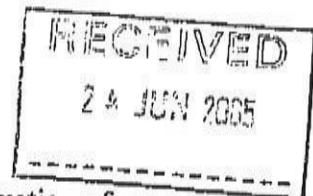


**NOTE BY AUDITOR OF COURT, STRANRAER
IN A TAXATION OF FEES TO COUNSEL JONATHAN BROWN**

IC v WB

in causa

Introduction**INDEXED**

The Account was Remitted to me by Faculty Services Limited for Taxation of Counsel's fees in relation to Jonathan Brown. This Taxation took place at Stranraer on 14th April, 2005. [REDACTED] appeared on behalf of the Scottish Legal Aid Board, and Mr. Jonathan Brown appeared on his own behalf.

The accepted grounds of dispute were basically as follows:-

1. The daily rate paid to Counsel;
2. Whether or not any uplift in fees was due to reflect the remote location of Stranraer; and finally
3. The rate payable for the Miscellaneous Hearings and review of the papers prior to Proof.

Prior to the Taxation, Mr. Brown lodged a written outline submission with references from McPhail, Sheriff Court Practice (2nd Edition) along with a number of privately funded cases, both within and outwith Edinburgh, and a decision of Sheriff Principal MacPhail in "*Gibson - v - Robb*" Edinburgh Sheriff Court, 26 April, 2004.

The Scottish legal Aid Board lodged a written outline submission with references to various Authorities as follows:-

1. Opinion of Lord Eassie in *Dingley - v - The Chief Constable of Strathclyde Police*.
2. Decision of the Auditor of Court, Hamilton, on 10 July, 2001 ("McLeay" case).

5

3. Decision of the Auditor of Court, Glasgow, on 20 September 2002 ("McGinley" case).
4. Decision of the Auditor of Court, Glasgow on 6 February 2003 ("Kelly/Elliott/Miller" case).
5. Decision of the Auditor of Court, Linlithgow dated 26 January 2005 ("Cifuentes" case).
6. Decision of the Auditor of Court, Dumfries on 6 October 2003 ("JW" case).
7. Decision of the Auditor of Court, Greenock, 11 January 2005 ("O'Hagan" case).

The Case

The case involved a dispute over residence/contact with the Pursuer residing in Dingwall and the Defender in various locations in Dumfries and Wigtownshire, and initially called for Proof on 31 January, 2003. Having commenced on that date further evidence was led over a total of 12 days between 31 January, 2003 and 17 May, 2004, with a further day for a Hearing on the Evidence on 14 June, 2004. During the course of the Proof there were three days on which Incidental Motions were heard namely 10 February, 2003; 10 March, 2003; and 8 December, 2003. An Appeal to the Sheriff Principal was heard on 10 June, 2003 and a Procedural Hearing on 23 April, 2004. It is fair to say that the case was complicated by the fact that as a result of the Appeal a Proof in Replication was necessary with some witnesses being recalled. Further complications as a result of the issue of the Defender's mental health developed as the case progressed.

INDEXED

RECEIVED
2 JUN 2005

The Submissions

Mr. Brown submitted that the fee due in this case should be calculated in accordance with Regulation 10(2) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, which is, so far as is relevant for present purposes, in the following terms:-

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24 JUN 2005

“(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”.

He submitted that the starting point therefore should be to ascertain what was the “Private Going Rate” or “Notional Private Rate” i.e. What fee would be allowed for work on a taxation between Solicitor and client, third party paying if that work was not legally aided. He referred to paragraphs in MacPhail which dealt with the three modes of taxation as follows:-

There are generally speaking three modes of taxation: party and party; solicitor and client, third party paying; and solicitor and client, client paying.

Party and party taxation is the mode employed for judicial accounts of expenses, and in party and party taxation “*only such expenses are allowed as are reasonable for conducting the litigation in a proper manner*”: MacPhail Sheriff Court Practice (2nd Edition) para 19.43.

At the other end of the scale, taxation on the basis of solicitor and client, client paying allows recovery of “*all expenses reasonably incurred by the agent for the protection of his client’s interest in the suit, even although such expenses cannot be recovered from the opposite party*”: MacPhail, *op.cit* para 19.45.

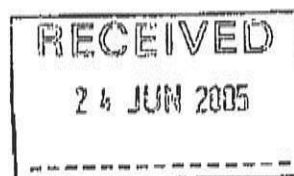
Taxation on the basis of solicitor and client, third party paying is an intermediate mode of taxation. While *not so generous as in taxation between solicitor and client, client paying, it is yet not quite so rigorous as the taxation between party and party*”. The approach should be to cover “*...those expenses which would be incurred by a prudent man of business without special instructions from the client in the knowledge that the account would be taxed*”. MacPhail, *op.cit*. para 19.46.

He submitted then that the notional private rate would depend primarily upon the three following factors:

1. The nature and complexity of the case.

INDEXED

(5)



2. The identity of the Counsel in question.
3. The location of the Court.

Dealing with the first of these factors, Mr. Brown expanded on the outline of the case detailed earlier in this note by stating that it was an extraordinarily difficult case to conduct. The Defender turned out to be mentally disturbed and throughout the case made numerous allegations about various parties connected either directly or indirectly with the case, e.g. : The Sheriff, Counsel and Witnesses. These included allegations that the pursuer was sexually promiscuous, and was in the habit of having random sexual encounters with groups of strangers. The pursuer's position was that these allegations were fantasies of the defender, and that the defender's sanity and stability were seriously in question. His written letters of complaints alone produced voluminous inventories of productions. There was an Appeal marked to the Sheriff Principal during the Proof which necessitated evidence being heard in replication, and finally there was the chapter of procedure relating to the Defender being remitted for Psychiatric examination. Due to the Pursuer residing in Dingwall, consultations with Counsel were carried out mainly at Stranraer Sheriff Court as the case progressed (Mr. Brown submitted that normally 2 consultation fees were allowed on Party/Party cases). The highly unusual nature of the case is demonstrated by the result, in that from a starting point where the defender had custody of the child and the pursuer had no contact, the final result was that the pursuer had custody of the child with the defender having no contact. Such a complete reversal of the position is unique in the experience of this practitioner. Mr. Brown also contended that in such a complex case where no Senior Counsel is employed, then Junior Counsel's fees should be uplifted.

Secondly Mr. Brown contended that the best evidence of the notional private rate for himself is the rate which he can command in privately funded cases. He then referred me to five privately funded cases within Edinburgh which demonstrated a range of daily rates from £1500 - £1830. He referred specifically to the case of [REDACTED] which proceeded to a judicial taxation on a party/party basis, which he contended was a more onerous mode of taxation than the present case. In that case, which he stated was no more difficult or complex than the present case and involved no expert evidence, the Auditor allowed a daily rate of £1500. He then referred me to

INDEXED

(6)

four privately funded cases outwith Edinburgh which produced a daily rate of £1600 - £1650. The principle demonstrated by these cases was that travel beyond Edinburgh was an uplifting factor in that these were all relatively straightforward, short cases with no requirement for additional preparation.

Thirdly Mr. Brown addressed the question of the location of the Court. He submitted that the distance from Parliament House and Stranraer Sheriff Court is approximately 132 miles and the journey takes about 3 hours each way. He contended that at a rate of £100 per hour (90% of the equivalent private rate for Solicitors recommended by the Law Society of Scotland), and 45p per mile, a round trip would attract a daily commuting rate of not less than £700.

He further contended that in the context of such a return journey than an overnight stay would be justified at a reasonable rate of £100 per night for Dinner, bed and breakfast. Due to the distribution of Court days in the present case, this would produce 12 journeys plus 19 overnight stays, giving a total of £10,300 which if divided by the 19 Court days involved produces a daily uplift of £542. As an alternative, on the basis of travel only from his home address, which would be a journey of 190 miles and 2 hours each way, this would produce a daily uplift of £481.

In all the circumstances Mr. Brown therefore submitted that his claim to the legal Aid Board for a net daily rate of £1,620 was both fair and reasonable.

██████████ stated that the relevant provisions of the Legal Aid Legislation are Regulations 9 and 10(2) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, and the statutory referral to myself for taxation is provided by Regulation 12. He contended that although Mr. Brown's references to MacPhail are accurate, these should be read in conjunction with the decision in *"Dingley - v - The Chief Constable of Strathclyde Police"*. Reference was made to three specific passages towards the end of Lord Eassie's Opinion as follows:-

"At all events, it appears to me that, given the appropriateness of the particular instruction to counsel, there should be little difference between the "ordinary" or

RECEIVED
21 JUN 2005

INDEXED

(7)

"reasonable" fee which the unsuccessful opponent is required to pay and the fee which a prudent solicitor would tender or agree for the same instruction. A prudent solicitor would presumably not pay an extraordinary or unreasonable fee. 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".

"In my opinion, general observations about the generosity of one basis of taxation as opposed to another have a capacity to mislead. There are different ways in which comparative generosity may arise. Items of work or expenditure may be eligible under the one, but not under the other, scale of taxation. That does not mean that as respect for the recoverable amount of items eligible under both scales a more generous remuneration must be allowed in the amount recoverable for those common items in the one account as opposed to the other".

"Where the particular task required of counsel is eligible in a party and party taxation for recovery against the losing party there is, in my view, prima facie no good ground where on the reasonable, ordinary fee recoverable from the losing opponent should differ to any significant extent from the fee payable by the third party who likewise has no direct control over the bargain eventually struck between the client's solicitor and counsel".

██████████ submitted that this House of Lords case clearly established the importance of the "reasonable fee". Further he submitted that in Lord Eassie's Opinion counsel couldn't necessarily assume that a Judicial Taxation on a party/party basis such as ██████████ was a more onerous mode of taxation as compared with the present case.

In dealing with Mr. Brown's calculation of a notional private rate ██████████ dealt firstly with the complexity issue. His view was that albeit there were some bizarre allegations made by the Defender and his supporters throughout the case, it remained essentially a dispute on residence and as such not the same level of difficulty as compared to the case referred to in his written submission. Thereafter ██████████

RECEIVED
24 JUN 2005

INDEXED

(8)

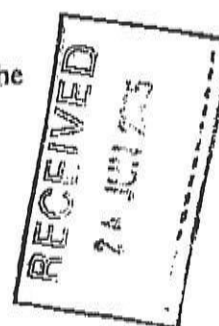
dealt with the issue of the identity of the Counsel instructed :- In support of his submission Mr. Brown had referred to a number of private cases and to counter that [REDACTED] referred to two cases which were quoted in the Opinion of Lord Eassie in "Nicholas Dingley - v - The Chief Constable of Strathclyde Police" viz:-

Macnaughton v Macnaughton 1949 S.C. 42 in which the Lord President (Cooper) at 46, said

"It is well to begin by restating the governing principles. The concern of the court is to decide not what fees a particular counsel was justly entitled to receive from his client for his services under the conditions under which he gave them, but what fees can properly be made a charge against an unsuccessful opponent. There is no objection to the employment by a client of any counsel, however eminent, in any case, however small, or to the payment of any fee, however large. But we have a plain duty to protect unsuccessful litigants against excessive charges, and not to permit the unavoidable risks of litigation to be enhanced by the added peril of possible liability for extravagant or unreasonable expenses".

and *Caledonian Railway Company v Greenock Corporation* 1922 S.C. 299,311:

"The principle underlying the many decisions which have been pronounced on this subject is that neither the "normal" fee nor the "proper" fee is ascertainable by any arbitrary valuation of our reference to any abstract standard but in accordance with the general practice of agents in instructing counsel. To state the principle more particularly, 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".



[REDACTED] submitted that the present case should be compared with the general level of fees set over the last three or so years, namely £ 170- £1350. He further specifically referred to the following cases - the "McLeay" case - Hamilton 2001, page 6, para 9(ii)

INDEXED

(9)

"The case had taken a total of forty eight days of court time and the Reporter had cited 16 witnesses in support of the application, including a substantial number of expert witnesses:- 3 Consultant Radiologists; 2 Consultant Paediatric Neurologists; a Consultant Geneticist; a Paediatrician; a Biochemist; and a Dentist as well as an expert report from the leading authority on genetics and the bone disease Osteogenesis Imperfecta. The Safeguarder called an internationally renowned authority on bone biochemistry and a Consultant Dentist. In addition the Reporter also called further medical evidence, partly of fact and partly by nature of the source expert, from a Paediatric Registrar; a Physiotherapist, and a number of Social Workers. Expert reports were produced from each expert witness.

And further, Paragraphs 16 and 17:-

INDEXED

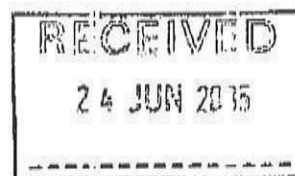
"As stated herein (and as agreed at taxation) this figure is subject to a reduction of 10%. The effect of this is that the daily rate claimed by Mrs. Clark in respect of the above will be reduced from £1,800.00 per day (the original claim for £2,000.00 per day being reduced by 10% as agreed at taxation) to £1,350.00 per day (I have restricted the daily rate to the days when the proceedings were actually conducted by counsel in court:- in the case of Mrs. Clarke a total of 43 days and 46 days for Mr. Cheyne) similarly, in respect of Mr. Cheyne his claim of £1,350.00 per day (the original claim of £1,500 per day being reduced by 10% as agreed at taxation) has been sustained and he should therefore be paid at this rate.

I think that I am obliged to state that I considered this to be an exceptionally complex case and in many ways quite unique. I also felt that it could be considered as being on quite a different level from that which junior counsel would normally be expected to conduct. I am therefore of the opinion that the fairly substantial increase in fees in this case in comparison to the level of fees that I am familiar with as an Auditor, and with the fees fixed by the Auditors in the cases referred to during the course of the taxation is justified. However, I do not consider that this rate should be regarded as the norm, or used to establish the "market rate".

██████████ contended that this had been a top of the range case and that even with inflation this wouldn't take the figure up to that claimed by Mr. Brown.



10



The "McGinley" case – Glasgow 2002, Page 3, paragraph 13 - [REDACTED] advised me that in addition to the five day Hearing, Counsel spent two full days in preparation with such time on this occasion being subsumed into the daily rate. Further, during the course of the Hearing at least three/four hours was spent each evening in preparation for the following days court appearance. He further advised that the Social Work Records were extensive and there was also Expert Reports from a Consultant Paediatrician and Psychologists in respect of both children ".....which resulted in a Legal Aid rate of £1080.

The "Kelly/Elliott/Miller" case – Glasgow 2002 Page 3, 1st Para. - "[REDACTED] had earlier provided me with a copy of the Sheriff's Stated Case for the Opinion of the Court of Session at Edinburgh which runs to almost 400 pages. There were some 200 findings in fact and the hearing extended to some 48 days of evidence with the interests of seven different parties being represented. In addition, there were a series of Procedural/Preliminary Hearings determining various issues. Evidence was taken from the various children, Clinical Psychologists (2), Police and Social Workers, oral and written medical evidence from five Doctors, evidence of Angela Kelly and Jacqueline Kelly, the sisters of the two female relevant persons, evidence of the five relevant persons and the evidence of [REDACTED] the parents of [REDACTED] and further evidence from Social Workers and Police, Educational experts and the area of evidence surrounding the use and sale of a computer".....which resulted in a Legal Aid rate of £1260; and finally

The "[REDACTED] case, page 6, last para. - " In determining what rate might be appropriate for this I have had regard to the nature of the case itself, which was a long and in some respects unusual case. Despite the fact that there were no criminal proceedings pending against [REDACTED] the allegations of sexual abuse were serious and would of course have been of importance to him. But I feel I also have had to make some comparisons of this case with the circumstances of the other cases provided to me, in particular the *McLeay* case. The present case does not seem to me to fully match *McLeay* and indeed the other cases in terms of difficulty, complexity, or novelty, particularly as the main thrust of the case was against the mother, who was not Mrs Richards' client. Accordingly I am persuaded in all the circumstances by the

(11)

views taken by the Auditors in those cases on the question of a reasonable daily rate. It seems to me that the rate suggested originally as being chargeable (were this a private case) i.e. £1750 to £2000 is more likely to be a rate closer to that for senior counsel. In this case junior counsel was instructed. SLAB is currently offering a net daily rate of £1250. 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 to almost £1390. Having regard to that, and the rate fixed in *McLeay* I am of the view that a daily rate of £1250 is a fair and reasonable rate for a case of this nature for junior counsel" - which resulted in a Legal Aid rate of £1250.

██████████ submitted that in all the circumstances the list of private cases referred to by Mr. Brown both within and outwith Edinburgh should be compared with the rates that Auditors generally allow in family matter cases. Secondly he did not see a great deal of difference in the cases referred to in or out of Edinburgh.

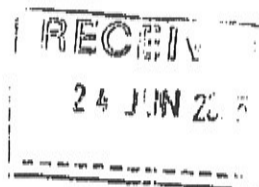
With regard to the location of the Court he referred to the "JW" case - Dumfries 2003 which resulted in a Legal Aid rate of £1170; and the "O'Hagan" case - Greenock 2005, which resulted in a Legal Aid rate of £1300.

In conclusion ██████████ submitted that if you were to look at the aforementioned Auditors Reports of recent years then the range would be from £1100 - £1300 at the top of the range. The Legal Aid Board's original response to Mr. Brown's claim had been to offer a net daily rate of £865 but as I understand the position that has risen during ongoing negotiations.

Mr. Brown argued that although inflation had not risen significantly, legal fees had increased by something in the region of 30% in the last few years. He also contended that if the daily rate allowed after taxation in ██████████ in Edinburgh on a party/party basis, was £1500 then what would it have been if heard in Stranraer with the extra travel etc. The same argument could be levied at the "O'Hagan" case in Greenock.

**INDEXED**

(12)

**Conclusion**

In determining what rate might be applicable here, I am heavily influenced by the Auditor's Reports of recent years referred to and in which by SLAB's own admission demonstrate a range of net daily rates of £1100 - £1300. Whilst being satisfied that this case would not be at the top of the range for complexity it was nonetheless a very difficult case to conduct with a number of very unusual aspects to it. I am also persuaded by Counsel's argument that a daily uplift would be merited here due to the extensive daily travel undertaken by Counsel from his home to Stranraer.

In arriving then at a fair and reasonable rate, I have taken into account all of the foregoing along with the rate which Mr. Brown demonstrated he could command as Junior Counsel in privately funded cases. I am of the view that a Gross daily rate of £1555, which after deduction of the 10% element of Regulation 10 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, gives a net daily rate of £1400, is both fair and reasonable. At this point it is perhaps worth stating that at the conclusion of submissions I was advised that SLAB's final (without prejudice) offer to avoid the necessity of a Taxation, was £1350 net and Mr. Brown's response was that he would have been prepared to accept £1485 net.

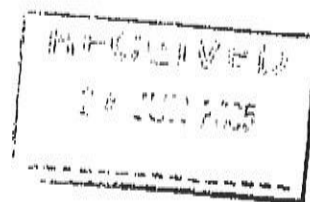
Dealing now with the question of the rate to be allowed for the miscellaneous hearings etc. Firstly we have Counsel's review of the papers on 30 January, 2003 in preparation for Proof. Counsel's fee note states that he was engaged in this task for a period of 4 hours for which I am prepared to allow at 50% of the net daily rate. The Motions heard on 10 February, 2003 and 10 March, 2003 dealt firstly with Interim residence and Interim contact orders pending outcome of the proof and secondly, revisal of the Interim contact order following upon the defender's refusal to return the child to the pursuer after a contact visit. These were extremely important matters to the client in the context of the proceedings as a whole and as such I am prepared to allow 75% of the net daily rate. The Appeal heard before the Sheriff Principal in Stranraer on 10 June, 2003 was crucial to the progress of the Proof and accordingly I am prepared to allow the full net daily rate for this. The Motion hearing on 8 December, 2003 dealt with the Defender's application to vary the Interim contact previously granted and was successfully opposed by the pursuer. Accordingly I am

(13)

prepared to allow 75% in this instance. The procedural hearing held on 23 April, 2004 was relatively straightforward and accordingly 50% of the net daily rate is appropriate.

In Summary therefore, I make the following awards of expenses in relation to the fees claimed by Jonathan Brown:-

a) Review of Papers	30.1.2003	£ 700
b) Proof	31.1.2003	£1400
c) Motion	10.2.2003	£1050
d) Motion	10.3.2003	£1050
e) Proof	14 – 17.4.2003 (4 days)	£5600
f) Proof	13.5.2003	£1400
g) Appeal	10.6.2003	£1400
h) Proof	17 – 19.11.2003 (3 days)	£4200
i) Motion	8.12.2003	£1050
j) Preparation of Draft Interlocutor (agreed with SLAB)		£ 200
k) Proof	14 – 16.1.2004 (3 days)	£4200
l) Procedural Hearing	26.3.2004	£ 700
m) Proof	17.5.2004	£1400
n) Hearing on Evidence	14.6.2004	£1400
		£25,750
		17.5% VAT £ 4,506
		TOTAL £30,256



INDEXED

EXPENSES OF TAXATION

Mr. Brown and [REDACTED] submitted that expenses of the Taxation should follow success.

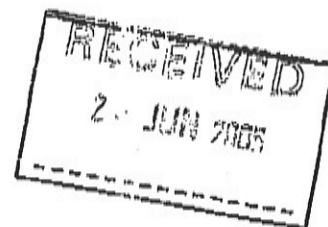
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Accordingly and notwithstanding Mr. Brown's degree of success, in light of SLAB's final, without prejudice, offer noted earlier I take the view that parties should be responsible for their own expenses. However, I take the view that SLAB should be responsible for payment of the Audit Fee which in this case is the sum of £907, thus making the final Total of £31,163.

BRUCE JAMES LINDSAY

Auditor of Court.

26.5.2005.



INDEXED