Auditor of the Court of Session

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DB

[redacted] v Scottish Ministers

Aidan O'Neill QC

Legal Aid Reference C7801588307

EDINBURGH 29 October 2010

At a second diet of taxation on 27 September 2010, the Auditor heard further representations on behalf of Aidan O'Neill QC and the Scottish Legal Aid Board, in respect of fees totalling £22,400.00 claimed by Mr O'Neill in a fee note dated 23 May 2007. Having considered the information provided and the submissions made, the Auditor now taxes the said fees at TWENTY TWO THOUSAND FOUR HUNDRED POUNDS (£22,400.00). To the said sum there falls to be added VAT at 17.5%, £3,920.00, and the Auditor's fee, inclusive of VAT, £1,052.80.

AUDITOR OF THE COURT OF SESSION

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Ms Frances Delaney

NOTE

1. The disputed fees in this case are Mr O'Neill's fees for his work in connection with a petition for judicial review of a decision taken by Scottish Ministers to revoke the petitioner's licence and to recall him to custody. One element – for Mr O'Neill's appearance before the Inner House on 27 April 2007 – was agreed at £150.

2. The Auditor previously taxed the said fees in terms of a Report of Taxation dated 30 March 2010, but Mr O'Neill lodged a Note of Objection and, by interlocutor dated 25 June 2010, Lord Tyre sustained the Note and remitted the taxation to the Auditor for reconsideration.

3. The relevant provisions of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 are as follows:-

   Regulation 9
   Subject to the provisions of regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

   Regulation 10
   (1) Counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4.

   Schedule 4, Paragraph 2
   Where the Table of Fees in this Schedule does not prescribe a fee for any class of proceedings or any item of work, the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general level of fees in the said Table of Fees.

Schedule 4, Paragraph 4

The auditor shall have power to increase any fee set out in the Table of Fees in this Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstance such an increase is necessary to provide reasonable remuneration for the work.

4. In reconsidering the taxation of the disputed fees in this case, the Auditor has adopted the approach identified in the following *dicta*:-

The Scottish Legal Aid Board v The Auditor of the Court of Session (re Uisdean McKay v HMA) 1999 SC 670, per the Lord Justice Clerk at pages 675 - 677

"*It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind 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.*"

"*Paragraph 3 limits the power of the Auditor to increase any fee set out in the Table of Fees to cases where he is satisfied that the test set out in the paragraph is met. By implication he is then expected to select a fee which will "provide reasonable remuneration for the work". The word "increase" does not in our view entail that he has necessarily to proceed by using some form of incremental calculation. It simply means that he can allow a higher fee. The case may be such that an incremental approach is unrealistic, because it is so different from any type of case for which the Table of Fees is appropriate. However, that does not mean that the Table of Fees can simply be ignored. Thus if the Auditor allowed a fee which was so high as to imply that the "ordinary" fee prescribed in the Table (ie, the fee allowable where there were no particular circumstances to warrant an increase or a reduction) was too low, it would be clear that something had gone wrong. In short, on the footing that a fee set out in the Table of Fees is otherwise prescribed, there requires to be a reasonable relationship between that fee and any higher fee which the Auditor is minded to allow, having regard to the*

features of the case which he considers to justify that higher level. In so far as certain observations by Lord Prosser in Geddes may suggest otherwise, we are unable to endorse his Lordship's views."

"*Having regard to the statutory framework within which the Auditor was required to operate it should have been unmistakable that his taxation had been carried out in accordance with its rules."*

The Scottish Legal Aid Board (McKay) case was concerned with the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, but the terms of Schedule 2, Paragraph 3 to which the foregoing *dicta* relate are essentially the same as Schedule 4, Paragraph 4 in the Civil Legal Aid (Scotland) (Fees) Regulations 1989.

Lord Tyre's Opinion dated 25 June 2010 in respect of Mr O'Neill's Note of Objection

"*It therefore appears to me that one of the purposes of the 1949 Act and its successors prior to 1984 was to secure that Counsel able and (prior to 1977) willing to provide services to legally aided persons would receive a reasonable fee: not always as much as counsel for a non-legally aided party would have received following taxation on the appropriate basis, but of a similar order. I can identify nothing in either the 1983 amendment or the 1986 Act to suggest that Parliament intended that that purpose should cease. The 1984 Regulations, made under the 1967 Act as amended in 1983, and the 1989 Regulations, made under the 1986 Act, should, in my opinion, in the absence of any contrary indication, be construed as intending to further the same legislative purpose."* [Para 38]

"*I conclude, in the context of the present case, that the reference in paragraph 9 of the 1989 Regulations to allowance of "such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying, covers both issues of eligibility and quantification."* [Para 40]

"*I prefer to found my interpretation in the historical context which seems to me to make clear that one of the principal purposes of the legislative scheme has been and continues to be to make access to justice available to legally-aided litigants through the counsel of their choice (unrestricted by the willingness or otherwise of counsel to be included in a list), on the normal basis of instruction, in consideration of the payment of a reasonable fee to Counsel by the Fund.*" [Para 45]

"*I have already expressed my view that although the starting point for calculation of the fee for an item of work is the relevant figure in the Table, the auditor's task is ultimately to fix reasonable remuneration for the work. If the fee that the auditor allows is higher – and possibly much higher – than the figure in the Table, then the auditor must give his reasons for departing from the figure in the Table and for selecting the fee that he has allowed. It is that explanation which, in my opinion, supplies the relationship between the prescribed fee and the fee allowed, provided, of course, that the auditor's explanation for the higher fee is reasonably related to one or more of the matters mentioned in paragraph 4, including "any other particular circumstances".*" [Para 50]

"*In my opinion Mr Clancy was correct in his submission that the inclusion of the word "particular" in both paragraphs 4 and 5 is intended to ensure that the auditor identifies and is therefore able to explain the circumstances which cause him to conclude that a higher (or lower) fee than that prescribed by the Table is necessary (or sufficient) to provide reasonable remuneration for the work concerned. Those may, in my opinion, include circumstances arising from the passage of time since the last uprating of the figures in the Table such as changes in the level of counsel's fees, whether as a result of general price inflation or otherwise. It remains necessary, however, for the Auditor to use some yardstick to determine whether or not an increase or reduction of the amount prescribed by the Table is needed to produce a reasonable fee. In my opinion the yardstick supplied by the Regulations is that specified in Regulation 9, namely the solicitor and client, third party paying basis of taxation. It follows that in my opinion the auditor is entitled to continue to have regard to the "prudent man of business" test in determining the extent, if any, to which a fee prescribed*

by the Table falls to be increased or reduced in order to provide reasonable remuneration for the work in question." [Para 54]

"*So far as paragraph 2 of Schedule 4 is concerned, similar considerations apply. Where the auditor decides to allow a fee for an item of work for which no fee is prescribed by the Table, the general level of fees in the Table provides the starting point. However, the auditor must have regard to "all the circumstances". These will include, in my opinion, an assessment of whether a fee at the general level of fees in the Table is sufficient (or excessive) in order to provide reasonable remuneration for the work. As with paragraph 4, the statutory yardstick for that exercise is to be found in Regulation 9.*" [Para 55]

Park v Colville 1960 SC 143, per Lord Patrick at page 153

"*Now, for nearly a century a distinction has been enforced, according as the taxation was between agent and client, client paying, or between agent and client, third party paying. If the taxation is between agent and client, third party paying, all expenses are allowed which would be incurred by a prudent man of business without special instruction from his client in the knowledge that the account would be taxed – Hood v Gordon per Lord McLaren at p.676.*"

Dingley v The Chief Constable of Strathclyde Police 2002 SCLR 160, per Lord Eassie at page 172

"*I would observe in passing that the term "man of business", little used today, simply refers to a solicitor..... 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 "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. 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.*"

"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 whereon the reasonable, ordinary fee recoverable from the losing opponent should differ to any significant extent from the fee payable by the tird party who likewise has no direct control over the bargain eventually struck between the client's solicitor and counsel."

5. The petitioner in the present case sought judicial review of the lawfulness of the Scottish Ministers' decision to recall his licence on the basis that it would automatically deprive him of his vote and his ability to participate in the elections of 3 May 2007 to the Scottish Parliament. First orders were granted by Lord Clarke on 20 March 2007 and a hearing on the petitioner's motion for interim orders was held on 22 March 2007 at which the Scottish Ministers and the Lord Advocate were jointly represented by the same set of counsel, with the Advocate General being separately represented. The motion for interim orders was refused by Lord Clarke on 23 March 2007. A first hearing on the petition was then held before Lord Malcolm on 3 and 4 April 2007. On 4 April 2007 Lord Malcolm announced his decision to dismiss the petition. The petitioner reclaimed. At a hearing arranged as a matter of urgency on 23 and 24 April 2007, the First Division refused the reclaiming motion. The case appears to have been regarded as being of UK wide importance. If the petitioner's argument had been upheld it would have meant that the Scottish Ministers would have had no power to recall prisoners released on licence to prison unless and until the UK Government altered the rules on prisoner disenfranchisement. The UK Government was represented before the Court of Session by two senior counsel - the Advocate General for Scotland and Gerry Moynihan QC. The Scottish Ministers were represented by senior and junior counsel. The case required knowledge and experience of European Human Rights law and constitutional law. These are the areas of law in which Mr O'Neill particularly specialises. The case concerned not only the petitioner's right to vote, but also his liberty. It was clearly of importance to him. A large number of documents had to be considered. Around fifty authorities had to be referred to and summarized. These consisted of case reports from the Scottish, English and Northern Irish courts as well as from the European Court of Human Rights, and extracts from

academic articles. The fact that the case was able to be heard by the Inner House in only two days owed much to counsel producing full notes of argument which were lodged with the court and which excerpted many of the relevant passages from the authorities.

6. The Table of Fees in Schedule 4 prescribes fees for revisal of pleadings by senior counsel and for senior counsel appearing in the Outer House and in the Inner House. Given (1) that the Table has not been updated since 1995, (2) that these prescribed fees consequently bear no relation to the fees which would currently be allowed for the same work on a solicitor and client, third party paying basis, and (3) that this was a particularly complex and difficult case (see paragraph 7 above), the Auditor is satisfied that these prescribed fees would not constitute reasonable remuneration for the revisal and appearance work carried out by Mr O'Neill in this case and that increased fees should therefore be allowed in terms of Schedule 4, paragraph 4. Applying the "prudent man of business" test and the Auditor's own knowledge and experience, however, he is of the view that the fees claimed by Mr O'Neill for revisal of the petition on 15 and 16 March 2007, and for his appearances in the Outer House on 20, 22 and 23 March 2007 and in the Inner House on 24 and 25 April 2007 do represent reasonable remuneration for this work on a solicitor and client, third party paying basis. (Mr O'Neill has not claimed a fee in respect of the first hearing before Lord Malcolm on 3 and 4 April 2007.)

7. The other fees claimed by Mr O'Neill are for drafting and/or considering Notes of Argument on 18, 19 and 21 March and 23 April 2007, for compiling Lists of Authorities on 19 and 26 March and 23 April 2007, for liaising with agents and junior counsel on 26 March 2007, and for revising Grounds of Appeal on 16 April 2007. Since there are no prescribed fees for such work in the Table of Fees, the Auditor requires to determine appropriate fees in terms of Schedule 4, paragraph 2. Given that the Table has not been updated since 1995 and that this was a particularly complex and difficult case (see paragraph 7 above), fees based on the general levels of fees in the Table would bear no relation to the fees which would currently be allowed for the same work on a solicitor and client, third party paying basis and would not therefore constitute reasonable remuneration for it.

Applying the "prudent man of business" test and the Auditor's own knowledge and experience, however, he is of the view that the fees claimed by Mr O'Neill for this work do represent reasonable remuneration for it on a solicitor and client, third party paying basis.

OUTER HOUSE, COURT OF SESSION

[2010] CSOH 79

P694/07
A1007/00

OPINION OF LORD TYRE

in NOTE OF OBJECTION

by

AIDAN O'NEILL, Q.C.,
Noter;

To the Report of the Auditor in the taxation of counsel's fees in Legal Aid reference C7801588307 relative to the application of Donald Birrell (AP)

for Judicial Review

and in

NOTE OF OBJECTION

By

DONALD DAVIDSON, ADVOCATE
Noter;

To the Report of the Auditor in the taxation of counsel's fees in Legal Aid reference C1/03/3019037 relative to the reclaiming motion in the case of Alan Pearson (AP)

against

J RAY McDERMOTT DIVING INTERNATIONAL INC

For the Noters: Clancy, Q.C.,; Mackenzie; Balfour + Manson LLP
For the Minuters: Dean of Faculty; Hamilton; Faculty of Advocates
For SLAB: Crawford, Q.C., Scottish Legal Aid Board

25 June 2010

Introduction

[1] These two Notes of Objection raise an issue of general importance in relation to the remuneration of counsel for work carried out on behalf of a person receiving civil legal aid. They disclose a change of interpretation of the relevant regulations by the Auditor of the Court of Session, compared with that adopted by his predecessors. The effect of the change of interpretation in the present cases has been that the fees allowed to counsel following taxation were reduced to a level which, it is said, does not represent a reasonable fee for the work carried out. For his part, the Auditor considered himself bound by the decision of the High Court of Justiciary in *The Scottish Legal Aid Board, Applicants* 1999 SC 670 to adopt the approach that he has taken.

[2] The background to the Auditor's taxations can be briefly stated. The first Note of Objections concerns the fee allowed following taxation to Senior Counsel, Mr Aidan O'Neill QC, for work in connection with an application by Donald Birrell, a legally aided person, for judicial review of a decision by the Scottish Ministers to revoke his licence and recall him to custody. The application gave rise to novel and difficult issues of law that were regarded as having national importance. The petition was dismissed by the Lord Ordinary and a reclaiming motion was refused. Mr O'Neill sought a fee amounting in total to £22,400 for all work carried out in relation to the application. An offer of £14,200 by the Scottish Legal Aid Board ("the Board") was declined and the fee was referred to the Auditor for taxation. The Auditor taxed the fees at £5,492.80.

[3] The second Note of Objections concerns the fee allowed following taxation to Junior Counsel, Mr Donald Davidson, for work in connection with an action of reparation for personal injury by Alan Pearson, a legally aided person, against his employer J Ray McDermott Diving International Inc. Mr Davidson was instructed in a reclaiming motion against an interlocutor of the Temporary Lord Ordinary who had assoilzied the defenders after a 10-day proof. The grounds of appeal were wide-ranging and required a substantial amount of work by Mr Davidson who had not been involved in the case at first instance. After a hearing which lasted for six days, Mr Davidson having spoken for three days, the reclaiming motion was refused. Mr Davidson sought a fee amounting in total to £20,250 for all work carried out in relation to the reclaiming motion. Some items in the fee note were accepted by the Board; others were disputed. A global offer of £15,000 by the Board was declined

and the fee was referred to the Auditor for taxation. The Auditor taxed the fees at £6,776.00. The disputed items were reduced from £17,900 claimed to £4,426.00 allowed.

[4] It will be readily apparent from this summary that the fees allowed to the Noters by the Auditor were significantly lower in each case than the sums that had previously been offered by the Board. These offers had been regarded by the Board as consistent with the approach to taxation adopted by the Auditor's predecessors, under which the fees allowed to counsel instructed on behalf of a legally aided person were "those expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that the account would be taxed". As discussed below, this is a well-established description of the basis of taxation known as "agent and client, third party paying". At the hearing I was provided with examples of previous taxations that followed this approach. Some, but not all, made express reference to the Table of Fees, discussed below, which is prescribed by regulations for civil legal aid work by counsel and which contains lower figures for fees than would be found due on taxation on an agent and client, third party paying basis. The present Auditor considered himself bound by the decision of the Court mentioned above to adopt a different approach. The principal issue raised by these Notes of Objection is whether he erred in law in forming that view.

[5] At the hearing before me, the two Noters, Mr O'Neill and Mr Davidson, were represented by the same counsel and it is common ground that the two Notes raise the same issues. The Dean of Faculty appeared on behalf of the Faculty of Advocates. His concern was that the fees had been taxed at a level which did not represent a reasonable fee and that in the absence of a reasonable fee counsel could not be obliged to accept instructions on behalf of a legally aided party. Such parties would therefore be deprived of their statutory right to select counsel of their choice and members of the public who rely on legal aid would be deprived of access to justice in the Court of Session. The Auditor was not represented at the hearing, but counsel appeared on behalf of the Board to provide a contradictor to the Notes of Objection and to support the approach taken by the Auditor. I am grateful to counsel for the Board whose submissions I have found of great assistance.

[6] The Auditor's Reports in relation to both taxations were issued on 30 March 2010. I was informed at the hearing that the Board have adjusted the level of their offers to counsel to take account of his decisions. The effect in general terms appears to be that significantly lower offers are now being made. Offers made by the Board prior to 30 March 2010 have been honoured provided

they have not been disputed by counsel. Where, however, any abatements made by the Board have been challenged by counsel, the offer has been withdrawn and a revised offer made. I was provided with a number of illustrations of the difference. One example concerned a family law case in which both counsel acted for legally-aided parties. Counsel who submitted a fee note prior to issue of the Auditor's decision was offered £600 for a motion roll hearing and £1,150 per day for a diet of proof. Opposing counsel who submitted a fee note for similar work after issue of the Auditor's decision was offered £23.10 for the same motion roll hearing and £240.50 per day for the proof. Another example concerned counsel who respectively represented a mother and a father in an adoption case. Counsel whose fee was agreed prior to the Auditor's decision received £32,600. Opposing counsel has now been offered £17,550 for similar work. These examples were provided on behalf of the Noters but I understood it to be accepted that they were not atypical of the difference in level of offers being made by the Board in the light of the Auditor's decision.

The statutory provisions

[7] The primary legislative provisions are currently contained in the Legal Aid (Scotland) Act 1986 ("the 1986 Act"), which established the Scottish Legal Aid Board. Section 31 provides, so far as material, as follows:

> "(1) ...A person to whom legal aid or advice and assistance is made available may select-
> (a) the solicitor to advise or act for him; and
> (b) if the case requires counsel, or a solicitor holding rights of audience by virtue of section 25 (rights of audience) of the Solicitors (Scotland) Act 1980, his counsel or such a solicitor,
> and he shall be entitled to make the selection himself.
> ...
>
> (2) Nothing in subsection (1) above shall prejudice any right of a solicitor or advocate to refuse or give up a case or to entrust it to another solicitor or advocate.
> ...
>
> (7) Except in so far as expressly provided under this Act, the fact that the services of counsel or a solicitor are given by way of legal aid or advice and assistance shall not affect the relationship between or the respective rights in that connection of counsel, solicitor and client."

Provision for payment of remuneration to solicitor and counsel is made by section 33:

> "(1) ...Any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting.
> ...

(2) The Secretary of State may, by regulations made under this section, make such provision as seems to him appropriate in respect of the fees and outlays of solicitors and counsel and, in respect of advice and assistance as mentioned in paragraph (b) of this subsection, advisers -

(a) acting in any proceedings for a person to whom legal aid has been made available; or

(b) providing advice and assistance in accordance with Part II of this Act.

(3) Without prejudice to the generality of subsection (2) above, regulations made under this section may-

(a) prescribe the work in respect of which fees may be charged;

(b) prescribe rates or scales of payment of fees and outlays allowable and the conditions under which such fees and outlays may be allowed;

(c) provide for the assessment and taxation of fees and outlays, and for the review of any such assessment or taxation, either by the Secretary of State or by any other person;

(d) prescribe general principles to be applied in connection with any such assessment, taxation or review;

(e) prescribe forms to be used for the purposes of any regulations made under this section; and

(f) make different provision for different cases".

[8] The reference in section 33(1) to "the Fund" is to the Scottish Legal Aid Fund to be established and maintained by the Board in terms of section 4 of the Act. It may be noted that the entitlement of solicitors and counsel under the primary legislation is to be paid in respect of fees and outlays "properly incurred" in providing legal aid or advice and assistance.

[9] As regards civil legal aid, the power in section 33(2) to make regulations was exercised by the Secretary of State by making the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Regulations"). Regulations 9 and 10(1) provide:

"9 Subject to the provisions of regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

10(1) Counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4."

[10] Before turning to Schedule 4, it is relevant to note also the terms of Regulation 10(2) (as amended to date), which concerns work related to proceedings in courts and tribunals other than the Court of Session:

"(2) Counsel's fees for any work in relation to proceedings in the sheriff court, Supreme Court, Employment Appeal Tribunal, Lands Valuation Appeal Court, Scottish Land Court or Lands Tribunal for Scotland, or before the Upper Tribunal or the Social Security Commissioners, shall be 90 per cent 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."

[11] Schedule 4 to the Regulations contains five paragraphs of text and a Table of Fees. The five paragraphs read as follows:

> "1. Subject to the following provisions of this Schedule, the fees of counsel and of solicitor-advocates shall be calculated in accordance with the Table of Fees in this Schedule and the fee of a solicitor-advocate for undertaking an item of work shall be-
>
> (a) where he is acting as a junior solicitor-advocate, the same as that allowable to a junior counsel for undertaking an item of work equivalent to that undertaken by the solicitor-advocate; or
>
> (b) where he is acting as a senior solicitor-advocate, the same as that allowable to a senior counsel for undertaking an item of work equivalent to that undertaken by the solicitor-advocate.
>
> 2. Where the Table of Fees in this Schedule does not prescribe a fee for any class of proceedings or any item of work, the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the said Table of Fees.
>
> 3. Where the Table of Fees in this Schedule prescribes a range of fees, the auditor shall (subject to paragraphs 4 and 5 of this Schedule) allow such fee within that range as appears to him to provide reasonable remuneration for the work.
>
> 4. The auditor shall have power to increase any fee set out in the Table of Fees in this Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances such an increase is necessary to provide reasonable remuneration for the work.
>
> 5. The auditor shall have power to reduce any fee set out in the Table of Fees in this Schedule where he is satisfied that because of any particular circumstances a reduced fee is sufficient to provide reasonable remuneration for the work."

[12] The Table of Fees which follows these paragraphs sets out in detail the fees payable for various items of work From 1989 to 1995 the figures in the Table were amended (upwards) at least annually. They were last amended by SI 1995/1044 in relation to work done on or after 1 May 1995.

The Auditor's decision

[13] In notes appended to each of his two Reports on Taxation, the Auditor, having set out the terms of Regulations 9 and 10(1) and paragraphs 2 and 4 of Schedule 4, quoted two passages from the Opinion of the High Court of Justiciary in *The Scottish Legal Aid Board, Applicants* 1999 SC 670. This case concerned a note of objections submitted by the Board to an auditor's report following taxation of fees payable under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ("the Criminal Regulations") to counsel who had represented a legally aided person named Uisdean

McKay. (During the hearing before me the case was referred to as the *McKay* case and I shall so refer to it in this Opinion.) Paragraph 3 of Schedule 2 to the Criminal Regulations is in terms identical to those of Paragraph 4 of Schedule 4 to the 1989 Regulations. The Court observed at 675-6:

> "It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind 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.
> ...
>
> Paragraph 3 limits the power of the auditor to increase any fee set out in the table of fees to cases where he is satisfied that the test set out in the paragraph is met. By implication he is then expected to select a fee which will "provide reasonable remuneration for the work". The word "increase" does not in our view entail that he has necessarily to proceed by using some form of incremental calculation. It simply means that he can allow a higher fee. The case may be such that an incremental approach is unrealistic, because it is so different from any type of case for which the table of fees is appropriate. However, that does not mean that the table of fees can simply be ignored. Thus if the auditor allowed a fee which was so high as to imply that the "ordinary" fee prescribed in the table (*ie* the fee allowable where there were no particular circumstances to warrant an increase or a reduction) was too low, it would be clear that something had gone wrong. In short, on the footing that a fee set out in the table of fees is otherwise prescribed, there requires to be a reasonable relationship between that fee and any higher fee which the auditor is minded to allow, having regard to the features of the case which he considers to justify that higher level. In so far as certain observations by Lord Prosser in *Geddes* may suggest otherwise, we are unable to endorse his Lordship's views."

[14] The Auditor noted that the terms of paragraph 3 of Schedule 2 to the Criminal Regulations were essentially the same as those of paragraph 4 of Schedule 4 to the 1989 Regulations and stated that he considered himself bound in the present case to follow the approach stipulated by the Court in *McKay*. In both taxations, the Auditor considered that certain fees specified in the Table of Fees would not constitute reasonable remuneration for the work carried out by the counsel concerned and exercised his power under paragraph 4 to increase certain fees claimed. In Mr O'Neill's case, the Auditor increased the prescribed fees by 200% so that, for example, the daily fees for appearance by senior counsel in the Outer House and in the Inner House were increased from £320.80 per day and £343.50 per day to £962.00 per day and £1,030.00 per day respectively. In Mr Davidson's case, the Auditor increased the prescribed fees by 50% from the prescribed figure for appearance by junior counsel in the Inner House of £256.00 per day to £384.00 per day. The Auditor stated that he did so "bearing in mind the need for a reasonable relationship between the prescribed fee and any higher fee which might be allowed in terms of Schedule 4, paragraph 4". This phrase echoes the words of the Court in the passage from *McKay* quoted above. Further, in both cases, the Auditor allowed fees

in terms of paragraph 2 for certain work, including preparation work not subsumed within an appearance fee, for which no fee was prescribed in the Table. In fixing fees appropriate to provide reasonable remuneration for this work, the Auditor stated that he had regard to all the circumstances, including the general level of the prescribed fees.

[15] The Auditor concluded his Note in each case with the following observation:

> "The Auditor acknowledges firstly that the Table of Fees in Schedule 4 has remained the same since 1995 (although he understands that a review is now underway) and secondly that the approach which he has taken in this case does not reflect the more generous approach which the Legal Aid Board itself takes when seeking to negotiate and agree fees with counsel. He is also concerned that his decisions could have a negative impact on the willingness of counsel to undertake legal aid work. As noted in paragraph 3 above, however, the Auditor nonetheless considers himself bound to determine the issues in this case in the manner stipulated by the court in the *Scottish Legal Aid Board (McKay)* case."

[16] Minutes were lodged by the Auditor in response to the Notes of Objection by Mr O'Neill and Mr Davidson. In those Minutes the Auditor referred to the reasons for his decisions set out in the Notes appended to his Reports on Taxation and provided the following comments:

> (1) In his opinion, regulation 9 prescribes the work in respect of which fees may be charged by counsel, whereas regulation 10 prescribes, by reference to Schedule 4, the rates or scales of payment of fees allowable;
>
> (2) There is no material difference, either in terms of wording or context, between the Civil and Criminal Legal Aid Regulations;
>
> (3) He considered not only that he was bound to follow the approach stipulated by the Court in *McKay* but also that that approach was correct.

Submissions of the parties

(i) Submissions on behalf of the Noters

[17] On behalf of the Noters, Mr Clancy submitted that the Auditor had erred in law in two respects. Firstly, he had erred in considering himself bound by the decision of the Court in *McKay*. It was a decision of the High Court of Justiciary regarding different regulations. Whereas the 1989 Regulations refer at paragraph 9 to the agent and client, third party paying basis of taxation, the Criminal Regulations contain phraseology which equates to taxation on a party/party basis. There is no equivalent in the Criminal Regulations of regulation 10(2) of the 1989 Regulations. The context of taxation is different in criminal cases as there is no comparable practice of taxation in non-legal

aid cases; nor is there the possibility of comparison with an opposing counsel being paid a fee at a non-legal aid rate. (I was advised during the hearing that non-legal aid taxations in criminal cases are extremely rare and that fees in such cases are normally agreed in advance, notionally on an agent and client, client paying basis.) In these circumstances, the decision of the Court was not binding on the Auditor and little assistance could be derived from it in the present case.

[18] Secondly, it was submitted that in any event the Auditor had erred in his interpretation of the Regulations by adopting too narrow an approach to his power to increase fees from the figure prescribed by the Table in Schedule 4. It was appropriate to adopt a purposive approach to interpretation. The purpose of the Regulations was to provide a reasonable fee to counsel conducting proceedings in a proper manner, with the fee being taxed on an agent and client, third party paying basis. The reference in Regulation 9 to this basis of taxation covered not only the issue of the eligibility (or admissibility) of a fee claimed but also its quantification. The general rule in Regulation 9 was "subject to the provisions of Regulation 10" only in relation to calculation of the fee. The purpose of the provisions of Schedule 4 was, similarly, to secure that counsel receives "reasonable remuneration" for work done. The Auditor had failed to consider whether the fees that he had allowed provided a reasonable fee on the appropriate basis of taxation or, alternatively, reasonable remuneration. On the Auditor's approach, purpose was ignored and the rates in Schedule 4 became the end rather than the means to an end.

[19] Mr Clancy acknowledged that in view of the terms of Regulation 10(1), the starting point for calculation of a fee for Court of Session work must be the Table of Fees in Schedule 4. He emphasised that the Auditor's power to increase a fee above the figure in the table is exercisable if he is satisfied that "because of the particular complexity or difficulty of the work *or any other particular circumstances* such an increase is necessary to provide reasonable remuneration for the work". Circumstances falling within the italicised phrase might be, but need not be, peculiar to the case. The particular circumstances necessitating an increase could be extraneous to the case: for example, the passage of time since the Table was last uprated in 1995; the rates of fees payable to counsel in non-legal aid cases on the same basis of taxation; or the fees payable to opposing counsel acting for non-legally aided parties in the same case. Inclusion of the word "particular" made clear that the Auditor was bound to identify the circumstance(s) to which he had had regard in deciding to

increase the fee from the figure in the Table and to explain why it justified the increase. If it had been intended that the relevant circumstances were restricted to, for example, the factors listed in rule 42.4 of the Rules of the Court of Session, then the Regulations would have said so. So far as paragraph 2 of Schedule 4 was concerned, it was notable that the Auditor was bound to have regard to "all the circumstances", including the general level of fees in the Table.

[20] It was further submitted that the Auditor had failed to interpret the Regulations in their proper context. The primary purpose of the legal aid scheme is to promote access to justice and to the courts. The right of effective access is implicit in Article 6 of the European Convention on Human Rights. Equality of arms, which is an important component of Article 6, would be undermined if counsel's fees were reduced to a level below what is reasonable. A legally aided person has a statutory right to select his or her counsel of choice (1986 Act, section 31(1), set out above). An advocate is subject to the cab rank rule and must accept instructions in legal aid cases on payment of a reasonable fee. On the Auditor's interpretation, counsel would not be paid a reasonable fee and the cab rank rule could not operate. The consequence would be to deprive legally-aided litigants of effective legal representation in the Court of Session.

[21] Mr Clancy drew attention to what he submitted were injustices and anomalies arising out of the Auditor's interpretation. Counsel undertaking legally-aided work in the Court of Session would be paid at rates determined in 1995 without regard to inflation and current fee levels for non-legally aided work. The unfairness of such a situation had been recognised in the long-standing practice of previous auditors. In cases where a legally-aided party was successful against a non-legally aided party, expenses would be recovered by the Board on a party/party basis, resulting in a windfall to the Board if counsel were then paid at the rates prescribed in the Table. It would be absurd if for legally-aided work carried out in the Supreme Court or in lower courts and tribunals counsel received 90% of the fees that would be allowed on an agent and client, third party paying basis but received only a fraction of that amount for Court of Session work. Similarly, it would be absurd if a fee allowed under paragraph 2 of Schedule 4 were to be calculated on a more generous basis than a fee increased by virtue of paragraph 4. It may be that there were no such injustices or anomalies when the Regulations were made, or when the rates in the Table were last uprated. These could, however, arise with the passage of time. With reference to the passage in *McKay* relied upon by the Auditor, a "reasonable relationship" between a fee in the Table and a higher fee which the Auditor was minded

to allow could be constituted by the figure in the Table being out of date and the fee allowed being in accordance with non-legal aid fees taxed on the appropriate basis. Indeed, the figures in the Table might now be of little or no relevance but the Table still gave useful guidance on matters such as differences between Outer and Inner House work and the relationship between the entitlement of junior and of senior counsel.

[22] In the alternative, Mr Clancy submitted that the Auditor had contravened the Noters' legitimate expectation when accepting work for a legally-aided party that they would be paid on the basis used by previous auditors. The change of practice was, moreover, a breach of the Noters' rights under article 1 of the First Protocol to the European Convention on Human Rights. The right to payment of a reasonable fee, calculated according to the previous auditors' practice, was a "possession" in terms of article 1. Reference was made in this context to the opinion of Lord Carloway in *McCall* v *Scottish Ministers* 2006 SC 266. The Auditor's decision to depart from that practice was an interference with the Noters' right to peaceful enjoyment of that possession to the extent that it operated retrospectively, i.e. to the extent that it applied to fees earned for work undertaken prior to the change of practice. It was not accepted that the practice adopted by previous auditors had been *ultra vires*. It was well known to all concerned, including the Board, and had been relied on by the Noters who accepted instructions on the understanding that they would be offered fees in line with that practice. To allow their expectation to be overridden by the public interest would be a disproportionate interference with their Convention rights.

[23] Finally, Mr Clancy submitted that the Auditor had failed to give adequate reasons for his decision. The Auditor's Notes did not explain the grounds upon which he considered that a "reasonable relationship" between the fees in the Table and the fees allowed was achieved by the different percentage increases that he applied. The Court in *McKay* had made clear that an "incremental" calculation (i.e. the use of percentage increases) was not necessarily the only approach which an auditor could adopt. Previous auditors had allowed increases by reference to what would be allowed on a specified basis of taxation. The Auditor in the present case had not provided a corresponding rationale for his approach.

(ii) Submissions on behalf of the Faculty of Advocates

[24] The Dean of Faculty explained that his interest lay in whether, in future, counsel would remain

bound by the cab rank rule in civil legal aid cases. This would not be possible if an instruction to act in such a case did not make provision for counsel to receive a proper or reasonable fee for his or her work. His submission was that the interpretation adopted by the Auditor did not provide for the payment of a reasonable fee.

[25] Reference was made to the legislative history of the primary legislation and of regulations made thereunder. I refer to this in greater detail below. As regards the provisions of the 1986 Act, the Dean of Faculty submitted that when Parliament used the expression "properly incurred" in relation to a fee, this referred to its eligibility for payment as opposed to its amount. Where, however, the Regulations used expressions such as "reasonable" fees, the concepts of eligibility and reasonableness of amount were conflated. The word "allowed" which appears in regulation 9 similarly referred to both eligibility and calculation. The purpose of the Regulations was to ensure that reasonable remuneration was available to counsel instructed by a legally-aided party in the Court of Session.

[26] The Dean of Faculty accepted that the Table in Schedule 4 was the starting point for calculation of such fees. He suggested that in 1995, in the absence of any of the features mentioned in paragraph 4, the figure in the Table would presumably have applied. Like Mr Clancy, he submitted that the expression "any other particular circumstances" in paragraph 4 had a broader application than circumstances peculiar to the case in question. He cited as an example the introduction of Chapter 43 procedure for personal injuries actions, which may have increased the amount of time required of counsel with regard to certain items of work and reduced it with regard to others. Although not peculiar to any individual case, this change would clearly be relevant to the taxation of counsel's fees. Circumstances were "particular" so long as they were linked to the work executed by counsel in discharge of his or her function. The aim remained to provide "reasonable remuneration". This was essential if the intention set out in primary legislation was to be achieved: namely, that of ensuring that legally-aided parties obtained access to justice with representation by counsel of their choice.

[27] With reference to the Opinion of the Court in *McKay*, the Dean of Faculty submitted that there would be a reasonable relationship between a fee in the Table and a higher fee allowed by the Auditor if the Auditor made clear that he had started by considering the Table fee and explained his reasons for departing from it. If, as at the present time, the Table fee did not allow remuneration in line with the appropriate scale of taxation (i.e. agent and client, third party paying), then that would

be a sufficient reason for departing from it.

(iii) Submissions on behalf of the Board

[28] On behalf of the Board, Miss Crawford accepted that it was appropriate to adopt a purposive construction of the relevant statutory provisions although she submitted, under reference to certain observations of Lord Steyn in *R (Quintavalle)* v *Secretary of State for Health* [2003] 2 AC 687 at para 21 that the degree of liberality of interpretation allowed may be restricted as regards social welfare legislation, of which statutes and statutory instruments making provision for legal aid were an example. She differed from the Noters and from the Dean of Faculty in her identification of the purpose of the legislation which, she submitted, included the control of public expenditure on the provision of legal aid, advice and assistance. She emphasised that there is no reference in the primary legislation to "reasonable remuneration": the purpose of section 33 of the 1986 Act was to secure that the liability of the Fund extended only to fees and outlays "properly incurred". The Act provided only for the remuneration, not the reasonable remuneration, of counsel. Attempts to amend what became section 33 during the passage of the Bill through Parliament to include, for example, a reference to "allowing fair remuneration" had been defeated.

[29] As regards the 1989 Regulations, Miss Crawford submitted that Regulation 9 was concerned only with the question of eligibility of fees on the specified basis of agent and client, third party paying. It had nothing to say about quantification of the fee allowable, which was dealt with by Regulation 10 and Schedule 4. The correct approach for the Auditor to adopt in applying the statutory framework as regards Court of Session work by counsel was as follows:

> (1) Is the fee in respect of work that would be allowable as reasonable for conducting proceedings in a proper manner, as between solicitor and client, third party paying (the "eligibility" criterion)?
>
> (2) If so, the fee is to be calculated in accordance with Schedule 4 including the Table of Fees.
>
> (3) If the fee is for an item of work that is not within the Table of Fees ("a non-prescribed fee"), is it appropriate to allow the fee in order to provide reasonable remuneration for the work with regard to all the circumstances including the general level of fees in the Table of Fees?

(4) If it is appropriate to allow a non-prescribed fee, the auditor requires to calculate the amount thereof. In doing so, he must look to the Table of Fees and consider what fee would bear a reasonable relationship to the level of fees in the Table.

(5) If the auditor is satisfied that a prescribed fee and/or non-prescribed fee should be increased because the particular complexity or difficulty of the work or any other particular circumstances render such an increase necessary to provide reasonable remuneration for the work, the auditor must look to the Table of Fees and then consider what fee would bear a reasonable relationship to the level of fees in the Table, taking account of the basis for his being satisfied that an increase is necessary.

[30] The major difference between the parties in relation to paragraph 4 of Schedule 4 was that Miss Crawford submitted that the phrase "or any other circumstances" should be construed *noscitur a sociis*, and confined to circumstances of the same kind as those specified in paragraph 4. The phrase did not entitle the auditor to have regard to external and/or general circumstances such as what counsel might be paid for non-legally aided work or under a different basis of taxation. Nor was he entitled to have regard to matters such as concerns regarding the continuing adequacy of fee rates prescribed in 1995. It was necessary to have regard to the Table to identify what is *deemed* to be reasonable remuneration. The purpose of Regulation 10 and Schedule 4 was not to provide reasonable remuneration as such, but rather to identify what was deemed to be reasonable remuneration when calculated in accordance with the rules. If the Regulations had ceased to provide for payment of what might be regarded as a reasonable fee, that was a matter for the Scottish Government, not for the Board or the auditor.

[31] Miss Crawford submitted that the authority of *McKay* was not restricted to the criminal legal aid scheme. The ratio, which was equally applicable to the Civil Legal Aid Regulations, was that the auditor required to carry out his task of taxing counsel's fees in accordance with the statutory framework. In the present case, it was clear from the Auditor's Note that he had done so. It would be unwise to attempt further definition of the phrase "a reasonable relationship" used by the Court in *McKay*: what was a reasonable relationship was to be considered under reference to the statutory framework and would include the factors which justify a non-prescribed fee and/or an increased fee.

[32] On the issue of legitimate expectation, it was submitted that counsel could have no legitimate expectation to receive a fee which had not been calculated in accordance with the statutory

framework. It would be, and had been, an error of law to apply the "prudent man of business" test to the calculation of the amount of fees as well as to the eligibility of a fee claimed. Regardless of the practice adopted by the Auditor's predecessors, there could be no legitimate expectation that fees would be calculated according to concession or a wrong view of the law. So far as the Noters' rights under article 1 of the 1st Protocol to the European Convention on Human Rights were concerned, Miss Crawford accepted, under reference to *Rowland* v *Environment Agency* [2005] Ch 1, that a legitimate expectation could constitute a "possession" even if it was beyond the powers of the public body which fostered the expectation to realise it. That, however, did not entitle the claimant to realisation of an expectation which it was beyond the power of the public body to realise, though it might entitle him to some other relief such as the benevolent exercise of a discretion. In the present case the court could not require the Auditor to continue an *ultra vires* practice. Miss Crawford invited me to find that there was here no clear and unambiguous representation upon which legitimate expectation might be founded; that there was no reliance on a representation by the Noters to their detriment; and in any event that there was an overriding public interest in controlling expenditure which outweighed any expectation of being paid according to the practice adopted by previous auditors.

[33] Finally, Miss Crawford submitted that the Auditor had given adequate reasons for his decision. He had correctly identified the relevant statutory provisions and the approach that he should take in calculating counsel's fees. He listed the factors which satisfied him that an increase under paragraph 4 was necessary and applied the approach of striking a reasonable relationship between the prescribed fees and any higher fee allowed. In selecting the amounts of the percentage uplifts, he had applied his knowledge and experience and expressed his view.

Interpretation of the statutory provisions: discussion

[34] It is not in doubt that a purposive approach to statutory interpretation should be adopted. As Lord Bingham of Cornhill observed in *R (Quintavalle)* v *Secretary of State for Health* (cited above), at para 7:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

I do not accept that the passage from Lord Steyn's opinion in the same case to which Miss Crawford referred should be construed advocating a less liberal approach to interpretation of social welfare legislation. It seems to me, as Mr Clancy submitted, that Lord Steyn was contrasting social welfare legislation with tax statutes rather than bracketing them together. In any event, the need to adopt a purposive approach even in relation to tax legislation has been emphasised in cases subsequent to *Quintavalle*.

[35] In the present case I consider that assistance can be derived from a consideration of the historical background to the enactment of the 1986 Act and the promulgation of the 1989 Regulations. Publicly financed legal aid and legal advice was introduced by Part I of the Legal Aid and Solicitors (Scotland) Act 1949. (The Dean of Faculty noted that legal representation without remuneration had previously been provided by counsel elected to the Poor Roll maintained by the Faculty of Advocates.) Section 6(1) of the 1949 Act provided for lists to be maintained of solicitors and advocates willing to act for persons receiving legal aid. Membership of the list was not compulsory. The right of a person entitled to receive legal aid to select his or her counsel was already a feature of the 1949 provisions (see section 6(3)). Under section 6(5), the sums payable to a solicitor or counsel for acting for a person receiving legal aid were not to exceed those allowed under Schedule 3 to the Act. That schedule allowed payment to counsel, in certain proceedings including proceedings in the Court of Session and the House of Lords, of 85% of the amount allowed on taxation and, in certain other proceedings including criminal proceedings, of the full amount allowed on taxation. Expenses were taxed for the purposes of the Schedule "according to the ordinary rules and as between solicitor and client" (para 5). I understand it to be common ground that this last phrase described the agent and client, third party paying scale of taxation. The figure of 85% was increased to 90% by the Legal Aid (Scotland) (Remuneration) Regulations 1960 (SI 1960/2447).

[36] No material change was made to these provisions at the time when enactments relating to legal aid and advice were consolidated in the Legal Aid (Scotland) Act 1967. A significant change was, however made by the Administration of Justice Act 1977, which abolished the maintenance of lists of solicitors and advocates willing to act for persons receiving legal aid and introduced the right to refuse or give up a case for good reason which now forms section 31(2) of the 1986 Act. The provisions relating to eligibility and calculation of fees remained unamended at that time. However, an important development occurred when section 3 of the Divorce Jurisdiction, Court Fees and Legal

Aid (Scotland) Act 1983 granted power to the Secretary of State to make regulations prescribing *inter alia* the work in respect of which fees might be charged and also rates or scales of payment of fees and outlays allowable. This was the forerunner of section 33(3) of the 1986 Act. So far as civil legal aid is concerned, the Secretary of State exercised the power by promulgating the Legal Aid (Scotland) (Fees in Civil Proceedings) Regulations 1984 which included schedules containing tables of fees. The figures in these tables were amended from time to time between 1984 and 1989, but otherwise the terms of the 1984 Regulations did not differ in any respect material to this case from the 1989 Regulations which in due course superseded them (save that the 1989 Regulations have subsequently been amended to apply also to solicitor-advocates).

[37] With effect from 1984, therefore, counsel's fees for Court of Session work were to be calculated in accordance with regulations rather than primary legislation and, moreover, in accordance with regulations which included a Table of Fees. Work in relation to proceedings in other courts and tribunals continued to be remunerated at 90% of the amount which would be allowed on taxation on an agent and client, third party paying basis. So matters stood at the time of enactment of the 1986 Act which, according to my understanding, first made reference to payment of fees or outlays "properly incurred".

[38] From this historical review I draw certain conclusions which appear to me to be of importance in relation to the construction of the 1989 Regulations. Between 1949 and 1984, counsel's entitlement was to be paid a fee which, depending upon the forum for which the work was carried out, was either 85% (subsequently increased to 90%) or the full amount of the fee that would be allowable on an agent and client, third party paying basis. No doubt the fee allowable on such a basis would vary from case to case, depending upon circumstances peculiar to the case, but also from time to time, depending upon other circumstances such as going rates and the value of money. It therefore appears to me that one of the purposes of the 1949 Act and its successors prior to 1984 was to secure that counsel able and (prior to 1977) willing to provide services to legally aided persons would receive a reasonable fee: not always as much as counsel for a non-legally aided party would have received following taxation on the appropriate basis, but of a similar order. I can identify nothing in either the 1983 amendment or the 1986 Act to suggest that Parliament intended that that purpose should cease. The 1984 Regulations, made under the 1967 Act as amended in 1983, and the 1989 Regulations, made under the 1986 Act, should, in my opinion, in the absence of any contrary

indication, be construed as intending to further the same legislative purpose.

[39] Before turning to consider whether the 1989 Regulations, properly construed, do indeed contain a contrary indication, I should say something about the scope of statutory references to allowance of fees on an agent and client, third party paying basis. In *Hood* v *Gordon* (1896) 23 R 675, Lord McLaren stated his view that

> "...When a statute authorises the taxation of expenses as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed."

It was argued by Miss Crawford that in the light of this description, a statutory reference to the agent and client, third party paying basis of taxation addressed only the issue of eligibility, i.e. whether an expense was allowable or not, and did not address the reasonableness of the amount. *Hood* v *Gordon* itself concerned the eligibility of a third counsel's fee. Mr Clancy pointed out that as there have never been tables for taxation of counsel's fees outwith the legal aid regulations, Lord McLaren must have had in mind both eligibility and reasonableness. In my opinion Mr Clancy's submission is to be preferred. I note that in *Hood* v *Gordon*, Lord Kyllachy considered that the principle being followed (i.e. that of taxation between agent and client) had been established in *Walker* v *Waterlow* (1869) 7 M 751. In the latter case, the auditor had taxed off fees to two counsel, a large part of junior counsel's fees, and other expenditure. It seems to me to be clear from the opinions delivered, especially those of Lord Cowan at 754 (where he referred to "checks imposed on lavish, improper or needless expenditure"), and Lord Benholme at 754 (where he referred to consideration of the "necessity and moderation" of an expense) that the Court had in mind both the eligibility of a fee and the reasonableness of its amount.

[40] In the light of these authorities, I conclude, in the context of the present case, that the reference in paragraph 9 of the 1989 Regulations to allowance of "such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying" covers issues of both eligibility and quantification. I find reinforcement for that conclusion in the fact that Regulation 10(2), which makes provision for fees for non-Court of Session work to be 90% of the fee that would be allowable on taxation between solicitor and client, third party paying, does so without the need for support from any further provision dealing expressly with calculation.

[41] Regulation 9 is expressly subject to the provisions of Regulation 10 regarding calculation of fees. As I have just noted, in the case of work carried out in relation to proceedings in courts and

tribunals other than the Court of Session, the link with Lord McLaren's "prudent man of business" test is maintained - albeit that the full amount which would be allowed on taxation is not payable - and was indeed extended in 1994 to work carried out by solicitor-advocates in relation to such proceedings. The critical question seems to me to be whether that link is severed in relation to Court of Session work by the requirement to calculate fees in accordance with Schedule 4.

[42] Paragraph 1 of Schedule 4 states that "subject to the following provisions of this Schedule", the fees of counsel (and, now, of solicitor-advocates) shall be calculated in accordance with the Table of Fees in the Schedule. I accept Miss Crawford's submission that in calculating counsel's fees for Court of Session work, the auditor's starting point must be the Table of Fees. I do not understand that this was ultimately contested by the other parties. The real dispute arises where, as in the cases of both Mr O'Neill and Mr Davidson, the auditor is satisfied that because of "the particular complexity or difficulty of the work or any other particular circumstances" an increase of the fee in the Table is necessary to provide reasonable remuneration for the work, and/or that a fee should be allowed for work for which no fee is prescribed by the Table. There appear to me to be three separate issues which require to be addressed.

[43] **The first issue** is whether there is, as submitted by Mr Clancy and by the Dean of Faculty, a legislative intention underlying the Regulations of providing reasonable remuneration to counsel.

[44] As I have already noted, Miss Crawford argued that the intention was not to provide reasonable remuneration as such, but rather to identify what was *deemed* to be reasonable remuneration when calculated in accordance with the rules. I am unable to accept that argument. By way of explanation, I respectfully adopt the following observations of Lord Prosser in *Geddes* v *Lothian Health Board* (17 February 1993, unreported) at page 11-12 of his Opinion:

> "It is to be noted that the expression 'reasonable remuneration for the work' occurs in all of the paragraphs 2 to 5 of Schedule 4. Where the Auditor departs from the table, under paragraph 4 or paragraph 5, the justification for his departure, upwards or downwards, is evidently that the Table of Fees is either below or above the level which would represent 'reasonable remuneration for the work'. The Table of Fees is the starting point, but in the circumstances where these last two paragraphs apply it has *ex hypothesi* failed to produce a reasonable fee. Perhaps more importantly, it appears plain that the result of the increase or reduction is intended to be reasonable remuneration for the work."

Thus, in his Lordship's view, the fixing of reasonable remuneration for the work is intended to be the aim of the process of increase or reduction of a fee specified in the Table. I respectfully agree.

[45] This textual analysis of the paragraphs of Schedule 4 is in my opinion supported by wider considerations of legislative intent. I bear in mind the statutory entitlement of a legally-aided party under section 31(1) of the 1986 Act to make the selection of counsel himself (a right which has subsisted since 1949) and also the statutory instruction in section 31(7) that the fact that the services of counsel or a solicitor are given by way of legal aid is not to affect the relationship between or the respective rights of counsel, solicitor and client. Were the 1989 Regulations to be interpreted in a manner which provided for payment of fees to counsel at an uneconomic level (but which was nevertheless deemed to be "reasonable remuneration"), then it seems to me that the statutory rights conferred by section 31 could not be effective. It was not suggested on behalf of the Board that Parliament must have intended that counsel should be required to carry out work in the Court of Session (as opposed to other courts and tribunals) at uneconomic rates. Without an undertaking to provide a proper or reasonable fee, counsel would not be bound to accept instructions, thereby depriving legally-aided parties of the right to counsel of their choice and of the usual rights of a client to engage counsel in accordance with the cab rank rule. For my part I attach greater weight to these considerations than I do to the use of the phrase "fees or outlays properly incurred" in section 33(1), upon which emphasis was placed by the Dean of Faculty. I have already noted that the use of that phrase in the primary legislation post-dates the 1984 Regulations which so far as material were reproduced in the 1989 Regulations and accordingly it seems to me to be of limited value as an aid to construction of the terms of the Regulations. It may be, as the Dean of Faculty submitted, that the words "properly incurred" refer to the eligibility aspect of the relevant basis of taxation, but I prefer to found my interpretation in the historical context which seems to me to make clear that one of the principal purposes of the legislative scheme has been and continues to be to make access to justice available to legally-aided litigants through the counsel of their choice (unrestricted by the willingness or otherwise of counsel to be included in a list), on the normal basis of instruction, in consideration of the payment of a reasonable fee to counsel by the Fund.

[46] In the course of her submission, Miss Crawford referred me to the Hansard report of the debate of what became section 33 of the 1986 Act. I did not find this helpful. The debate was of an unsuccessful proposed backbench amendment and contains no official statement regarding the meaning of any words in the section as enacted. In my opinion the conditions for reference to Hansard, as restrictively applied in cases such as *R* v *Secretary of State for the Environment,*

Transport & the Regions [2001] 2 AC 349, are clearly not fulfilled here.

[47] **The second issue** is the relationship between the fee specified for work in the Table and any higher (or lower) fee which may be allowed by the auditor. This was the matter with regard to which the Auditor appears to have considered himself bound by the Opinion of the Court in *McKay* to depart from the practice of his predecessors.

[48] It is appropriate at this stage to address the Noters' argument that the Auditor erred in law by regarding himself as bound by *McKay*. I accept that on a strict application of the doctrine of *stare decisis*, the Auditor was not so bound. *McKay* was a decision of the High Court of Justiciary in relation to criminal legal aid regulations. The *ratio* of the decision, at page 677E-F, appears to me to be the somewhat narrow one that the auditor, in his decision narrated at page 672B-C, had not had proper regard to the statutory framework in which he was required to operate. In my opinion, however, the Auditor in the present case was entitled and indeed bound to treat as at least highly persuasive an Opinion of the High Court of Justiciary on the proper approach to be taken by an auditor under a paragraph of the Criminal Regulations that was in terms identical to those of paragraph 4 of Schedule 4 to the 1989 Regulations. I consider myself to be similarly bound. I do not accept the submission on behalf of the Noters that differences in context as between the civil and criminal regulations render *McKay* of little assistance. The Criminal Regulations provide for taxation on a party/party basis, but I refer in that connection to the observations of Lord Eassie in *Dingley* v *Chief Constable of Strathclyde Police* 2002 SCLR 160 at paras 27 and 28 that, firstly, for similar work performed pursuant to the same instruction, the amount of the fee to counsel recoverable under a party/party award ought not to diverge markedly from that recoverable on an agent and client, third party paying basis and, secondly, where a particular task required of counsel is eligible for recovery on a party/party basis there is, prima facie, no good ground whereon the reasonable ordinary fee should differ to any significant extent from the fee payable by a third party. The present case is concerned with calculation and not eligibility and so I do not regard the different bases of taxation as a material distinction between the Schedules to the respective Regulations. The absence of a body of comparable material, or of an opposing non-legally-aided counsel, in criminal cases seem to me to be matters to be taken into account by the auditor when fixing reasonable remuneration rather than by either the auditor or the court when interpreting the Regulations.

[49] The two passages from the Opinion of the Court in *McKay* (at page 676) which the Auditor in the present case purported to follow are set out at paragraph 13 above. As I read these passages, the Court was here concerned with the relationship between the fee prescribed by the Table of Fees for an item of work and any higher fee allowed by the auditor. The following guidance may in my opinion be derived from them:

- Taxation must be carried out within the statutory framework contained (for civil legal aid cases) in Schedule 4 to the 1989 Regulations.
- Where the auditor considers that the test in paragraph 4 is met, he is expected to select a fee which will provide reasonable remuneration for the work in question, but he may do so otherwise than by an incremental calculation: in other words, it is not necessary for the fee allowed to be stated by him in terms of being an uplift of x % on the fee prescribed.
- The Table cannot simply be ignored. Any increase or reduction of the prescribed fee must be warranted by particular circumstances, and there requires to be a reasonable relationship between the prescribed fee and any higher fee allowed, having regard to the features of the case which the auditor considers to justify the higher level.

[50] I have set out above the competing submissions made to me regarding the proper interpretation of the Court's requirement that there be a "reasonable relationship" between the prescribed fee and any higher fee allowed. In my opinion, the submission by the Dean of Faculty is to be preferred. I have already expressed my view that although the starting point for calculation of the fee for an item of work is the relevant figure in the Table, the auditor's task is ultimately to fix reasonable remuneration for the work. If the fee that the auditor allows is higher - and possibly much higher - than the figure in the Table, then the auditor must give his reasons for departing from the figure in the Table and for selecting the fee that he has allowed. It is that explanation which, in my opinion, supplies the relationship between the prescribed fee and the fee allowed, provided, of course, that the auditor's explanation for the higher fee is reasonably related to one or more of the matters mentioned in paragraph 4, including "any other particular circumstances". I find support for this analysis in the Court's guidance, already mentioned, that there need not be an arithmetic relationship produced by incremental calculation between the prescribed fee and the fee allowed.

[51] Counsel for the counsel concerned in *McKay* had sought (at page 674F-H) to place reliance

upon certain views expressed by Lord Prosser in *Geddes* v *Lothian Health Board*, a case to which I have already referred. The dictum relied upon appears at page 13 of Lord Prosser's opinion where he stated:

> "Where some minor increase appeared to be justified, the figure in the Table would no doubt be a true starting point, and the Auditor might decide that some specific additional figure was the best way of producing reasonable remuneration. But where the circumstances are seen by the Auditor as utterly different from the 'ordinary' circumstances catered for by the Table, the fact that he is granting an 'increase' on that fee may afford no guidance at all as to what the appropriate fee, to provide reasonable remuneration, ought to be."

The Court in *McKay* found itself unable to endorse "certain observations" by Lord Prosser in *Geddes*. It appears likely to me that the Court was referring here to the dictum at page 13 that I have just quoted, and that the Court's concern was that it (and perhaps certain other passages in Lord Prosser's Opinion) could be read as suggesting that in cases which were not "ordinary" cases, the Table need not constitute the starting point for determination of counsel's fee. This would be contrary to the Court's reminder in *McKay* that taxation requires to be carried out within the statutory framework which, as is common ground in the present proceedings, provides for the Table to be the starting point in all cases. It does not appear to me, however, that the reservations expressed by the Court in *McKay* extend to the whole of Lord Prosser's Opinion in *Geddes*. I have already quoted, and adopted, a passage from *Geddes* which seems to me to be wholly consistent with the Court's reasoning in *McKay*. I would also respectfully agree with Lord Prosser's observation (at page 12) that

> "If it had been intended that 'reasonable remuneration' should mean something different in the context of legal aid, then I should have expected this to be made plain. 'Reasonable remuneration' is a broad phrase, of general application, and must bear its ordinary meaning in the absence of any direction to the contrary."

I find nothing in *McKay* that appears to me cast doubt on the correctness of this observation, which provides support for the view that I have already expressed as to the underlying legislative intention of the Regulations.

[52] **The third issue** is the scope of the expression "any other particular circumstances" in paragraph 4. This was not a matter which was addressed directly in *Geddes* or *McKay*, or in any other decision to which I have been referred. The question is whether the expression should be interpreted as applying only to circumstances specific to the case in question and as excluding "external" circumstances such as the passage of time since the Table was last uprated in 1995.

[53] I am of the view that it should not be so interpreted. To do so would defeat what I have held to be the legislative intention of the Regulations, namely to secure the payment to counsel of a reasonable fee for work carried out on behalf of a legally-aided person. On the narrower interpretation, such a fee could be allowed in cases where the reasons why the Table figure did not provide reasonable remuneration were specific to the case, but could not be allowed where the reasons were not peculiar to the case. I see no rational justification for such a difference. I also consider that it would often be difficult to draw a clear distinction between circumstances which were specific to the case and those which were not. The example suggested by the Dean of Faculty affords a useful illustration: the application of Chapter 43 procedure in personal injury actions would clearly seem to have a bearing on the fees allowable to counsel in a particular case, but could be argued to be either specific or not specific to that case. In response to Miss Crawford's suggestion that the introduction of Chapter 43 procedure is accommodated by paragraph 2 of Schedule 4, I accept that that may be so where an entirely new item of work is created in the course of the proceedings, but the change in procedure is likely also to have affected items of work (such as the drafting of a summons) for which the Table does prescribe a fee. The same argument might be said to arise in relation to any identifiable sub-category of Court of Session actions. Moreover, the *noscitur a sociis* argument is, in my view, weakened by the fact that the phrase "any particular circumstances" is also used in paragraph 5, where there are no *socii*, and where it is clear that the matters expressly mentioned in paragraph 4 (particular complexity and difficulty of the work) would not be relevant to *reduction* of a prescribed fee.

[54] In preferring the broader interpretation, I am mindful that appropriate content must be given to the word "particular" in the phrase "any other particular circumstances". In my opinion Mr Clancy was correct in his submission that the inclusion of the word "particular" in both paragraphs 4 and 5 is intended to ensure that the auditor identifies and is therefore able to explain the circumstances which cause him to conclude that a higher (or lower) fee than that prescribed by the Table is necessary (or sufficient) to provide reasonable remuneration for the work concerned. Those may, in my opinion, include circumstances arising from the passage of time since the last uprating of the figures in the Table such as changes in the level of counsel's fees, whether as a result of general price inflation or otherwise. It remains necessary, however, for the auditor to use some yardstick to determine whether or not an increase or reduction of the amount prescribed by the Table is needed to produce a

reasonable fee. In my opinion the yardstick supplied by the Regulations is that specified in Regulation 9, namely the solicitor and client, third party paying basis of taxation. It follows that in my opinion the auditor is entitled to continue to have regard to the "prudent man of business" test in determining the extent, if any, to which a fee prescribed by the Table falls to be increased or reduced in order to provide reasonable remuneration for the work in question.

[55] So far as paragraph 2 of Schedule 4 is concerned, similar considerations apply. Where the auditor decides to allow a fee for an item of work for which no fee is prescribed by the Table, the general level of fees in the Table provides the starting point. However, the auditor must have regard to "all the circumstances". These will include, in my opinion, an assessment of whether a fee at the general level of fees in the Table is sufficient (or excessive) in order to provide reasonable remuneration for the work. As with paragraph 4, the statutory yardstick for that exercise is to be found in Regulation 9.

Application of discussion to the Auditor's decisions

[56] In *McKay*, it was emphasised by the Court at page 675 that

> "So far as concerns the fees allowable to counsel, it is plain that this court would not be justified in interfering with the auditor's decision unless it were plain that he had misdirected himself or had reached a result for which there was no reasonable explanation. So long as he did not adopt a wrong approach, the quantification of the fee to be allowed was a matter for him in the exercise of his discretion, and it is not a proper function of this court to substitute its own view."

This was accepted by the Noters, but it was contended that the Auditor had indeed misdirected himself or, in any event, had failed to give adequate reasons for his decision.

[57] There is no doubt, in my view, that the Auditor has carried out his task in both taxations with due regard to the statutory framework, including paragraphs 2 and 4 of Schedule 4. He has used the fees prescribed by the Table in Schedule 4 as his starting point in relation to the application of both paragraphs. I have already explained why I do not consider that he erred in law in regarding himself as bound to follow the approach set out by the Court in *McKay*. I observe also that in the Notes to both of his Reports on Taxation, the Auditor has stated in relation to the fees which he has allowed under paragraph 2 that he was of the view that they provided "reasonable remuneration" for the items of work in question. At first sight, therefore, the Auditor has carried out his task in accordance with the statutory framework and has arrived at the required statutory result, namely the allowance of fees

which provide reasonable remuneration to counsel. Nevertheless, I have concluded that the Auditor has misdirected himself in law. It is, of course, for the Auditor, and not for this court, to assess what is or is not a reasonable fee for work done. The problem, in my view, is that it appears to be implicit in the terms of the final paragraph of each of the two Notes (which I have quoted in paragraph 15 above) that he, the Auditor, does not consider that the amounts which he has allowed constitute reasonable fees for the work done by counsel. I infer this from his reference to the absence of review of the fees in the Table since 1995 and to his concern that his decisions could have a negative impact on the willingness of counsel to undertake legal aid work. It appears to me that the Auditor has had in mind a distinction between reasonable remuneration on the one hand and a fee deemed by application of the Regulations to be reasonable remuneration on the other, and has considered himself bound by *McKay* to allow the latter rather than the former. An indication of this is to be found in the Auditor's references to seeking to achieve a "reasonable relationship" between the prescribed fee and the fees that he has allowed under paragraph 4 by using an incremental calculation. For the reasons set out in this Opinion, I think that this is not the correct approach and that the Auditor has erred in law by misconstruing the observations of the Court in *McKay* as obliging him to adopt it.

[58] Even if I had not come to that conclusion, I would have held that the Auditor has failed to give adequate reasons for his decisions in each of the taxations. It respectfully appears to me that some, though by no means all, of the criticisms made by the Court in *McKay* of the auditor's report in that case may also be made here. In particular, the Auditor has not explained the basis upon which he has arrived at the (differing) percentage uplifts that he has applied in implementation of his power under paragraph 4 to the fees prescribed by the Table. Nor has he specified the circumstances (other than the general level of prescribed fees) that he has taken into account in allowing fees under paragraph 2 for work for which no fee is prescribed. Such explanations are, in my opinion, rendered all the more necessary by the Auditor's acknowledgment, in his Minute to the Court, that he considered Regulation 9 to be relevant only to the issue of eligibility of fees and not to their calculation. The practice of the Auditor's predecessors appears to have been to assess increases and non-prescribed fees by reference to the "prudent man of business" test, i.e. by reference to the basis of taxation specified in Regulation 9. Having rejected that approach in relation to calculation of fees, it was in my opinion incumbent upon the Auditor to explain his reasoning in (a) choosing to deal with

paragraph 4 increases by way of incremental calculation; (b) selecting the percentage increases that he has in fact allowed; and (c) selecting the figures allowed under paragraph 2. This, in my view, he has failed to do. His references to "reasonable relationship" and to "all the circumstances, including the general level of prescribed fees" do not, in my opinion, afford a sufficient indication of his reasoning in relation to these matters.

[59] I was invited by Mr Clancy to give directions to the Auditor to enable him to give effect to my decision. I am, however, anxious to avoid trespassing upon territory that is properly that of the Auditor. In line with the approach taken by the Court in *McKay*, I shall simply remit taxation of these fees to the Auditor for reconsideration in the light of the views set out in this Opinion.

Breach of the Noters' legitimate expectations and Convention rights: discussion

[60] The Noters' challenges to the Auditor's decisions based upon breach of their legitimate expectations and of their Convention rights arise as live issues only if their primary arguments on statutory interpretation and adequacy of reasons are rejected. I therefore have to address the issues of legitimate expectation and Convention rights on the footing that I am wrong in having found in favour of the Noters on their primary arguments. The hypothesis upon which this part of my Opinion proceeds is accordingly that the Auditor did not err in his approach to interpretation of the Regulations and, moreover, that the approach to paragraph 4 of Schedule 4 taken by his predecessors, i.e. the application of the "prudent man of business" test, was wrong in law.

[61] On that hypothesis, it does not appear to me that there has been any breach of the Noters' legitimate expectations under domestic law. As Bingham LJ observed in *R* v *IRC, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569 in the context of tax legislation:

> "The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law."

Bingham LJ referred in turn to the following dictum, also in the context of a tax statute, of Lord Oliver of Aylmerton (sitting in the Court of Appeal) in *R* v *Attorney-General, ex parte Imperial Chemical Industries plc* (1986) 60 TC 1 at 64:

> "...[The oil companies'] only legitimate expectation can have been that their liability to petroleum revenue tax in respect of ethane supplied for petrochemical purposes would be determined in the manner provided for by the law. Any expectation that they would be entitled to some advantage from some extra-statutory and *ultra vires* relaxation of the provisions of the statute cannot, as it seems to me, be termed a 'legitimate expectation' which ought to affect the court in the exercise of its discretion or to cause it to withhold relief if ICI

otherwise shows itself to be entitled to any."

[62] In the present case it does not appear to me that any question arises of the auditors' former practice having been *ultra vires*, even if it was wrong in law. However, the dicta which I have quoted apply, in my opinion, with even greater force to the practice of an auditor, whose task is to apply the law and resolve disputes between counsel and the Board, than to an agency of the executive such as a revenue department. In my opinion, counsel in the present case had no legitimate expectation other than that the Auditor would correctly apply the law to the taxation of their fees. If the Auditor failed to do so, then a remedy is, of course, provided by way of a Note of Objections to this court. One might as well argue that where a judge at first instance has decided a question of law in a particular way, a litigant who has acted in reliance upon that decision being correct has a legitimate expectation that in his own case a different judge will decide the question in the same way, and that such legitimate expectation could provide a valid ground of appeal if the second judge failed to do so.

[63] I can more readily see how questions of legitimate expectation could arise if a particular practice relied upon by counsel were a practice of the Board rather than the auditor. It might be easier in such circumstances to argue that instructions to act for legally-aided parties were accepted on the basis that the Board's practice would be followed when payment was sought. Issues such as clear representation, reliance and *vires* might, of course, arise, but this hypothetical situation seems to me to be more obviously comparable with the case law on legitimate expectation than a challenge to the decision of an auditor performing an adjudicatory role.

[64] Turning to the issue of Convention rights under article 1 of the 1st Protocol, the Noters founded strongly on *McCall* v *Scottish Ministers* 2006 SC 266. That case concerned the promulgation of a new scheme of regulations for criminal legal aid which differed significantly from its predecessor and created "winners and losers" among counsel as a consequence of the changes. Judicial review was sought by a member of the Faculty of Advocates of the Regulations because they were retrospective in that they applied to all proceedings concluded on or after the commencement date and therefore altered (in some cases adversely) the fees payable for work carried out while the old Regulations had been in force. It was held by Lord Carloway that the statutory entitlement of counsel to payment arose when work was carried out, that the right to receive such payment was a "possession" for the purposes of article 1, and that the applicant had had an entitlement to be

remunerated under the Regulations in force at the time when the work was done. The retrospective application of the new Regulations was therefore an infringement of the applicant's right to peaceful enjoyment of her property.

[65] Applying that decision to the facts of the present case, I accept that the Noters acquired a statutory entitlement to payment at the time when they carried out the various items of work in respect of which their fees were before the auditor for taxation, and that such entitlement to payment was a "possession" in terms of article 1 in respect of which they had a right of peaceful enjoyment. However, in my opinion the similarity between the present case and *McCall* ends there. The critical point in *McCall* was that the Regulations were amended with retrospective effect. There has been no such amendment here. In my opinion the "possession" of the Noters for article 1 purposes has at all times been an entitlement to payment of fees for work done in accordance with the statutory provisions creating that entitlement. On the hypothesis that the practice of previous auditors was not in accordance with a proper construction of the 1989 Regulations, I do not consider that the Noters had any entitlement to payment on the basis of that practice. It follows, in my view, that the change of interpretation by the present Auditor did not constitute an infringement of the Noters' right to peaceful enjoyment of their property.

[66] For these reasons I reject the Noters' contentions that the Auditor's departure from previous practice constitutes a breach of either their legitimate expectations or their Convention rights.

Disposal

[67] For the reasons given above, I shall sustain the Notes of Objection and remit taxation of the fees of counsel in both cases to the Auditor for reconsideration in the light of this Opinion.