

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

Note by Sheriff Alan D Miller

on

Objections to the Auditor's Report

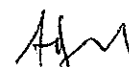
in the case of

PF Glasgow v Scott Redmond

7 January 2015

Introduction

1. Scott Redmond was prosecuted on a summary complaint containing six charges. He appeared from custody in Glasgow Sheriff Court in (I understand) August 2013 and, represented by a duty solicitor, pled not guilty to all 6 charges. Diets were assigned and he was granted bail. He then instructed Martin Lavery, solicitor, who applied for and was granted legal aid. In due course, on the day of the trial diet Mr Redmond tendered pleas of guilty to 4 of the charges (subject to amendment in respect of 1 of the charges) and not guilty to the remaining 2. The procurator fiscal accepted these pleas and the matter was brought to a conclusion without proceeding to trial.
2. Subsequently, a dispute arose about the fees to which Mr Lavery was entitled under the legal aid certificate. He contended that he was entitled to a fixed payment of £485 by way of fees, but the view of the Scottish Legal Aid Board was that he was entitled only to half of that fee. The interim auditor of court ruled in Mr Lavery's favour on 14 November 2014. The Board lodged a note of objections to that determination. A hearing was assigned which called before me on 17 December 2014.
3. The central issue concerns the interpretation of the relevant legal aid regulations - the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, Regulation 4(5B) - in circumstances where an accused person appears in court on a summary criminal complaint containing more than one charge, initially pleads not guilty while represented by a duty solicitor, and subsequently through a nominated solicitor of his or her own choosing offers a 'mixed plea' (guilty to certain charges, not guilty to others) which the Crown accept.
4. This issue has been the subject of dispute between the Board and solicitors on a number of occasions and in various courts and remains contentious. Coincidentally, revised



regulations which amend the terms of Regulation 4(5B) came into effect on the day of the hearing. Any question of their interpretation and effect lies beyond the scope of this decision.

The Auditor's Decision

5. It is clear from the terms of the interim auditor's full and helpful note that both parties made wide-ranging submissions before him. What is also clear is that he felt himself to be rather ill-equipped to take a view on several of the issues raised, such as the merits or demerits of literal or purposive approaches to statutory interpretation.
6. Nevertheless it is to his credit that he set out the arguments, and his decision, as fully yet succinctly as he did. Ultimately, as stated in his Note he found in Mr Lavery's favour on the basis of Mr Ewing's submission that Regulation 4(5B) was ambiguous and that the Board's interpretation of it would lead to absurd results. In coming to that conclusion, he appears to have taken into account issues of fairness and reasonableness.

Hearing on 17 December 2014

7. Mr Haggerty represented The Board, and Mr Ewing represented the solicitor Mr Lavery. I am grateful to both for providing copies of their prepared submissions.
8. Mr Haggerty argued that the auditor had misdirected himself in law and had misdirected himself by taking account of perceived issues of fairness and reasonableness. Regulation 4(5B)(c) was clearly engaged if, before trial, an accused person changed their plea to one of guilty either to a sole charge or to all charges on a complaint. In these situations, there was a change of position after a passage of time. The purpose and effect of the Regulation remained the same in a 'mixed plea' situation where the case did not proceed to trial, there being no outstanding plea of not guilty. Exactly the same situation would arise under the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011, Regulation 7(1) where a mixed plea was offered at first appearance. If accepted, the duty solicitor would be able to continue to act even though one of the conditions for doing so stipulated in the Regulation is that at the first appearance "the accused tenders a plea of guilty", with no reference to a mixed plea situation.
9. He lodged and referred to the Executive Note attached to the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 which had introduced paragraph 4(5B) into the 1999 Regulations. It was clear from the terms of the sixth policy objective stated in the Note that Parliament's intention was to save expenditure by reducing fees where the plea is changed to one of guilty before the start of the trial. In contrast, as the



Note stated "Where a trial goes ahead, the full fees will be payable". Finally, he conceded that the 1999 Regulations had not been the clearest in all circumstances and that the new 2014 Regulations did clarify the situation; but that would not make the auditor's decision correct in this case.

10. Mr Ewing submitted that the Board's position had changed from supporting a supposedly clear, literal interpretation before the auditor, to now conceding some unclarity in the 1999 Regulations and relying on policy materials. The issue was solely one of statutory construction, not of fairness as appeared to have been argued in other similar cases. A modern approach to interpretation could be found at *Craies on Legislation* (10th edition, 2012) at paragraph 18.1.2. He also accepted the statement at the head of paragraph 18.1.3 that "In practice, therefore, the argument between literal and purposive interpretation may never have had much substance except as a purely academic exercise, and it is now probably wholly futile".
11. Looked at in context, Regulation 4(5B)(c) could only apply where the subsequent guilty plea was in respect of either a sole charge or all charges on the complaint. The singular 'plea of guilty', the default usage in criminal procedure legislation such as the Criminal Procedure (Scotland) Act 1995 sections 77 and 144, would also include the plural by virtue of the Interpretation Act 1978, section 6 and the Interpretation and Legislative Reform (Scotland) Act 2010 section 22. Legal aid was made available for proceedings, not individual charges: Legal Aid (Scotland) Act 1986, section 24. The meaning of the term 'plea of guilty' was always contingent on the context. Where it was thought necessary, the mixed plea situation would be referred to: for instance, section 145 of the 1995 Act referred to the accused pleading guilty 'to any charge against him'. His construction would still result in financial savings for the Board. The consequence of the Board's construction would be that a plea of guilty to any charge would engage Regulation 4(5B), even if the accused then proceeded to trial on other charges on the same complaint; but the Board in fact pay the full fee in such situations.
12. The amendments to Regulation 4(5B) introduced by the 2014 Regulations further supported his point in that they now clearly caught the mixed plea situation. The relevant Policy Note could have stated that this was intended simply as a clarification, but did not. In fact it was a substantive amendment that would make Regulation 4(5B) applicable to situations where it did not currently apply.
13. In a brief reply, Mr Haggerty said the new regulations simply unwrap and clarify what the previous terms had said. The position was clear in a single charge scenario and there was no reason why it should be fundamentally different in a mixed plea situation.



Legislative Framework

14. Although the primary legislation governing legal aid in Scotland is the Legal Aid (Scotland) Act 1986, the Act itself essentially stakes out the ground within which a veritable forest of detailed secondary legislation has been generated. Of particular interest here is the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, which introduced and still govern the fixed fees system for summary criminal legal aid. As amended by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011, at the relevant time for this case Regulation 4 of the 1999 Regulations read:

"4.— Fixed payments allowable to solicitors

- (1) There shall be made to a solicitor who provides relevant criminal legal aid in summary proceedings, in respect of the professional services provided by him and the outlays specified in paragraph (2) below, and in accordance with the provisions of this regulation, the fixed payments specified in Schedule 1 or 1A.
- (1A) In the application of paragraph (1) above in relation to the assisted person's case, fixed payments are payable under one of those Schedules only (as alternatives to each other) where—
 - (a) Schedule 1 is for the purpose of—
 - (i) cases in the JP court (other than before a stipendiary magistrate);
 - (ii) cases in the JP court (before a stipendiary magistrate) or the sheriff court which proceed beyond the first 30 minutes of a trial;
 - (b) Schedule 1A is for the purpose of cases in the JP court (before a stipendiary magistrate) or the sheriff court which do not so proceed.
- (1B) Those Schedules are to be read and applied accordingly.
- (1C) There is to be made (in accordance with the other provisions of this regulation) to a solicitor who provides relevant ABWOR in summary proceedings, in respect of the professional services provided by the solicitor and the outlays mentioned in paragraph (2) below, the fixed payments specified in Schedule 1B.
- (1D) Schedule 1B is for the purpose of cases in the JP court (before a stipendiary magistrate or otherwise) or the sheriff court.
- (2) The outlays specified in this paragraph are all outlays in connection with—
 - (a) the taking, drawing, framing and perusal of precognitions;
 - (b) the undertaking by another solicitor of any part of the work; and
 - (c) photocopying.
- (3) Except where proceedings have been brought under section 185 of the 1995 Act, for the purposes of the references to summary proceedings in paragraphs (1) and (1C) above the following are to be treated as a single matter—
 - (a) a single summary complaint or complaints which arise out of the same incident; and
 - (b) proceedings under any of the following provisions of the 1995 Act arising out of the complaint or complaints referred to in sub-paragraph (a):—
 - (i) section 22(2), where it is alleged that the assisted person breached the undertaking by reason of failure to appear at court in accordance with the undertaking;

AM

- (ii) section 27(1)(a);
- (iii) section 28; or
- (iv) section 150(8).

- (4) Where in such proceedings a solicitor acts for more than one assisted person a separate fixed payment shall be made to him in respect of each such assisted person, in accordance with paragraph (5) below.
- (5) Where a solicitor represents 2 or more assisted persons he shall be paid in respect of the first assisted person 100% of such of the fixed payments as are appropriate to that assisted person, in respect of a second assisted person 40% of the appropriate fixed payments, and in respect of a third and each subsequent assisted person 20% of those payments.
- (5A) Where—
- (a) a solicitor provides relevant ABWOR to an assisted person when, in the same court on the same day, that person is first brought before a court to answer to two or more summary complaints which are not to be treated as a single matter by virtue of paragraph (3); and
 - (b) a guilty plea is tendered to the charge libelled in each complaint at the first diet at which the assisted person is called upon to plead to the charge,
- the amount payable under paragraph 1 of Part 1 of Schedule 1B is 100% of the prescribed amount in respect of the first complaint, 40% of that amount in respect of the second complaint and 20% in respect of any other complaints.
- (5B) The amount payable under (as the case may be) paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1A is half the amount that would otherwise be payable if the assisted person—
- (a) was represented by a solicitor arranged by the Board to provide criminal legal aid pursuant to regulation 7(1) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 at the first diet at which the assisted person was called upon to plead;
 - (b) tendered a plea of not guilty at that diet; and
 - (c) before the commencement of the trial tendered a plea of guilty.
- (6) Where a solicitor represents an assisted person who has been remanded in custody at or subsequent to the first calling of the case and that assisted person is at any time during that remand under 21 years of age the fixed payment specified in paragraph 1 of Part 1 of Schedule 1 shall be increased by £100.
- (6ZA) Where paragraphs (5B) and (6) both apply, the amount payable under paragraph 1 of Part 1 of Schedule 1 is to be halved in accordance with paragraph (5B) and £100 added to the quotient in accordance with paragraph (6).
- (7) Where the Board grants an application for a change of solicitor under regulation 17(3) of the Criminal Legal Aid (Scotland) Regulations 1996 there shall be paid to each of the solicitors who act for the assisted person in the relevant proceedings—
- (a) an equal part of the total amount payable under paragraph 1 of Part 1 of Schedule 1 or (as the case may be) under paragraph 1 of Schedule 1A;
 - (b) where Schedule 1 applies, the amounts payable under paragraphs 2 to 13 of Part 1 of Schedule 1 shall be payable to the solicitor who carries out the work described in those paragraphs; and

(c) where Schedule 1A applies, the amounts payable under paragraph 1 of Schedule 1A so far as applying by reference to paragraphs 10, 10AA and 13 of Part 1 of Schedule 1, or under paragraph 2 of Schedule 1A, are payable to the solicitor who carries out the work concerned (despite, in the case of paragraph 1 of Schedule 1A, the reference in sub paragraph (a) above to that paragraph).

(7A) Paragraph (7) above is subject to paragraph (1A) above (and, accordingly, does not affect the restriction imposed by it).

(7B) Where, in relation to relevant ABWOR, there is a change of solicitor by virtue of regulation 14A(2) and (3) of the Advice and Assistance (Scotland) Regulations 1996, there is to be paid—

(a) to each of the solicitors who act for the assisted person in the relevant proceedings, an equal part of the total amount payable under paragraph 1 or 2 of Part 1 of Schedule 1B; and

(b) to the solicitor who carries out work described in the other paragraphs of that Part of that Schedule, the amount payable under those paragraphs in respect of the work.

(8) Where the work done by a solicitor constitutes a supply of services in respect of which value added tax is chargeable, there may be added to the amount of payments allowed to the solicitor an amount equal to the amount of value added tax chargeable.

(9) Where a solicitor represents an assisted person (having relevant criminal legal aid) in a court which has been designated as a drug court by the sheriff principal—

(a) Part 1 of Schedule 1 shall not apply to those proceedings; and

(b) where that assisted person has been remanded in custody at or subsequent to the first calling at the case and is at any time during that remand under 21 years of age, there shall be payable in addition to the fixed payments specified in Part 2 of Schedule 1 a payment of £100.

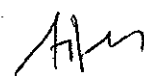
(10) Where a solicitor represents an assisted person (having relevant ABWOR) in a court which has been so designated—

(a) Part 1 of Schedule 1B does not apply; and

(b) the fixed payment specified in Part 2 of that Schedule is payable instead.”

15. The detailed amounts payable are tabulated in Schedules 1 and 1A. In terms of Schedule 1A, a fixed payment of £485 will be made for professional services in proceedings in the sheriff court in respect of "All work up to and including- (a) any diet at which a plea of guilty is made and accepted or plea in mitigation is made; (b) the first 30 minutes of conducting any trial" and thereafter dealing with sentence and advising on appeal. That provision also appears in Schedule 1, although it is there supplemented by provision for further fees payable where a trial continues beyond the first 30 minutes.

16. It is immediately apparent that although the scheme is one of fixed payments, these payments can be adjusted up or down in various circumstances including the nature of the proceedings, the age or custodial status of the accused, or the length of proceedings.



It is also apparent that there is no explicit reference in Regulation 4 to the mixed plea situation as in this case.

17. I am not aware of any provisions within the 1986 Act that might shed and more than very hazy light on the proper interpretation of Regulation 4 and sub-paragraph 4(5B)(c) in particular. However, I agree with Mr Ewing – and this was not disputed by Mr Haggerty – that the context in which the 1999 regulations operate is provided by the Criminal Procedure (Scotland) Act 1995. It is of interest to note the variety of ways in which the matter of pleading is described in the 1995 Act.
18. The terms of sections 144 (first diet), 146 (plea not accepted), and 148 (intermediate diet) refer only to “the plea of not guilty” or to pleading to “the charge”. The singular of course includes the plural but, even allowing for that, there is no reference in these provisions to a mixed plea situation.
19. Other procedural provisions use varying terminology. Although Mr Ewing sought to suggest that section 145 did acknowledge the possibility of mixed pleas, in my view its terms are context-specific and simply clarify that any question of continuation without plea is applicable to the whole complaint. Section 152A, concerning two or more complaints being tried together, does refer to complaints containing “one or more charges to which the accused pleads not guilty”: but that is explicable as the court's power is in fact to order that specific charges be tried together. The terms of section 160 acknowledge that a no case to answer submission may be made and upheld in respect of specific charges, with the trial then proceeding “only in respect of any other offence charged in the complaint: subsection (2). In terms of section 164, “A conviction of a part or parts only of the charge or charges libelled in a complaint shall imply dismissal of the rest of the complaint”.
20. Sentencing provisions also vary in their terminology. There is explicit acknowledgement in section 167(6) that “several charges... [may be] embraced in one complaint”, in the context of clarifying the power of the court to impose a cumulo sentence. Generally, however, sentencing provisions refer to “an offence” (for instance section 200(1)(a), section 203(1)) or “the offence” (section 201(1)).

Analysis

21. When considered on its own, there is undoubtedly a degree of uncertainty as to the application of Regulation 4(5B)(c) in all situations. It is plain that the Regulation is engaged if the accused changes a plea of not guilty to a plea of guilty before trial in respect of a single charge, or in respect of all charges on a complaint (with or without



amendment). It is also plain that the regulation is not engaged if the accused continues to plead not guilty to a sole charge or to all charges. But what if, as here, a plea of guilty to certain charges and not guilty to others is tendered and accepted?

22. This is a question of statutory interpretation, and I do not consider it particularly helpful to seek to pray in aid broad notions of fairness or reasonableness. Nor do I consider it necessary to stray far into statements of policy, beyond acknowledging the perhaps obvious point that a central purpose of the provisions introduced by the 2011 Amendment regulations was to save money. Nor, as noted by *Craies*, is a simplistic bifurcation of approach between supposedly literal and purposive schools of interpretation likely to assist. What is essential is to consider the disputed text in context of the terms of the Regulations as a whole, the scheme of the Regulations and the terms of the 1995 Act, taking account of the terms of the new amending regulations and of other decisions on the disputed text.
23. Matters come into focus when Regulation 4 is read along with the Schedules which elaborate its provisions. In particular, I find it highly significant that both Schedules refer to a "diet at which a plea of guilty is made and accepted" (emphasis added). "A Schedule is an extension of the section which induces it": *Bennion on Statutory Interpretation* (5th edition), section 241 at page 721. That is all the more pertinent where, as here, much of the detail is placed in the Schedule (see *Floor v Davis (Inspector of Taxes)* [1980] AC 695, Lord Wilberforce at page 703 as quoted in *Bennion*) and where there are clear cross-references from the principal regulation to the Schedules. If words such as "which was accepted" can be considered to be implied at the end of Regulation 4(5B)(c), then the argument tilts conclusively in the Board's favour. Such an implication seems inevitable given the terms of the Schedules. Given the centrality of this issue, I have to express some surprise that neither party referred to the terms of the Schedules in submissions.
24. That reading is consonant with the scheme of the 1999 Regulations when taken as a whole. That scheme is one of modifiable fixed payments. By definition, in such a scheme the level of remuneration received in an individual case may bear little relation to the actual volume of work involved in that case. It is relatively easy to construct hypothetical scenarios indicative of apparent illogicality in such a scheme, as Mr Ewing sought to do. It is important, however, to note that the scheme is designed to take broad account of the level of service required: hence the additional payments in respect of young, remanded clients (Regulation 4(6)) and in respect of cases where trial commences and exceeds 30 minutes (Schedule 1). Remuneration is still, although in a relatively crude way, related to



time and effort. In particular, it is linked to whether a case does or does not proceed to trial.

25. The disputed provision also requires to be read in the context of the criminal proceedings in respect of which the fixed payments are made. From the brief survey summarised at paragraphs 17-20 above, I note that those provisions of the 1995 Act which deal with pleading in summary proceedings up to the point of trial also make no reference to a mixed plea situation. I consider section 145 to be of no assistance to Mr Ewing as its terminology is grammatically singular. The inconsistencies of terminology deployed in other provisions perhaps reflect no more than the somewhat eclectic derivation of the different provisions of the 1995 Act.
26. Although Mr Ewing was unwilling to concede the point, in this court at least it is an everyday occurrence for accused persons to be prosecuted on summary complaints containing 2 or more charges, and in such cases for a mixed plea to be offered and accepted on the day of trial. It is certainly far from being an unusual scenario. On Mr Ewing's submission, however, it would constitute an anomaly: the only situation where the full fee was still payable in respect of a case that did not proceed to trial. Such an interpretation would also be inconsistent with the established and undisputed interpretation of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011, Regulation 7(1) in relation to a mixed plea offered (and, by clear implication, accepted) by a duty agent at first appearance.
27. Mr Ewing argued that, on the Board's interpretation, the fixed fee should be cut in half under Regulation 4(5B) where an accused tenders a plea of guilty to any charge before trial, but still goes to trial on other charges on the same complaint. That would be inconsistent with the scheme of the Regulations. It would be inconsistent with the terminology of the Schedules (see paragraph 23 above), and with the further provisions in the Schedules for payment of the full fee whenever a case proceeds to trial. Mr Haggerty was clear that the Board have never adopted or applied such an interpretation.
28. Finally, I note the terms of the amendments to Regulation 4(5B) implemented by The Criminal Legal Aid (Fixed Payments and Assistance by Way of Representation) (Scotland) (Miscellaneous Amendments) Regulation 2014. By virtue of Regulation 7 of the 2014 Regulations, for proceedings commencing on or after 17 December 2014 the following is substituted for the existing text of Regulation 4(5B) of the 1999 Regulations:

"(5B) The amount payable under paragraph 1 of Part 1 of Schedule 1 or, as the case may be, paragraph 1 of Schedule 1A is half the amount that would otherwise be payable if the assisted person—



- (a) was represented by a solicitor arranged by the Board to provide criminal legal aid in accordance with regulation 7(1) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011;
- (b) tendered a plea of not guilty to any charge libelled in a complaint at the first diet at which the assisted person was called upon to plead; and
- (c) before the commencement of the trial tendered a plea of guilty to that charge or any other charge in that complaint resulting in the disposal of the case".

29. It may be that the Board, and the Scottish Government, considered such amendment to be required in view of the continuing dispute as to the existing terms of Regulation 4(5B). I was given a copy of the note dated 13 February 2013 by Sheriff McCulloch of Kirkcaldy on precisely the same issue as was before me, albeit argued in somewhat different terms. Parties also provided their own agreed note of the terms of an oral decision on a similar case given by Sheriff McNair at Cupar on 24 May 2013, along with reports on taxations issued by various auditors. What is apparent is that none of these auditors, and neither learned sheriff, was referred to the terms of the Schedules to the 1999 Regulations as an aid to interpretation. I can only speculate whether amendment of Regulation 4(5B) would have been considered necessary at all if the accepted canons of statutory interpretation had been properly applied before now.

Decision

30. When the terms of the regulation under scrutiny are read in the context of the 1999 Regulations as a whole, there is no question that the Board were correct to reduce the solicitor's core fee by one-half. There is nothing in the scheme of the Regulations, in the wider statutory context, or in the now amended terms of the specific regulation that undermines that view. For the reasons given, I find no particular assistance in the previous (non-binding) decisions to which I was referred.
31. Accordingly, I sustain the note of objections and remit to the auditor to amend his report so as to reduce the core fee payable to Mr Lavery from £485 to £242.50.
32. The question of expenses was raised. Mr Haggerty said it was not the Board's practice to seek expenses in a situation such as this. In any event, given that both parties focused their submissions on questions of statutory interpretation but that neither addressed me on the crucial question of interpretation of the Regulations as a whole, I would not have considered it appropriate to make any award of expenses even if sought. I make no award of expenses in respect of proceedings before me or before the auditor.