

INSIGHT



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***R v Hessel*: Court of Appeal Guideline Judgment on Appropriate Discounts for Pleas of Guilty**

R v Hessel is compulsory reading for practitioners who are involved in criminal and regulatory prosecutions. The judgment sets out the appropriate discounts for guilty pleas. While it has long been recognised that guilty pleas will normally attract credit for a defendant, the Court of Appeal has previously resisted laying down specific guidelines for the amount of credit to be received. The Courts preferred to leave the appropriate discount to the discretion of sentencing judges and there was an informal range adopted between 33% and 10% depending on when a defendant pleaded guilty. However, the range was very flexible and, on occasion, inconsistencies between defendants could arise. For example, a defendant who pleaded guilty at a comparatively late stage might end up receiving the same credit for his or her guilty plea as a defendant who pleaded guilty at the very first opportunity. This was obviously unfair to the defendant who had acknowledged guilt right from the outset. Therefore, the Court of Appeal is to be commended for its judgment in *Hessel* which clearly sets out the guidelines now in place in a very practical way.

The Guidelines

The following is the “sliding scale” that will apply:

1. A defendant will receive a 33% reduction in sentence if their plea is communicated at the “first reasonable opportunity”;
2. A 20% reduction will apply if the plea of guilty is communicated at a status hearing (in the summary jurisdiction) or at the first callover after an indictment has been filed;
3. A 10% reduction will apply if the plea is entered three weeks before a defended hearing or trial.

The guideline is a “sliding scale”, so if a plea of guilty (or a willingness to plead guilty) is communicated between, say, the first reasonable opportunity and a status hearing then the appropriate discount will be between 33% and 20%. A reduction of less than 10%

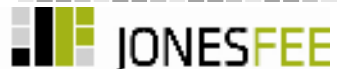
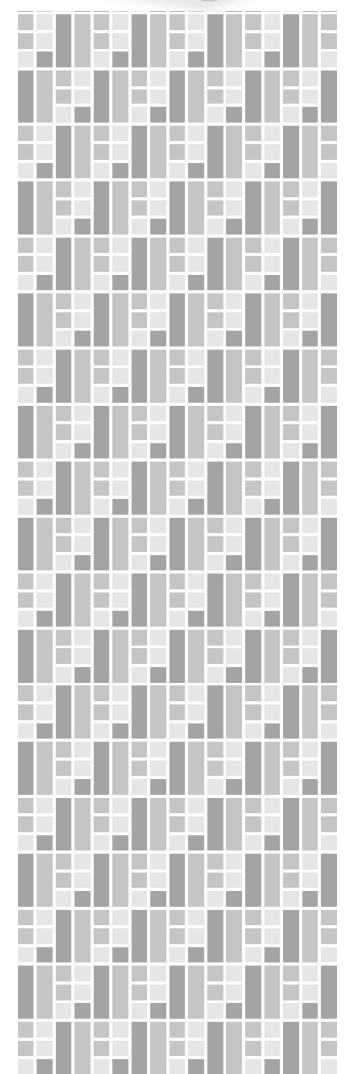
will be appropriate if the plea of guilty is communicated after a trial or hearing commences. And, no discount will be appropriate if the plea is communicated after a prosecution case has concluded.

Judges are to give discrete emphasis to the discount applied to the plea of guilty - i.e. Judges are to explain what the sentence would have been but for the guilty plea. Judges are also to keep the reduction for guilty plea separate from other mitigating factors that may exist.

Importantly, the Court of Appeal has determined that the reduction for guilty pleas will incorporate remorse. In other words, generally speaking, there is no further discount for remorse. However, the Court did leave open the possibility that exceptional remorse “demonstrated in a material way” may attract its own reward. For example, if a defendant were to inform a prosecuting agency of offending before the agency was even aware of it, then this may amount to “exceptional remorse”.

First Reasonable Opportunity

The judgment defines the “first reasonable opportunity” as follows. In the summary context, this will generally be at the “second appearance” (as defined in the District Court committal procedure practice note of June 2009). This means after a defendant first is summonsed to Court and after “initial disclosure” has been made under the Criminal Disclosure Act 2008. Initial disclosure includes a list of witnesses and exhibits; copies of interviews with a defendant and witnesses; diagrams and photographs; and a summary of facts. Therefore if initial disclosure has not been made then the first reasonable opportunity is likely to be extended. This puts a high premium on prosecuting agencies organising and providing their disclosure at an early point in time. The Court will also expect that a defendant will have legal representation by the second appearance.



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In terms of indictable proceedings, the first reasonable opportunity will be, again, the second appearance by which time a defendant is expected to have representation and will expect disclosure to have been made.

The Court has specified that the first reasonable opportunity will not be extended because a defendant disputes a summary of facts or enters into plea bargaining. Nor will it be extended if a defendant is engaged in challenging the admissibility of evidence or was awaiting a sentencing indication. The Court clearly stated that defendants who prefer to stand on their rights are entitled to do so, but cannot expect the maximum discount if they do. The Court outlined that the correct course to follow if a summary of facts is disputed is to enter a guilty plea and then negotiate on the summary. If negotiations fail, then a disputed facts hearing can be triggered (section 24 of the Sentencing Act). If the dispute is regarded as “reasonable” then the maximum reduction for the early plea of guilty may still be appropriate. However, if a disputed facts hearing effectively turns into a mini-trial, which the defendant “loses” then the standard discount will not be appropriate; a re-evaluation takes place. This must be right as the Court of Appeal has confirmed that reductions for pleas of guilty recognise saving complainants and witnesses from having to give evidence; saving the State the time and expense of a hearing; and remorse.

Willingness to Plead Guilty

The Court has usefully set out that significant reductions in terms of the sliding scale set out above can still apply if a defendant communicates a “willingness” to plead guilty at the first reasonable opportunity. For example, a defendant may well accept liability for certain charges. However a prosecution agency may prefer a charge which is more serious than that which the defendant is willing to plead guilty to. The classic example is the prosecution preferring a charge of murder in circumstances where a defendant is prepared to acknowledge liability for manslaughter, but not the more serious charge. The Court of Appeal has outlined that it is still appropriate to receive the maximum reduction if the willingness to plead guilty is communicated at the first reasonable opportunity if:

1. The prosecution ultimately accepts a plea to the lesser charge; or
2. Following a hearing, the defendant is ultimately convicted on that lesser charge.

One important aspect for practitioners is that the Court recommends that the willingness to plead guilty is communicated **in writing** to the prosecution with a copy to the Court (see paragraph 43 of judgment). This way there can be no dispute that the willingness was signalled.

Conclusion

Hessell is compulsory reading for practitioners in this area. It will impact on all levels of offending, both criminal and regulatory. The judgment provides clear guidelines which will assist practitioners in advising clients about the choices they face and what impact those choices will have on their outcome. Clearly, there are significant incentives for acknowledging guilt at the first reasonable opportunity if instructions mean that this is appropriate. Despite the complaint some sentencing judges might have about the judgment potentially limiting the ambit of a sentencing judge’s discretion, *Hessell* is a very clear and practical judgment which, it is hoped, will assist practitioners, defendants and ultimately the Courts in sentencing.

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