

Taxation – Procurator Fiscal Stirling v [REDACTED] EG

Stirling 24 September 2013

I tax the account of expenses submitted to the Scottish Legal Aid Board by Cairns Brown, Solicitors, Dumbarton in respect of the accused Eric Gray at £242.50 plus VAT.

Roland McMillan

Auditor of Court

The diet of taxation was held on 22 August 2013. Mr Cairns appeared for Cairns Brown and [REDACTED] appeared for the Scottish Legal Aid Board.

I was advised that the case first called on 27 June 2011 when the accused [REDACTED] appeared from custody with the duty agent and pled not guilty to both charges on the complaint. Trial was fixed for 9 January 2012 and an intermediate diet was also fixed. At the trial diet on 9 January 2012, the accused appeared with the nominated solicitor, when he pleaded guilty under deletion to charge 1 and not guilty to charge 2. The pleas were accepted by the procurator fiscal and sentence was deferred to 8 February 2012. I was advised that any remaining procedure in the case was not an issue at this taxation.

Cairns Brown then submitted an account to SLAB in the sum of £485 and £97 VAT.

The Board offered a half fee of £242.50 and £48.50 VAT as they considered that the case fell under Regulation 4(5B) of the Criminal Legal Aid (Fixed Payment)(Scotland) Regulations 1999.

The regulation is in the following terms:-

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 which the assisted person was called on 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.*

Mr Cairns referred me to the decision of the Auditor at Dumbarton dated 27 June 2012 where the auditor had allowed the full fee in a similar case and where the sheriff had upheld the auditor's decision although he did not provide a written note with his reasons for his decision.

In the Dumbarton case, Mr Cairns had submitted that regulation 4(5B) did not apply as the accused had pled guilty to only one of the charges (the not guilty plea to the other charge being accepted by the procurator fiscal) and he was therefore entitled to the full fee. ██████████ had submitted that in the circumstances the regulation did apply and a half fee was payable. The auditor allowed the full fee as he considered that the case involved more than a plea of guilty.

Mr Cairns then submitted that the Board had misconstrued the regulation in the present case as that referred to a plea of guilty before the trial commenced and in this case a plea of guilty under deletion had been tendered to one of the charges (and this was not the same as a plea of guilty) and secondly a not guilty plea had been accepted by the prosecutor to the second charge. He further submitted that the situation in the present case wasn't covered by the regulation in question.

██████████ referred to a decision by Sheriff McCulloch at Kirkcaldy dated 13 February 2013 in respect of a note of objections by the Board to the decision of the auditor in the case Procurator Fiscal, Kirkcaldy v ██████████. In that case the sheriff sustained the note of objections and remitted the case back to the auditor to allow the half core fee offered by the Board.

██████████ submitted that the circumstances in that case were similar to this case and that the decision of Sheriff at Kirkcaldy should be followed.

He also referred me to a decision by Sheriff MacNair at Cupar dated 24 May 2013 in respect of a note of objections by the Board to the decision of the auditor in the case Procurator Fiscal, Cupar v ██████████ where the sheriff followed the decision by Sheriff McCulloch.

In each of these cases, the sheriff decided that a literal interpretation of regulation 4(5B) should be applied to the circumstances of the case.

In my view, the circumstances of this case fall within Regulation 4(5B) and following the decisions of the sheriffs at Kirkcaldy and Cupar, I tax the account at £242.50 plus VAT.

SOLICITOR REFERRAL – DIET OF TAXATION

Assisted Persons Name : [REDACTED]
ABWOR Reference : SM/1570123911
Solicitors Name : Cairns Brown

Date of Taxation & Location: Auditor Stirling Sheriff Court 5 February 2013 @ 09:30hrs

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. The 1st charge was breach of the peace and the 2nd carrying a knife contrary to the Criminal Law (Consolidation) (Scotland) Act 1995.

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) “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: THIS IS VIRTUALLY IDENTICAL IN ITS FEATURES TO THE CASES OF P.F v [REDACTED] & P.F v. [REDACTED] WHICH THE BOARD LOST AT TAXATION IN DUMBARTON AND KIRKCALDY SHERIFF COURT AND IN THE NISH CASE WERE ALSO UNSUCCESSFUL ON A SUBSEQUENT NOTE OF OBJECTIONS BEFORE THE SHERIFF. A SIMILAR NOTE IS TO BE LODGED IN THE ROSS CASE I UNDERSTAND. UNCLEAR HOW THE DIET BEFORE THE SAME AUDITOR AS THIS ONE 31/1/13 IN CUPAR (PF v. [REDACTED] AND PF v. [REDACTED] WENT.

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 granted to the solicitors who took the case through to its natural conclusion.

On the 8 February 2012 and before the start of trial (intermediate diet) the accused's plea of "not guilty" to 1 charge was accepted and he then tendered a plea of guilty to the other 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.

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.”

Boards Position

As per both the Regulation and 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.

Solicitors 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 we have already lost an almost identical point in Dumbarton Sheriff Court.

27 June 2012 – Auditors Decision.

August 2012 – Sheriffs decision (**Douglas you have confirmed this was an oral decision only**).

Kirkcaldy 9 January 2013 – Auditors decision.

Cupar 31 January 2013 – Unknown (before the same auditor).

6. Appendixes

Appendix 1 – Auditors decision Dumbarton 27/6/12.

Appendix 2 – Auditors decision Kirkcaldy 15/1/13.

Appendix 3 – Executive Note – S.S.I. 2011/162 (See sixth policy objective)

Referred by:



Date: 1-2-2013

.