AUDITOR OF COURT
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Please reply to: K MacKenzie

Your reference: JDS/SMcB

Our reference: -

Date: 24.5.00

[redacted]

Scottish Legal Aid Board
DX ED 250
EDINBURGH 1.

[redacted]

Sorry to have taken so long to finalise this following the taxation on 3 march. I have been very aware that time has been getting on but at last the Sheriff Clerk's typists could fit me in - just as I was due to go away on holiday, following which I had a week of illness.

Yours sincerely

K MacKenzie

Auditor of Court

1/K 18250

Sep 2
Travel (20 min); Day 3 of Submissions, 10 am-3.50 pm (lunch 20 min); Consultation with Agent (20 min); travel (20 min); Overnight stay — £1000.00

Sep 3
Final Preparations re Court's queries re the law (1 hr); travel (20 min); pre Court preparation/waiting (20 min); Day 4 of Submissions, 10.10am-12.50 pm; Consultation with JS (20 min); packing up (30 min); travel home (1 hr 25 min) — £1000.00

18250.–	
	51000.00
3193.75 VAT @ 17.5% (off VAT)	8925.00
21443.75	
	£59925.00
Deduct	21443.75
	£38481.25
less 10%	3848.12
	34633.12
Add audit fee	2400.00
	37033.12
of which £1600 taxed off	1600.00
	35433.12
Add fee allowed to Mr Dunn	617.62
	£36050.74

NOTE BY THE AUDITOR OF PAISLEY SHERIFF COURT

In the

TAXATION OF THE ACCOUNT OF EXPENSES OF

JOHN A.P. MOIR, ADVOCATE

in causa

RENFREWSHIRE COUNCIL, PETITIONERS

V

THE PARENTS OF CHILD J.S., RESPONDENTS

For a

FREEING FOR ADOPTION ORDER

This taxation related to the fees claimed by Mr John Moir, Advocate, for representing the mother of a child, J.S., in a freeing for adoption petition at the instance of Renfrewshire Council. The mother was legally aided in the matter, and the fees are payable by the Scottish Legal Aid Board, hereinafter called "the Board". At the taxation Mr Moir was represented by [redacted], Law Accountant, and the Board was represented by [redacted] Solicitor.

PRELIMINARY MATTERS

[redacted] began by noting two preliminary points.

I will deal first with the peculiar nature of the Board amongst parties who may be required to pay judicial fees, arising from its statutory constitution, in which connection [redacted] brought my attention to the Civil Legal Aid (Scotland) (Fees) Regulations 1989, Regulations 9 and 10(2).

Regulation 9 requires me, subject to the provision of regulation 10, to allow Counsel such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

Regulation 10(2) restricts counsel's fees for any work in relation to proceedings in inter alia, the Sheriff Court to 90% of the amount of fees which would be allowed for that work on a

taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid.

For the purpose of this note I will deal in the undiscounted fees and deduct 10% in the final computation.

The second preliminary matter was the implication of the phrase "taxation as between solicitor and client, third party paying". He sad that of the three standards of taxation, this standard fell between those applied as between a straightforward account between solicitor and client and an account between party and party.

It is also convenient to mention under this head the circumstances which, [redacted] argued, are relevant in considering the amount of a reasonable daily fee. The Board, he said, accepted as relevant those circumstances put forward in an earlier taxation by Mr Munday, Advocate, and accepted by me. In a note on that taxation dated 25 November 1997 I set out the relevant circumstances as follows:-

(1) that every taxation of counsel's fees must be decided on its own merits as at the time when counsel's services were provided;

(2) the experience of the advocate;

(3) the difficulty of the case, having regard to complexity, novelty and other factors;

(4) the importance of the case to the clients;

(5) the inclusion or otherwise of preparation in the daily rate;

(6) the amount of travelling involved.

[redacted] said that the Board accepted these as relevant, explaining that the complexity referred to both evidential and legal complexity, and that legal complexity is the more important.

The relevance and importance of these circumstances are not in dispute in this taxation.

Turning now to [redacted] arguments on the substance of this account, I note first that the following items in the account are not disputed:-

(1) fees for notes

(2) fees for consultations, except that on 11 May 1998.

The points which are at issue are:
firstly, the daily fee rate which should be paid to Mr Moir for each day in court;
secondly, the number of hours of preparation time for the case that should be subsumed in the daily rate;
thirdly, the hourly rate at which preparation time not subsumed in the daily rate should be paid;
fourthly, and without contesting the number of hours spent in preparation, whether it had been necessary or appropriate to work all these hours, and
fifthly, whether the fee charged for a consultation on 11 April 1999 is excessive.

It is almost impossible to argue these points separately, since each depends to some extent on the others. I will nevertheless attempt to deal separately with arguments on aspects such as daily fees, preparation and hourly fees, so far as possible.

DAILY FEES AND PREPARATION TIME. [redacted] said that a reasonable daily fee should subsume preparation and incidental work to a far greater degree than Mr Moir's account of expenses allows. Indeed, he said that in the present case, even if I found all the hours claimed for preparation and incidental work to have been reasonably and necessarily worked, and even if I should fix a lower daily rate than claimed in the account, all matters separately claimed at an hourly rate should be so subsumed. He pointed out that there were thirty court days into which the preparation could be subsumed.

In the account as presented [redacted] said that the daily fees themselves subsumed only about 4 hours preparation each. He had counted 152 hours of preparation charged separately. Subsuming all preparation into the daily fees would therefore allow for about 9 hours

preparation per day, and that said [redacted] was not an unreasonable number of hours to be subsumed in the circumstances.

[redacted] said that even if all the hours claimed were subsumed into the daily fees £900 would be a reasonable daily fee in this case, given the various matters I have to consider in reaching my decision. In support of that position [redacted] drew my attention to a report issued by a joint auditor of Edinburgh Sheriff Court on 23 November 1999 in which he dealt with a fee claimed by junior counsel for an appeal to the sheriff against the decision of a children's hearing. The children's panel had refused to allow a further contact with his child who had been sexually abused. In that case counsel had claimed a fee of £900 for one day's appearance of 6 hours in court, and 11 hours of preparation forby. [redacted] said that that advocate was not untypical in claiming only a daily fee, even though the preparation had been so extensive, and the matter had been of so much importance to the client.

I was invited to look in detail at paragraph 7 of the joint auditor's report, in which he sets out his conclusions. At the bottom of page 3 he concludes that not less than £850 would be a reasonable daily fee in a case without undue complexity and not requiring special knowledge. On page 4, he describes the case in question as being in "the category of abnormality in magnitude or difficulty" and he accepts that this justifies a higher fee, and that £900 is reasonable for this case". He therefore sustains that fee, going on to say that, however the fee is "a bit on the light side", which remark in itself suggests a high degree of complexity in the case in question.

[redacted] said that the Board accepts these arguments and the guidelines they contain. It is, he said, implicit in the joint auditor's report that as £900 was "a bit on the light side" for a single day in Court requiring 11 hours preparation, the rate for such a case would be "a bit" higher, and on that basis the Board would accept £950 per day as reasonable for the very rare case of major complexity and difficulty, £900 for a case of unusual complexity or novelty, and £850 for a case of normal complexity. [redacted] noted in connection with these proposals that the employment of counsel was sanctioned in the Sheriff Courts only when there was more than usual complexity, difficulty or novelty, so these categories must be understood with that in mind.

[redacted] also put before me a note by the same joint auditor of Edinburgh Sheriff Court dated 20 October 1997. This dealt with counsel's fees sought for conducting a 5 day long proof about assumption by Lothian Regional Council of parental rights in respect of a child of the two respondents, who were separately represented. This case was, [redacted] said, in many respects on all fours with the present case, especially in regard to complexity and importance to the client. In his report upholding a fee £750 per day, without any further allowance for preparation, the joint auditor commented on the complexity and specialities of the case in such a way as to make clear that it was indeed a difficult and complex case. [redacted] submitted that if £750 a day was reasonable in 1995 for such a case then the daily fee of £900 suggested by the Board in the present case was appropriate for a similar case in 1998, and, as in both these cases no further preparation fees were allowed, neither should I allow preparation fees in addition to the daily rate in this case, unless I found the case to have presented counsel with complexities and difficulties rarely met with. In that event, I should allow counsel no more than an all-inclusive daily rate of £950 for each day spent in court, although he believed that counsel acting for a private client would accept a lower rate even than £900 per day.

HOURLY RATE. Whilst holding fast to his primary arguments, [redacted] briefly addressed me about an appropriate hourly rate for counsel, in the event of my allowing any preparation in addition to a reasonable daily rate.

He said it was quite unreasonable for counsel to claim what he described as very high daily and hourly fees. He said that if hourly and daily fees were both to be allowed then they should both be moderate so that the total fee claimed was fair and reasonable. He said that while a quick comparison of £100 per hour for junior counsel with the £88.60 per hour for a solicitor seemed to suggest £100 for counsel is reasonable, the huge difference in their respective overhead payments showed it to be excessive. [redacted] said he understood that counsel paid Faculty Services Ltd 17% or 17½% of his fees. Solicitors' overheads were, by contrast, in the region of 60-70%. Seen in that light £100 per hour for counsel was unreasonable.

I turn now to [redacted] submissions. He began by directing my attention to his written submissions lodged earlier, to which he would refer from time to time as his arguments

progressed. I will deal with his various arguments so far as possible following the order adopted by [redacted]

PRELIMINARY POINTS

[redacted] did not dissent from [redacted] explanation of the nature of the Board or his view of the standard of taxation of a party/party account of expenses. He did, however, suggest that the party/party standard of taxation is closer to the more generous solicitor/client standard than the restrictive party/party standard.

He argued that this is particularly so in modern times, and suggested that the concept of the "prudent man of business" is now rather dated. He submits in his written submissions the view that the prudent man of business "must now have a degree of common sense with a facing of the reality of a situation which might not have been the situation in Victorian times".

He next put it to me that to his mind and other auditors' way of thinking third party paying has "a more simple interpretation" now, that it requires to be demonstrated to me that a particular area of counsel's work was either unnecessary or extravagant before I tax it off, and I am being asked to tax counsel's fees "without specific restrictions" and in the knowledge that the court has certified the case as exceptional.

DAILY FEE RATE. [redacted] written submissions on this are contained in a section headed "basis of charging". In this he explains that he was approached by Mr Moir to assist him in this matter, and it is clear from those submissions that [redacted] decided the level of fees after consultations with others in his office.

On the question of daily fees [redacted] said that Mr Moir put in an average of 15 hours a day in attending at the proof and in morning and evening preparation on proof days. The daily fees of £1,000, he said, subsumes the whole of the daily attendances and the preparation of the written submissions. He said that the rate of £1,000 per day is discounted to take account of both the party party nature of the account and any idea of a wealthy instructing client. He said that the daily rate of £1,000 is, in the circumstances, fair and reasonable.

In support of the daily fee rate [redacted] drew my attention to a note by a depute auditor of court in Inverness in the case of [redacted]. In that case the depute auditor allowed a fee of £1,000 per day, subsuming on going preparation. The depute auditor also allowed a number of fees which were not challenged by the Board. Unfortunately, the note does not specify what work these fees covered. The depute auditor also allowed fees charged for preparation, but the note does not state the number of hours involved over the hourly rate allowed. [redacted] however, said at the taxation that the rate was £75 per hour. [redacted] particularly drew my attention to the similarities between the Larson case and the case under consideration. Both involved a social work department, allegations of child abuse, a 50% increase by the court of the instructing solicitor's fees, a similar basis of taxation (3rd party paying), a challenge of separate charges for preparation, substantial numbers of productions, a challenge of amount of the daily fee, long working hours during the proof, written submissions and substantial necessary non-working hours, which I assume means travelling and waiting in court. Despite these similarities [redacted] submits that its very length brings the present case into "a higher complexity scenario" than [redacted]. That, I assume, means simply that [redacted] believes this case is more complex.

PREPARATION TIME AND HOURLY RATES [redacted] main purpose, as evidenced by the number of authorities he referred to on the subject, was to convict me of the propriety of allowing payment for preparation over and above a daily fee for days in court and of paying for that by hourly rates. He deals with this matter at page 7 of his written submissions where he says, and I paraphrase, that he accepts that in a run of the mill case, legally aided, counsel are restricted to the schedule of charges set down by statute, but that in difficult cases charging separately for preparation is common and has been endorsed by auditors of court and judges.

He directs my attention to Lord Penrose's judgment in Ahmed's Trustee v Ahmed (no 1) SLT 1993 at p.390 in which his Lordship states (last paragraph of p.392).

".....the Dean reminded me that preparation was now commonly remunerated separately from appearance in court, and that the Legal Aid scheme as presently administered provided 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 to expect a party to pay when found liable in expenses of a late discharge of a proof".

[redacted] also referred me to the case of Uisdean McKay v HM Advocate and to a taxation report by the auditor of the Court of Session, to a note of objections by the Board to that taxation report, to an opinion of the court dealing with the note of objection and to a report by the auditor in the second taxation.

[redacted] pointed out that in his second report the auditor adhered to his previous decision to allow senior counsel £150 per hour and junior counsel £100 per hour. Again he argued the similarities between that case and the present one in terms of difficulty and complexity.

I was also referred to two notes by the joint auditor, Edinburgh, in the case of HM Advocate v Gielty. In particular, at pages 33 and 34 the joint auditor lists the elements of work he allows fees for, including 14 fees for preparation. Also on page 3 of the joint auditor's second report he allowed senior counsel £785 and junior counsel £500 for each day of the trial, by applying a multiplier of 2½ to the table fee for senior counsel, and then by looking at junior counsel's important contribution to the case settled on £500 per day for him.

[redacted] also briefly mentioned the cases of Fife Council v Malpas & Macnaughton v Macnaughton 1949 SC42. In Malpas Lord Bonomy allowed both senior counsel and junior counsel block fees for preparation for a proof and quoted from Macnaughton in which Lord President Cooper, in considering a proper fee for competent counsel states:- "The answer cannot be found by applying arbitrary rules of thumb, but requires an appraisal of the nature and 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". He then said that the Rules of Court do not affect that guidance.

Pointing out that that guidance was applicable to a normal case, [redacted] directed my attention to page 9 of his written submissions where he quotes further from Lord Bonomy's opinion in Malpas "....it seems to me to follow that, in deciding whether to allow or disallow any particular item, the auditor is undertaking a task similar to mine and should only disallow an item if it can truly be said that to incur that expense was not reasonable, in the sense that a competent solicitor acting reasonably would not have incurred it". Then I was referred further to Macnaughton in which at page 46 Lord President Cooper said "...But if the case is abnormal in magnitude or difficulty or in any other respect, a second approximation must be

made to reflect the specialities, and this second approximation may yield a substantially higher figure".

[redacted] submitted that the present case is abnormal in magnitude and difficulty and that is reflected in the level of counsel's fees sought. Malpas & Macnaughton were, [redacted] said, respectively an average and an above average case.

I was also referred to the Code of Practice for advocates issued by the Faculty of Advocates, page 11 of which suggests several different bases for charging fees – block, daily or hourly. Also, in the case of [redacted] which settled the evening before the proof was to begin, [redacted] pointed out that senior and junior counsel were both allowed preparation fees (9 days at £1,000 and £665 respectively) as well as £1,500 and £1,000 for the proof and 6½ days each for "commitment" in respect of their inability to accept other work while still expecting to conduct the proof in question.

[redacted] also referred to a passage in McLaren on expenses at page 451, which reads as follows:
"(2) Amount of fees – (a) Agents discretion – Agents are entitled to exercise a certain discretion as to the fees to be paid to counsel in each particular case, and it is only when that discretion is abused that it is within the province of the auditor to interfere" and "The agent is in the first place the best judge of what fees should be sent to counsel, and where he disburses a fee there is a strong possibility that he has not sent more than is reasonable". And "The agent who sends the fee, and is from his intimate knowledge of the facts and character of the case he is conducting able to estimate the work which counsel will have to perform, is best able to form an opinion as to the fee which ought to be sent. If on consideration of the whole circumstances (better known to him than to anyone else), he sends a fee which is not distinctly extravagant, I would not allow the auditor to interfere with it."

Lastly, I will mention two cases which [redacted] mentions in his written submissions, Elas v SMT Coal Co 1950 SC570 and Cassidy v Celtic Football Club. In the latter case the sheriff quotes with approval Lord Mackintosh's opinion in the former, as follows:-

"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 and

circumstances of the present time, and not to have been deflected from that aim by the Faculty of Advocates..... . There is not and never has been any rigid scale of fees for counsel. As was stated by Lord President Clyde in Caledonian Railway Company v Greenock Corporation 1922 SC299, 1922 SLT 30, "both the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one are just such fees as a practising law agent finds sufficient in order to command the services of competent counsel in cases of a similar character". In taxing the present account therefore, the auditor should have had in his consideration not any supposed scale of fees propounded by the Faculty of Advocates or any other body or person .....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 in similar cases had led him to form upon the question whether the fee was in all the circumstances of the case a reasonable fee or an extravagant one.

[redacted] argued that the authorities he quoted justified the account of expenses as drawn. Preparation had been allowed in a number of cases in different circumstances and hourly rates had been allowed in recent years by some auditors of court. In further support of the reasonableness of the fees he produced a copy of a letter sent to him by the instructing solicitors, HBM Sayers, which, he said, illustrated the complexity and the importance of the case, and praised counsel for the way he coped with it. The letter specifically states that the solicitors would not be surprised at a daily rate of £1,000.

Replying to [redacted] said that I should prefer the approach of the joint auditor at Edinburgh in the taxation of Mr Kelly's fees, to that of the depute auditor at Inverness in the [redacted] case. He said that there is no "correct" level for counsel's fees.

Rather, counsel charges a figure which seems appropriate to the whole circumstances of the case. He did not dispute the propriety of allowing fees for preparation where that was appropriate. The questions for me he said are the extent, manner of charging and the rates of fees. He said that £100 per hour and £1,000 per day were "top line" amounts, and if these forms of charging were both allowed it should be at much reduced figures. [redacted] said, are legal aid cases and not relevant to a private fee. When [redacted] protested and said [redacted] was indeed relevant, [redacted] pointed out that it was not, in that not only was it a criminal case but it had been extremely complex. He made no

comment on [redacted] He pointed out that the solicitors mention only a figure of £1,000 per day. He also pointed out that the Board's position is to an extent artificial in relation to cases in which they are as third party paying an agent/client fee, in that they do not have any input into the matter before hand, as a solicitor acting for a private client would have had.

CONCLUSIONS

I will first deal with the relative rigour implied by the three standards of taxation. The only authority on the point I know of begins with Macphail at para 19.46. Quoting McLaren on expenses p.509 he says "The taxation of an account as between agent and client to be paid by the unsuccessful party should approach more nearly the taxation of party and party than the taxation of an account between an agent and his own client". Macphail continues "Thus, in taxation as between solicitor and client, third party paying, the auditor may disallow numerous items which would be admissible in a taxation as between solicitor and client, client paying". There is then a reference to that well known prudent man of business.

I find no reason to dissent from that expression of the respective rigour of taxation of the three kinds of taxation.

I have to confess that I can take no coherent message from [redacted] comments on the prudent man. He says that the prudent man is a very old man now. I can only say that, old or not, he has been very much approved of in judicial decisions throughout his long life. In fact, the principle illustrated by the prudent man is still as meaningful as it ever was. Referring to [redacted] written submissions at the bottom of page 3 I can only say that a prudent man has always had common sense, and he can do no other than face the realities of the times he lives through. At the end of the day no prudent man pays more than necessary to obtain the standard of service he seeks.

Dealing with the effect that an uplift of solicitors' fees has on counsels' fee, I should note that if there is no speciality in a case, counsel's employment in the Sheriff court is not sanctioned. It is not uncommon when the use of counsel is sanctioned to find that the solicitor's fee is enhanced by the court. When the joint auditor at Edinburgh uses the phrase "without undue complexity or difficulty" at page of his report of 23 November 1999, it is implicit by the sanctioning of use of counsel that there was complexity or difficulty some extent. I should also note that because solicitors and counsel are performing different tasks there may not in

fact be an invariable relationship between the complexities of their respective tasks. That said I have had ample opportunity to consider this matter and I accept that this case lies towards the top category in respect of the complexities for both solicitor and counsel.

I also accept that counsel put in many hours of preparation for this case. I am not, however, convinced that all of it can be allowed. I particularly noted the hours spent at or in or with – I am not sure of internet terminology – the internet, and reading medical reports, and also [redacted] assertion at the taxation that counsel had to become "virtually an expert" on brittle bone disease.

My understanding is that the expertise counsel brings to a case is legal expertise. Medical expertise is a matter for properly qualified doctors and there was a good number of them certified as expert witnesses in this case, and a plethora of medical reports and opinion. I assess that about 13 hours were spent on preparation which I consider inappropriate for a "third person paying" account, and which, in my view, it was unreasonable to incur, insofar as they seemed to me to represent, in [redacted] word, a degree of "fishing" for information.

Apart from these points I should say that I agree with the joint auditor at Edinburgh when he states at page 13 (paragraph 20) of his note dated 23 February 1998 "I reject the concept of counsel being remunerated by arithmetically multiplying the exact time spent on each item by an "hourly rate", although, like him, I found the detail of the account helpful. My agreement is largely founded on this, that any hourly rate covering such a multiplicity of items as telephoning, photocopying, travelling, revising precognitions, studying productions etc seems to me to be the kind "arbitrary standard or rule" that Lord President Cooper warns against in Macnaughton.

I do not believe that solicitors' hourly rates can be used to argue for possible hourly rates for advocates unless the huge difference in their overheads is understood. The only figures I know of dealing with solicitors' overheads can be found in a 1993 cost of time survey by the Law Society of Scotland. At that time the hourly rate for solicitors approved by the Law Society was £80 and the average "zero-income hourly cost rate" was £48.11. If I understand the figures aright the solicitor pays out 60% of his hourly rate in overheads as opposed to the

advocate's 17½% or so (I take it, in stating this, that [redacted] figures were accurate about that).

These things being the case, I do not propose to follow the example of the depute auditor at Inverness, preferring as I do the joint auditor at Edinburgh's approach in his report dated 23 November 1999.

When I go on to consider the principal authorities on taxations of private fees, which I find more persuasive than any others, I find they all focus on two things – that the best indicator of a reasonable fee for counsel is what a competent agent would send him and, apart from that, that auditors should rely on their own skill and experience before they exercise their discretion to interfere.

McLaren at p.451 gives a clear exposition of both these points, as does Lord Mackinosh in Elas v SMT Coal Company.

In Macnaughton Lord President Cooper gives guidance to auditors about how an auditor might choose to exercise that discretion. He says that, as quoted earlier, the auditor in a special case must make two approximations, one for an ordinary case and another to reflect the specialities. Judicial opinions delivered in criminal cases, however interesting and even instructive they may be, are not in my view very helpful in the present circumstances. Indeed, no opinion delivered in a case for which a table of fees exists can be of much assistance to an auditor of court in assessing a private fee. Where there is a table of fees, the fees stated in that table are the starting point, and provide the auditor with what Lord President Cooper in Macnaughton called the "first approximation". I think I can only consider those cases in which the fee under consideration is a private fee between an agent and client as directly in point. It is clear from these cases that in a difficult case, which counsel has spent much time preparing for proof, but which settles at the last minute, preparation cannot reasonably be met by a figure appropriate to one morning in court. I think that there is no other way to properly remunerate counsel in any case in which the preparation is disproportionate to the court time than to allow separate preparation fees. The question here is whether the preparation necessarily done in this is in any way proportionate to the days spent in court. I have already indicated I will not allow all the preparation. I should also comment on the preparation of the submissions for what amounted to 4 days in court

from 31 August to 3 September. By my reckoning a total of 65 hours 30 minutes were spent between 1 July and 3 September for these four days. The 19 hours 25 minutes of court time would have included not only Mr Moir's submissions but also those presented for the other two parties involved in the litigation, and even if Mr Moir's arguments consumed 8 or 9 hours of the total, it seems he spent over seven hours preparing for each hour of presentation. I cannot believe that such extensive preparation was reasonable, despite the importance of the case, and I am convinced that no solicitor acting for a private client of relatively modest means would authorise such expenditure.

Given my view of the preparation overall I think that a reasonable daily fee for each day in court – I will also allow a daily fee at the same rate for 11 May – will be sufficient to remunerate counsel properly for his involvement in this case.

Turning to what that daily fee should amount to I have to consider the various methods outlined in the authorities by which counsel's fees should best be computed. The main approved method is that the solicitor should decide, either by seeking an agreed fee at the outset or by sending a suitable fee at the case's end, taking account all counsel has done. Failing that, counsel should discuss the matter with his or her clerk and charge a fee based on their joint deliberations. Failing both these, the auditor is left with his own skill, experience and discretion.

It cannot be said in this case that the solicitor sent the advocate a suitable fee, nor did he seek a fixed fee from the advocate in advance, nor did counsel consult his clerk.

What counsel chose to do was to leave the matter of feeing in [redacted] hands. It is no disparagement of [redacted] to point out that counsel has not charged his feeing on any judicially approved basis.

That being so, the only course open to me is to rely on my own knowledge and experience and any guidance I may find from the solicitors involved. Now is has been my invariable experience that counsel's fees have been charged for cases similar to this on the basis of payment for notes, consultations and days in court. I have had relatively recent experience of a case not too different from this one except in length – this one lasted about twice as long – in which despite complexity, difficulty and much preparation counsel charged on a daily

basis. Time has moved on since then and the fee in the present case must be more than I allowed then.

Accepting as I do the three categories of difficulty previously mentioned, I think that despite my having disallowed so much preparation this case tends towards the third, most complex, category, and a more generous daily should be allowed than usual.

I am also prepared as I said before to allow a daily fee to counsel for his consultation on 11 May 1999, at the same rate as for days in court.

Had I absolutely nothing else to guide me than my own experience and taking into account the distance of Paisley from Edinburgh I would allow Mr Moir a daily fee of £950 for each day in court and for 11 May 1999.

However, I do have the letter dated 2 March 2000 from the solicitors involved in this case, and even if the opinion given there was not reached in contemplation of sending counsel his fee I am sure it was given in good faith and on an honest appraisal of the work counsel did. The solicitors say that a daily rate of £1,000 would seem to be justified, and as that figure rests on their own involvement in the case and their extensive knowledge of it I cannot say that that figure would be extravagant, I will allow Mr Moir that amount for his daily fee. I cannot forebear to note that nowhere in his letter does the solicitor even hint that preparation fees should be allowed as well as the suggested £1,000 per day.

Because I have decided to allow a daily fee I do not have to give further consideration to any hourly rate. I should say, however, that if I had allowed a daily rate and an hourly rate for preparation the daily rate would have been much less than £1000 and the hourly rate much less than £100.

My own fee for the taxation is £2,400. My first inclination is to make all of it payable by counsel because, even if he has been successful to the extent that I have allowed more than the £20,860 offered to him, in my opinion the account was hugely overstated, and that in itself would have created a barrier to any sensible negotiation with the Board about the fee to be paid. However, it was agreed at the taxation that my fee would be apportioned with regard to the relative success of parties in the taxation calculated in this way, that a fee of £20,860 or

less would represent total success by the Board and a fee as submitted in the account would represent total success by counsel.

On that basis taking a broad axe to the figures, I calculate about 2/3 success for the Board and 1/3 success for counsel, and I will therefore find the Board liable for £800 of my fee and counsel liable for £1,600.

My last task is to consider [redacted] involvement in the taxation. [redacted] said it was reasonable that he should have appeared for counsel at the taxation. He noted that other auditors had allowed him his fee for attending taxations as had the Court of Session auditor and, indeed, a Court of Session judge. He claimed a total of 24½ hours (7½ hours for his written submissions, 9½ for preparation and 7½ hours attendance at the taxation) all at a rate of £78.50 per hour. His claim therefore totals £1,923.25.

[redacted] pointed out that it was doubtful if anybody but a solicitor or a party himself could properly appear at a taxation which was, after all, a proceeding in the sheriff court, albeit not a proceeding in the court itself. I know that in the past some sheriff court auditors refused to allow anybody but solicitors or parties to appear at taxations, but I think it is nowadays generally accepted that law accountants can appear at taxations. Indeed, [redacted] objection was directed at the propriety of allowing [redacted] a fee, and he did not at the beginning object to his appearance at the taxation.

I think that if it is proper to allow [redacted] to appear he should be allowed also his reasonable fees for appearing.

As I said earlier I found the detail included in the account and the citation and quotes from cases in his submissions to be very helpful, but his written arguments less so. Also, in my view, Mr Quinn misdirected himself at the start by his approach. His written arguments about the "prudent man of business" were obscure, not to say obfuscatory, and his arguments were in large part based on cases which were not truly in point. Because of that the taxation was longer than necessary. Had [redacted] sought the solicitor's views earlier and given proper consideration to those views as expressed in the solicitor's letter dated 2 March 2000 he would surely have realised that that was, by every test, the best guide for Mr Moir's reasonable fees, and he would surely not have presented the present account. That he did so

suggests to me that he did not give the matter well directed consideration. For these reasons I will allow Mr Quinn only one half of the 17 hours claimed for preparation, that is 8½ hours and I will allow him also 5 of the 7½ hours of taxation, a total of 13½ hours.

As to the rate to be allowed to [redacted], as explained to him at the taxation I invariably allow law accountants, whether as full-time employees of solicitors or not, one half of the rate I allow to solicitors and I have never been criticised for doing so.

The present rate for solicitors set by the Law Society for Scotland is £91.50 per hour, so will allow [redacted] 13½ hours at £45.75 per hour, a total of £617.62.

Having regard to all these factors I tax the account at the sum of £36,050.74, as brought out on page 11 of the account.

"K MACKENZIE"

(K MacKenzie)
Audtor of Court, Paisley
23 May 2000