

# **Taxation Report**

**22<sup>nd</sup> October 2008**

JB



**Central Criminal Lawyers**

**Fixed Payment**

**Trial Diets**



**SCOTTISH COURT SERVICE**  
***Sheriffdom of Lothian and Borders***

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[REDACTED]  
Scottish Legal Aid Board  
DX 555250  
EDINBURGH

Your Ref: CB1914

Our Ref: DF


Date: 24 February 2009

Dear Sir/Madam,

PF V [REDACTED]

I enclose a copy of the Sheriff's determination in relation to the objection to my report on the taxation held on 22 October 2008.

Yours faithfully

  
D Fyfe  
Auditor of Court



INVESTOR IN PEOPLE



CUSTOMER SERVICE EXCELLENCE

SHERIFFDOM OF LOTHIAN & BORDERS AT LINLITHGOW


JUDGEMENT

On Note of Objections by Messrs Central Criminal Lawyers to the auditor's report on taxation held on 22<sup>nd</sup> October 2008.

On account relating to Summary prosecution P.F.Linlithgow v James Borthwick

Linlithgow      25th February 2009.

The Sheriff, having resumed consideration of the matter, repels the Note of Objections and approves the Report of the Auditor of Court taxing the account in the sum of £1100.



NOTE:

Introduction

1. Messrs Central Criminal Lawyers (CCL) with the assistance of the Scottish Legal Aid Board (the Board) acted for the accused in the above prosecution, which after sundry procedure called before me for trial on 21<sup>st</sup> February 2007. The trial could not be concluded and was adjourned until 7<sup>th</sup> March. On that date all concerned expected further evidence to be heard but the accused was ill and the trial was further adjourned until 23<sup>rd</sup> April, when again all concerned expected evidence to be led. On that date the accused failed to appear and a warrant was issued for his apprehension. After an appearance on warrant, 2<sup>nd</sup> October 2007 was assigned as a further trial diet and on that date the trial was completed and the accused convicted.

2. In due course CCL submitted their account to the Board. It included a charge of £400 for the appearance on 2<sup>nd</sup> October 2007. The Board proposed an abatement to that charge, suggesting it be reduced to £200. CCL did not accept the abatement and a taxation was held before the auditor of court at Linlithgow on 22<sup>nd</sup> October 2008. The



auditor found against CCL and they lodged a Note of Objections. A Hearing on the opposed Note of Objections was held on 26<sup>th</sup> January 2009 and after hearing submissions I made avizandum.

3. In preparing their account CCL referred to Schedule 1 to The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations, 1999. I reproduce the Schedule as follows. It is in current form and certain of the fees have increased since 2007 but there have been no other alterations.

## F.98 SCHEDULE 1

### F.99 PART 1

### Regulation 4

	<i>Where professional services are provided in relation to proceedings in the District Court (other than where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court (other than proceedings in a Court specified in Schedule 2) or the District Court (where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court and those proceedings are brought in a Court specified in Schedule 2</i>
<b>1.</b> All work up to and including:	<b>£315</b>	<b>£515</b>	<b>£565</b>
(i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;	(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £290)	(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £490)	(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £540)
(ii) <sup>1</sup> the first 30 minutes of conducting a proof in mitigation, or a proof of a victim statement, other than in the circumstances where paragraph 3 below applies;			
(iii) the first 30 minutes of conducting any trial;			
(iiiia) <sup>2</sup> first or second diet of deferred sentence; and			
(iv) <sup>3</sup> advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal, together with any subsequent or additional work other than that			

specified in paragraphs 2-13 below.

**2.<sup>7</sup>** All work mentioned in paragraph 1 above that is done in connection with a complaint under section 27(1)(b) of the 1995 Act. £157.50 £257.50 £257.50

**3.<sup>8</sup>** All work done in connection with a grant of legal aid under section 23(1)(b) of the Act including the first 30 minutes of conducting a proof in mitigation, or a proof of a victim statement. £25 £50 £50

**4.** Conducting a trial or proof in mitigation for the first day (after the first 30 minutes) £50 £100 £100

**4A.<sup>9</sup>** Conducting an adjourned trial diet, during which no evidence is led, where there was no intention nor anticipation that evidence would be led, the only matter in consideration being the determination of the further procedure of the trial proceedings. £25 £50 £50

**4B.<sup>10</sup>** Conducting an adjourned trial diet, during which no evidence is led, where there was an intention and an anticipation that the trial would proceed through the continued leading of evidence. £50 £100 £100

**5.** Conducting a trial or proof in mitigation for the second day. £50 £200 £200

**6.** Conducting a trial or proof in mitigation for the third and subsequent days (per day). £100 £400 £400

**7.<sup>11</sup>** Representation in court at a continued diet following a victim statement having been laid before the court where the court determines sentence or fixes a proof of a victim statement, or adjourns such a proof without hearing evidence. - £50 -

**8.<sup>12</sup>** Conducting a proof of a victim statement where there has been no trial or proof in mitigation for the first day (after the first 30 minutes), and thereafter for subsequent days (per day). - £200 -

**9.<sup>13</sup>** Conducting a proof of a victim statement at a continued diet following a concluded trial or proof in mitigation (per day). - £200 -

**10.<sup>14</sup>** Representation in court at a diet of deferred sentence or per appearance in a court which has been designated as a youth court by the sheriff principal, at a hearing in respect of a community supervision order, or £25 £50 £50

per appearance at a hearing in a court which has been designated as a domestic abuse court by the sheriff principal.

<b>10AA.</b> <sup>15</sup> Representation at a first or second diet of deferred sentence (one only) at which the court considers a report required under section 203 of the 1995 Act and where the case is disposed of (as an additional payment).	£25	£25	£25".
<b>11.</b> All work done where the accused is in custody and has tendered a plea of not guilty until determination of the application for legal aid.	£25	£25	£25
<b>12.</b> All work done by virtue of section 24(7) of the Act until determination of the application for legal aid.	£25	£25	£25
<b>13.</b> <sup>16</sup> All work done in connection with a bail appeal under section 32 of the 1995 Act, or an appeal under section 201(4) of the 1995 Act.	£50	£50	£50
<b>14.</b> <sup>17</sup> All work done in connection with an application for bail subject to a movement restriction condition under section 24A of the 1995 Act.	-	£50.	-

4. In accordance with paragraph 1 of the Schedule CCL charged the sum of £500 (the sum then appropriate) for all professional services provided to the accused up to and including the first 30 minutes of the trial. As the trial diet on 21<sup>st</sup> February lasted longer than 30 minutes they also charged in accordance with paragraph 4 of the Schedule the sum of £100 for the remainder of their services that day. In accordance with paragraph 4B of the Schedule, they also charged sums of £100 for each of their appearances on 7<sup>th</sup> March and 23<sup>rd</sup> April. In accordance with paragraph 6 of the Schedule they also charged the sum of £400 for the services provided on 2<sup>nd</sup> October 2007. It is the latter charge which is the matter in dispute between the parties. The Board consider that the appropriate paragraph was 5 and the appropriate charge £200.

5. It will be noted that the descriptions of the professional services under each heading are as follows:

Para 5; "Conducting a trial or proof in mitigation for the second day"

Para 6; "Conducting a trial or proof in mitigation for the third and subsequent days"

6. The issue is therefore whether 2<sup>nd</sup> October was the second or third (or subsequent) day of the trial.

7. The Note of Objections avers that the auditor erred in his interpretation of paragraphs 5 and 6 of the Regulations as although he correctly stated that 4A and 4B apply when a diet of trial is continued but no evidence is led, this is not relevant to



consideration of the diet on 2<sup>nd</sup> October. Regulations 5 and 6 refer simply to the number of trial diets which have preceded the diet being charged for. 2<sup>nd</sup> October was de facto the fourth day of the trial. Paragraphs 4A and 4B make reference to a charge for "conducting an adjourned trial diet". Trial diets, whether adjourned or not, had been conducted on 7<sup>th</sup> March and 23<sup>rd</sup> April, and 2<sup>nd</sup> October was accordingly the fourth diet. The auditor should not have read into regulations 5 and 6 the need for the preceding diets to have included the leading of evidence.

8. Prior to the hearing the agent for the Board Miss Cuschieri lodged an inventory of productions in which she helpfully provided the salient documents with in addition a copy of a judgement of Sheriff Stephen at Edinburgh on 29<sup>th</sup> December 2000.

### Submissions

9. Mr Bryce for CCL opened his submissions by providing, by reference to that Judgement, a history of the development of the provisions. As originally promulgated, they did not include paragraphs 4A and 4B. The charge for the second day of the trial was £200, under paragraph 5, and £400 for the third and subsequent days under paragraph 6. After the Fixed Fee regulations were introduced in 1999 the Board noted that second trial diets frequently lasted for a very short time and might involve very little work on the part of the agent. On occasions all concerned knew that the diet would be short and procedural in nature, so that little preparation would be required. Agents were frequently being paid £200 for such an appearance. The Board considered that this was not an appropriate use of public funds and took a test case before Sheriff Stephen who found that a trial diet was a trial diet and the £200 fee must be paid whatever the nature of the diet.

The Regulations were therefore amended by The Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 2005 which introduced paragraphs 4A and 4B.

10. Mr Bryce submitted that while 4A and B envisaged a different "quality" of trial diet it was still a trial diet, and the wording of 4A and B included the words "Conducting an adjourned trial diet". If the Scottish Parliament had intended that conducting an adjourned trial diet should not count towards the accumulation of trial diets resulting in a £400 fee, there would have had to be a consequential alteration to paragraphs 5 and 6 making it clear that the necessary accumulation would only occur if the preceding diets had included the leading of evidence. That might in his submission have been an omission, or it might have been an added element in the "swings and roundabout" nature of the blunt instrument that was a fixed payment.

11. Miss Cuschieri had prepared written submissions. She began by explaining the nature of the dispute. In her detailed arguments, however, she made a number of points. She noted that 2<sup>nd</sup> October was put forward by CCL as the fourth day of the trial; why had the second day of the trial not been charged for? She asked that I interpret the wording of the paragraphs on the basis of the work carried out rather than simply the number of days. She put forward the following example; a fee under paragraph 4 is paid after the first 30 minutes of trial. The trial begins when the first witness is sworn. If the first witness is sworn in at 3.45 on a Monday and the case then



concludes at 4pm that day, no charge under fee 4 could be rendered. If, however, the trial adjourned at 4 pm on the Monday and recommenced on the Tuesday, at 10am, concluding at 10.16 am, fee 4 could be charged as the trial has lasted in excess of 30 minutes. This, she submitted, was an example of one daily rate over two calendar days.

12. Her principal submission was that on each of 7<sup>th</sup> March and 23<sup>rd</sup> April CCL conducted an adjourned trial diet. On each of 21<sup>st</sup> February and 2<sup>nd</sup> October they had conducted a trial. She pointed out that an "adjourned trial diet" was defined in Regulation 2(1) as "a diet that follows a trial that has commenced by the leading of evidence". No evidence had been led on these days and they could not be regarded as trial days proper. The court minutes do not distinguish between trials at which evidence is led and trials at which it is not, hence the need for a distinction in the regulations as introduced by 4A and 4B.

13. At the hearing Miss Cuschieri took me in detail through her written submissions. They centred on the points already narrated.

14. Mr Bryce was given the opportunity to respond and in response to Miss Cuschieri's query about the second day submitted that his firm were not charging for a second day because special arrangements had been introduced to deal with days 2 and 3 under paragraphs 4A and 4B. In response to her example, he submitted that at the stage of first and second day of the trial calendar days were not important. By the time it came to the third and subsequent days of the trial, calendar days were important.

15. I asked the parties if I should look behind the rules at their purpose. Mr Bryce thought not, Miss Cuschieri agreed, unless the results were very different from the wording.

#### Decision

16. In departing from the "time and line" system which had governed the payment of summary criminal Legal Aid fees in the past, The Scottish Parliament introduced a system which by its very nature was simple and unsophisticated. The system changed from payment for work done to payment for acting for an accused at certain stages of the process, with the differences between the amount of actual work required in individual cases evened out by the "swings and roundabouts" principal as affecting an agent who dealt in considerable volume with summary criminal work. Payment was pitched at a level which over a large number of cases would even out to represent fair payment.

17. The stages in the regulations as originally promulgated were set out in the numbered paragraphs. The stages with which we are concerned here are those during which a trial is conducted. The first 30 minutes of the trial was to be included in the block fee under paragraph 1. The remainder of that day attracted another £100 under paragraph 4. The second day attracted another £200 under paragraph 5. The third and subsequent days attracted another £400 under paragraph 6. There was no examination of the work done. If the agent was acting during that stage of the proceedings he was





paid the appropriate fee, and if it was far too much or far too little for the work done that would even itself out over a number of cases.

18. As was explained to me by the agents with the help of reference to Sheriff Stephen's decision, after the new system had been running for some time it became clear that in setting the block fee sufficient account had not been taken of the frequency of trial diets at which no evidence was led and which might occupy the agents for only a short time. That category of trial diet could be broken down even further into days when this occurred unexpectedly, after preparation by all concerned, and the so-called "notional" trial diet, where the calling is procedural and all concerned know that there will be only a five or ten minute hearing that day involving little or no preparation. It appeared to the Board that agents were being paid too much for these procedural hearings. The original scheme was therefore altered by the introduction of paragraphs 4A and 4B.

19. In dealing with this apparent injustice the Scottish Parliament departed from the logic of the original scheme. Instead of assessing the number of shorter diets which occur in the average prosecution and reducing the block payment accordingly, a decision was taken for reasons of which I am not aware to introduce into the system an element of examination of the work done. In two categories of "shortened" trial diet, a reduced fee would be payable, the amount depending on the amount of work which would be expected to be required in each category. The logic of the system as originally introduced required that it be an instrument of uniform and level "bluntness". Appearance at a trial diet, of whatever complexity and duration, was as Sheriff Stephen ruled sufficient to trigger payment of whatever fee was appropriate. To look further into the nature of that trial diet was to introduce a level of sophistication not envisaged in the 1999 Regulations. If one were to continue this process, and begin to examine each element of work more closely, one would very quickly arrive back at the time and line system abandoned in 1999.

20. So what effect does this analysis of the history of the Regulations have on this dispute?

21. When paragraphs 4A and 4B were introduced by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2005, the only consequential alteration was a definition of "adjourned trial diet"; it was described as meaning "a diet that follows a trial that has commenced by the leading of evidence"

22. It appears to me that in creating the new level of scrutiny described, paragraphs 4A and 4B permit payment for a different element of work, ie acting for an accused while an adjourned trial diet is taking place. The concept of an adjourned trial diet is entirely new. The original Regulations did not see the need to define concepts like "conducting a trial", leaving this to the plain English used in the Schedule. When, however, it was decided to introduce payment for a sub-species of trial diet, it was considered that a new definition was required, and one was inserted. On the other hand the language of paragraphs 5 and 6 has not been altered. It will be remembered that payment under these paragraphs contemplated a trial diet ranging from a five minute appearance with no preparation to a five hour trial with full preparation. Because of the introduction of 4A and 4B, payment under paragraphs 5 and 6 cannot cover this range, as if for example the third trial diet were of the type described in 4A



and 4B the lesser fee would apply. When the new class of "adjourned trial diet" was introduced the fixed payments under paragraphs 5 and 6 should logically have been increased, as they must cover a different and more onerous range of work. Making sense of the Regulations as amended is made difficult by the illogical nature of the amendments. I must, however, try to interpret them in such a way as to make sense.

23. I must follow the general principles of interpretation. Here I have to deal with ambiguity. I have to seek out the true meaning of what the Scottish Parliament said. I must give words (where there is no specific statutory definition) their natural and ordinary meaning, and am permitted to take into consideration the context in which they are used. I should examine the regulations in their entirety. I may also consider the wider context in which the Regulations were made, and their purpose.

24. So what does "conducting a trial or proof in mitigation for the second day" mean?

25. I have come to the conclusion that the auditor was correct in his interpretation of the Regulations. I do so for two reasons. Firstly, when the amendments were inserted in 2005 they introduced the new sub species of trial diet which I have already discussed. That sub-species was itself subdivided, but what is more important is that a specific definition was thought to be necessary. That definition brings its own problems; it can be applied equally to the "new sub-species" or to the existing one of "conducting a trial"; but the important feature is that the Scottish legislature considered that a separate definition was necessary. "Adjourned trial diets" enjoy separate and different treatment under the amended regulations, and it is my view that they do not equate to "conducting a trial or proof in mitigation". They should not therefore be counted in assessing whether the next day of true trial or proof is the second, third or twenty fifth day.

26. This interpretation is supported to some extent by a broader consideration of the Regulations. I appreciate that I am using a substantial element of speculation here, although I suggested this proposition to Mr Bryce and he did not seem to demur. The charge for a day's trial increases sharply where it lasts for longer than two days. This can only be because a trial with three day's evidence is most unusual in the summary sheriff court. If the case requires three day's evidence it must be a matter of a very different colour from the simple prosecution with a few witnesses on either side. The work done on the third day will be little different from the work done on the second, but the mere fact that the trial has lasted so long means that from the beginning it is likely to have required a great deal more than the average amount of effort on the part of the solicitor. This justification for higher fees does not of course apply where the second day is adjourned for reasons other than complication or extent of evidence. The £400 fee should therefore only be paid where there is evidence led on the preceding two days.

I have therefore rejected the Objections tendered and have approved the auditor's report.

  
 Sheriff of Lothian and Borders at Linlithgow

**Report on the taxation held on 22 October 2008 in relation to the case of**

**PF LINLITHGOW -V- J [REDACTED]**

The Scottish Law Directory Fees Supplement 2007 sets out the procedure to be followed if there is any question or dispute arising between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings. As Auditor for the Sheriff Court for the district in which the above proceedings took place the matter was referred to me for taxation. Reference to me as auditor under the regulation was made at the instance of both the solicitor concerned and the Board and reasonable notice was given in relation to the diet fixed for the purposes of taxation.

Mr. Ian Bryce appeared on behalf of Central Criminal Lawyers and [REDACTED] appeared on behalf of the Board.

The point in dispute was the fixed fee for the diet of 2<sup>nd</sup> October 2007 and whether that fee should be £200, as the second day of trial, or £400, as the 3<sup>rd</sup> or subsequent day of trial dependent upon the interpretation of the Regulations (Criminal Legal Aid (Fixed payment) (Scotland) Regulations 1999 (as amended).

[REDACTED] lodged a written note of submissions on behalf of the Board to which she intended to refer.

In their submissions, both Mr. Bryce and [REDACTED] very helpfully explained the history of the creation of regulations 4A and 4B and why the previous regulations required to be amended. A decision had been taken by the Auditor at Edinburgh Sheriff Court regarding the appropriateness of the fees as they stood before amendment. In making that decision, the Auditor took the view that "a fixed fee was a fixed fee". Objections to the Auditors report were lodged by the Board and, having heard the parties thereon, Sheriff M. Stephen upheld the view taken by the Auditor. That decision meant in effect that every continued diet for trial would legitimately merit one block fee regardless of the circumstances of that calling. Mr. Bryce and [REDACTED] both stated that prior to amendment, and the insertion of regulations 4A and 4B, there was a degree of absurdity in fees previously claimed and that the current fees were more equitable.

In his submissions Mr. Bryce argued that while it might have been the intention of the Board to pay only £200, for the second day of trial, and £400, on the third or subsequent days(per day), the wording used does not reflect that intention. That being so, in his opinion the calling on the 2<sup>nd</sup> of October was the 4<sup>th</sup> day of trial, the trial have been previously continued for the purpose of hearing further evidence, and accordingly the appropriate fee should have been applied.

In her submissions, [REDACTED] argued that work done in these matters should not be seen as calendar days but as a block fee for works done. She gave the example that if a trial started on one day, was then adjourned to a subsequent day, but in total time took no

more than 30 minutes, the appropriate fee would be £100; regardless whether it was dealt with over two calendar days.

To assist my understanding of the current fees I asked two hypothetical questions of Ms. [REDACTED] namely-

*If a witness entered the witness box on the second day of a trial and was asked and answered one question and then either the witness, accused, trial lawyer, prosecutor or sheriff could not continue due to illness, what fee would the Board consider properly chargeable?*

[REDACTED] said that since evidence had been led then £200 (*conducting a trial or proof in mitigation for a second day*) would be the appropriate fee.

*If evidence was led and closed in one day but the sheriff decided, due to the lateness of the hour, to continue that trial to hear parties on the evidence, to make a determination of guilt, to hear the accused's solicitor in mitigation of sentence or to pass sentence, what fee would be properly chargeable?*

[REDACTED] said initially that the fee properly chargeable would be £200 (*conducting a trial or proof in mitigation for a second day*). However, on reflection and taking into account no evidence was led, said that 4B (*Conducting an adjourned trial diet, during which no evidence is led, where there was no intention nor anticipation that evidence would be led, the only matter in consideration being the determination of further procedure of the trial proceedings*) would be properly chargeable.

In conclusion both Mr. Bryce and [REDACTED] suggested it was a matter of which box fits the circumstances but that they differed on the interpretation of the definitions in relation to 4A, 4B, 5 and 6.

Having taken into account all that was said today, the note of submissions lodged on behalf of the Board, the office file of Central Criminal Lawyers and the Criminal Complaint of [REDACTED] I consider the appropriate fee chargeable on 2<sup>nd</sup> October 2007 to be £200 (*conducting a trial for the second day*). In doing so, I take account of the minutes of the case that clearly record on which occasions evidence was led and the view, related to me, of the Auditor of Edinburgh Sheriff Court when he concluded that "a fixed fee is a fixed fee". In my opinion, 4A and 4B apply when a diet of trial is continued but no evidence is led; albeit their definitions could be clearer.

David Fyfe  
Auditor of Court  
Linlithgow Sheriff Court  
22/10/2008



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[REDACTED]  
Scottish Legal Aid Board  
DX-555250  
EDINBURGH

Your Ref: cb191 4

Our Ref: DF

Date: 22 October 2008

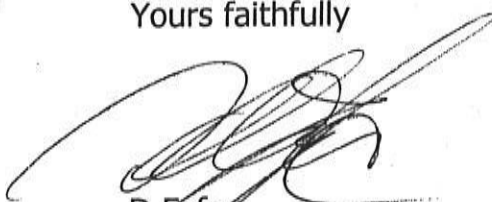


Dear Sir,

PF V [REDACTED]

I enclose a copy of my report in relation to the recent taxation.

Yours faithfully

  
D. Fyfe  
Auditor of Court

Stero

Yes-I'm  
brilliant

UZ.



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CUSTOMER SERVICE EXCELLENCE