



Compass Chambers

Regulatory Crime Proceedings -
A practical approach to
preparation and presentation

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23rd November 2018



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A Practical Approach to
Preparation of Regulatory
proceedings and Prosecutions.

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Legislation

- First diets are governed by s71 of the 1995 Act
- Preliminary hearings under s72
- Preliminary pleas and issues under s79



Guidance

- High Court Preliminary Hearings –
Practice Note No 1 of 2005
- Sheriff Court First Diets -
Practice Note No 3 of 2015

Case Management

Practice Note No 3 2015 -

"Proper judicial control over the use of Court time is an important part of the entitlement to a fair hearing within a reasonable time."

"The First Diet is intended to be the end-point of preparation rather than the starting point."



Disclosure

Crown Disclosure Manual

Para 10.8.2

- Police to have all statements in the hands of the Procurator Fiscal within 21 days of Full Committal
- Crown to provide defence with copies of all statements in their possession within 28 days



Disclosure

Productions

Para 6.3.1

Best practice requires disclosure of productions no later than 28 days after first appearance on petition



First Diet

Main Points to Attend to -

- Written Record
- Defence Statement
- Tender Plea



Preliminary Pleas and Issues

- Section 71(2) provides that –

"...the Court **SHALL**, at a first diet, consider any preliminary plea or preliminary issue.....of which a party has, not less than 2 clear days before the first diet, given notice "



Preliminary hearings

Section 72(3) -

- “...the Court SHALL dispose of any preliminary pleas (within the meaning of section 79(2)(a) of this Act) of which a party has given notice not less than 7 clear days before the preliminary hearing to the court and to the other parties.”



Practice Note 2005

- Before the accused is called upon to plead, the court will dispose of any preliminary pleas of which notice has been given.



Restrictions on Pleas

Section 79 provides -

- (1) Except by leave of the court on cause shown, no preliminary plea or preliminary issue shall be made, raised or submitted in any proceedings on indictment by any party unless his intention to do so has been stated in a notice.

Preliminary Pleas

Included under s 79 are pleas to -

- Competency or Relevancy
- Pleas in Bar of Trial

Preliminary Issues

Included under s 79 are –

- Separation or Conjunction of charges or trials
- Objection by a party to the Admissibility of any Evidence
- Any other point ...which could ...be resolved with advantage before the trial.

Hearing of Preliminary Plea

Practice Note 2005

- The Court will expect the prosecutor and the accused's representative to be prepared to make full submissions on any such plea.
- Lists of authorities will be required

Examples

- Criminal Finances Act
- Bankruptcy, Insolvency and Statutory Frauds
- Road Traffic Act prosecutions
- Bribery Act
- Environmental legislation prosecutions



Preparation

- Read all the papers
- Consider all the components to the charge
- Follow the chain of evidence
- Question the Crown case
- Understand your defence
- Use the preliminary or First diet
- Take the necessary objections on time
- Help the Court by being prepared



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A TACTICAL APPROACH TO DEFENDING

WHEN TO TAKE A PRELIMINARY PLEA OR ISSUE

THE JUDGE'S LEGAL DIRECTION ON EVIDENCE

- THE NATURE OF EVIDENCE
- What does evidence consist of? First, you've to understand what's evidence and what's not:
- What's been agreed by each side and recorded in a joint minute of admissions is evidence. You must accept that as proved fact.
- What a witness says in the witness box is evidence.
- Questions or suggestions put to witnesses aren't evidence. They *only* become evidence if the witness agrees with what's put. But, if all a witness did was to agree with what's put, you'll need to take care in deciding what weight to give that.
- Matters put to a witness who can't remember them, or who doesn't know about them, aren't evidence.
- What's said in the speeches isn't evidence.



ASSESSING WITNESSES

When it comes to witnesses, you've to judge the quality of the evidence of each one of them. There are two aspects to the evidence of any witness, credibility and reliability. A credible witness is an honest one, doing his best to tell the truth. But a witness may be doing his best and yet be unreliable because his memory isn't accurate. Before you can accept a piece of evidence from a witness, you must be satisfied that it is honest, and that his evidence is reliable. In doing that you can look at the content of witnesses' evidence, their body language in giving it, and compare what they say with other evidence in the case.

You should judge all the witnesses in the same way, whether they're lay people, police officers, doctors, scientists or the accused.

PRELIMINARY PLEAS AND PRELIMINARY ISSUES: SECTION 79 OF THE 1995 ACT

- **79 Preliminary pleas and preliminary issues**
- (1) **Except by leave of the court on cause shown**, no preliminary plea or preliminary issue shall be made, raised or submitted in any proceedings on indictment by any party unless his intention to do so has been stated in a notice under [section 71\(2\)](#) or, as the case may be, [72\(3\)](#) or [\(6\)\(b\)\(i\)](#) of this Act.



- For the purposes of this section and those sections—
- (a) the following are preliminary pleas, namely—
- (i) a matter relating to the competency or relevancy of the indictment;
- (ii) an objection to the validity of the citation against a party, on the ground of any discrepancy between the record copy of the indictment and the copy served on him, or on account of any error or deficiency in such service copy or in the notice of citation; and
- (iii) a plea in bar of trial; and



- (2) For the purposes of this section and those sections—
- (b) the following are preliminary issues, namely—
 - (iv) an objection by a party to the admissibility of any evidence;
- (4) Where the court, under subsection (1) above, grants leave for a party to make, raise or submit a preliminary plea or preliminary issue (other than an objection to the admissibility of any evidence) without his intention to do so having been stated in a notice as required by that subsection, the court may—
 - (a) if it considers it appropriate to do so, appoint a diet to be held before the trial diet for the purpose of disposing of the plea or issue; or
 - (b) appoint the plea or issue to be disposed of at the trial diet.



- **79A Objections to admissibility of evidence raised after first diet or preliminary hearing**
- (1) This section applies where a party seeks to raise an objection to the admissibility of any evidence after—
 - (a) in proceedings in the High Court, the preliminary hearing; or
 - (b) in proceedings on indictment in the sheriff court, the first diet.
- (2) The court shall not, under [section 79\(1\)](#) of this Act, grant leave for the objection to be raised if the party seeking to raise it has not given written notice of his intention to do so to the other parties.
- (3) However, the court may, where the party seeks to raise the objection after the commencement of the trial, dispense with the requirement under subsection (2) above for written notice to be given.



- (4) Where the party seeks to raise the objection after the commencement of the trial, the court shall not, under section 79(1) of this Act, grant leave for the objection to be raised unless it considers that it could not reasonably have been raised before that time.



WHAT IS THE PURPOSE OF TAKING A PRELIMINARY PLEA?

- The primary purpose is to knock out or weaken the Crown case.



PLEA IN BAR OF TRIAL

- OPPRESSION
- *HM ADVOCATE v WITHEY* [2017] HCJAC 47
- <https://www.scotcourts.gov.uk/search-judgments/judgment?id=7aaf36a7-8980-69d2-b500-ff0000d74aa7>
- The court will exercise the power to prevent the prosecution from proceeding “only in special circumstances which are likely to be rare”

STUURMAN v HM ADVOCATE 1980 J.C 111

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- The criminal justice system treats companies and individuals differently.
- Individuals have the protection of the European Convention on Human Rights.
- Companies do not.



- Article 6 states
- *(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*



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- *(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

WHAT IS THE PURPOSE OF TAKING A PRELIMINARY PLEA?

- THE PURPOSE IS THE SAME AS WHEN TAKING A PRELIMINARY ISSUE
- IT IS TO KNOCK OUT OR WEAKEN THE CROWN CASE



- **2- General duties of employers to their employees.**
- **(1)** It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.



- **3.— General duties of employers and self-employed to persons other than their employees.**
- (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.



- **40. Onus of proving limits of what is practicable etc.**
- In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

SHOULD YOU TAKE A PRELIMINARY ISSUE?

- Is the raising of the issue likely to weaken the Crown case against your client?
- Is the issue one that the Crown can remedy?



RECOVERY OF PRODUCTIONS AND LABELS

- Was a search warrant granted?
- If not, should it have been?



- The High court can suspend a search warrant by means of a Bill of Suspension
- A Bill of Suspension was taken by Clyde and Co and is reported at [2016] HCJAC 93
- <https://www.scotcourts.gov.uk/search-judgments/judgment?id=e78420a7-8980-69d2-b500-ff0000d7>

BHOWMICK v HM ADVOCATE [2018] HCJAC 6

- <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018hcjac6.pdf?sfvrsn=2>
- If you don't raise a preliminary issue about the evidence, you cannot object to the evidence being led at trial.



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EXPERT EVIDENCE

- Kennedy v Cordia 2016 UKSC 6
- <https://www.supremecourt.uk/cases/docs/uksc-2014-0247-judgment.pdf>



- *Hainey v HM Advocate* [2013] HCJAC 47
- <https://www.scotcourts.gov.uk/search-judgments/judgment?id=d7bb86a6-8980-69d2-b500-ff0000d74aa7>



- In conclusion, very careful consideration of the Crown case will reveal whether or not there are flaws in the Crown case.
- Tactically, careful consideration of the flaws will allow you to decide if it is advantageous to the client to take a preliminary plea or issue or not.



- If it is not, you will need to be able to deal with the evidence in cross examination to demonstrate to the jury that that evidence is not to be relied upon.
- Your job in defending is to undermine the Crown case to the extent that ultimately a jury is not persuaded to a standard of beyond a reasonable doubt that it can convict the client.



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