, 35, 38, and 44 below, and

(b) allowed four major Discussions between Counsel (24th March {paragraph 24}, 25th April {paragraph 25}, 10th June {paragraph 43} and 13th July {paragraph 45}) and taxed off all the minor Discussions and also the brief communications with the agents, and

(c) allowed the full fees claimed for three of these four major Discussions. These three are allowed in full, and the other one (number two) in part, because the seven smaller fees have been disallowed and in consequence the overall remuneration, for these inter-Counsel discussions, seems fair and reasonable.

The details are set out in the analysis at paragraph 49 below.

In addition to his general objection, [redacted] had particular queries about all ten of the consultations and also about the discussion on 10th June. Where he made specific objection, it is better if I comment on the fees allowed or disallowed at that point However, as [redacted] did have a general objection of principle, it is proper to explain what else has been allowed and why. All ten consultations are, as mentioned, covered in the "specific objection" section, so the following three paragraphs respond to his challenges on the principle of allowing Discussion between Counsel.

24. Discussion 1 between Counsel took place on 24th March. It was explained to me that this took place four days after the Crown had served a fresh Indictment. Senior and Junior Counsel felt it necessary to discuss the new legal issues, particularly to discover what crime was now alleged to have been committed and when. They discussed the evidential problems which the Crown faced and the importance for the defence of the Inland Revenue Schedule E Manual. This was also the first occasion when a fee was charged for discussing the Crown's productions. On looking at their copies of the Crown's productions, Counsel realised that not all the productions had been made available in copy form - hence the visit to the Fiscal's office on 16th April. I accept that this was a

necessary and an important meeting, at this stage of the case, even if it is not one of the regular categories in the Schedule. One hour has been charged in all. Without accepting the principle of an hourly rate, and while I would normally regard £150 and £100 as too high for work - especially discussion - lasting only one hour, Counsel had at some stage to look over the Crown productions - for which no separate charge has been made - and the ground covered was different from the topics discussed at the consultation three days previously. Considering all these factors, and especially the element of perusal of Crown productions which has not been charged elsewhere, I have on this occasion allowed the full fees claimed for the "discussion" as fair and reasonable.

25. After the visit to the Fiscal's office, two more consultations (the third and fourth) were held. I comment on them at paragraphs 35 and 36 below. Thereafter, a second discussion took place between Senior and Junior Counsel on 25th April. [redacted]challenge, apart from the principle, was to the need for Counsel to confer between themselves when they had just had an hour-long consultation with experts and the instructing agent. Mr Hammond and [redacted] explained that the discussion was to follow up the information regarding accountancy practice which had been obtained from the accountants at the consultation just concluded. Counsel had let the instructing agents go, because they felt that the fine-tuning was a matter for themselves. Without being disparaging, they saw it as a specialist area into which the agents need not delve. In other words, it could be regarded as an extension of the consultation and could have been charged as such. Counsel also took the opportunity to discuss the extensive case law, itemised at paragraph 8 above. They had to investigate all cases where PAYE might be applicable to the agricultural industry. In view of the technical nature of both accountancy practice and the law I consider that this follow-up meeting was reasonable, considering that the consultation had been for information-gathering purposes, and that Counsel had to plan where they were going to go from there. Because of the complexities which were emerging, I cannot say that two hours were unreasonable to cover both the planning of further accountancy evidence and the cases to be considered. However, I distinguish this extended discussion, following a consultation, from the fees which I accepted as a one-off situation at the end of paragraph 24. For this discussion, technical though it was, £300 and £200 seem a little generous, so I have allowed £200 and £130.

26. As I have disallowed discussions 3, 4, 5, and 7, and as discussions 6 and 8 are detailed at paragraphs 43 and 45, that gives, I hope, sufficient guidance to parties as to how the Discussion between Counsel aspect has been approached.

<u>PREPARATION FEES</u>

27. [redacted] third challenge of principle was that the fees in the Schedule for consultation, trial etc. already include an element for preparation, so in normal situations there should be no separate charge for "preparation". He accepted that extensive preparation had taken place in this particular case and he did not press for all the fees claimed to be taxed off in their entirety. In other words, he accepted that this was a situation where paragraph 2 of the Schedule could be invoked:

> Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.

However, accepting that, [redacted] still asked why Counsel had apparently gone over and over the same ground with the experts and asked me to apply a "broad brush". In particular, he queried whether the total was reasonable, both in the length of time charged and in the level of fees charged.

[redacted] responded by reference to <u>Ahmed Trustees v Ahmed (1)</u> 1993 S.L.T. 390, and by further reference to <u>Douglas Geddes v Lothian Health Board</u>. From <u>Ahmed</u> he quoted the last paragraph on page 392:

> "In addition to the background circumstances particular to the present case, the Dean reminded me that preparation was now commonly remunerated separately from appearance in court, and that the legal aid scheme as presently administered provides for payment of such fees. This was a material factor not only as between counsel and agent for the party giving instructions, but as between parties in considering what was reasonable ... "

and two passages on page 394:

> "Put another way, it would appear to follow from the auditor's assumption that the proper time for solicitors to instruct counsel for preparation for the proof is prior to the pre-proof consultation, so that consultations may satisfy the requirements of full discussion of all aspects of the pursuer's case. If that is correct, there can be no reason why counsel should fail to receive proper remuneration for work so instructed and carried out."

and later -

> "In my opinion, the Dean of Faculty was well founded in challenging the basis on which the auditor approached this matter, so far as it concerned the determination of a proper level of remuneration for counsel for preparation. In light of the disposal of this matter, it is clearly unfortunate that Counsel did not charge separately for the preparation work which was carried out. Had he done so, the auditor's mind might have focussed more directly upon the proper level of remuneration for that work. But in the whole circumstances, it appears to me to be clear that the auditor's reasons confused the two elements of the question, namely, whether the work was done, and whether the work was remunerated otherwise than by the first day's fee... "

28. From Douglas Geddes v Lothian Health Board, Mr. Quinn quoted from page 5:

> "The second area of alleged misdirection, as I understood the submissions for the Board, lay in a failure to deal correctly with the question of preparation for days in Court. ... It is submitted by the Board "that the Table of Fees makes no provision for preparation and that this is subsumed in the daily fee figure. Every day in Court requires some measure of preparation." Apparently on the basis of these submissions, it is further submitted that the Auditor has inter alia misdirected himself in that "he had adopted the wrong approach in considering whether 'the fee claimed is justified', having regard to the amount of preparation." Thereafter, in setting out what the Board say the proper approach should have been, there is no mention of preparation.
>
> It is true that the Table of Fees makes no separate provision for preparation. Ever since tables of this type were originally prepared, I have understood that those items described as "Day in Court" were regarded as covering not merely the hours in Court, but the necessary preparation, and indeed ancillary work, such as incidental discussion with solicitor, client or expert witnesses around the time of the proof. Correspondingly, the fee for the "Day in Court" in the Table contains within it remuneration for such preparatory or ancillary work. That the conduct of the case in Court is thus treated as part of a unitary item, which also includes preparatory and ancillary work appears to me, in the normal case, not merely to be sensible (avoiding a pointless proliferation of items) but in realistic terms unavoidable: if time were the only consideration, one could no doubt separate preparation, or ancillary events, from the hours in Court, but the work done at these various different times is in fact normally so inter-related that it may be virtually meaningless to treat them as anything other than a single item, for purposes of remuneration.
>
> I did not understand counsel for the Board to suggest that preparation should not be paid for. ... "

Pages 7 and 8 of the Opinion go on at length on this point, and my comment [redacted] is that much the Opinion is not directly relevant for this case, because the issue in that case was the amount of additional preparation fees linked with time actually spent in court. In this case, ten of the fourteen preparation fees charged were ten or more days before the trial started. The Opinion is, however, useful as a general principle and also when considering the four preparation fees in the week before the trial. I note that in this case there are, perhaps because of the guidance given by Lord Prosser just mentioned, no charges for preparation in addition to the fees for the trial days themselves.

29. **DECISION ON PREPARATION FEES**

For convenience, I have divided the preparation fees into:
"Initial work",
"Focussing the issues", and
"Eve of trial".

<u>"Initial work"</u>

Only two, both for Senior Counsel, fall into the first category. His first activity in the case was to read all the papers for five hours, and decide what else was required. Although £ 150 per hour is on the high side for that, my approach here, as for the Discussions, is to allow more generous fees for major items and to disallow smaller items, so as to achieve a fair result overall. Having said that, I take seriously what Mr. Shearer had to say, that any fees for consultations, whether basic or enhanced, include an element of preparation within the fee. There was a consultation two days later, for which I have allowed the full fee claimed of £ 150, so I will recognise Mr. Shearer's point by reducing the first Preparation fee from £ 750 to £ 650.

The next preparation charge is over four months later, and nearly three weeks after the last consultation. It is true that a fee has been allowed for a discussion a week before, but that was on a specific topic. As nothing has been charged for preparation for four months, and as this was preparation for an important consultation on the following day, I have allowed it in principle, although again I recognise the force of Mr Shearer's argument that the two hour fee, given in full for the consultation on the next day, must have some element of preparation in it. For that reason I have reduced the Preparation fee from £ 225 to £175.

"Focussing the issues"

Before I look at the details, it is proper to record one of Mr. Shearer's basic concerns and Mr. [redacted] answer to it. Mr. Shearer's point is well summarised by a letter which he had earlier sent to [redacted] - referred to again at paragraph 50 below:

> "I have also noted on various Fee Notes that Counsel, both Senior and Junior, have claimed for considering Authorities and researching Case Law. We would not normally consider investigation of the Law either by reference to Case Law or by reference to Authorities and legislation as forming a proper charge against the Legal Aid Certificate or, indeed, in a private case. Counsel is paid professional rates for his knowledge of the law. As such, I do not consider it appropriate to charge for research work."

[redacted] responded that when Counsel came to investigate the cases mentioned within the Schedule E Manual, which were tax cases not to be found in either the Session Cases or Scots Law Times, they discovered that one case led on to another, and so on. This was not, [redacted] claimed, what the Board had termed "research' - it was necessary preparation for the trial, leading to an exchange of authorities between Crown and Defence. The Sheriff called for all authorities to be produced to him and the narrative of one of the fees charged by Junior Counsel demonstrates how much was involved in that. [redacted] reported that the Sheriff had recorded his thanks to Counsel in regard to the numerous authorities which had been provided to him for consideration.

Against that background, I note that between 7th and 13th June, Senior Counsel charged twice for eight hours of preparation, on the 7th and 11th, then 4 hours more on the 13th. The first was picking up the loose ends after the consultation with experts on 28th May and after the Sheriff and Fiscal had raised points at the first diet. I would not have been minded to allow the full "hourly rate", but Faculty Services Limited have, perhaps inadvertently, charged eight hours at only £ 100 per hour. Coming at this stage of the case, and applying the principles mentioned, I do not regard £ 800 in all as excessive. There was then a period of much activity over three days, following which Senior Counsel set aside eight hours, working on submissions. I do not doubt the hours put in, but since he has been allowed three hours of discussion on the previous day, and there was a consultation on the following day, I will allow a lesser "hourly rate" and give another £ 800 in place of the £ 1,200 claimed. The final item for Senior, under this heading, is four hours after the consultation on 12th June. No specification is given, but it was a fairly frenetic time. Since, however, full fees have been allowed for a consultation two days later, I will restrict this also to £400 for the preparation in place of the £ 600 claimed.

Junior Counsel has seven preparation charges, totalling £ 3,600 over the period 3rd to 13th June. That has to be looked at now in light of the fact that I have also allowed two meetings with the Procurator Fiscal, a meeting with the Sheriff Clerk, and a discussion with Senior Counsel - four smaller items in this period have been disallowed. The first (four hours) was going over productions, the second (eight hours) was planning cross-examination and considering admissions, the third (four hours) was looking out authorities, the fourth and fifth (five hours and eight hours respectively) were working out submissions, checking references, etc, the sixth (four hours) is not itemised, and the seventh (out of order on the Notes of Fee, but on the same day as number six) (three hours) was for researching the law - a total of 36 hours. The meetings and discussion allowed elsewhere add another six hours, giving a total 42 hours over seven working days (Tuesday, Friday, and the next Monday to Friday inclusive). I do not question for a moment that Counsel put in this time, but the question is what the Legal Aid Fund can reasonably be expected to meet for it. I have to balance two considerations, namely:

the complexity of the case, and

Schedule 2 to the Regulations, because Counsel is deemed to have accepted instructions on the basis that this was a legal aid case.

Recognising the first, I have introduced a category unknown to the Schedule, namely "preparation", and I have increased substantially the daily trial rate for Junior appearing with Senior, which in the Schedule is £ 172 per day. Recognising the second, I have allowed £ 400 per day for six six-hour days (because the meetings and discussion allowed elsewhere occupied another six hours), which brings out £2,400 in place of the £ 3,600 charged. The details are set out in the annexation at paragraph 49, but I stress that the individual abatements in that paragraph do <u>not</u> represent value-judgments on the seven individual parts of the preparation - they are simply a broad-axe allocation of the £ 1,200 which has to come off the total of the seven as a group.

<u>"Eve of trial"</u>.

Senior Counsel has charged £ 600 and £ 750 for preparations 12 and 13 on two consecutive days, 18th and 19th June. Since his last substantial preparation on 13th June, there had been a discussion, a consultation and his first appearance in court. The trial was meant to start on 16th June, but on that very day, the Crown produced an extra witness list and wished to lodge some new productions, introducing new matters. Because of that, the trial was adjourned for a week. I queried what preparation Counsel could have done on the 18th and 19th which he would not have done already, in anticipation of the trial starting on the 16th. [redacted] explained that on 18th June, he read authorities and prepared submissions for four hours. On the following day, he received and read the final accountant's report, which had not been available until then. In light of it, he further examined the authorities, all of which took five hours. That was his last (allowed) charge before the trial started on 23rd June.

My problem with the 18th - although I do not question that Counsel did spend time revising the authorities and his submissions - is twofold, namely that he has already been allowed eight hours of preparation and two consultations in the five days before the anticipated starting date for the trial, and presumably had brought the case to a state of readiness for the 16th, and secondly that he has, properly, been allowed a modified fee of £ 750 for attending Court on the 16th. When it did not go on, he had the rest of that day for additional reading. Partly for that reason, and partly because I am going to allow the full time spent on preparation on the following day, I have disallowed the whole fee for the 18th.

The 19th is different, because the final report from the accountants arrived, and it was, I am assured, of considerable assistance to Counsel in conducting the defence. It seems reasonable that Senior Counsel devoted five hours on 19th June to preparation, and to finally reviewing all the papers which had come in by that time. However, as mentioned several times already, £ 150 per hour is a high rate for preparation, so I have allowed £600 in all which, if one wants to calculate hourly rates, is still £ 122 per hour..

Junior Counsel's eve-of -trial preparation was:

five hours on June 17th, copying 566 pages for use in court. This, including the cost of the photocopies, is charged at £ 250 inclusive and I allow that in full.

two hours on June 19th, reading the final accountant's report, which, as mentioned above, had not been available until then, and considering the authorities in light of it, and

one hour on June 22nd (literally the eve of trial) reading new precognitions. There is no difficulty - apart from the principle of charging on an hourly rate - with the time involved, but recognising that the figures charged are on the high side for preparation, I have left the two hours on the 19th intact and taxed off the one hour on the 22nd, which recognises both concern just mentioned and also that the fee for the first day of the trial has some element of preparation in it.

That concludes comment on preparation, which was the third of the points of principle, so it remains now to consider the sixteen specific points raised by Mr. Shearer.

30. **Challenge 1.**

[redacted] first detailed challenge was to the time spent at the first Consultation, on 17th January 1997. It was attended by two accountants, but the Board had not sanctioned any "expert witnesses" at that stage. Sanction was ultimately granted on 8th May, backdated to 21st April. Therefore, [redacted] contended, Counsel should not charge for meeting with accountants at this stage. [redacted] responded that it was not really a "Consultation with Experts", but that Messrs Evans and Brolly of Messrs Arthur Andersen who were the client's accountants. Senior Counsel had expressed the wish to go through the papers in the case, in order to identify areas where accountancy evidence might be required. Because he had been able to discuss specific areas at that stage, future Consultations were kept to a minimum due to Counsel's initial grasp of the case. To some extent, the two men were able to assist on the generality of the case, but what the Consultation really threw up was the necessity, for the defence, of an accountant expert in agricultural matters. The Accountants left the Consultation to seek someone to provide the sort of specialised accountancy agricultural evidence that would be required.

As the consultation lasted for only one hour, and as it was the first meeting between Counsel, agents and client (as far as the Legal Aid Fund is concerned), it seems reasonable, both in time and in the fees charged, whether or not the accountants were yet sanctioned. If there is to be a penalty for Counsel meeting with people who have not been sanctioned by the Board, it lies in the fact that the witnesses will not be paid for their attendance. If substantial and technical accountancy evidence had been discussed, there might have been a stronger argument for saying that this consultation was premature, but I do not regard one hour, at the rates charged, as unreasonable for this first meeting. The objection is repelled, and the uplift in fees from £118 and £55 to £150 and £100 respectively is allowed under paragraph 3 of Schedule 2.

31. **Challenge 2.**

The second consultation, on 21st March, was not challenged by [redacted] in principle, but he objected to a time charge for travel, within Edinburgh, from Parliament House to Costorphine. [redacted] explained that on 20 March 1997, a fresh Indictment was served on the client, requiring a consultation on the following day. It took place at the Maybury Hotel because that was a convenient meeting place for those travelling from the South and the West and Counsel. At it, Counsel were brought up to date on the position regarding the employment of an accountancy expert; areas of further investigation were highlighted, and the terms of the fresh Indictment and its appendices were discussed with the client. Junior Counsel's handwritten Notes in regard to that consultation were made available to me in a black Lever Arch file, and the consultation seems to have been necessary and justified.

However, I do find merit in the objection to a time charge for travelling. Counsel were instructed, and accepted instructions, in terms of the Criminal Legal Aid Scheme. This makes it clear that in normal circumstances, any consultation "In Edinburgh" attracts a flat fee of £118 for Senior Counsel and £55 for Junior Counsel. There is an additional fee for a consultation in prison - which recognises the need to travel to the prison - and different fees for consultations in different places outside Edinburgh. As mentioned earlier, the Schedule provides for unusual and complex situations, but that does not, in my view, justify introducing a concept wholly alien to the Schedule, namely travel within the city of Edinburgh. It was accepted that Counsel spent about fifteen minutes in travel each way. Having regard to the general framework of the Regulations, which have block fees for consultations within Edinburgh, I am prepared to increase the fees in the Schedule for the time actually spent consulting, because of the importance and complexity of the case, but not to allow the travel aspect. The consulting time was one and a half hours, so for the reasons set out in paragraph 21, this consultation justifies fees of £225 and £150 respectively.

32. **Challenge 3.**

The Notes of Fee for both Counsel included a consultation on 24th March (although on Senior's Note it was dated "24 Jan 97"). Parties were agreed that there was not in fact a consultation on that day, it having been confused in the processing with the third consultation on 22nd April. These fees were therefore deleted of consent.

33. **Challenge 4.**

Mr Shearer challenged the attendance of both Counsel together at the Procurator Fiscal's office on 16th April, and also the length of time charged for examining the productions for the Crown. Mr Hammond explained the Crown had made available photocopies of some of the productions, but not all of them. Senior Counsel had looked over these and noted various concerns. He therefore wished to look at the original productions and to work through the problem areas with his Junior, the latter checking on points of detail while Senior concentrated on the overall strategy of defence. In fact, when they got to the Fiscal's office, it became evident that:

(a) a quantity of Bank Statements and cheques had not been copied,

(b) of those productions copied, some of the invoices were blurred at the edges and the handwriting on others was not clear, and

(c) volume 2 of the productions had no Certificate of Authenticity. If no such Certificate could be obtained, the Crown might fail to prove about £100,000 of the fraud alleged.

Looking at the copy productions made available to me, I am not prepared to say that two hours, spent together considering the original productions, is an unreasonable charge at this stage of the case. Counsel had had a lengthy discussion about the line of evidence on 24th March, which I have already allowed in full, so I will allow £225 and £150, as an "additional item" under paragraph two of the Schedule.

34. I note here, because there was no specific or even general challenge to it, that Junior Counsel attended at the Procurator Fiscal's office on 6th May "viewing original

productions and preparing for trial numbers of productions and pages" (3.5 hours), that on 9th June both Counsel had a "meeting PF discussing what matters could be agreed, noting ......" (1 hour each), that on the following day Junior Counsel had a meeting with the Sheriff Clerk (half hour) and that on the following day again he met the Procurator Fiscal again about the productions (1.5 hours). All these are charged at the full rate, but because there were 1643 sheets of productions before the case came to trial, and because the Fiscal was regularly seeking meetings to discuss the case, it was clearly an anxious and complex situation, so I have not taken anything off any of these four items.

35. **Challenge 5.**

In addition to his general point, that there were too many consultations, [redacted] had a specific objection to time for travel being part of the fees charged for Consultation 3, on 22nd April. [redacted] explained that it had been arranged for two reasons - first, the instructing agents had obtained some further productions and, secondly, Counsel wished to clarify, before meeting the accountants on 25th April, some issues about PAYE in the agricultural industry. Bearing in mind that there had been no discussion between client, Counsel and agents since the new Indictment had been served and since Counsel had inspected the Crown productions, some consultation seems justified, although it must be related to the fuller consultation three days later. I will allow the consultation in principle, but, for the reasons set out at paragraph 31, no travel. Senior Counsel has charged £150 for 45 minutes, which I regard as excessive, but I suspect that he intended the fee to cover travel time (which has not been separately claimed by Senior) in addition to the 45 minutes. Junior Counsel has charged £100 for 45 minutes of consultation and 40 minutes of travel. As there must have been some preparation, which is not separately charged, I will allow £110 and £75 respectively, but that is for the meeting only, excluding any travel element.

36. **Challenge 6.**

Consultation 4, on 25th April, was held in the High Street, and Mr Shearer had two objections to it. First, the queried the necessity of a second consultation in three days, and secondly he asked what could be achieved if the client was not there. Separately, he challenged the discussion for two hours which followed the consultation, for which another charge was made. I have allowed the two hour discussion, for the reasons set out in paragraph 25, but there remains the challenge to the fee for the consultation. [redacted] accepted that only the agents and the potential expert witness were in attendance, not the client. The purpose of the consultation was to lay out guidelines for expert accountancy evidence, and there was nothing which the client could have contributed at that stage. As to a second consultation in three days, the previous consultation, with the client, had been to write the agenda for this meeting with the expert witness. Having met with the client, Counsel now had to find out how accountancy evidence worked in relation to the agricultural industry, how the client's practice of paying the gang master tied in with the productions and how far the expert witness supported the practice adopted by the client in his trading methods. I find this a reasonable consultation, for which one hour is charged and, in view of the highly technical nature of the discussion, the fees of £150 and £100 do not seem too generous and I allow them.

37. **Challenge 7.**

[redacted] questioned the necessary of a further consultation (number 5) on 8th May, asking what had developed since the consultation and lengthy discussion on 25th April. Separately, he queried the time charged. I will deal with that first. The agent charged "9.45 am to 1 pm, including travel from Coatbridge, and then from 2 pm to 3.15 pm." Mr Shearer therefore reckoned that Counsel, who consulted in Edinburgh, should not have charged 4 hours for the consultation. Mr Hammond confirmed that the consultation lasted from 11 a.m. to 1 pm, then, after a break for lunch, from 2 pm to 3 pm. My decision on that is that even solicitors, who charge on an hourly rate, are normally allowed to charge for a short lunch break, particularly since they will probably keep thinking and even talking about the case over lunch. If Counsel are going to use "time sheets", then it is not improper to have charged "4 hours" for the meeting which started at 11 am and concluded at 3 pm. However, as I have indicated earlier, a multiplier of hours by £s is no more than a starting point and the real question is what the consultation, if justified, is worth overall.

[redacted] explained that the expert witness had been given a "shopping list" at the consultation on 25th April, and that this was effectively his provisional report back. The trial was now only six weeks away and it was fortunate that this consultation on 8th May took place, because Counsel were not happy at the line of investigation which the expert "reported back". They were able, following discussion, to correct this and to get the expert evidence which they required. The consultation was lengthy because the expert was determined to explain what happened within the industry and how he thought the system worked. What Counsel wanted, and what they were eventually able to get over to the expert, was the status of the key figures in the case and how they related to each other in the question of employment.

After the consultation, Counsel had a discussion to consider further planning in light of what they had learned at the Consultation and the approach to be adopted to the trial. For this discussion they have noted 1.5 hours, making a total of 5.5 hours, charged in total at £825 and £550. [redacted] made the point that Counsel had been engaged for the hour before the consultation in preparation for it. Putting everything together, this was effectively a "day". On that basis, the fees claimed are not over generous for preparation, consultation and discussion at this stage of the case. On the other hand, the fruits of what had been discussed on 8th May were gone over at length with the agents and client on the following day, at consultation 6. Complex though the issues were, there must be a point where consultation and discussion cease to be a charge on the Fund. I have allowed the full fee for 8th May on the basis that I am going to restrict the consultation on the following day to one hour in place of the two hours charged.

38. **Challenge 8.**

On 9th May, Consultation number 6 took place with the client. Mr Shearer had two queries. First, he asked why this consultation was held at all, when there had been a four hour consultation on the previous day. Secondly, he queried whether the second part of the detailed narrative was a proper charge against the Fund, namely a discussion between Counsel for one hour, after they had consulted with the client for one hour. [redacted] explained that the decision to hold two consultations on consecutive days was deliberate, because Counsel did not wish the client to hear the discussion with the expert witness in case the client adopted the views of the expert as his own evidence. Having got their own minds straight after meeting the expert, Counsel then had to take the instructions of the client on various issues flagged by the accountant. Who was responsible for paying PAYE in situations five years previously? That was carefully gone over with the client.

On the second challenge, [redacted] explained that after the client had gone, Counsel had to review the evidence to date and to check what additional investigations had been undertaken and generally to consider whether they had an adequate defence. That may be, but I have allowed 1.5 hours of discussion on the previous day on the basis that since discussion is not a recognised head in the Schedule, it should be allowed sparingly and on the basis that the hour of discussion on 9th May would come off. As this consultation was more an investigation into the facts than a detailed analysis of accountancy practice or the law, it may not attract the same uplift, from the basic consultation rate of £118 and £55, so I have taken a broad axe and allowed these basic rates for the 6th consultation.

39. <u>Challenge 9</u>.

Junior Counsel charged for a telephone discussion with the agents, and dated this on 14th May. [redacted] pointed out that, quite apart from the fact that there was no provision in the Schedule for telephone calls, the agent's account dated it on the previous day. Mr Quinn suggested that there might have been two separate calls, but since I have disallowed the fee anyway, for the reason set out in paragraph 23, the point need not be pursued.

40. The next item was not specifically challenged, but [redacted] had a general objection to going outside the Schedule, so I have to adjudicate on it. On 20th May, Counsel considered the implications of a letter from the Inland Revenue, refusing access to various papers. The expert had suggested that this file might reveal useful information and Counsel had to consider whether to lodge a Specification of Documents. It was decided not to do so, but the point had to be decided, and decided quickly, without waiting for the next consultation. Counsel were entitled to consider the position, so I have allowed a fee which is not in the Schedule. However, following the general principle of sticking as closely to basics as possible, I have allowed a basic consultation rate, which is provided in the Schedule, of £118 and £55 in place of the £150 and £100 claimed. I have not taken off the meeting which Junior Counsel had with the Procurator Fiscal on 27th May, although it is not a Schedule item, partly because it was the Fiscal who requested the meeting.

41. **Challenge 10.**

For consultation 7, on 28th May, Counsel charged for two hours. [redacted] in addition to his general point about the number of consultations, compared the time charge to the 1.5 hours charged by the agent. As I am using the hourly rate only as a guideline and not as a mathematical calculation - although, as mentioned before, the information is useful to have - the question is how to value the meeting overall. On the previous day, the instructing agents had provided additional productions, which had previously been missing, and Counsel were anxious to ensure that all aspects of accountancy evidence had now been covered. The expert witness was present. and, in justification of the meeting, [redacted] referred me to the third part of the expert's report, especially to pages 5, 6, 7, 8, 9, 10 and 11. The question was whether the client had undertaken what was considered to be normal accountancy procedure within the agricultural industry. This was now a crucial question, because the Preliminary Diet was only five days away, at which various Statutory matters have to be disclosed. It was Counsel's intention to opposing a variety of areas at the Diet, so a fair amount of discussion and preparation was required. In the whole circumstances, and since fees at three of the previous six consultations have been reduced, I have not abated the fees claimed, even if the consultation did not run for the full two hours - although I suspect that Counsel, who have been meticulous in logging their time, may have continued the discussion after the agent had left.

42. **Challenge 11.**

On 2nd June Counsel conferred by phone and on 3rd June, Junior Counsel spoke on the phone with the Fiscal. [redacted] questioned the principle and also the need for these particular conversations. [redacted] explained that the Fiscal had put Junior Counsel in a difficult position by producing new documents and offering a deal to dispose of the case. He had to consult with his Senior and report back. For the reasons set out in paragraph 22, I am not prepared to allow these charges, crucial though the discussion may have been for the case, because such small items are better subsumed in the larger fees allowed for the main activity in the case.

43. **Challenge 12.**

In addition to his general objection about discussions between Counsel, [redacted] concerned that some aspects of the discussion number six [illegible] charge against the Fund. He mentioned, in par[illegible] layout". Mr Hammond accepted that the three hours charged were more truly described as "preparation" than "discussion", but maintained that the lengthy narrative in the Notes of Fee justified the fee proposed. The description given there is:

> Meeting and discussing case & reviewing preparations & strategy for trial. Discussing expert witness report, presentation of defence material & challenges, precognitions, technical rules re proof of documents, relationship of evidence to the matters charged on Indictment, lodging of further productions, objections, ergonomics of court layout, books to be brought out for case, need to discuss arrangements with Sheriff Clerk, need to do joint note setting out need for re-precognition of Mr Drysdale on the terms of the experts report.

I note [redacted] concern about the subject matter of the discussion, but Mr. Hammond explained what was involved and why. I have therefore allowed this as a necessary "meeting and discussion" for the reasons set out in paragraph 23, and, for the reason given in section (c) of that paragraph, namely that it is better to have a few large discussion fees, to cover all discussions, than to have a plethora of small ones, the full fee claimed here has been allowed, both in time and in amount, because all the other discussion fees on that day and on the previous day have been taxed off.

44. <u>Challenge 13</u>.

[redacted] pointed out that Junior Counsel had not been able to attend the first part of consultation eight on 12th June, but that both Counsel had charged one hour. He also repeated his general concern that this was "yet another consultation". [redacted] explained that although Mr Hammond had not been able to make the beginning of the consultation, he had prepared for it and had attended the latter part. On the wider question, [redacted] claimed that it was part of the necessary and exhaustive preparation which took place continuously from 9th to 13th June. For two reasons, I believe that justice will be served by allowing a nominal £ 100 for Senior and nothing for Junior for this consultation. First, Counsel had spent eight hours and five hours respectively on preparation seven on the previous day and they were to spend another four hours each on preparation nine on the following day, and, secondly, this was no more than a meeting with the client "reviewing precognition in relation to tests in law and his practices with regard to gangmasters and their employees, discussing strategy for trial and practical arrangements". I accept that Junior Counsel had to participate in the latter, but in the context of 9th to 13th June, it was part and parcel of the overall preparation.

45. Chronologically this is the place to comment on discussion eight, which is dated in the

Notes of Fee for 13th June. [redacted] did not specifically challenge it, but it was part of his general objection to the legal aid fund paying for Discussions between Counsel. [redacted] pointed out that Faculty Services Limited had put the wrong date for this item, which should have read "13 July" and it related to a meeting when Counsel reviewed the authorities and their submissions to the court and the course of action to be adopted, when it was disclosed that a juror might have had been threatened. As this was a completely new area, for which no earlier preparation had been done, and as it was sprung on Counsel for immediate action, the additional discussion seems justified, at he rate charged, even although fees for the trial are payable for the surrounding days.

46. **Challenge 14.**

On Sunday 15th June, the day before the trial was due to start, both Counsel met the client again (consultation 9), "reviewing Crown section 67 notice, matters arising and discussing strategy in the case". [redacted] renewed his comment that the fee for appearing at the first day of the trial, even although it was modified because the trial was adjourned, included some element of preparation. I take his point, but this was a Sunday, pulling together a fairly hectic week of preparation, and although the preparation has been remunerated and there is a trial fee for the following day, I will allow the fees charged because of the importance of this strategy meeting on the eve of the trial.

47. **Challenge 15.**

[redacted] pointed out that for consultation ten on 22nd June, Junior Counsel had charged for one hour (including travelling), whereas the agent had charged for only twenty minutes. [redacted] advised that Counsel had travelled specially on Sunday to meet the client and agents on the day before the trial started, that his travel time was twenty minutes each way and that the consultation had lasted twenty minutes. If one abates the travel time, for the reasons set out in paragraph 31, the resulting twenty minutes is really part and parcel of the fee agreed for the first day of the trial, so I have abated the whole entry here.

48. **Challenge 16.**

[redacted] final specific challenge was to the length of a telephone discussion which Junior Counsel had with the agents on 19th June. Counsel noted this at 15 minutes whereas Mr Marr, the agent, had recorded 5 minutes. As I have disallowed this and other minor items, holding, at paragraph 23, that they should be embraced in generous general fees, the point need not be pursued here.

49. **SUMMARY OF FEES ALLOWED FOR COUNSEL**

Date 1997	Work done	Mr. Targowski Claim	Mr. Targowski Allow	Mr. Hammond Claim	Mr. Hammond Allow	Paragraph
Jan 15	Preparation 1	£ 750	650	-	-	29
Jan 17	Consultation 1	£ 150	150	£ 100	100	30
Mar 21	Consultation 2	£ 300	225	£ 200	150	31
"Jan"(Mar)24	Consultation 0	£ 300	0	£ 200	0	32
Mar 24	Discussion 1	£ 150	150	£ 100	100	24
Apl 16	Attending PF	£ 300	225	£ 200	150	33
Apl 22	Consultation 3	£ 150	110	£ 100	75	35
Apl 25	Consultation 4	£ 150	150	£ 100	100	36
Apl 25	Discussion 2	£ 300	200	£ 200	130	25
May 6	Attending PF	-		£ 350	350	34
May 8	Consultation 5	£ 825	825	£ 550	550	37
May 9	Consultation 6	£ 300	118	£ 200	55	38
May 14	Discussion 3	-		£ 25	0	39
May 20	Considering docs	£ 150	118	£ 100	55	40
May 27	Preparation 2	£ 225	175		-	29
May 27	Meeting PF	-		£ 50	50	40
May 28	Consultation 7	£ 300	300	£ 200	200	41
Jun 2	Attending court	-		£ 600	600	5
Jun 2	Discussion 4	£ 75	0	£ 50	0	42
Jun 3	Telephone discuss	£ -		£ 15	0	42
Jun 3	Preparation 3	£ -		£ 400	300	29
Jun 6	Preparation 4	£ -		£ 800	500	29
Jun 7	Preparation 5	£ 800	800	-		29
Jun 9	Meeting PF	£ 150	150	£ 100	100	34
Jun 9	Discussion 5	£ 75	0	£ 50	0	23
Jun 9	Preparation 6	-		£ 400	300	29
Jun 10	Discussion 6	£ 450	450	£ 300	300	43
Jun 10	Discussion agents	-		£ 50	0	23

Jun 10	Discussion 7	-		£ 10	0	23
Jun 10	Inspecting prods	-		£ 50	50	34
Jun 11	Meeting PF	-		£ 150	150	34
Jun 11	Preparation 7	£1,200	800	£ 500	400	29
Jun 12	Preparation 8	-		£ 800	500	29
Jun 12	Consultation 8	£ 150	100	£ 100	0	44
Jun 13	Preparation 9	£ 600	400	£ 400	300	29
Jun 13	Research/preparation 10	-		£ 300	100	29
Jun 15	Consultation 9	£ 150	150	£ 100	100	46
Jun 16	Attending court	£ 750	750	£ 500	500	29
Jun 17	Preparation 11	-		£ 250	250	29
Jun 18	Preparation 12	£ 600	0	-		29
Jun 19	Telephone discuss	£ -		£ 25	0	48
Jun 19	Preparation 13	£ 750	600	£ 200	200	29
Jun 20	Telephone discuss	£ 75	0	£ 50	0	48
Jun 22	Preparation 14	-		£ 100	0	29
Jun 22	Consultation 10	-		£ 100	0	47
Jun 23	Trial - day 1	£ 900	625	£ 600	-425	5
Jun 24	Trial - day 2	£ 900	-	£ 600	-	5
Jun 25	Trial - day 3	£ 900	-	£ 600	-	5
Jun 26	Trial - day 4	£ 900	-	£ 600	-	5
Jun 27	Trial - day 5	£ 900	-	£ 600	-	5
Jul 1	Trial - day 6	£ 900	-	£ 600	-	5
Jul 2	Trial - day 7	£ 900	-	£ 600	-	5
Jul 3	Trial - day 8	£ 900	-	£ 600	-	5
Jul 4	Trial - day 9	£ 900	-	£ 600	-	5
Jul 7	Trial - day 10	£ 900	-	£ 600	-	5
Jul 8	Trial - day 11	£ 900	-	£ 600	-	5
Jul 9	Trial - day 12	£ 900	-	£ 600	-	5
Jul 10	Trial - day 13	£ 900	-	£ 600	-	5
Jul 11	Trial - day 14	£ 900	-	-		5
Jul 13	Discussion 8	£ 225	225	£150	150	45
Jul 14	Trial - day 15	£ 900	-	£ 600	-	5
	TOTAL	£23,900	£ 7,821	£ 17,625	£ 6,865	

50. **EXPENSES**.

[redacted] moved for the expenses of his appearance at the taxation. In addition to the two and a half hours at the diet itself, he and his Assistant [redacted] had met with Senior and Junior Counsel (Messrs Targowski and Hammond) on Tuesday, 3rd February, to prepare for the taxation hearing, and the meeting lasted from 4.30 pm until 8.45 pm. He referred to the decision of 4th February 1998 by the Sheriff Court auditor in Aberdeen, who had, after taxing fees for Counsel in H.M.A. v Masson and Cruickshank, given [redacted] fees which totalled £ 750 plus VAT. For this case, Mr. Quinn put his time charge at £ 500.

[redacted] did not suggest, on this occasion, that the Board's entitlement to a "free accounting" extended to the appearance at the diet of taxation. He referred, without disapproval, to a decision of mine in a taxation on 20th October 1997, where I allowed Daniel Kelly, Advocate, £ 70 for appearing personally at a taxation against the Legal Aid Fund. [redacted] objection to the Board meeting the expenses of this taxation, either [redacted] or the auditor's, was that the diet was premature. He claimed that the Board had made offers and, when these were not acceptable, the Board had asked for further information. Some had been supplied only at the same time as the Faculty had asked for a diet of taxation. He contended that the taxation should not have been asked for until it was seen to be inevitable, by reason of an impasse between the parties. In particular, he referred to his letter of 23rd January, quoted below, which had not been answered until 12th February. Accordingly, [redacted] contended, the parties were still negotiating and the taxation should not have taken place.

[redacted] responded that detailed information had been given to the Board in September 1997 and further details in November 1997. He submitted that although the parties had managed to agree the fees for the trial itself, they were so far apart on other areas that an impasse had effectively been reached. Since it was inevitable that a taxation would be required later if not sooner, the Faculty were justified in seeking a date when they did. He illustrated this by referring to the Board's request of 23rd January 1998 for additional information, when the main points raised were as follows.

(1) Counsel had failed to supply any documentation or detailed file notes to justify the level of preparation which appears to have been undertaken.