Neutral Citation No. [2022] EWHC 1659 (SCCO)

Case No: T20197343

SCCO Reference: SC-2022-CRI-000002

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 23 June 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
GARY MOORE

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: Gomer Williams & Co. Ltd

The appeal has been unsuccessful for the reasons set out below.

COSTS JUDGE WHALAN

Introduction

1. Gomer Williams & Co. Limited ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the Appellants are entitled to be paid two separate fees, as claimed, or one fee, as allowed.

Background

2. The Appellants represented Gary Moore ('the Defendant') who appeared at Swansea Crown Court alongside three co-defendants, his mother Audrey Osbourn and his brothers Ian and Clayton Moore. The prosecution alleged mortgage and investment fraud.

3. On 23rd December 2019, the defendants appeared at a PTH on a 16-count Indictment. The Defendant was charged on counts 1 (conspiracy to commit fraud), 2 (obtaining a money transfer by deception), 3, 4 and 5 (fraud). He pleaded not guilty and a trial was fixed for 15th June 2020. The trial date was later vacated due to the ill-health of a co-defendant and re-fixed for 6th September 2021. Further mention hearings were listed on 25th August, 27th August and 10th September 2021.

4. At the mention hearing on 10th September 2021, the prosecution produced a second 15-count Indictment, which varied some of the counts specified on the first indictment in December 2019. At count 3, the period of relevant offending was changed from 1st-30th September 2007 to 1st January – 24th February 2007. At count 5, the charge against Audrey Osbourn was removed. Count 9 was removed in its entirety.

5. On 10th September 2021 the Defendant pleaded guilty to counts 1-5 in the second indictment. The court stayed the original (first) indictment on 14th October 2021.

The Regulations

6. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended, apply to this appeal. Reference is made by the parties to paragraph 27 (re the definition of a 'case') of Schedule 2 to the 2013 Regulations.

The submissions

7. The Respondents' case is set out in Written Reasons dated 9th December 2021 and in written Submissions drafted by Mr Michael Rimer, a Senior Lawyer at the Government Legal Department, dated 8th June 2022. The Appellants' case is set out in the Grounds of Appeal attached to the Appellants' Notice and in Written Submissions drafted by Mr Colin Wells, Counsel, dated 29th February 2022. Mr Wells and Mr Rimer both attended and made oral submissions at the hearing on 10th June 2022.

8. The Appellants, in summary, submit that two fees should be paid, as there were two indictments which were not joined and, therefore, two cases. When the prosecution produced the second, 15-count indictment, it superseded the original 16-count indictment, which was formally stayed by the court. The changes in the second indictment were not merely cosmetic or reflective of 'housekeeping', but comprised substantive changes to the criminality alleged against the Defendant. Thus, the period of offending cited in count 3 was completely different, meaning that the evidence adduced to prove the case was also different. It was this fundamental change, submits Mr Wells, that led to the Defendant changing his pleas to guilty.

9. Mr Wells cites and relies on the dicta of Senior Costs Judge Gordon-Saker in R v. Hussain & Others [2011] 4 Costs LR 689, the decision of Costs Judge Campbell in R v. Sharif [2014] SCCO Ref: 168/13 and, in particular, my decision in R v. Ayomanor [20201] SC-2020-CRI-000146. The relevant paragraph in Ayomanor is:

> 19. The principles to be taken apply from [the reported] cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, account or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic

application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable.

10. The Respondent, in summary, submits that there were no substantive alterations to the prosecution's case between the first and second indictments, so that this was really a case of administrative amendment, rather than two indictments indicating two cases.

11. Mr Rimer cited and relied on the determination of Costs Judge Brown in R v. Arbas Khan [2019] SCCO Ref: 219/18. CJ Brown acknowledged (para. 19) that two indictments could 'be joined without the necessity to create a new indictment'. Such a joinder 'operated by way of an amendment to an existing indictment'. Mr Rimer also relied specifically on the more recent decision of Costs Judge Rowley in R v. Wharton [2021] SC-2021-CRI-000195. In Wharton CJ Rowley wrote to the trial judge, HHJ Teague QC, to enquire as to the actual procedure adopted (in that case) in the Crown Court. HHJ Teague QC's response is reproduced at paragraph 9:

> 9. What tends to happen is that the prosecuting advocate applies for leave to amend. I then make a quick assessment as to whether I should simply grant the application or stay the original bill. If I think the latter course may be easier, I suggest staying the existing bill of indictment and preferring the amended version in its place and ask whether the prosecuting advocate is happy for the application to be dealt with in that way. They nearly always agree to my suggestion, as does defence counsel. That is very likely to be what happened in this case.

CJ Rowley then applied this practise to his determination:

> 10. The trial judge confirmed to me that there is no practical difference as to which option is taken. His practise depended on how much amendment was required. A typographical error or similar would be amended. A more significant change typographically would render it simpler to stay the indictment and proffer an amended version.
>
> …
>
> 13. The fact that two separate documents had been uploaded rather than annotating the original indictment in some fashion is simply how modern technology is likely to be employed. Ease of practise dictates this approach as was confirmed by the trial judge. It does not enable further claims to be made for fees in respect of what is very much the same work.
>
> 14. This case reveals another instance where the workings of the 2013 Regulations do not walk entirely in step with criminal practice. The only rationale for counsel's argument is that a stayed indictment may mean there are two cases and therefore two fees. There was no prospect of Wharton ever facing

counts of both ABH and GBH. The second superseded the first by what can only be described as an amendment to the indictment faced. Once the amendment had been made, Wharton was never in any danger of being tried for ABH. As such, although there were two indictments in fact produced in order to reflect the change in the offence faced by Wharton, there was, as a matter of law, only one indictment containing offences with which Wharton was being prosecuted. That indictment was amended but this does not mean that there was more than one case as defined in the 2013 Regulations.

My analysis and conclusions

12. It is acknowledged that the 2013 Regulations, as amended, impose a technical regime, the mechanical application of which can produce a 'swings and roundabouts' approach to remuneration. One potential consequence of this mechanical application was recognised by Senior Costs Judge Gordon-Sakar in Hussain (ibid) and in my decision of Ayomanor (ibid).

13. However, I consider that the decision of CJ Rowley in Wharton (ibid) represents an important development in the assessment of costs under the LGFS where two fees are claimed. Senior Costs Judge Gordon-Saker concluded in Hussain that where an original (or previous) indictment was stayed or quashed, in favour of a second (or subsequent) indictment, there would be, on a mechanistic application of the Regulations, two cases and two fees, notwithstanding that in reality there 'was really only one case'. This was also my conclusion in Ayomanor. It is clear from Wharton, however, that judges in the Crown Court often adopt a more pragmatic or flexible approach when the prosecution seeks to change an indictment. As such, whether or not the original (or previous) indictment is to be stayed or quashed, depends very much on the typographical nature and extent of the changes sought by the prosecution and the consequent practice selected (often, it seems to me, quite informally) by the trial judge. In this context, the fact that an indictment was stayed or quashed is not, of itself, an indication that the subsequent indictment represents a second (or new) case.

14. In this appeal, the changes affecting the Defendant were limited essentially to count 3. Mr Wells is quite right that the changes to the case particulars (a complete change in the alleged criminality from September 2019 to January-February 2019), were substantive, rather than a mere tinkering or tidying up of the charge. Yet, the offence was essentially the same and there was never a suggestion that the Defendant would or could face trial on (in the context of count 3) two separate charges of fraud. In other

words, the second count 3 superseded and replaced the original count 3, in circumstances where the Defendant would only be charged on one such count.

15. I must conclude, therefore, that the approach of CJ Rowley in Wharton be preferred to that followed by SCJ Gordon-Saker in Hussain (ibid) and myself in Ayomanor (ibid). I find that in effect the second indictment in this case was merely an amendment of the original indictment. It could not be said that there were two cases and the Appellants are only entitled to one fee. The appeal is accordingly dismissed.

TO:

Gomer Williams & Co. Ltd.
19 John Street
Llanelli
SA15 1UT

COPIES TO:

Mr Michael Rimer
Legal Aid Agency
102 Petty France
London SW1H 9AJ
DX328 London

Determining Officer
DX 10035 NOTTINGHAM