COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in causa

HER MAJESTY'S ADVOCATE

Against

MD [redacted]

EDINBURGH. 21 March 2005

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Donald R MacLeod, Advocate, in relation to fees claimed by counsel for representing [redacted] in the High Court, in both Edinburgh and Perth, on sexual abuse charges.

2. At the Taxation on the 14 June 2004, the Board were represented by Mr [redacted] Solicitor. Mr MacLeod did not appear, but elected to exhibit written submissions for the Auditor's consideration.

3. The Fee Notes in dispute are for Hearings at Perth High Court, a consultation in Perth & perusal of Social Work Records, a Consultation in Canterbury, a Note for the employment of Senior Counsel, the conduct of the Trial in Edinburgh High Court and Preparation.

The Fees issued by Faculty Services Ltd., in dispute are as follows:

27.11.01 – Consultation - £225
03.12.01 – Consultation - £250
15.04.02 – Attendance at Perth High Court - £450
10.06.02 – Attendance at Perth High Court - £250
10.06.02 –Attendance at Cons, Perth & reading Social Work Records £250
19.07.02 – Attendance at Consultation in Canterbury - £1500
23.07.02 – Attendance at Edinburgh High Court - £650
24.07.02 – Note for Sanction of Senior Counsel - £150
16.09.02 – Attendance at Edinburgh High Court - £200
18.09.02 – Attendance at Trial in Edinburgh High Court - £750
19.09.02 – Attendance at Trial in Edinburgh High Court - £750
20.09.02 –Attendance at Trial in Edinburgh High Court to include a cons, - £900
-Preparation to include reading 543 pages of productions - £900

5. In his submissions counsel outlined the background and the complexities of the case. [redacted] was indicted in the High Court on serious child sexual abuse charges committed against the daughter of an ex-girlfriend. Mr MacLeod had previously represented the accused in another case relating to sexual offences, for which he was convicted of unlawful sexual intercourse, but acquitted of attempted rape.

Mr MacLeod explains he found the accused difficult - At the first consultation in this case, the accused blamed counsel for the short prison sentence he had received in the previous case referred to, causing him to lose his job and had resulted in the break up of his foster parent's marriage. He did not understand that his solicitor had instructed Mr MacLeod in this case, because of the outcome achieved in the previous case, where he had been acquitted of attempted rape.

[redacted] presented with almost child-like naivete and it was difficult to conduct consultations because of his petulance and distracted and resentful behaviour. The difficult lay in ensuring that he understood the important nature of the charges and the content of the consultation. After interminable delays, all of which had arisen for various and legitimate reasons, the trial proceeded, only to be aborted on the final day shown on the fee-note when his former girlfriend blurted out in the presence of the Jury information about his previous conviction. After some delay, the Crown intimated that it had been decided not to re-raise the matter. [redacted] was therefore acquitted of all charges. There can be no doubting the serious nature of these charges which upon conviction in the ordinary case would almost certainly have led to a long prison sentence and an extended sentence. My concern here was that an incisive judge might have, after full psychiatric assessment, decided that a discretionary life sentence was the only way of ensuring public protection and that consideration made it all the more imperative that [redacted] fully comprehended the case against him".

Counsel makes reference to the previous case where it was the view of one psychiatrist who advised the defence that the accused had undergone a difficult birth and may have suffered frontal lobe damage affecting his inhibitions and self control mechanisms. This resulted in counsel having to investigate whether the accused was suffering from 'false or implanted memory syndrome' – "the underlying notion being that the child's mother had for her own ends, "brainwashed" her young child over some years into believing that she could recollect Donaghy abusing her". Counsel required to trace an expert in this field and spent considerable time on the internet in the course of his inquiries. He was able to locate a suitable expert, but could not use him as he was subsequently arrested in connection with pictures of abused children on his computer. Counsel then had to source an alternative expert in this field. He travelled to Canterbury to consult with the expert. Although cited to attend trial the expert was not able to give evidence as the trial was aborted after 3 days. In

preparation for the Trial, counsel spent three hours considering social work records and twelve hours perusing the 543 pages of productions.
In support of his fees counsel makes the following submissions:

a) "The adjournment obtained on the 14.07.02 was not obtained right away. Other business was dealt with in court before this case. On that occasion it had to be explained to the court that our intended expert on false or implanted memory syndrome had been arrested... I consider the fee charged was fair and reasonable in those circumstances".
b) "I accept the annotation for 10.06.02 is not as clear as it could be but it is meant to suggest that I spent three hours reading the social work records at the offices of Perth Council after the consultation... I think the fee charged for that endeavour was modest having regard to the importance of the work, which required an eye for detail and the taking of cross-referenced notes.
c) "I am prepared to accept the abatement proposed for the 23.07.02 but wish to record at that by this stage the Crown were very anxious that the trial proceed (the charges were by this time becoming antique) and there was every prospect that the judge might have ordered that the case proceed there and then so full preparation had to be undertaken".
d) "I was asked to write the Note for sanction of senior when it became clear in late July 2002 that the case might proceed at Perth when I was on holiday. I recollect writing that Note quite clearly and do not see why I should not be paid for doing so bearing in mind the gravity of the case, whatever has happened to it since. Indeed, it is difficult to understand how Ian Hamilton QC ever became instructed without such a note".
e) "I now turn to the question of the fees charged for the days of trial namely 18-20.09.02. It is to be recollected that this trial was aborted half way through the Crown case, on the afternoon of the third day. My memory is that the trial was expected to last about another three days. The whole defence case had yet to be explored and [redacted],

the defence psychologist speaking to false and implanted memory syndrome would I think, have occupied several hours of court testimony alone. Her evidence was expected to be contentious, so I think three more days is a conservative estimate".

f) "The problem remains of what is to happen in respect of extensive preparation in such a case as this where there is early abortion of the proceedings. My fee note refers to 543 pages of productions and on top of that of course there were the precognitions to be read. Where a trial proceeds, counsel might expect to recover a large element of his preparation in the ongoing accumulation of daily fees over the duration of the trial for a period of weeks. Is it not correct to allow a realistic rate of remuneration for the days when the case was dealt with in court? I would also mention that in July 2002 I was kept on the end of a lead by the Crown on several occasions, having been told that the case might or might not call on particular days and only receiving word not to attend the night before. The fees charged ultimately for the trial are intended as modest recognitions of the work undertaken and refer to the remarks which I made in the submissions in the case of Wendy Gillespie and to the comparison with fees in that and other submissions. I refer particularly to Lord Bonomy's remarks in this connection too".

g) Finally, I turn to the Canterbury visit to meet with [redacted] for which sanction was obtained. I was not privy in advance to anything which SLAB say they imposed on the instructing agents although I was made a ware that there had been some discussion on this point. The visit was essential. The trial was due to start in Perth circuit the following week and I still had not seen the expert. I travelled overnight to London on the sleeper and thence by train to Canterbury the following day where I met [redacted] for some time. I then travelled by train back to London in the late afternoon and took the return sleeper to Edinburgh. I think the approach by SLAB to this matter proceeds on complete misunderstanding of their powers in such a context. They cannot dictate

the fees of counsel in advance, far less package them up with those of the agents to a total acceptable to themselves. The reason that I say that is that the governing regulations make no such provision and make it clear that counsel is to be remunerated on a fair and reasonable basis for work properly undertaken, the decision as to the amount lying, in the event of dispute, with the Auditor. SLAB cannot legitimately seek to by pass the statutory procedure in this way. This is a matter of principle for me, and for all my colleagues and I am prepared to litigate further upon it if necessary. Moreover, I submit the fee charged was reasonable, indeed modest, considering the loss of working time entailed in travel. I had to ensure that no other work overran on the day of my departure and so this prevented me from seeking instruction elsewhere. Further, and in any event, the idea that I should accept £400 for this item when I expended well over £100 in travelling is plainly ludicrous. Less than £300 net for such an important consultation at such a distance .... The abatement is unacceptable".

6. [redacted] lodged points of objection as follows:

This case proceeded in Edinburgh High Court and involved a charge of rape of a seven year old girl.

The fees are prescribed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 10 (1) (the "Criminal Fees Regulations") which provides that 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".

The fee prescribed by Schedule 2 of the Criminal Fees Regulations for junior counsel in respect of the "Trial per day" in Edinburgh is £242.50. Although

sanction was apparently granted for senior, the proceedings were conducted by junior and are chargeable under Chapter 1 if the schedule.

Claim

Counsel has claimed various fees as set out in the fee note.

The following fees have been abated.

		CLAIMED	OFFER	ABATE	TAXED
27.11.01	Consultation	£225.00	£175.00	£50.00 ✓	175
03.12.01	Consultation	£250.00	£175.00	£75.00 ✓	75
15.04.02	Attendance at Perth High Court (case adjourned)	£450.00	£390.00	£60.00 ✓	390
10.06.02	Attendance at Perth High Court/ Viewing productions	£500.00	£400.00	£100.00 (+50)	450
19.07.02	Attendance at consultation, Canterbury	£1500.00	£400.00	£1100.00	Retn 400
23.07.02	Attendance at Edinburgh High Court (case adjourned)	£650.00	£400.00	£250.00 ✓	400
24.07.02	Note for Sanction of Senior Counsel	£150.00	£Nil	£150.00	0
16.09.02	Edinburgh High Court	£200.00	£125.00	£75.00	125

Counsel has claimed £1200.00 per day for trial. A separate preparation claim of £900.00 has been lodged.

Offer

Various abatements as above have been made in respect of claims for consultations, meetings and attendances at the High Court which did not proceed to trial.

The claim, dated 19 July 2002 for attendance at Canterbury to consult with a psychologist has been restricted to £400 as a result of insufficient sanction cover. Counsel has been advised to arrange for the instructing solicitor to apply for increased cover retrospectively.

The note dated 24 July 2002 has been abated as this was not requested by the Board and it is unclear why sanction was sought.

The claim for the conduct of the trial per day for 18, 19, and 20 September together with separate preparation is considered to be excessive. These claims bear no relation to the table of fees prescribed for counsel and no indication is given in line with the observations in *HMA – V- Uisdean McKay 1999 SCCR 679* as to how these sums have been arrived at. The offer for the trial days is *withdrawn*.

7. Having heard [redacted] and having considered Mr MacLeod's submissions the Auditor is guided by the decision in the case of *Uisdean McKay v. H.M.A. Ref S.C.C.R. 679.* On page 10, the Lord Justice Clerk states, "it is important, in our view to bear in mind that the allowance of fees at taxation in a legal aid case requires to be carried out within a statutory framework, in the present case as that set out in Schedule 2. The rule binds the Auditor, and they bind Counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them. Para. 2 makes specific reference to the general levels of fees in the Table of Fees as one of the circumstances to which the Auditor is to have regard. Where a case is of a type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work which no fee is prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the table. This points to the terms of para. 3, namely 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". Thus in

such a situation the Auditor would be entitled under para. 2, to allow a higher fee than would have resulted from this allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3".

Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 provides that counsel shall be allowed "such fees as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy".

The Auditor having considered counsel's submissions, assumes that the abatements proposed by the Board to the consultations dated 27.11.01 & 03.12.01 are acceptable to counsel, as these have not been referred to. Further, the Auditor notes that counsel is no longer insisting on his fee for the attendance at Edinburgh High Court on the 23.07.02, and is accepting the amount offered by the Board.

The Auditor having regard to the terms of Regulation 14 (1) (d) of the Criminal Legal Aid (Scotland) (Regulations) 1996, is unable to consider counsel's fees for the consultation in Canterbury, as this is considered by the Board to form work of an unusual nature or likely to involve unusually high expenditure, for which the prior approval of the Board is required. As insufficient sanction was obtained by the instructing solicitor, the regulation does not allow the Auditor any discretion and he therefore cannot give consideration to counsel's fees at taxation. The Auditor understands that the only possible remedy available is set out under the terms of Regulation 14 (1) (2), in that the instructing solicitor can apply to the Board for retrospective authority. Should retrospective authority be obtained, counsel's fees can be remitted to the Auditor for consideration in the event of any dispute between the Board and Counsel.

The Auditor is not persuaded that he can have regard to Lord Bonomy's comments in the publication referred to, as they do not reflect the appropriate basis for

taxation, but is a matter for the relevant bodies. Accordingly, the Auditor is not convinced that a taxation is the forum for these issues and can only have regard to what a reasonable fee would be based on the particular circumstances of the case, due regard being had to economy. In applying this test, the Auditor is satisfied that the Boards approach in this case is correct, having regard to the circumstances of this particular case. However, the Auditor concedes that counsel should be remunerated for the preparation undertaken and allows counsel a reasonable fee based on the work done. The Auditor therefore, taxes counsel's fees at £4265 as follows:

- 27.11.01 – Consultation - £175
- 03.12.01 – Consultation - £175
- 15.04.02 – Perth High Court - £390
- 10.06.02 – Perth High Court/Consultation/Social Work Records - £450 * (+ 50)
- 23.07.02 – Edinburgh High Court - £400
- 24.07.02 – Note for Sanction, Senior Counsel - £0.00
- 16.09.02 – Consultation -Edinburgh High Court - £125
- 18&19.09.02 – Trial, 2 days @ £600 per day = £1200
- 20.09.02 – Trial, 1 day - £750
- - Preparation - £600 * (+600)

Mary Lockhart

AUDITOR OF THE COURT OF SESSION