NOTE BY AUDITOR OF COURT, GREENOCK
IN A TAXATION OF FEES TO COUNSEL MARIA CLARKE

In causa HOH

INVERCLYDE COUNCIL v [redacted]

Introduction.

The account was remitted to me by Faculty Services Limited for taxation of Counsel's fees in relation to Maria Clarke.

This taxation took place at Greenock Sheriff Court on 11 January 2005. Mr [redacted] appeared on behalf of the Scottish Legal Aid Board, and [redacted], Law Accountant, Alex Quinn & Partners, appeared on behalf of Maria Clarke.

At the initial stages of the Hearing, two areas in dispute were accepted. These were

(1) That the Fee for the "Note" dated 10 December 2001 would be **£50.00,**

(2) That the fee for the Consultation with an expert, dated 29 January 2002, would be **£400.00**

The remaining areas in dispute between the Board and Maria Clarke were basically on three points:-

1. The daily rate payable to Counsel,
2. Whether preparation time was allowable, and
3. The rate payable for Consultations at Port Glasgow.

Prior to the hearing [redacted] had lodged written submissions with references to various authorities, including, *Mclaren on Expenses at page 451*, unreported opinion of Lord Bonomy i.c. *Mrs Mary Malpas v Fife Council, 15 January 1999, MacNaughton v MacNaughton, 1949 SL42,* and *Ahmed's Trustees v Ahmed, (No. 1) 1993 SLT 390.*

At the Hearing the Scottish Legal Aid Board lodged a written submissions and a table showing the areas in dispute, and also lodged the following authorities, including unreported opinion of Lord Eassie i.c. *Dingley v The Chief Constable of Strathclyde Police, 9 October 2002,* The Decision by the Auditor of Court Glasgow, 6th February 2003 [redacted] case), The Decision of the Auditor of Court at Arbroath, 22 August 2002 ([redacted] case).

The Case.

The case involved was an action by Inverclyde Council for a Parental Rights and Responsibilities Order in respect of two children SGO and KDT, in terms of Section 8 of the Children (S) Act 1995.

The Action was raised on 20th July 2001 and is governed by the procedures laid down in section 86 of the Children (Scotland) Act 1995 and the Child care Maintenance Rules.

The procedures involved in this type of Action are very similar to those under the Adoption and Freeing Order procedure, and not the normal civil procedure.

The case is a complex and novel one, and was the first action of its type at Greenock Sheriff Court and possibly the first action of its type in a Scottish Court.

A brief history of the case is set out in order to put the case into context.
Both children had been the subject to numerous applications to the Sheriff Court by the Reporter to the Children's Panel over a number of years dating back to 1992 and the Council have sought no fewer than fifteen Court orders in respect of the children. Both parents were separated and sought different remedies from the court. Their representation was entirely separate and accordingly different complexities were involved.

[redacted] has been involved in crime since the age of 13/14, and has suffered from addictions to alcohol and drugs. He has also been imprisoned on various occasions and has also spent time in hospital, largely for drug use /misuse. His Social Work, rehabilitation and medical records were substantial.
The orders sought by Inverclyde Council were to assume the Parental Rights on behalf of the long term foster carers of the children.

The Children's Panel had terminated Contact by either parent, and recommended the granting of the Orders sought.

The context of the Contact Order sought by [redacted] was totally different to that in a normal civil action for Contact, and also in the procedures to be followed.

The case was initially set down for a two day Proof commencing on 15th November 2001.

The Proof commenced on that date, and evidence was led over a total of ten day between 15th November 2001 and 14th March 2002, with a further two days as a Hearing on Evidence on 14th and 15th May 2002.

In total, the Proof lasted for 12 days over a six month period, and the diets of Proof took place on approximately two days in each of the months between November and March, and the Hearing on Evidence two months after the close of the Proof (May 2002).

The Submissions

At the commencement of the taxation, parties agreed that the only areas requiring taxation were (1) Counsel's daily rate and (2) whether preparation time was allowable and justifiable, (3) The rate payable for Consultations in Port Glasgow.

In so far as Counsel's fee was concerned, the Civil Legal Aid (Scotland)(Fees) Regulations 1989, Regulation 9 thereof, provided that "*Counsel may be allowed such fees as are reasonable for conducting proceedings in a proper manner, as between Solicitor and client, third party paying*".

A proviso to that regulation was set out in Regulation 10, ie "*Counsel's fees for any work in relation to proceedings in the Sheriff Court ... shall be 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".

The daily rate claimed by Ms Clarke was £1,500, and the rate offered by the Scottish Legal Aid Board was £1,000. It was agreed by both parties that these sums were the actual sums which would be payable (i.e. these were in effect the 90% rates), depending on which figure, if either, I assessed as reasonable.

[redacted] referred me to the authorities in his written submission (Macnaughton v Macnaughton, and Malpas v Fife Council) and argued that these provided the Auditor a clear discretion to fix a market rate for Counsel's fees. His view was that the phrase "*Solicitor and client, third party paying*" was the highest rate payable other than Agent and Client. This had been a lengthy, complex and difficult case, and Counsel in the case was of the view that the fee of £1,500 was fair and reasonable.

On the issue of preparation, [redacted] submitted that in addition to length, complexity and difficulty, this had also been the first case of its type in a Scottish Court and was far more complicated than a normal civil action. There had also been numerous productions lodged, and a lengthy Section 86 Report running to 41 pages plus appendices. [redacted] also observed that even in a "party and party" rate, in his experience Counsel were more frequently receiving preparation fees. No rate was actually fixed for this, but he stated that the practice of Auditors was to remunerate preparation time on the basis of calculating the overall number of hours of preparation into a "court day" daily rate. The final rate chargeable for preparation and

non court days (ie. for a full day's consultation) was normally two thirds of that daily rate, sought by Counsel at the rate of £900 per day.

I was referred to the case of "Ahmed Trustees V Ahmed No 1 (OH)" 1993 SLT, where Lord Penrose observes on page 392, at the last paragraph:

"That preparation was now commonly remunerated separately from appearance in court, and that the Legal Aid Scheme as presently administered provided payment for such fees".

Replying on behalf of the Scottish Legal Aid Board, [redacted] submitted that the meaning of the expression "*Solicitor and client, third party paying*" was now determined by the case of *Dingley*. In that case, Lord Eassie had considered a note of objections to a taxation by the Auditor of the Court of Session. [redacted] directed me to two sections of Lord Eassie's opinion, firstly at paragraph 26 Lord Eassie observes:

"only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed"

And later:

"There is no limit to the number of counsel that a party may choose to employ or the fees that he may send, but if he shall think proper to employ an unnecessary number of counsel or to pay higher fees than are warranted by ordinary practice, the extra expense thereby occasioned shall not be allowed against the opposite party";

And at paragraph 27:

"For that reason it appears to me that, for similar work performed pursuant to the same instruction, the amount of the fee to counsel recoverable under a party and party award ought not to diverge markedly from that recoverable on an agent and client, third party paying basis".

[redacted] argued that this case now defined "*solicitor and client, third party paying*". In effect, he submitted, it was not within the discretion of the Auditor to simply fix a fee at a market rate. Rather, the fee payable where the Scottish Legal Aid Board is the third party ought to be that fee which is the "ordinary and reasonable" fee. A taxation involving the Scottish Legal Aid Board was more akin to party and party taxation. He did not accept that it was standard procedure to pay separate preparation fees for this type of case, although he noted that this was the practice in criminal cases at the Auditor's discretion. However, this was not a criminal case.

So far as what a reasonable daily rate might be, he drew my attention to various cases of a similar nature which he submitted at the hearing. In particular, he referred to the decision of the Auditor at Glasgow in what he described as the [redacted] case. He pointed out that the daily rate fixed in [redacted] included all preparation time, and the time for preparation of submissions. The *inclusive* daily rate fixed in the [redacted] case was £1,260. In that case, SLAB was prepared to pay two thirds of what ever daily rate was fixed for the preparation for submissions at the end of the case, but was not prepared to pay separate preparation fees for work done before the proof or during the

evenings of the days on which the proof ran, as had been claimed. All preparation fees ought to be subsumed by the daily rate.

[redacted] also drew my attention to an additional case at the hearing, viz. the [redacted] case, (a decision of the Auditor at Arbroath dated 22nd August 2002). In this case the Auditor observed on page 3, fee note 10:

"This fee relates to excessive preparation which took 4 days and additional periods undertaken in the evenings plus work over the weekend and for the 10 day proof diet. It is my view it would be fair and reasonable to allow a daily rate of £1395, which would take into consideration the vast amount of preparation and the complexity of the case".

[redacted] said that SLAB did not dispute that there would have been some preparation time, but that the fee, whether on the days of the proof or at any other time ought to be subsumed by the daily rate. Having regard to the decisions in the cases referred to which generally indicated that preparation in this type of case was subsumed into a reasonable daily rate, he contended that no separate preparation fee should be paid.

In determining what rate might be appropriate for this I have had regard to the nature of the case itself, which was a novel case under new procedures, it was a long case, and involved Counsel in long days of approximately 12 hour per days (including about 4 hours traveling each day). I am persuaded

in all the circumstances by the views taken by the Auditors in those cases on the question of a reasonable daily rate. In this case, junior counsel was instructed and sanctioned. SLAB is currently offering a net daily rate of £1,000. Taking into account the 10% deduction element required by Regulation 10 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989, that would bring the gross rate being offered by SLAB to almost £1,100.
Having regard to that, and the rate fixed in the other cases mentioned in the submissions, I am of the view that **a gross daily rate of £1,445** is a fair and reasonable fee, having taken into account the lengthy days due to the extensive traveling time involved in Counsel commuting to and from Edinburgh to Greenock, and for a case of this nature for junior counsel.
After deduction of the 10% element of Regulation 10 of the Civil legal Aid (Scotland)(Fees) Regulations 1989 this gives **a net daily rate of £1,300.**

In relation to preparation, again the cases to which I was referred suggest to me that, subject to some exceptions, preparation time generally ought to be subsumed within the daily rate.
I have taken into account the excessive traveling time Counsel was involved in each day, and this time could have been used for preparation of the future day's court, and records of evidence led, and so I have not allowed time for preparation for the continued hearings.
The only exception to that is that I will allow 2 days preparations for the Hearing on Evidence which took place about two months after the close of the evidence in the Proof, and required consideration of 10 days Notes of Evidence.
Having heard submissions on the rate for non-advocacy days, I am of the opinion that the rate for the preparation for Final Submissions should be 2/3