

REPORT OF TAXATION

MG

PROCURATOR FISCAL, CUPAR v [REDACTED]

Cupar 20 February 2013

I certify that I have taxed the Account of Expenses submitted to the Scottish Legal Aid Board by Rollos Law LLP, Solicitors, Cupar in respect of the Accused Liam Graham in the sum of FIVE HUNDRED AND FIFTEEN POUNDS (£515.00).

Mr. C L Donald

Auditor of Court

NOTE

BACKGROUND

This is the Report of Taxation from the taxation diet held on 31 January 2013 in respect of an Account of Expenses submitted to the Scottish Legal Aid Board by Rollos Law LLP, Solicitors, Cupar in respect of the Accused [REDACTED]

Mrs. Miller, Solicitor, appeared for Rollos Law LLP (Rollos) and [REDACTED] appeared for the Scottish Legal Aid Board (the Board). With the consent of all parties, this taxation diet was held in conjunction another and Mr. Williams, Solicitor, who was attending that taxation, was also present during part of this taxation.

According to the minutes attached to the court complaint, the case first called 29 August 2012 when the accused pled not guilty to charge 1 and guilty to charge 2.

It is recorded that the guilty plea to charge 2 was not accepted by the Prosecutor, therefore intermediate diet and trial dates were fixed for both charges for 18 October and 12 November respectively. On 18 October, the same plea was tendered and the Prosecutor again did not accept the plea in respect of charge 2. A further intermediate diet was assigned for 1 November. On that date, the minutes state that "the accused indicated an intention to adhere to the pleas of not guilty previously tendered in relation to charges 1 and 2". This appears to be an error. A further intermediate diet was assigned for 8 November. On that date, the minutes state, "the accused being asked to confirm the plea previously tendered pled guilty to charge 1, as amended, said plea being accepted by the Prosecutor. Adhered to the plea of not guilty to charge 2, said pleas (*sic*) to charge 2 being accepted by the Prosecutor." Sentence was deferred in respect of charge 1 until 9 May 2013.

Rollos submitted an Account of Expenses to the Board in the sum of £485 in terms of paragraphs 1 of Part 1 of Schedule 1 of the 1999 Act. The Board offered £242.50 as they stated that the case fell under Section 5B of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 so the fee should be halved. That Regulation states:

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 referral was made to me in terms of Regulation 11 of the Criminal Legal Aid (Scotland) Regulations 1989.

SUBMISSIONS

At the beginning of the taxation, [REDACTED] tendered a list of points of objection, along with copies of the relevant legislation and the decision of two other Auditors of Court in relation to 'Section 5B' taxations. The Auditors in those cases decided against the Board. In the Dumbarton case, the Board lodged a note of objections and the Sheriff upheld the decision of the Auditor (although no note as to the reasons were issued) and, as at the 31 January, the Sheriff at Kirkcaldy was yet to hear parties on the note of objections submitted by the Board in respect of that decision.

Mrs. Miller referred me to the decision of the Auditors at Dumbarton and Kirkcaldy. She appeared as duty agent, a plea was offered at the first calling, although not accepted by the Prosecutor. There were numerous discussions with different Procurator Fiscals and repeated attempts to resolve the case as quickly as possible. The plea accepted was guilty to 1 under deletion of the words "repeatedly" and not guilty to charge 2. There was no option but to proceed with the not guilty pleas and it has been minuted as such. The defence tried to resolve it all the way through. If the plea had been guilty as libelled then she agreed that half fee would be payable. In the Kirkcaldy case (as it happens, also one of Mrs. Miller's) the plea was to a lesser charge, the circumstances were the same. There was nothing to be gained by the defence delaying the case. She submitted that if I interpret the Regulations literally then there is no room for a mixed plea to be accepted and that would be too broad a brush approach being taken. I should be entitled to look behind the Regulations to see what intended by them.

[REDACTED] addressed this case and the other taxation simultaneously. In addition to the point of objections tendered, he said that the amendment to the

Regulations that brought in Regulation 5B were designed to stop wasting court time. I was referred to Section 285 of Bennion Statutory Interpretations and was asked to take the literal meaning of the words in the Regulations and I should not interpret them. As the three stipulations in 5B could be answered affirmatively then a half fee will apply. He argued I cannot look beyond the Regulations and should not concern myself about the amount of work undertaken by the solicitor within his file. The £485 fee can apply to short or lengthy cases. The Regulations were a cost saving exercise and a broad-brush approach was taken. If it is perceived as not fair then that does not matter. Regarding mixed pleas, Mr. [REDACTED] stated that the Regulations refer to a plea of guilty. You don't have to plead not guilty to all the charges then guilty to all the charges, just not guilty to a charge then before the commencement of the trial a plea of guilty is tendered.

CONCLUSION

I have come to the conclusion that this case does not fall within Regulation 5B. The accused plead not guilty to charge 1 and guilty to charge 2 at the first calling of the case. The Prosecutor did not accept the pleas and not guilty pleas were recorded in respect of both charges. I think it is fundamental that the accused made a plea of guilty at the time of the first calling.

Notwithstanding [REDACTED] submission that I cannot look beyond the Regulations, he did refer me to the reason why Regulation 5B was brought in. Also, in his list of points of objection, he specifically refers to part of the Executive Note that accompanies the Regulations. Part of that note states:

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 level 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. It is estimated that this amendment will deliver circa £894,736.36 of savings to the Legal Aid Fund in 2011-12 and circa £1,601,057 for a full year.

The words "a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial" are, in my view significant for this case. While I do accept that the not guilty plea to charge 1 was changed to one of guilty, although to an amended charge, in my view, this is balanced out by the fact that the Prosecutor accepted a not guilty plea to charge 2, the charge that the accused had original tendered a plea of guilty.

In addition, I consider I am entitled to take in to account the Explanatory Note to The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011. Part (c) states:

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 to the principal Regulations to be halved if the duty solicitor tenders a not guilty plea on the person's behalf and the person subsequently pleads guilty before the trial begins.

I consider the word "subsequently" is significant for this case. The accused tendered a guilty plea at the first opportunity. It is clear from the file that there were significant attempts to resolve this matter from the earliest stage of the proceedings. Notwithstanding that the Prosecutor accepted different pleas to those originally tendered, the fact that a guilty plea was tendered and not accepted at the first calling does, in my view, show that there was not a "subsequent" change of plea in the spirit of the legislation.

Therefore, I do not consider that Regulation 5B applies to this case and the full amount sought in terms of paragraph 1 of Part 1 of Schedule 1 of the 1999 Act by Rollos Law LLP, Solicitors, Cupar from the Scottish Legal Aid Board, including the audit fee should be allowed.

In my view, the cases decided by the Auditors of Court at Dumbarton and Kirkcaldy do not cover the situation we have in this case, in that a plea of guilty tendered at the first calling was not accepted but pleas were then accepted by the Prosecutor at a later stage. I do not intend to comment on the fact that a plea was accepted to an amended (lesser) charge, as I do not consider it relevant to my decision. Nor do I intend to comment on the 'mixed pleas' situation but perhaps there could be more clarity in any future amendment to the Regulations.

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

NOTE OF OBJECTIONS

COPY

in the case of

PF (CUPAR) -v- [REDACTED]

arising from

A decision of the Auditor at taxation on
31 January 2013

The Scottish Legal Aid Board objects to the Report by the Auditor of Court, Cupar Sheriff Court, dated 20 February 2013, in relation to the fees claimed by Rollos Law LLP, Cupar in respect of the accused Martin Green.

For ease of reference a copy of the Report and a copy of the Points of Objection, and supporting documentation, lodged by the Board are attached to this Note. The Board objects for the following reason.

1. In reaching his decision, it is respectfully submitted that the Auditor misdirected himself in law in concluding that regulation 4(5B)(c) could not apply in the circumstances of the case as set out in the conclusion of his Report and, in particular, for the reasons enunciated in the last three paragraphs of said Report, and that the nominated solicitor was, therefore, entitled to the full fee.

It is submitted that regulation 4(5B), on a plain or literal interpretation, is engaged in the circumstances of this case.

In the procedural circumstances narrated by the Auditor, a plea of not guilty was tendered to charge 1 and guilty to charge 2. This was not accepted by the Crown. The pleas were tendered by the duty solicitor. Subsequently, the nominated solicitor, on behalf of the accused, tendered a plea of guilty to charge 1 (albeit to a lesser charge) to which a plea of not guilty had originally been tendered by the duty solicitor.

Whilst there may have been attempts, perhaps indeed significant attempts, to resolve this matter from the earlier stage of the proceedings, the terms of the relevant provision are nevertheless engaged and the only conclusion can be that the nominated solicitor is only entitled to a half fee rather than the full fixed payment for the case.

IN RESPECT WHEREOF



Solicitor
44 Drumsheugh Gardens
EDINBURGH
Solicitor for the Scottish Legal Aid Board

DECISION

“I was originally attracted by the idea of a purposive interpretation as the regulation as framed does not appear to address multiple charges. But that does not fall within the legislative intent set out in the Note on Sheriff McCulloch’s decision and the Auditor’s report.

The current situation can cause anomalies in circumstances where the major charge is dropped, but if the minor charge is dropped at the last minute it can also be anomalous. In the circumstances, given the range of outcomes, I have not found it possible to apply a purposive interpretation.

I am therefore thrown back on a literal interpretation in circumstances where the regulation does not distinguish between charges. It talks about *a* plea of not guilty and *a* plea of guilty.

Here *a* plea of not guilty and *a* plea of guilty was tendered. That these were two different charges is not relevant. I have sympathy with the solicitors. However it is entirely a matter for policy and not for the Sheriff to find a way round what the regulation says.

I have no pleasure in doing so. I do not think the regulation is fair in all cases, although it may be fair in some cases.

I shall sustain the Note of Objections and remit to the Auditor to amend the Report by allowing half the fee in terms of regulation 4(5B) of the 1999 fixed payment regulations.”

24 May 2013

THE CRIMINAL LEGAL AID (FIXED PAYMENTS) (SCOTLAND) REGULATIONS 1999

S.I. 1999 No. 491 (S. 33)

Made: 28 February 1999
Laid before Parliament: 2 March 1999
Coming into force: 1 April 1999

As amended to take account of:

The Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 [S.I. 1999 No. 1820] coming into force on 1 July 1999;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 [S.S.I. 1999 No. 48] coming into force on 1 October 1999;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2001 [S.S.I. 2001 No. 307] coming into force on 15 October 2001;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002 [S.S.I. 2002 No. 247] coming into force on 17 June 2002;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 2) Regulations 2002 [S.S.I. 2002 No. 442] coming into force on 1 November 2002;

The Criminal Legal Aid (Youth Courts) (Scotland) Regulations 2003 [S.S.I. 2003 No. 249] regulation 4 coming into force on 2 June 2003;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2004 [S.S.I. 2004 No. 51] coming into force on 11 March 2004;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 2) Regulations 2004 [S.S.I. 2004 No. 126] coming into force on 2 April 2004;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 3) Regulations 2004 [S.S.I. 2004 No. 263] coming into force on 28 June 2004;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2005 [S.S.I. 2005 No. 93] coming into force on 23 March 2005;

The Criminal Legal Aid (Summary Justice Pilot Courts and Bail Conditions) (Scotland) Regulations 2006 [S.S.I. 2006 No. 234] regulation 3 coming into force on 12 June 2006;

The Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010;

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 2) Regulations 2010;

The Criminal Legal Assistance (Fees) (Scotland) Regulations 2010

The Criminal Legal Assistance (Fees) (No. 2) (Scotland) Regulations 2010

The Advice and Assistance and Legal Aid (Online Applications Etc.) (Scotland) Regulations 2011 [S.S.I. 2011 No. 161]

Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 [S.S.I. 2011 No. 162]

The Criminal Legal Assistance (Fees) (Scotland) Regulations 2011 [S.S.I. 2011 No. 333]

The Secretary of State, in exercise of the powers conferred on him by sections 33 and 41A of the Legal Aid (Scotland) Act 1986, and of all other powers enabling him in that behalf, hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 and shall come into force on 1 April 1999.

Interpretation

2. (1) In these Regulations, unless the context otherwise requires –

"the Act" means the Legal Aid (Scotland) Act 1986;

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995;

"adjourned trial diet"¹ means a diet that follows a trial that has commenced by the leading of evidence;

"assisted person"² means a person to whom criminal legal aid or (as the case may be) assistance by way of representation has been made available in relation to the proceedings in question;

"continued diet"³ means a diet which takes place on a separate date from the diet at which a victim statement is laid before the court;

"diet of deferred sentence"⁴ includes those diets where the case has been adjourned for inquiries or reports under sections 201 (power of court to adjourn case before sentence) and 203 (reports) respectively of the 1995 Act;

"excluded proceedings" means–

- (a) summary proceedings arising following a reduction from solemn proceedings;
- (b) proceedings in relation to which legal aid is only available by virtue of section 22(1)(a) of the Act (identification parades held by or on behalf of the prosecutor in contemplation of criminal proceedings);
- (c) ⁵proceedings in relation to which legal aid is only available by virtue of section 22(1)(c) of the Act (assisted person in custody or liberated by police on undertaking to appear), except where those proceedings are before a court which has been designated as a drug court by the sheriff principal;
- (d) proceedings in relation to which legal aid is only available by virtue of

¹ Inserted by S.S.I. 2005 No. 93 (in force from 23 March 2005).

² Amended by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30th June 2008).

³ Inserted by S.S.I. 2004 No. 51 (in force from 11 March 2004).

⁴ Inserted by S.S.I. 1999 No. 48 (in force from 1 October 1999).

⁵ As amended by S.S.I. 2001 No. 307 (in force from 15 October 2001) by excluding proceedings in the drug court.

Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

section 22(1)(da) of the Act (plea of insanity in bar of trial);

- (e) proceedings in relation to which legal aid is only available by virtue of section 22(1)(db) of the Act (examination of facts);
- (f) proceedings in relation to which legal aid is made available by virtue of regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996 (matters of special urgency);
- (g) ⁶any reference in connection with proceedings under article 234 of the EEC Treaty;
- (h) ⁷any reference on a devolution issue under paragraph 9 of Schedule 6 to the Scotland Act 1998;
- (i) ⁸proceedings under Section 9 of the Extradition Act 1989;
- (j) ⁹proceedings under Section 5 of the International Criminal Court Act 2001;
- (k) ¹⁰proceedings in relation to which legal aid is only available by virtue of section 22(1)(dd) of the Act (solicitor appointed by court for person accused of sexual offence);
- (l) ¹¹proceedings in an appeal to the High Court under section 174(1) (appeals relating to preliminary pleas) of the 1995 Act

"proof in mitigation" includes those diets where a proof in mitigation takes place at the same time as a proof of a victim statement;

"relevant ABWOR"¹² means assistance by way of representation provided by a solicitor in relation to summary criminal proceedings other than excluded proceedings;

"relevant criminal legal aid" means criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings;

"victim statement"¹³ means a statement made for the purposes of Section 14 of the Criminal Justice (Scotland) Act 2003.

(2) In these Regulations, unless the context otherwise requires, any reference to a numbered regulation is to one of these Regulations.

(3)¹⁴ For the purposes of these Regulations, a trial, proof in mitigation or proof of a victim statement shall be taken to commence when the first witness is sworn.

Application

3. (1)¹⁵ For the purposes of these regulations, the references in section 33(3A) and (3B) of

⁶ As amended by S.S.I. 1999 No. 48 (in force from 1 October 1999) to the extent of substituting "234" for "177".

⁷ Inserted by S.I. 1999 No. 1820 (in force from 1 July 1999).

⁸ Inserted by S.S.I. 2001 No. 307 (in force from 15 October 2001).

⁹ Inserted by S.S.I. 2001 No. 307 (in force from 15 October 2001).

¹⁰ Inserted by S.S.I. 2002 No. 442 (in force from 1 November 2001).

¹¹ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30th June 2008).

¹² Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30th June 2008).

¹³ Inserted by S.S.I. 2004 No. 51 (in force from 11 March 2004).

¹⁴ Inserted by S.S.I. 1999 No. 48 (in force from 1 October 1999) and amended by S.S.I. 2004 No. 51 (in force from 11 March 2004) adding references to a proof in mitigation and proof of a victim statement.

¹⁵ Amended to the extent of adding "and relevant ABWOR" by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30th June 2008).

Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

the Act to criminal legal assistance relate to relevant criminal legal aid and relevant ABWOR.

(2) These Regulations shall apply –

- (a) In respect of relevant criminal legal aid first made available in terms of sections 22 or 24(7) of the Act, only in relation to any case where criminal legal aid is first so available on or after 1 April 1999; and
- (b) In respect of relevant criminal legal aid first made available otherwise, only in relation to any case where an application for criminal legal aid is granted on or after that date.

(3)¹⁶ These Regulations apply also in respect of relevant ABWOR.

Fixed payments allowable to solicitors

4. (1)¹⁷ 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)¹⁸ 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)¹⁹ Those Schedules are to be read and applied accordingly.

(1C)²⁰ 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)²¹ 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

¹⁶ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30th June 2008).

¹⁷ Reference to Schedule 1A inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

¹⁸ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

¹⁹ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

²⁰ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

²¹ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

(c) photocopying.

(3)²² 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)²³ 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;
 - (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)²⁴ 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)²⁵ 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;

²² Substituted by S.S.I. 2004 No. 263 (in force from 28 June 2004). Reference to paragraph (1C) inserted by S.S.I. No 237 (in force from 5 July 2010).

²³ Substituted by S.S.I 2011 No. 162 (in force 22 March 2011) applying only in respect of proceedings commenced on or after 22 March 2011.

²⁴ Reference to Schedule 1 deleted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

²⁵ Inserted by S.S.I 2011 No.162 (in force 22 March 2011) and applying only in respect of proceedings commenced on or after 22 March 2011. (Due to a savings provision in the amending regulations these provisions apply equally to a duty solicitor made available by regulation 5 of the Criminal Legal Aid (Scotland) Regulations 1996)

Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

(b) tendered a plea of not guilty at that diet; and

(c) before the commencement of the trial tendered a plea of guilty.

(6)²⁶ 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)²⁷ 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)

(6A)²⁸ [Omitted]

(7)²⁹ 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) ³⁰an 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; and
- (b) ³¹where 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) ³²where 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)³³ Paragraph (7) above is subject to paragraph (1A) above (and, accordingly, does not affect the restriction imposed by it).

(7B)³⁴ 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(4), 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

²⁶ Inserted by S.S.I. 2001 No. 307 (in force from 15 October 2001) to the extent of adding "Part 1 of..."

²⁷ Inserted by S.S.I. 2011 No. 162 (in force 22 March 2011) but, again, only if proceedings commenced on or after 22 March 2011.

²⁸ Regulation (6A) to (6C) inclusive omitted by S.S.I. 2011 No. 332 (in force from 31 October 2011). The provisions were inserted by S.S.I. 2010 No. 270 (in force from 8 July 2010), and regulated the payment of a solicitor providing advice to a suspect at a police station. They were removed on the agreement that such work should no longer be subsumed in the event that the case proceeded to ABWOR or criminal legal aid.

²⁹ Substituted by S.S.I. 2004 No. 263 (in force from 28 June 2004).

³⁰ Reference to Schedule 1A inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

³¹ Amended by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

³² Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008). Reference to paragraph 13 inserted by S.S.I. No 237 (in force from 5 July 2010).

³³ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

³⁴ Inserted by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

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)³⁵ 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

Exceptional cases ³⁶

4A. - A solicitor who provides relevant criminal legal aid shall –

- (a) where the circumstances prescribed at paragraph (3) exist; and
- (b) subject to the conditions prescribed at paragraph (5),

Instead of receiving the fixed payments specified in Schedule 1, be paid out of the Fund in accordance with regulations made under section 33(2) and (3) of the Act.

(2) It shall be for the Board to determine whether the circumstances prescribed at paragraph (3) exist, and whether the conditions prescribed at paragraphs (5) and (9) are met.

(3) The circumstances referred to in paragraph (1)(a) are where an assisted person would be deprived of the right to a fair trial in any case because of the amount of the fixed payments payable for the criminal legal assistance provided.

(4) The factors to be taken into account by the Board in considering whether the circumstances prescribed at paragraph (3) exist shall include –

- (a) the number, nature and location of witnesses;
- (b) the number and nature of productions;
- (c) the complexity of the law (including procedural complexity);
- (d) whether the assisted person, or any witnesses, may be unable to understand the proceedings because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.

(5) The conditions referred to in paragraph (1)(b) are as follows–

- (a) the solicitor providing relevant criminal legal aid shall make an application to the Board –

³⁵ Inserted by S.S.I. 2001 No. 307 (in force from 15 October 2001). Amended by the addition of the words "(having relevant criminal legal aid)" by S.S.I. 2008 No 240 (applying only in relation to a case where the criminal legal assistance concerned is made available on or after 30th June 2008).

³⁶ Inserted by S.S.I. 2002 No. 247 (in force from 17 June 2002).

- (i) In such manner and form, which may include an online form³⁷; and
- (ii) containing such information,

as it may specify, at as early a stage in the provision of the relevant criminal legal aid as is reasonably practicable and that solicitor shall, if required by the Board to do so, supply such further information or such documents as the Board may require to enable it to determine the application; and

- (b) that solicitor shall keep proper records of all professional services provided by way of and outlays incurred in the provision of that relevant criminal legal aid, whether before or after the Board exercises its power to determine whether the conditions prescribed at paragraph (5)(a) are met.

(6) An application for a review under section 33(3K) of the Act shall –

- (a) ³⁸[Omitted]
- (b) subject to paragraph (7), be lodged with the Board within 15 days of the time when notice of refusal of the application was given to the applicant;
- (c) include a statement of any matters which the applicant wishes the Board to take into account in reviewing the application; and
- (d) be accompanied by such additional precognitions and other documents as the applicant considers to be relevant to the review.

(7) Paragraph (6)(b) shall not apply where the Board considers that there is a special reason for it to consider a late application for review.

(8) Where the Board has granted an application for a change of solicitor under regulation 17(3) of the Criminal Legal Aid (Scotland) Regulations 1996, any solicitor who provided relevant criminal legal aid prior to that grant shall, where the Board has determined that the circumstances prescribed at paragraph (3) exist, instead of receiving the fixed payments specified in Schedule 1, be paid out of the Fund in accordance with regulations made under section 33(2) and (3) of the Act.

(9) A solicitor to whom paragraph (8) applies shall only be paid where that solicitor has kept proper records of all professional services provided by way of and outlays incurred in the provision of that relevant criminal legal aid.

Submission of accounts

5. (1)³⁹ A claim for a fixed payment in accordance with these Regulations shall be made by submitting to the Board not later than 4 months after the date of conclusion of the proceedings in respect of which the relevant legal aid or assistance was granted, an account specifying the fixed payments which are claimed in relation to the proceedings, together with any fees and outlays which are claimed in relation to those proceedings by virtue of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 or the Advice and Assistance (Scotland) Regulations 1996.

(2)⁴⁰ The Board may accept accounts submitted later than the 4 months referred to in paragraph (1) if it considers that there is special reason for late submission.

³⁷ Inserted by S.S.I. 2011 No. 161 (in force from 1 April 2011) enabling the Board to require submission of an application online or by electronic means

³⁸ Omitted by S.S.I. 2011 No.161 (in force from 1 April 2011)

³⁹ Amended to the extent of substituting "4 months" for "6 months", and adding references to "assistance" and the Advice and Assistance (Scotland) Regulations 1996 by S.S.I. 2008 No 240 (which came into force on 30 June 2008).

⁴⁰ Amended to the extent of substituting "4 months" for "6 months" by S.S.I. 2008 No 240 (in force from 30 June 2008).

Consequential

6. In the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 at the beginning of regulation 3 (fees and outlays to which the Regulations apply) insert -

"Subject to the provisions of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999,".

Henry McLeish
Minister of State,
Scottish Office

St Andrew's House,
Edinburgh
28 February 1999

POINTS OF OBJECTION

Assisted Persons Name : [REDACTED]
ABWOR Reference : SM/2656257112 & SM/2747923812
Solicitors Name : Gray, Lawyers & Estate Agents & Rollo Davidson
McFarlane

Date of Taxation & Location: Auditor Cupar Sheriff Court 31 January 2013 @ 14:00hrs x 2

Type of Case : Summary Criminal

1. Nature of the case:

The solicitors applied for and were granted summary criminal legal aid to represent the accused in respect of 2 charges.

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 applies to Fixed Payments where there is no conflict. It is those regulations which provides for taxation in terms of Regulation 11(1)(c), which states

"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. Nature of dispute:

NOTE: THESE CASES ARE VIRTUALLY IDENTICAL IN THEIR FEATURES TO THE CASES OF P.F v [REDACTED] & P.F v. [REDACTED] IN WHICH THE AUDITORS FOUND AGAINST THE BOARD AT TAXATION IN DUMBARTON AND KIRKCALDY SHERIFF COURT. IN THE [REDACTED] CASE THE BOARD WAS ALSO UNSUCCESSFUL ON A SUBSEQUENT NOTE OF OBJECTIONS BEFORE THE SHERIFF.

In these cases the duty solicitor initially tendered a plea of not guilty on the accused's behalf. A grant of summary criminal legal aid was then granted to Gray, solicitors and, respectively, Rollo Davidson McFarlane, solicitors who took the cases through to their natural conclusion.

Gray & Co Account

There was 2 charges to the complaint. Charge 1 was that the accused acted in a threatening and abusive manner which was likely to cause a reasonable person to suffer fear and alarm as he brandished a glass bottle and charge 2 he was in possession of an offensive weapon (baseball bat).

On the 7 June 2012 and before the start of trial (intermediate diet) the accused's plea of "not guilty" to charge 1 was accepted and he then tendered a plea of guilty to charge 2 and was sentenced to a community sentence order. In effect a "mixed plea"

bargain has disposed of this case before the start of trial and the accused has changed his plea to guilty (albeit to only one of the charges) before the start of trial.

Rollo Davidson McFarlane Account

Again another mixed plea with the case resolving by way of a plea of guilty to one charge and not guilty accepted to another. The 2 charges are assault and acting in a threatening and abusive manner.

The only dispute relates to whether this is a case which is caught by The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011, in particular, Regulation 5 of these regulations which makes amendment to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, by inserting a new Regulation 4(5B) 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 applying the Regulation and having regard to the Executive Note we believe that only a ½ case disposal fee is payable as the terms of Regulation 4(5B) have 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)

The taxation will be on the reduction of the ½ core fee only.

Solicitor's Position

Similar to other agents who have taken this to taxation there position is that a plea of guilty did not dispose of this case it was a mixed plea.

It should be noted that a reference to having to plead guilty "to all of the charges" only features where "the solicitor represents an accused person in the same court on the same day on more than one complaint and pleads guilty to all of the charges" (Regulation 4 (5A) not Regulation 4 (5B)).

4. Mailshot Guidance Issued by the Board to the Profession

In terms of the mailshot which we issued to the profession "Criminal Legal Assistance Update - 17 March 2011" is as follows:-

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.

5. Similar Taxations

As mentioned above, the following decisions are relevant.

27 June 2012 - Auditor's Decision.

August 2012 - Sheriff's decision (Sheriff did not write on it).

Kirkcaldy 9 January 2013 - Auditor's decision.

6. Supporting documentation

See e-mail of 30 January 2013