

**Legal Services Department**

44 Drumsheugh Gardens  
Edinburgh EH3 7SW

Hays DX ED555250 EDINBURGH 30  
LP2 EDINBURGH 7  
Website: [www.slab.org.uk](http://www.slab.org.uk)  
Telephone: (0131) 226 7061



Fax Number: (0131) 225 3705  
Ext No. 689

Mr N R Weir  
Auditor of Court  
Dumbarton Sheriff & Justice of the Peace Court  
LP 7  
DUMBARTON

Our Ref: JDH/CS

09 July 2012

FN

Dear Mr Weir

**PF DUMBARTON -v- [REDACTED] NOTE OF OBJECTIONS**

I attach Note of Objections together with a copy of the original Points of Objection (slightly amended but not to any material extent) and a copy of your report.

This is lodged in terms of regulation 11(3) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 which allows the Board (or any other party) to state written objections to the Sheriff within 14 days of issue of the Auditor's report. I am sorry, I should have clarified that it is 14 days, not 7 days for the purpose of lodging a Note of Objections.

I look forward to being notified of the hearing in due course.

[REDACTED]

Head of Legal Services - Technical or Criminal

SHERIFFDOM OF NORTH STRATHCLYDE AT DUMBARTON

NOTE OF OBJECTIONS

in the case of

PF DUMBARTON -v- 

arising from

A decision of the Auditor at taxation on  
26 June 2012

The Scottish Legal Aid Board (the Board) objects to the Report by the Auditor of Court, Dumbarton Sheriff Court, dated 27 June 2012 in relation to the fees claimed by Mr Cairns, Solicitor, Dumbarton. For ease of reference, a copy of the Report and a copy of the Points of Objection lodged by the Board are attached to this Note. The Board objects for the following reasons

1. In reaching his decision, it is respectfully submitted that the Auditor misdirected himself in law, at paragraph 1 of the Auditor's report, in apparently agreeing with Mr Cairns' submission that regulation 4(5B)(c) could not apply as the accused had pled guilty to only one of the charges, and that the nominated solicitor was therefore entitled to the full fee. It is submitted that regulation 4(5B) does not require that a plea of guilty is tendered to all the charges on a complaint, only that "before the commencement of the trial [the assisted person] tendered a plea of guilty". In this regard, it was stated by the Board that, a plea of not guilty to the other charge having been accepted by the Crown, the accused person did plead guilty to the remaining charge thus satisfying the terms of the provision. The case was thereby disposed of and did not proceed to trial.
2. In reaching his decision, the Auditor, at paragraph 2 of the Report, took into account irrelevant information *et separatim* arrived at a view that no Auditor, properly directed, could have reached in arriving at his decision. The Auditor postulated that it would have been "bizarre" that had the accused pled not guilty to both charges and had this plea been accepted then the full fee would have been payable thus arriving at the "unacceptable situation" where a not guilty plea over in minutes would be paid at twice the rate of a partial guilty plea involving the preparation for and the submission of a plea in mitigation which might be involved and lengthy. Firstly, it is submitted that this is irrelevant arriving at a decision which should have been based on what the Auditor considered to be a proper interpretation of the relevant provision. Secondly, it assumes, wrongly in the Board's view, a *nexus* between the application of regulation 4(5B) and the amount of work undertaken by the solicitor, and thirdly, it assumes as a given that there would be more work in negotiating a plea whereby the Crown accepts a plea of not guilty to one charge and a plea in mitigation is made, against the amount of work in persuading the Crown to accept a plea of not guilty to both charges (in this case) thereby disposing of the proceedings.

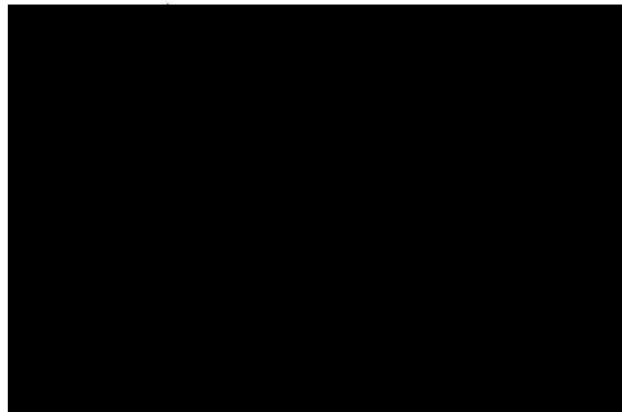
3. Lastly, the Auditor failed to have sufficient regard to the terms of regulation 4(5B) and the terms of the Executive Note relating to this provision (set out in the attached Points of Objection) explaining the purpose of the sixth policy objective which, *inter alia*, was to "...ensure that the appropriate plea is made at the earliest possible stage in the proceedings on the basis of the best possible advice from the solicitor". In this case, an outcome whereby the Crown accepted a plea of not guilty to both charges would have been to wholly vindicate the original plea of not guilty, and in this situation the solicitor would have been entitled, properly, to the full fee.

The penultimate sentence of the narrative in the Executive Note, states "*This amendment does not affect the fees set out in Schedule 1B which relate to ABWOR, where a plea of guilty has been tendered*".

Regulation 6(1)(ba) of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 [2003 No. 179] makes provision for ABWOR to be provided "at any diet to which the case has been adjourned under section 145 of the 1995 Act". This refers to continuation without plea procedure where ABWOR is available to an accused person who is not in custody. Similarly an appointed solicitor providing ABWOR under regulation 6A of the ABWOR regulations to a person who appears from custody is also entitled to provide ABWOR for the purposes of a continuation without plea.

In both circumstances, where this procedure is adopted, the solicitor will be paid the full fee prescribed by Schedule 1B. The relevant case disposal fees for criminal legal aid and ABWOR in the sheriff court are the same, £485.

It should also be noted that in the context of sheriff court proceedings, even a half fee amounts to £242.50.



Dumbarton 27 June 2012. The Auditor of Court taxes the account submitted to the Scottish Legal Aid Board in respect of the accused [REDACTED] in the sum of £647-00.

N R Weir

Auditor of Court

At the taxation which took place on 26 June 2012 Mr. Cairns appeared on his own behalf and [REDACTED] appeared for the Scottish Legal Aid Board.

Mr. Cairns had submitted an account for £485-00 plus VAT in respect of a complaint containing two charges in which, at a bail review, a plea of guilty to one of the charges and not guilty to the other was accepted by the Procurator Fiscal. The Board's response to the account was to offer 50% of the fee claimed as, in their view, it fell under Reg. 5(B) of The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 which state in abbreviated form that the accused was

- (a) represented by a solicitor at the first diet
- (b) tendered a plea of not guilty at that diet
- (c) before the commencement of the trial tendered a plea of guilty

Mr Cairns submitted that Sub Reg. 5(B)(c) could not apply as the accused had pled guilty to only one of the charges and he was therefore entitled to the full fee. Mr. Haggerty stated that as there had been a plea to one of the charges the Board were entitled to ignore the other charge and apply the Sub Reg. and invited me to do the same.

I do not share the Board's view. I am of the opinion that in this case because there was more than a plea of guilty Mr. Cairns is entitled to his full fee. I am enforced in this view by the admission by [REDACTED] in a response to my question that had the accused pled not guilty to both charges and had this plea been accepted then the full fee would have been payable. This would lead to the bizarre, and in my view, unacceptable situation where a not guilty plea over in minutes would be paid at twice the rate of a partial guilty plea involving the preparation for and the submission of a plea in mitigation which might be involved and lengthy.

I have therefore taxed the account in the sum of £647-00 being a fee of £485-00, VAT of £97-00, account fee of £36-00 and audit fee of £29-00.

SCOTTISH LEGAL AID BOARD

POINTS OF OBJECTION

Assisted Persons Name : [REDACTED]  
Legal Aid Reference : SM/08/1498284811  
Solicitors Name : Cairns Brown

Date of Taxation & Location: Auditor Dumbarton Sheriff Court 26 June 2012 @ 2.15pm

Type of Case : Summary Criminal

1. Nature of the case:

The nominated solicitor applied for and was granted summary criminal legal aid to represent the accused in respect of charges of assault and acting in a threatening and abusive manner.

2. Fees allowable to solicitors

Solicitors are entitled to payment in terms of The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 also apply to Fixed Payments cases where there is no conflict between the regulations. It is those regulations which provides for taxation in terms of Regulation 11(1)(c)

*"11.-(1) If any question or dispute arises 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 in-*

*(c) the sheriff or district court, the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place...*

*(3) The Board and any other party to a reference under paragraph 1(a) or (c) shall have the right to state written objections to the High Court or, as the case may be, the sheriff in relation to the report of the Auditor within 14 days of issue of such report and the Board and any such other party may be heard thereon".*

3. Nature of dispute:

In this case the duty solicitor initially tendered a plea of not guilty on the accused's behalf. A grant of summary criminal legal aid was then made to Messrs Cairns Brown, solicitors. At the diet of 28 October 2011 (which was set down as a Crown bail review) the plea of "not guilty" to charge 1 (assault) was accepted and the accused tendered a plea of guilty to charge 2 (threatening and abusive behaviour) and was fined £300. In effect a "mixed plea" bargain has disposed of this case but importantly the accused has changed his plea to guilty before the start of trial.

This case is affected by Regulation 4(5B) of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 2011 [S.I. 1999 No. 491 (S.33)] which reads as follows:-

*(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.”.

The Executive Note which accompanies these Regulations explains the purpose of this regulation.

“The sixth policy objective is to reduce by half the new prescribed fees in Schedule 1 and 1A of the principal Regulations in the following circumstance: where the accused person appears from custody, is represented by the duty solicitor (whether or not the case is subsequently taken forward by the duty solicitor), a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial. Where a trial goes ahead, the full fees will be payable. The aim is to deliver the required savings by reducing the very significant discrepancy between the levels of fees paid for a guilty and not guilty plea for solicitors operating under the duty scheme and to ensure that the appropriate plea is made at the earliest possible stage in the proceedings on the basis of the best possible advice from the solicitor. This also recognises that the duty scheme can, in some cases, provide new business to solicitors. It is of course always within the gift of the solicitor who will be acting for an accused person to attend the court personally. This amendment does not affect the fees set out in Schedule 1B which relate to ABWOR, where a plea of guilty has been tendered. Regulation 5 gives effect to this policy objective.”

#### Board's Position

In terms of both the regulation and the Executive Note, only a ½ case disposal fee is payable here as the terms of Regulation 4(5B) have all been met. To confirm:-

- (a) was the accused represented by the duty solicitor = YES.
- (b) Was a plea of not guilty tendered at that diet = YES.
- (c) Before the commencement of trial did the accused tender a plea of guilty = YES (albeit not on all charges, but that is not a requirement of regulation 4(5B))

#### Solicitor's Position

As a guilty plea was not tendered to both charges the ½ fee is not appropriate. He believes that a guilty plea must have been tendered “to all of the charges” before the ½ fee is payable. The regulation does not say that. Regulation 4(5B)(c) simply states “before the commencement of the trial tendered a plea of guilty” - and that is what accused did.

It should be noted that regulation 4(5A), not regulation 4(5B) provides that “(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”. These are quite separate provisions.

The third policy objective in the Executive Note relates to regulation 4(5A).

#### 4. Mailshot Guidance Issued by the Board to the Profession

The Board mailshot which we issued to the profession “Criminal Legal Assistance Update - 17 March 2011” states

*This mailshot provides details of important fee changes arising from the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011.*

The regulations follow the tripartite discussions between the Scottish Government, the Law Society of Scotland and the Scottish Legal Aid Board, to identify savings as a result of the £1.3 billion cut in the Scottish Government budget next year.

**3. Reduced fee where the duty solicitor tenders a not guilty plea and the accused person subsequently pleads guilty before the trial begins**

Regulation 5 further provides for the fixed payment payable to a solicitor under paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1A (summary criminal legal aid) to the Fixed Payment Regulations to be halved if the duty solicitor tenders a not guilty plea on the person's behalf and the person subsequently obtains a grant of summary criminal legal aid (whether with the duty solicitor or any other solicitor acting as nominated solicitor) and pleads guilty before the trial begins, a half core fee will be payable.

Regulation (5B) reads as follows.

“(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.”

The core fixed payment will be halved before any enhanced payment under regulation 4(6) where the assisted person has been remanded in custody and is under 21 years of age at any time during that remand.

This amendment does not affect fixed payments under Schedule 1A where the trial actually commences but does not exceed 30 minutes duration. In these situations the solicitor is still entitled to the relevant unrestricted case disposal fee payable for that court even though the first day trial fee is not chargeable.

The provision only affects proceedings commenced on or after 22 March and not applications arising from an earlier plea of not guilty.

