

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

**IN THE COURT OF JUDICATURE IN NORTHERN IRELAND
TAXING OFFICE
BEFORE TAXING MASTER WELLS**

AND in the matter of an Appeal under Rule 14 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the '2005 Rules') as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 (the '2011 Amendment Rules').

NOTICE OF DECISION AND REASONS

To: Gavyn Cairns B.L., (the 'Representative')
And The Northern Ireland Legal Services Commission (the 'Commission')
Department of Justice (the 'Department')

Defendant	Certificate Nos. Taxing Ref No	Offences
James Anthony Healy	CC/12/11/23442 T/CC/14/00130	1 Murder, 2 Manslaughter, 3 Possession of offensive weapon with intent, 4 Possession of offensive weapon.

1. The 2011 Rules have thrown up some startling anomalies, none better highlighted than in this appeal.
2. The Defendant was initially charged with Murder and Possession (as at 4 above). Out of discussion and events, the outcome of the case was that
 - a) the Murder Charge did not proceed. The Representative could be entitled to a Basic Trial Fee ('BTF');
 - b) the Manslaughter Charge was added and the Defendant pleaded - he was sentenced to six years - this was a very serious matter. The Representative could be entitled to a Guilty Plea 2 Fee ('GP2 Fee');
 - c) the Possession with Intent charge was added and the Defendant pleaded; and

- d) the Possession did not proceed.
3. The effect on fees of this is that counsel might have marked a BTF on either the Murder or on the 'simple' Possession or GP2 Fee on either the Manslaughter or the Possession with Intent.
 4. This is the Appeal of Junior Counsel; he was led in the matter by Senior Counsel, who has been remunerated on a different basis to his Representative Appellant Junior Counsel.
 5. The comparative fees for a led Junior Counsel for each scenario at paragraph 3 are:

a) Murder BTF	£3,600.00
b) Manslaughter GP2 Fee Pages count - 737pgs	£2,250.00
c) Possession with intent GP2 Fee Pages Count - 737pgs	£4,200.00
d) Possession BTF	£780.00
 6. The 2011 Amendment Rules amended the 2005 Rules which prescribed the Crown Court remuneration for solicitors and counsel assigned under the Legal Aid, Advice and Assistance (NI) Order 1981 (the '1981 Order'). *Inter alia*, the 2011 Amendment Rules substituted reduced levels of Standard Fee remuneration for guilty pleas, trials and other hearings. "Very High Costs Case" ('VHCC') recognition ceased to exist.
 7. The 2005 Rules created Standard Fees, to the intent that remuneration would be similar across a Class of Offence appropriate to the position of the Representative and the outcome of the case.
 8. Out of the 2005 Rules Schedule 1 Part 5 paragraph 20 (1), where a defendant has been charged with more than one offence, the Standard Fee payable to a representative may be based on whichever offence Counsel (in this instance) has selected. The Representative is perfectly entitled to seek a GP2 Fee rather than a BTF; the former being much more remunerative than the latter. The successful outcome for the Defendant on the Murder charge and the late plea on the Manslaughter charge are less remunerative than the late plea on the Possession with Intent charge. 2011 Rules did not amend this methodology.
 9. The BTF under the 2011 Rules is not related to the "pages of prosecution evidence served on the court" ('PPE'). The PPE formula only relates to GP2

Fees (on occasions, the Representative can be much better remunerated with a GP2 Fee than with a BTF).

10. The principle on which the 2011 Amendment Rules is based is not one of providing fair remuneration by reference to the amount of work done, but it is a rule-based system; its *modus operandi* is one of swings and roundabouts.
11. The 2011 Rules provide for the calculation of the GP2 Fee by reference to the PPE. There is a range of fees relating the Class of Offence to the PPE. Murder and Manslaughter are offences falling within Class A. The Possession offence might be in Classes B, C or H. The GP2 Fees are much higher for an Offence within Class A than Classes B, C or H. (Interestingly, the same fees applies for these latter three Classes).
12. There is a difference in the threshold for the PPE range between Class A on the one hand and Classes B, C and H for led Junior Counsel: -

Class of Offence	PPE Range	Led Junior Counsel
Class A (including Manslaughter)	1 - 750	£2,250
	751 - 3,000	£4,200
	3,001 +	£9,450
Class B (possibly including Possession with intent)	1 - 687	£1,200
	688 - 1,462	£4,200
	1,463 +	£9,450
Class C (possibly including Possession with intent)	1 - 714	£1,050
	715 - 1,262	£4,200
	1,263 +	£9,450
Class H (possibly including Possession with intent; certainly 'ordinary' Possession - though it was a BTF not a GP2 Fee)	1 - 750	£1,050
	751 - 1,443	£4,200
	1,444 - +	£9,450

13. The PPE in this case was 737. Counsel gets almost twice the GP2 Fee for the Possession with Intent plea than he would get for the Manslaughter plea.

14. This is predicated on the Possession with Intent being in Class B or C. If it is in Class H, then the remuneration for led Junior Counsel is much lower.

15. Rule 11 of the 2005 Rules as amended by the 2011 Rules (principally by removing the provision for a Certificate of Exceptionality and replacing it as below), relate to the determination of Counsel's fees and provide that: -

(2) . . . the Commission shall allow fees for work allowed by it . . . in accordance with Schedule 1.

(3) The Commission may, except in relation to work for which a Guilty Plea 1 Fee is payable or a fixed fee is allowed under paragraph (9), allow any of the following classes of fee to counsel in respect of work allowed by it under this rule -

a) a Basic Trial Fee or Guilty Plea 2 Fee, as applicable, for preparation and, where appropriate, the first day's hearing including, where they took place on that day, short consultations, applications and appearances (including bail applications), views and any other preparation;

b) a Refresher Fee for any day or part of a day during which a hearing continued including, where they took place on that day, short consultations, applications and appearances (including bail applications), views and any other preparation;

c) subsidiary fees for -

i. attendance at consultations and views not covered by sub-paragraph (a) or (b);

ii. attendance at applications and appearances (including bail applications and adjournments for sentence) not covered by sub-paragraph (a) or (b).

16. Paragraphs (4), (5), (6) and (7) were omitted by the 2011 Rules. Paragraphs (8A) and (8B) deal with costs in trials that last more than 80 days and are not relevant in this appeal.

17. Rule 11, Paragraph 9 provides: -

In any proceedings specified in paragraph 2 of Schedule 1, the Commission shall allow a fixed fee calculated in accordance with paragraphs 19, 20(2) and 21(2) and (3), together with any travelling allowance payable under paragraph 30(1), of that Schedule.

18. Schedule 1 Part 1 Paragraph 3 provides:-

“(1) A case on indictment is a guilty plea if it was disposed of without a trial because the assisted person pleaded guilty to one or more counts.

(2) Subject to sub-paragraph (3), a Guilty Plea 1 Fee shall be payable in a case where the assisted person pleaded guilty to one or more counts at the first arraignment and the case did not proceed to trial.

(3) A Guilty Plea 2 Fee shall be payable in a case where the assisted person pleaded guilty to one or more counts after the first arraignment but before the end of the first full day of trial and the trial did not proceed further.

(4) A Basic Trial Fee shall only be payable in a case where the assisted person pleaded not guilty to one or more counts and the trial proceeded beyond the first full day of trial (or it was otherwise completed as a trial within one day).

(5) For the purposes of sub-paragraphs (3) and (4), a day shall not be considered as the first full day of trial unless the prosecution had opened its case and the first prosecution witness had begun to give evidence.”

19. Paragraph 4: -

A reference in this Schedule to the Table of Offences refers to the Table of Offences in Schedule 3 and a reference in this Schedule to a Class of Offence refers to the Class in which that offence is listed in the Table of Offences.

20. Paragraph 5: -

1) For the purposes of this Schedule-

- a) every indictable offence falls within the Class under which it is listed in the Table of Offences and, subject to sub-paragraph (2) below, indictable offences not specifically so listed shall be deemed to fall within Class H;*
- b) [renders ‘conspiracy’ cases into the same Class of Offence as the substantive offence];*
- c) and (d) [places a burden of proof on the representative to establish value, where relevant to Class of Offence]; and*
- d) [deals with interpretation of statutory offences].*

2) If a representative is dissatisfied with the classification of an indictable offence not listed in the Table of Offences, he may apply to the Commission to reclassify the offence.

21. Possession with Intent to Commit an Indictable Offence, contrary to Section 93 of the Justice Act (NI) 2011, is not an offence within the Table of Offences in Schedule 3 of the 2005 Rules. The Appellant says that the offences ought to be in Classes B or C which are respectively: -

Class B - Offences involving serious violence or damage, and serious drugs offences

and

Class C - Lesser Offences involving violence or damage, and less serious drugs offences.

22. I do not intend to recite the full extent of the offences in Classes B and C. Most of the offences are statutory offences contrary to the Sexual Offences (NI) Order 2008.

23. The offences in Class B include: -

Kidnapping
Section 18 - 'GBH' with intent
Using explosives with intent
Armed robbery

24. The Offences in Class C include: -

Child abduction
FGM
Numerous Firearms Offences
Section 20 - unlawful wounding
Section 47 - 'ABH'
Robbery

25. Class H is headed *Miscellaneous lesser offences* and includes: -

Breach of ASBO
Open and notorious lewdness
False procurement
Possession of offensive weapon*
Affray
Obstructing a train
Possession (only) of Class B or C drug
Criminal harassment

26. *The Defendant had been charged with this Offence in this case.

27. In good time and as required by the 2005 Rules, the Representative lodged this appeal to the Taxing Master against the Commission's decision by letter and Notice of Appeal. The Representative wished to appear and be heard.

28. Notice of the appeal has not been sent to the Department.
29. The appeal was listed for hearing before me on 27 October 2014. Mr Cairns BL, the Representative, appeared. I am obliged to him for his considerable helpfulness throughout.
30. However I expressed concern and disgruntlement that the Representative had not set out in the Notice of Appeal exactly what is under appeal and the amounts that they are claiming; this is required by the 2005 Rules (not amended by the 2011 Rules). It is difficult to get a measure of the issues beforehand.
31. This was a serious case.
32. Rule 4 (2) of the 2005 Rules, which deals with the general principle and which in turn is subject to Rules 16 and 17 (which relate to VHCCs) provides: -
- In determining costs, the [Taxing Master] shall, subject to and in accordance with these Rules -*
- (a) *take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and*
- (b) *allow a reasonable amount in respect of all work reasonably undertaken and properly done."*
33. I note that Senior Counsel the Representative in the case was allowed a GP2 Fee based on either Class B or C (the amount of the fee and the PPE are the same).
34. I am quite satisfied that the Commission were correct to remunerate Senior Counsel on the basis of a Class B or C offence. For whatever reason, his Junior has not been so remunerated. He was paid a BTF for the Murder.
35. I allow the appeal. The PPE are 737 and fall within the '715 - 1262' PPE Range.