Neutral Citation No. [2023] EWHC 244 (SCCO)

Case No: T20217134

SCCO Reference: SC-2022-CRI-000041

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 16th January 2023

Before:

COSTS JUDGE WHALAN

R
v
KRYSZTOF ZIOLKOWSKI

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

Appellant: Hedley Solicitors

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

COSTS JUDGE WHALAN

Introduction

1. Hedley Solicitors ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in respect of a claim submitted under the Litigator's Graduated Fee Scheme ('LGFS'). The issue for determination is whether the Appellants are entitled to a 'cracked trial' fee, as claimed, or a 'guilty plea' fee, as assessed by the Respondent.

Background

2. The Appellants represented Krysztof Ziolkowski ('the Defendant') who was charged with co-defendants at Teesside Crown Court on an indictment alleging conspiracy to murder.

3. On 27th April 2021, the case was listed for a preliminary hearing. A pre-trial preparation hearing ('PTPH') was set down for 26th May 2021 and the trial was listed on 11th January 2022.

4. On 26th May 2021, the judge gave directions to progress the matter to trial, providing for, inter alia, the service of a schedule of evidence, case summary and other pleadings. A further hearing was listed for the week of 13th September 2021, which was also classified as a PTPH. The Defendant was not arraigned at either hearing.

5. On 10th September 2021, a co-defendant, Martin Chielewski, made an unopposed application to dismiss and was discharged.

6. The adjourned PTPH was actually heard on 21st September 2021, when it was noted, inter alia, that a number of the remaining defendants wished to make applications to dismiss. Accordingly, the judge set a timetable for those applications, whilst preserving the trial date in January 2022.

7. On 28th October 2021, the Defendant's application to dismiss was heard. It was unopposed by the Crown so he was discharged.

8. Other defendants made subsequent applications to dismiss, which were unsuccessful, and the trial proceeded against them in January 2022.

9. The Appellants note also a number of other interlocutory hearings were listed on 25th May, 21st June, 31st August and 20th September 2021, where the court dealt with various issues concerning preparation for trial.

The Regulations

10. Representation was granted on 23rd April 2021, and so the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended, apply.

11. Schedule 2, paragraph 1(1)(a) sets out the definition of cracked trial:

> "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;
> (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 any 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;

12. Schedule 2 paragraph 2(2) outlines provision that apply where there is an application to dismiss:

> …Where, at any time after proceedings are sent or transferred to the Crown Court…they are –
>
> (a) discontinued by a Notice served under section 23A of the Prosecution of Offences Act 1985…; or
>
> (b) dismissed pursuant to
>
> (i) paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (applications for dismissal);

(ii) section 6 of the Criminal Justice Act 1987 (applications for dismissal); or

(iii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (applications for dismissal)

the provisions of paragraphs 21 and 22 apply.

13. Paragraph 21 provides:

> (4) Where an application for dismissal is made under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1988, section 6 of the Criminal Justice Act 1987 or paragraph 5 of Schedule 6 of the Criminal Justice Act 1991, and that
>
> (a) the charge, or charges are dismissed and the assisted person is discharged;
>
> (b) the case is remitted to the magistrates' court in accordance with paragraph 10(3)(a), 13(2) or 15(3)(a) of Schedule 3 to the Crime and Disorder Act 1998,
>
> the litigator instructed in the proceedings must be paid a fee calculated in accordance with paragraph 6, or where appropriate, paragraph 8, as appropriate for representing an assisted person in a guilty plea.

Submissions

14. The Appellants' submissions are set out in the Grounds of Appeal and in written Submissions on Costs (8 pages) drafted by Ms Menary, Counsel on 14th December 2022. Ms Menary appeared at the oral hearing (heard remotely) on 15th December 2022.

15. The Appellants, in summary, point out that at no point did the Defendant enter a guilty (or any) plea, notwithstanding his indication (from an early stage) that he was not guilty of the alleged offence. This is because it was, from an early stage, anticipated – and indeed the court was told – that the Defendant would be making an application to dismiss. Ms Menary points out that the procedure governing an application to dismiss is set out in the Criminal Procedure Rules 3.20(1), so that a written application to dismiss must be filed before arraignment. Insofar as the intention was indicated to the court, any arraignment was necessarily postponed to facilitate the anticipated applications being made in compliance with the Rules. The defence, in other words, followed correct procedure by ensuring that the Defendant

was not arraigned before his successful application to dismiss was filed and heard in October 2021. There is, moreover, an important purpose in this procedure, whereby the Defendant's credit is preserved in the event that any application to dismiss is unsuccessful. If, conversely, a defendant is arraigned and pleads not guilty, in circumstances where the application to dismiss is ultimately unsuccessful, his credit would be compromised.

16. Notwithstanding the anticipated application to dismiss, the court maintained a trial listing in January 2022 and, submits the Appellants, they were obliged to continue preparing for trial. This meant considering more than 10,000 PPE, conferences with the Defendant, instructing an expert and drafting/finalising the Defence Statement. It is simply unfair, submits the Appellants, to be paid as a guilty plea when, whilst following the required procedure, they were obliged to prepare for trial while also preparing for the application to dismiss.

17. The Appellants refer additionally to an email sent by the trial judge's clerk which notes that the listing on 28th October 2021 should have been for "a cracked trial hearing" but was "listed as a guilty plea hearing by error". This, it is submitted, supports the contention that the correct fee is for a cracked trial and not a guilty plea.

18. The Appellants also cite and rely on the decision of CJ Rowley in R v. Williams [2020] SC-2019-CLI-000118, and my decision in R v. Fitton [2022] SC-2021-CLI-000139.

19. In Williams, Judge Rowley allowed a cracked trial and not a guilty plea, notwithstanding the fact that the defendant did not plead not guilty at the PTPH because she was very formally arraigned. He stated, at para. 10 that:

> I am in no doubt that this case qualifies for a cracked trial fee. The judge's note expressly describes the hearing as a PTPH and it is clear that a number of the co-defendants did formally plead at that hearing. Williams indicated what her plea would be, but in the absence of her counsel, on what everyone described as a busy morning, she was not formally arraigned. It seems to me to be taken an overly literal interpretation of the regulations to consider that hearing to be anything other than one where the defendant's position in respect of the courts was made clear to the judge.

20. In Fitton I allowed a cracked trial and not a guilty plea fee, in a complex and "unusual case" where the defendant was not arraigned at the PTPH, because of complications

concerning a European Arrest Warrant and the defendant's 'special protection' arising from his extradition. Sadly, the defendant died before the correct procedure could be unravelled and followed by the prosecution.

21. The Respondent's submissions are set out in Written Reasons dated (incorrectly) 12th December 2022 and in Written Submissions (4 pages) drafted by Ms Weisman, a Senior Legal Adviser at the LAA, on 21st October 2022. Ms Weisman also attended the hearing on 15th December 2022.

22. The Respondent, in summary, states that this is a straightforward case, as the 2013 Regulations anticipates and provides specifically at Schedule 2 paras. 2 and 21 for payment after a successful application to dismiss. Thus, the Appellants' claim was assessed properly as a guilty plea and not a cracked trial.

23. Ms Weisman adds that the decisions in Williams (ibid) and Fitton) (ibid) have no real relevance or application in this appeal, as in neither case was the cracked trial fee assessed following an application to dismiss. Both cases, in other words, turned on their particular (and atypically complex facts), in circumstances which are different to this case.

24. As to the relevance of the email from the court clerk, Ms Weisman cites the comment of CJ Leonard in R v. Bernard [2022] SC-2021-CRI-000143. (This is actually a quote from my judgment in R v. Bernard-Sewell [2022] SC-2021-CRI-000094.) At para. 14 in his judgment, CJ Leonard (quoting para. 16 of my judgment) noted:

> It should go without saying that in criminal cost appeals the Costs Judge is invariably assisted – and should always pay close attention – to any view or opinion recorded by the substantive trial judge. The trial judge always has more experience and understanding than the Costs Judge of the (often very complex) issues of law and fact arising in a trial. But any such view cannot be treated as being "decisive and dispositive" in a subsequent costs appeal, …as in these circumstances the role of the Costs Judge, as prescribed by statute, would be rendered otiose. The substantive tribunal (fortunately for him/her) are also not required to be aware of or apply the technical intricacies of the LGFS.

Just because the court clerk considered the hearing to be a cracked trial, in other words, does not make it so pursuant to the technical provisions of the LGFS.

My analysis and conclusions

25. This is not an easy or straightforward appeal to determine. Ms Weisman recognises (at para. 17 of her written submissions) that 'on the face of the matter the cracked trial provisions at paragraph 1(1) could be argued to apply here'. Yet, I am satisfied ultimately that the submissions of the Respondent should be preferred to those of the Appellants. It seems undeniably clear to me that the 2013 Regulations anticipate and provide specifically for payment as a guilty plea in circumstances where the defendant is discharged following a successful application for dismissal. Given that the criminal procedural rules provide for a procedure that militates against arraignment if an application to dismiss is anticipated, it must follow that the 2013 Regulations acknowledge that in the circumstances anticipated by para. 21, an application to dismiss would involve invariably a defendant who had not been arraigned and/or entered a guilty plea. I agree with Ms Weisman that the decisions in Williams (ibid) and Fitton (ibid) can be distinguished, as neither case involved an application to dismiss. Ultimately, in my conclusion, the Regulations anticipate the issues raised by this appeal, and provide clearly for assessment as a guilty plea.

26. I should note that I reach this conclusion without any real enthusiasm; indeed I consider the outcome to be a matter of regret. Ms Menary points out correctly that the Appellants in this case followed the prescribed procedure and, as such, were obliged effectively to prepare both for the trial listed in January 2022 as well as the application to dismiss. It seems unfair that they are disadvantaged financially as a result of following correct procedure, and they would undoubtedly have been paid as a cracked trial had the Defendant been arraigned and pleaded not guilty, as he was undoubtedly minded to do. More particularly, it seems to that the Regulations, as drafted, invoke an undesirable and unsatisfactory conflict of interest between a defendant and his/her legal representative, who must disadvantage themselves financially in order to preserve their client's credit. Nonetheless, I must apply the Regulations as drafted and it seems to me that a straightforward reading and interpretation of the existing provisions provides for assessment as a guilty plea and not a cracked trial.

27. I conclude, for all these reasons, that this appeal should be dismissed.

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