IN THE COURT OF SESSION

REPORT

by the

AUDITOR OF COURT

on

ACCOUNT OF EXPENSES

in the Petition

of

TM [redacted]

Petitioner

for

Judicial Review of a Decision of the Respondents to refuse to grant sanction for the employment of junior counsel

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EDINBURGH. 22 November 2012. In terms of the Interlocutor of 22 December 2011 the Auditor taxes at the sum of TWENTY FOUR THOUSAND SIX HUNDRED AND EIGHTY THREE POUNDS AND EIGHTY EIGHT PENCE (£24,683.88) the expenses incurred by the Petitioner as set out in the Account of Expenses No. 11 of Process for which the Respondents have been found liable.

NOTE/

NOTE

1. It was submitted on behalf of the Petitioner that the role of the Auditor is limited to considering and determining matters raised by paying parties in written Points of Objection. The Auditor does not agree. No such limitation is suggested in the Rules of Court. (Rule of Court 42.2.(5) provides merely that if a paying party seeks to intimate Points of Objection outwith the specified time limit, the Auditor shall not, subject to paragraph (6), take account of them at the diet of taxation.)

   When the Court remits an account of expenses to him for taxation, the Auditor is obliged to carry out that exercise whether or not the paying party chooses to intimate Points of Objection. The Auditor's duty, as defined in Rule of Court 42.10.(2), is to allow "*Only such expenses as are reasonable for conducting the cause in a proper manner*". Rule of Court 42.13A.(4) stipulates that "*The charges which shall be allowed under paragraph (1) shall be* ***such as the Auditor determines are reasonable***" [emphasis added], and Rule of Court 42.5.(2) permits the disallowance of expenses "***Where it appears to the Auditor*** *that a party found entitled to expenses was unsuccessful or incurred expenses through his own fault in respect of a matter which would otherwise be included in those expenses*" [emphasis added]. In taxing an account, the Auditor requires to consider these issues, whether at the invitation of a paying party or not.

   The purpose of Points of Objection is to assist the process of taxation by providing the paying party with an opportunity, prior to a diet, to highlight specific items of concern and allowing the receiving party and the Auditor a chance to consider these in advance, but the Auditor would not, in his opinion, be fulfilling the Court's remit to him if he was to restrict his role solely to the determination of issues raised by the paying party.

   In paragraph 19.36 in the third edition of 'Sheriff Court Practice', the Hon. Lord Macphail states "*At the diet, both parties are heard on any question arising on the account. The auditor may himself raise questions and tax off, or on, any sums although not moved to do so.*" While acknowledging the absence from the Sheriff Court Rules of provisions regarding written Points of Objection, it respectfully seems to the Auditor that it would be odd if his role was limited in a way in which the role of Sheriff Court Auditors is not.

2. In considering the fees of Counsel in this case, the Auditor had regard to:-

a) The test set out in Rule of Court 42.10(1):

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

b) The following *dictum* of Lord Penrose in *City of Aberdeen Council v W A Fairhurst* 2000 SCLR 392:

"*One must assume that the rules envisage the possibility that there may be expenses and fees which it is fair to impose on a client because of his relationship with his solicitor and the circumstances in which work is performed on his instructions and expenses which it is appropriate to recover from an unsuccessful opponent. Rule 42.10(1) must ... be interpreted as imposing an objective test in this context. Negatively, not all of the fees and expenses which it is fair to charge against a client will necessarily be recovered on a party and party taxation.*"

c) The following *dictum* of Lord Bonomy in *Malpas v Fife Council 1999 SLT 499*:

"*It was accepted by both parties that different charges are made by different counsel for similar work, and that a range of charges for any given work might be reasonable. Similarly it is common experience that different agents might approach preparation for a case in different ways and with differing degrees of diligence, but the additional work done by one would not obviously in these circumstances be described as "unreasonable". So there may be a range of different ways of conducting a case that might all be described as "reasonable". It seems to me to follow that, in deciding whether to allow or disallow any particular item, the Auditor ... should only disallow an item if it can truly be said that to incur that expense was not reasonable, in the sense that a competent solicitor acting reasonably would not have incurred it.*"

d) The following *dictum* of Lord President Cooper in *Macnaughton v Macnaughton 1949 SC 42* in the context of a rule which was not dissimilar to Rule of Court 42.10(1):

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

In obedience to this principle the search of the Court has always been for the "proper fee" of "competent counsel" for the conduct of a case of known magnitude and difficulty, involving a stake of known value or importance. The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature and amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing counsel in an average case of the type in question presenting no specialties. But, if the case is abnormal in magnitude or difficulty or in any other respect, a second approximation must be made to reflect these specialties, and this second approximation may yield a substantially higher figure.

....It is for the Auditor – at least in the first instance – to apply his mind to these factors in making what I have called the second approximation."

e) The following *dictum* of Lord Eassie in *Dingley v The Chief Constable of Strathclyde Police* 2002 SCLR 160:

"But at all events, so far as fees to counsel are concerned, it appears to me that, given the propriety and reasonableness of the particular instruction to counsel in question, the amount found on taxation on a party and party basis to be recoverable should equiperate with what someone who is not in control of the amount of the fee payable would consider to be reasonable remuneration to counsel for the work encompassed by the instruction."

f) The following *dicta* of Lord Carloway in *Jarvie v Greater Glasgow Primary Care NHS Trust 2006 CSOH 42* (in relation to Counsel's fees for preparation for hearings):

"*The Auditor must reach an objective view on what is reasonable. Although that may have some regard to the amount of days actually occupied in preparation, that is unlikely to be a determinative factor and in some cases may carry little weight. In many cases, the scope for meticulous detailed preparation is, if not infinite, considerable. A party may wish such preparation carried out and he is perfectly entitled to instruct that work. That does not mean, however, that it is reasonable for his unsuccessful opponent to be burdened with the resultant charges.*

The Auditor sees a very large number of accounts over a considerable range of cases. He is placed, with that experience, in an ideal position to determine what is reasonable for preparation time in a given type of case because he sees the range of charges made by a large number of counsel in similar situations. It is not necessary for the Auditor to provide a detailed analysis of his reasoning as to how he reaches a particular figure, allowed in days, for preparation. The Auditor is addressing his decisions, and the contents of his Minute on a Note of Objections, to members of the legal profession, well versed in the practices and procedures of the Court. In selecting a number of days appropriate for preparation, the Auditor is applying his knowledge and experience to the case as disclosed on record and in the account and supporting vouchers. There is no need for him to repeat the contents of these documents in order to set out what the parties already know about the nature of the case and the work carried out in connection with it. The Auditor is expressing a view, based on his knowledge and experience, that he considers that a particular number of days is reasonable for a case of the particular type and complexity. That view will normally be respected by the court, unless some misunderstanding or other defect in reasoning is apparent."

g) The following further *dicta* of Lord Carloway in *Jarvie v Greater Glasgow Primary Care NHS Trust (supra)* (in relation to Counsel's fees for hearings which do not proceed):

"For the reasons already outlined above, when the stage is reached when it becomes reasonable to charge an element of counsel's fee for a discharged or otherwise cancelled proof in a party and party account, it is not necessary for counsel's preparation to be charged separately from a first day of a proof. That preparation may be subsumed into the fee for the first and subsequent days, having regard to the complexity of the action. The more complex the case, the higher the daily rate may be and the more reasonable it may be to have particularly experienced counsel charging at that rate. If preparation is charged separately then that may have a bearing on the level of daily fee chargeable, even if it will not strictly have a bearing on the number of days allowed by the Auditor. In fixing that number, the Auditor is not engaged in the exercise of assessing what the Temporary Judge described as "compensation" for counsel. He is not assessing what counsel might be "entitled to", that being an issue determinable on an agent and client taxation. He is deciding what, in all the circumstances, it is reasonable to have charged as an outlay by agents against an unsuccessful opposing party in respect of the instruction of counsel for a discharged or cancelled proof. As already explained, he will do that, having regard to a large number of factors, not least his wide knowledge and experience of what is reasonably charged in the many accounts (both agent and client and party and party) which come before him across the wide range of cases he deals with. It is not for the Court to start indicating to the Auditor what it thinks might be appropriate in respect of counsel's fees for a proof and especially to suggest, for example, that a certain proportion of days out of the total ought to be chargeable in a party and party account. It is, of course, the Court's function to supervise the Auditor's decisions and to reverse them if the well-known tests, including unreasonableness, are met."

h) The Respondents' written Points of Objection and the information and documentation provided at the diet of taxation.

3. In the opinion of the Auditor, the authorities referred to in the preceding paragraph clearly acknowledge (1) the potential for a difference between the fees which a particular Counsel may be entitled to receive from his client and what is reasonable to have charged as an outlay against an unsuccessful opposing party,

and (2) the consequent requirement for the Auditor to disallow not only charges which he considers to be agent and client in nature and therefore not recoverable at all on a party and party basis, but also charges which he considers, in all the circumstances (including the nature, complexity and importance of the proceedings), to be excessive or otherwise unreasonable.

4. As for the Auditor's own knowledge and experience, the Petitioner may rest assured that in the course of his lengthy career (29 years) as a litigation solicitor in Edinburgh, he has on many occasions instructed Counsel in complex judicial review proceedings.

5. The Petitioner sought recovery of a fee of £1,200.00 plus VAT charged by his Senior Counsel, Mr Andrew Smith QC, for drafting a Note in response to the Respondents' written Points of Objection which was intimated to the Auditor and to the Respondents in advance of the diet of taxation (although Mr Smith's note of fee was not intimated to the Auditor or to the Respondents until more than a week after the diet). In the opinion of the Auditor, the Note contains nothing by way of information or submissions which could not have been presented to the Auditor by any competent solicitor or law accountant, and it is accordingly not reasonable, on a party and party basis, that the paying party should have to bear the cost of it.

6. Finally, the Petitioner sought a decerniture from the Auditor in respect of interest on the expenses as taxed. The Auditor does not consider that it is competent for him to make such a decerniture and is unaware of any authority which suggests otherwise. The appropriate way in which to secure such a decerniture is by means of a motion to the Court.