Neutral Citation No. [2022] EWHC 2230 (SCCO)

Case No: T20210301

SCCO Reference: SC-2022-CRI-000032

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21 July 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
DALE

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

Appellant: **Harwood Solicitors**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 15 April 2021, and the 2013 Regulations apply as in force at that date.

2. The issue on this appeal is whether the Appellant solicitors, who represented Elliot Dale ("the Defendant") in the Crown Court at Preston, should be paid the Graduated Fee appropriate to a trial that has started, or appropriate to a cracked trial. The Appellant has been paid for a cracked trial but maintains that a full trial fee is payable.

3. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> > (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
> >
> > (ii) either—
> >
> > (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or
> >
> > (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea,
>
> declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…"

4. "Trial" is not defined in the 2013 regulations, and in many cases the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

5. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.
> (2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea

by a defendant, or a decision by the prosecution not to continue…
(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes…
(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty…
(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence…
(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.
(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.
(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer… in the light of the relevant principles explained in this judgment."

6. To help put those principles in context, it is worth repeating the summary of events given by Spencer J at paragraphs 10-13 of his judgment in *Lord Chancellor v Henery*:

> On the day of trial a grade C fee-earner from the solicitors, a paralegal, attended court to instruct counsel… at 3.05pm the case was called on. The judge confirmed that it was an effective trial. The judge was informed that a prosecution witness (a police officer) was not available, but defence counsel confirmed that he was not required. There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made…
>
> At 3.17pm a jury was empanelled and the jurors were sworn. The court log records that the jury was sent home to return at 12 noon the following day, "they are NOT put in charge today, to be put in charge tomorrow". The case was adjourned until 11am the following day…
>
> Next day… the case was called on at 11am and counsel requested more time, which the judge allowed. At 12.40 pm the prosecution applied to add a second count to the indictment, against each defendant, alleging affray. The application was granted. At 12.51 pm the judge informed counsel that he would discharge the jury, the court log again recording that the jury had not been "put in charge." No doubt the judge was concerned that the jury had already been waiting for nearly an hour. Once the jury had been

discharged, all three defendants pleaded guilty. Their cases were adjourned for sentence…"

7. On those facts, Spencer J found that there had been no trial in any meaningful sense. The question in this case is whether, applying the principles he set out, a different conclusion should be reached.

The Facts of This Case

8. The Defendant was charged on an indictment containing 11 counts; four of causing a child to watch a sexual act; one of attempting to engage in penetrative sexual activity with a child; two of being concerned in making an offer to supply a controlled drug of Class A; three of making indecent photographs of a child; and one (count 11) of possessing an extreme pornographic image.

9. Counts 1-10 related to alleged incidents involving the Defendant's cousin and her friend. The Defendant was 18 and the girls were 13 and 14.

10. The case was listed for a pre-trial preparation hearing (PTPH) on 17 May 2021 with another unconnected allegation of rape (T20217197). The Defendant entered not guilty pleas. The rape trial was fixed for 6 December 2021 and the trial of this case, counts 1-11, was fixed for 10 January 2022.

11. At a hearing on 7 October 2021 the Crown offered no evidence on counts 1 to 10 and not guilty verdicts were entered.

12. On the listed count 11 trial date of 10 January 2022, Defence counsel was awaiting the result of a Covid test. The case was adjourned to the following day with new Defence counsel to be instructed if necessary.

13. On 11 January 2022 the case was listed for trial at 12.20. New Defence counsel attended. The court log records Prosecution counsel advising the Judge, His Honour Judge Medland QC, that she had tasked the officer in the case to deal with enquiries from the Defence and that the Crown needed the Defendant to put his position into a Defence Statement so that the Crown could consider it.

14. HHJ Medland QC asked Defence Counsel when this position had arisen and, upon the defence being outlined, observed that it must be set out clearly in a Defence Statement. Prosecution counsel indicated that in response to the statement further evidence needed to be obtained and further work needed to be done.

15. HHJ Medland QC offered his assistance if requested, and stated that he was not minded to swear in a jury at that point. The case was adjourned until 12:55, when Defence Counsel advised the court that the position was unchanged and that the Defence Statement was about to be uploaded. HHJ Medland observed that if the Defendant were to plead guilty, he would face a financial penalty, but Defence counsel confirmed that the Defendant wished to continue. The case was adjourned until 10am on 12 January, HHJ Medland QC indicating that a Jury would be sworn in then.

16. The case was listed at 10.00 on 12 January before Her Honour Judge Lloyd. The court log however records that when the case was called on at 10:46, Prosecution counsel advised HHJ Lloyd that the Crown would offer no evidence on count 11, putting on the record her dissatisfaction at the fact that had the Defendant served a Defence Statement prior to 10 January, the case could have been disposed of without the need to list it for trial at all.

17. HHJ Lloyd asked whether the Crown would be applying for wasted costs and was advised that there would be no such application. HHJ Lloyd then advised Defence counsel in emphatic terms that she required within 7 days a full explanation from the Appellant, as a huge amount of court time had been dedicated to the case, precious trial time had been wasted and she regarded it as the fault of the Defendant and the Appellant that the requisite information had not been provided. There would, she said, be no wasted costs and no defence costs if applied for. The court log records "Trial Cracked or Ineffective: K - Prosecution end case: public interest grounds… Late service of defence statement".

18. Following the hearing as required by HHJ Lloyd, Mr Younas of the Appellant firm offered a written explanation for the late production of the Defence Statement, in these terms:

> "Previous trial counsel took instructions from Mr Dale when he faced an 11 count indictment and the defence statement adequately addressed the case as it was against him at the stage 2 date.
>
> Previous trial counsel did not conduct the rape trial and subsequently did not see Mr Dale. It was at the conclusion of the rape trial that the Crown finalised their position as to the remaining count on this case.
>
> Having read the opening of the Prosecution case that the Crown recently tightened up their evidence in respect of the 3 images sent via WhatsApp. Therefore it would only have been on the 10th or 11th January 2022 that instructions would have been needed on the issue of sent messages.
>
> New trial counsel only came into the case on Tuesday 11th January. The 3 counts were previously just count 11 on the original indictment and contained reference to 18 videos as opposed to these specific 3 videos. That was only specified this week by the crown so in terms of taking his instructions on these 3 videos in particular, that only happened on the trial day."

19. HHJ Lloyd did not accept this explanation, replying:

> "I do not concur with Mr Younas view of the situation.
>
> Whether trial counsel has seen Defendant or not, it is for Defence solicitors to prepare a defence statement in accordance with the CPR and directions made at PTPH i.e, stage 2. Putting Prosecution to "strict proof" is not an adequate defence statement particularly as the burden of proving that Defendant has a statutory defence is upon Defence.

> The evidence was not "tightened up" by Prosecution nor was there an opening. It was only when Defence counsel served the Defence Statement on the second listed day of trial that Prosecuting counsel was able to act upon it. Had an adequately detailed defence statement been served when it should your client's case in relation to the images may have resolved much sooner."

Submissions

20. In the Appeal Notice the Appellant offers the following account of events.

21. Further telephone attribution was served by the Crown on the morning of 11 January, which the Defence team had to go through with the Defendant at length, advising the Defendant on the effect of this new evidence on his case. .Discussions also took place between the Defence and Prosecution counsel regarding "the public interest", and the Defence planned to have the conversation with the Judge in open court. At this point Prosecution Counsel confirmed that the CPS would not drop the matter on public interest grounds.

22. Prosecution Counsel also asked the Defence to produce and serve a new defence statement based on the defendant's instructions that morning, which was subsequently written, signed and served on the court just before the lunch break.
23. Given the instructions that the Defendant gave to the Appellant, the Defence had several other questions for the Prosecution, including how the videos were presented in WhatsApp chat. All these discussions took place in court.

24. Following service of the new Defence Statement, and queries raised by the Prosecution regarding the defence, the Defence team in the afternoon of 11 January went to Hutton Police Station. The purpose was to analyse the phone download, which due to the sensitive nature of the evidence this had to be undertaken at the police station.

25. On 12 January 2022, as a result of what the defence team analysed at the Hutton Police Station, the Crown following consultation decided to offer no evidence on all charges, on what was effectively day 2 of the trial.

26. The Appellant in the Appeal Notice contends that in accordance with modern practice the court was dealing with substantial matters of case management and that the trial had begun in a meaningful sense.

27. The Appellant's case was expanded upon in written submissions by Mr McCarthy of counsel. These submissions appear to have been prepared on the instructions of the Appellant without sight by Mr McCarthy of the court log or the post-trial correspondence between the Appellant and HHJ Lloyd, and which in consequence (and I emphasise that this is not a criticism of Mr McCarthy) do not appear to me to be entirely factually accurate.

28. Mr McCarthy points out in his written submissions that the case was listed as a trial throughout. On 11 January 2022, it appears that the matter was not called on until

12:20pm because the Crown served additional evidence in advance, which included telephone attribution material. The case was based on materials sent on a telephone via WhatsApp. Telephone evidence was consequently vital and had to be considered with care. The various defence statements served addressed the issues clearly and disclosure was sought in relation to the downloads relied upon.

29. On 11 January the Crown served a witness statement of Abby Twiname. This was accompanied by four exhibits of extracted telephone material. It was this material that generated further discussion between the parties and the Defendant on 11th January. As a result of consideration of this material, the Defendant updated his defence statement on the same date.

30. Counsel on both sides were in discussion during the day as to the way in which the Crown now put the case. There were discussions as to presentation of the evidence, based in particular on the new material served. Much of this discussion took place outside the Court room but matters were also canvassed with the Judge during the day.

31. As a result of service of the updated defence statement, the Defence team was permitted to attend at the Police station to view the fuller telephone material. Given the sensitivity of the material, it could not be provided in any other way. This is a common process in such cases. Following this review, the Defence held further discussions and representations were made to the Crown.

32. On 12th January 2022, the matter was again listed for trial. The Defendant was steadfast in his refusal to accept the allegations. The defence made further representations. On a careful review by the Crown, including the updated defence statement and submissions from Counsel and Solicitors, the Crown decided that it had no alternative but to offer no evidence. This bought the case to an end.

33. Mr McCarthy's oral submissions on the hearing of the appeal were based on better information. He indicated that all parties anticipated a trial. New Defence counsel, on 11 January, had he said expressed concerns about the adequacy of the Defence Statement and it would appear that until 11 January the Appellant had not properly reviewed the sensitive material held at Hutton Police Station. It is unclear whether counsel accompanied the Appellant to view the material on 11 January, but the Crown's decision to offer no evidence on count 11 must have come about first because of the review of the sensitive material on 11 January and second from service of the Defence Statement on the same date.

34. Mr McCarthy accepted that the Defence is under a duty to serve a Defence Statement in good time but submitted that was done in good time when new counsel determined that an updated Defence Statement was required. That is not ideal, but it is not unusual.

35. This was not a large, complex multi-handed case, but, Mr McCarthy submitted, it was important and it did result in a positive outcome for the Defendant, who had held out for a trial. Possible slowness on the part of the Defence team in reviewing the sensitive material and preparing a Defence Statement does not detract from the fact

that a trial had, in a meaningful sense, begun, matters of substantial importance having been addressed. The question must be addressed in the context of the case.

36. There are always cases where work is undertaken later than it should have been, but that does not, he submitted, have a bearing upon whether a trial has started. The Defendant could, for example, have declined to update the Defence Statement until a point when it was unarguable that a trial had started. Under statute the responsibility for serving a Defence Statement lies with a defendant, and so the decision as to whether to serve a Defence Statement is that of a defendant. Whilst failure to do so might be held against a defendant, or a trial Judge might well be dissatisfied at the late production of or amendment to a Defence Statement, that does happen, and the timing has no bearing on the question of whether a trial has begun.

Observations

37. Mr McCarthy has referred to a number of Costs Judge decisions concerning "substantial matters of case management" which, of necessity, are fact sensitive. Mr Orde has focused rather on an interpretation of *Lord Chancellor v Henery* which I might well find too restrictive, if I thought it necessary to analyse his submission in detail for the purposes of this appeal. Although I am grateful to both Mr McCarthy and Mr Orde for their submissions, I do not find it necessary to go into them in depth, for these reasons.

38. I start by expanding on observations I have made in several recent judgments on the question of whether a trial has started. Arguably, the "substantial case management" criterion will only be met if the court itself engages in substantial matters of case management. As I have said before, it seems to me that that must be what Spencer J had in mind in *Lord Chancellor v Henery*.

39. A number of judgments at Costs Judge level have however accepted that "substantial matters of case management" may in effect be delegated by the court to Prosecution and Defence counsel, who may resolve them through discussion rather than through active intervention by the trial Judge, and that in such circumstances a trial may be said to have started in a meaningful sense.

40. In principle I do not disagree, but many appeals are now presented on the basis that almost any discussions between Prosecution and Defence on the date set for trial involve "substantial matters of case management". That is not the case. Proper regard must be had to the nature of the discussions.

41. "Substantial matters of case management" (*R v Wood* (SCCO 178/15)) must involve significant issues concerning the conduct of the trial which, if not agreed, would fall to be determined by a ruling from the trial judge. That does not extend to any other discussion between Prosecution and Defence, even if the subject matter (such as negotiating a basis of plea or, as in *Lord Chancellor v Henery*, a change to the indictment) can be said to be important in a wider sense. To broaden the definition of "substantial case management" to that extent is to depart from the guidance of Spencer J.

42. Applying that definition, I have seen nothing to justify the proposition that substantial matters of case management were addressed in this case between 10 and 12 January 2022. Service and consideration of a quite limited body of telephone evidence would not qualify. Nor would service of a proper Defence Statement on a public interest defence, which should already have been served as a routine matter.

43. Further, the Appellant is relying, not as the appeal suggests on work appropriately undertaken at trial to persuade the Crown to withdraw its case, but upon a proper review of the sensitive evidence and the preparation of an adequate Defence Statement that should have been, but was not, undertaken pre-trial. There is an inherent contradiction in the proposition that a trial must have started because a solicitor has belatedly undertaken work that, if done in good time, could have avoided a trial altogether. When Spencer J referred to the court dealing with "substantial matters of case management" he could scarcely have had that in mind.

44. Whilst Mr McCarthy is right in saying that the ultimate responsibility for serving a Defence Statement lies with a defendant, the ultimate responsibility for any step taken by any party to any litigation, civil or criminal, always lies with that party. It does not absolve a solicitor from the responsibility to give due consideration to the evidence and to advise the client appropriately, in this case on the availability of a statutory defence and the timely service of an adequate Defence Statement. For the reasons given by HHJ Lloyd it is evident that the responsibility for that not being done, and for the attendant waste of court time and cost, lies with the Appellant.

Conclusions

45. For the reasons I have given, I do not accept that "substantial matters of case management" were addressed in this case so as to justify the conclusion that, applying the guidance of Spencer J in *Lord Chancellor v Henery,* a trial started in a meaningful sense.

46. Further, when Spencer J envisaged the court addressing "substantial matters of case management" he could not have had in mind work belatedly undertaken by Prosecution and Defence on the date set for trial because a Defence solicitor had failed to prepare a defendant's case properly pre-trial: especially where, if that work had been done in good time, a trial might have been avoided altogether..

47. The Appellant's conduct in this case brought about a substantial waste of valuable court time and resources. The Appellant seems to have been lucky to have escaped a wasted costs order. Whilst the 2013 Regulations must be applied mechanistically, there is no proper basis in this case for concluding that the same conduct should be rewarded by an increased Graduated fee.

48. For those reasons, the appeal fails.