Neutral Citation No. [2024] EWHC 1325 (SCCO)

Case No: 21CL0209119

SCCO Reference: SC-2024-CRI-000037

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 June 2024

Before:

COSTS JUDGE ROWLEY

R
v
THOMAS

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

Appellant: Hussain Solicitors

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

The appropriate additional payment, to which should be added the sum of £1,500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Hussain solicitors against the decision of the determining officer to calculate the litigator's graduated fee by reference to a cracked trial under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Stephen Thomas who was charged with possessing a prohibited weapon (a Taser) and conspiracy to supply controlled drugs of both Class A and Class B.

3. The first PTPH took place in October 2019 but proceedings were delayed by the onset of Covid so that the pre-trial review did not take place until 17 February 2022. According to the determining officers written reasons, the advocate (presumably the defendants advocate) indicated that he hoped the case might resolve without trial.

4. Nevertheless, the trial was listed for hearing on 31 October 2022 and it was called on at 11am on that day. According to the written reasons, which draw heavily on the court log, the court was advised that the case in respect of various co-defendants had resolved so that there were now only two defendants including Thomas. The prosecution hoped that those charges might also resolve and asked for time to see if that was possible.

5. The judge indicated that he wished to start jury selection on the basis that the trial would start and the first batch of jurors were called in. Based on the court log, the determining officer sets out problems with the jury which resulted in the entire panel needing to be released and a fresh panel to be chosen the following day.

6. The determining officer then records that when the case was called on the following morning, the defendant changed his plea in relation to two of the four counts he faced. The prosecution asked for the remaining charges to lie on the file.

7. Consequently, although the solicitors made a claim for a graduated fee based on a two-day trial, the determining officer considered that in fact the definition of a cracked trial had been established and so made a payment on that basis. Neither the solicitor nor the determining officer's view was changed by the redetermination and written reasons process.

8. The solicitors instructed Martin McCarthy KC, whilst he was still a junior, to represent the defendant at the trial. He produced a note for the purposes of taxation and he also appeared on the solicitors' behalf at the hearing of this appeal.

9. Mr McCarthy was able to give me a first-hand account of the events up to his client pleading guilty. As is inevitably the case, the court log can only provide some information since relevant events are usually occurring outside of the court as well as within it. In this particular case, there appear to be some discrepancies regarding the court proceedings between the court log (or at least the determining officers understanding of what are likely to be short entries) and counsel's recollection. Given the rather remarkable situation regarding the abortive jury, I am inclined to think that Mr McCarthy's recollection would be as vivid as it appeared at the hearing.

10. In any event, Mr McCarthy's note for taxation, which also recorded the events, was produced a month or so after the trial. The relevant paragraph is as follows:

> "The jury were empanelled. It was expected to be a long case. After the first jury were empanelled on the first day, one of the jurors indicated a problem in that she knew my client as she had been his girlfriend. She disclosed to other jurors that fact before being empanelled. It then transpired in a note from another juror that the juror concerned had told other jurors that my client was a drug dealer. The Judge began an inquiry, called the juror in who had reported what she heard said. After submissions, it was decided the jury should be discharged."

11. In the determining officer's written reasons, the judge is said to have asked for the juror who had identified the problem to be brought into court. Whilst that was occurring, the defendants "would be allowed the rest of the day to go through issues with their teams with a view to, potentially, resolving the case." The written reasons continue by saying that the prospective juror then came into court et cetera. The impression is very much given that the judge's decision to release the jury was taken in the absence of the defendants and their legal teams. The description in Mr McCarthy's note, on the other hand, specifically refers to submissions being made by the advocates.

12. Whilst this may appear to be a matter of detail, it seems to me that submissions regarding the suitability of the jury are a paradigm example of substantial matters of case management. This is important given the need to consider the guidance of Spencer J in Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) in order to establish whether the trial had commenced.

13. Having analysed the decisions of various costs judges and High Court Judges in this area, Spencer J concluded that the key issue was whether the trial had commenced in a meaningful sense. He summarised the relevant principles at paragraph 96 of his judgment in the following terms:

> *"(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 (R v Maynard, R v Karra).*
>
> *(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 (Meek and Taylor v Secretary of State for Constitutional Affairs).*
>
> *(4) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in 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 (R v Brook, R v Baker &*

> *Fowler, R v Sanghera, The Lord Chancellor v Ian Henery Solicitors Ltd (the present appeal)).*
>
> *(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 (R v Dean-Smith, R v Bullingham, R v Wembo).*
>
> *(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 purposes of the Graduated Fee Schemes. It would 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, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment".*

14. The written reasons clearly take the view that paragraph 4 of Spencer J's guidance is applicable here. It is the essential characteristic of a cracked trial that the defendant changes plea to guilty at the very beginning of the hearing. Whilst that occurred on day two here, the time taken before the defendant had the opportunity to change his plea only involved the abortive jury selection and discussions between the parties with a view potentially to resolving the case. In the determining officer's view, none of this could be described as substantial matters of case management. As the determining officer puts it:

> "Reviewing additional material, attempting to resolve the case, jury selection issues, etc are all the sorts of case management matters normally dealt with prior to trial, but which do not constitute the substantial matters of case management that the Henery judgement and subsequent Costs Judge decisions indicate are required to determine that the trial has started. The time spent on [the first day] appears to have been generally involved in timetabling the conclusion of resolved cases and the first attempt at jury selection in this case – the sort of case management matters that are common to most cases."

15. In Mr McCarthy's submission, it is paragraph 6 of Spencer J's guidance which is the most apposite. The case was expected to last between four and six weeks and the judge was clearly keen to secure a jury panel who were able to sit for that length of time. It does not appear that the first jury were sworn in, but as the guidance makes clear that is not determinative. The issue is whether substantial matters of case management were undertaken before the guilty pleas were entered so that it can be

said that the trial had begun in a meaningful way even if it had not been opened or the jury sworn in.

16. Mr McCarthy was able to give me background in respect of the procedural issues in this case. He had submitted an application to sever the firearms charge with which the defendant was also faced so that the trial -related solely to drug dealing. The prosecution had refused to agree to the indictment being severed and so it was to be dealt with at the outset of the trial. There was also a count relating to the defendant being in possession of counterfeit currency and which the defendant's defence statement said had occurred by him being paid by others with that currency.

17. Mr McCarthy told me that the expectation was that the trial would proceed and the prosecution had uploaded numerous documents just before the trial. There was in fact a separate section on the DCS for the purpose of this defendant's trial. On the day before the trial began the prosecution provided a revised opening note and agreed facts document. It was not possible to respond to that before the trial and the expectation was that it would be dealt with on the first day. Mr McCarthy recalled being handed a very large blue bundle at the hearing which was a paper copy of the e-bundle. This resulted in discussions with the Crown counsel about procedural matters. Mr McCarthy's strongest recollection in relation to discussions with his client related to his knowledge about the acknowledged ringleader of the conspiracy who had already been tried and the overall hierarchy. By the end of that first day Mr McCarthy recalled the possibility of minor offences being dropped if a guilty plea was proffered in respect of the more serious ones.

18. The defendant wished to reflect on matters and discussed them again with counsel on the following morning. In return for guilty pleas the prosecution offered not to proceed with either the firearm or counterfeit currency charges.

19. As Mr McCarthy put it, the defence lawyers should not be prejudiced by dealing with matters which ultimately resolve the case without a trial. That is undoubtedly an outcome to be wished, but there is a line to be drawn as to when the trial commenced and there is a difference in the remuneration depending upon whether that has occurred. Inevitably, therefore, a defendant may plead guilty before the trial has begun in any meaningful sense, through good legal advice, even though that is to the detriment of the defendant's legal team.

20. It is also regrettable that the last-minute service of updated versions of documents cannot be said to be unusual. There is some force in the determining officer's categorisation of the sort of case management matters normally dealt with at the beginning of the trial but which could not be said to be <u>substantial</u> matters of case management.

21. There is unfortunately, little in the <u>Henery</u> decision to guide the parties and the court as to when case management becomes substantial case management. At paragraph 94 of his judgment, Spencer J simply refers to there being commonly "a great deal of important work by the advocates and the litigators, vital to the smooth running of the trial, [which] will be going on in court on the day on which the jury, in such circumstances, is selected but not sworn. Depending on the circumstances…that may well mean that the trial has begun in a meaningful sense."

22. Within the review of cases in Henery, there are references to applications for abuse of process and admissibility of evidence which would be heard without the jury being present. They would also need to be heard at the beginning of the case in order to establish how it would proceed thereafter. In this particular case, it seems to me that the question of severance of the indictment would form an equally important application. The question of whether the defendant was carrying a firearm would have no other bearing on the drug dealing conspiracy than potentially to prejudice the jury against the defendant.

23. It seems to me that this application can be described as a substantial matter of case management even though it does not appear that the application was made at the hearing before the defendant changed his plea. Its existence would overhang the discussions between the parties and the future progress of this trial and potentially a further trial. It also seems to me that the advocates' submissions regarding the suitability of the first jury would undoubtedly be a matter of case management if it had occurred later in the trial. The judge called upon the advocates to make submissions in this case at the outset but it seems to me difficult to conclude that that was not a substantial matter of case management.

24. Therefore, whilst I accept a good deal of the thrust of the determining officer's view that much of the work done by the litigators (and advocates) could only be described as the expected case management at the beginning of a long trial, I have reached the conclusion that there were some matters of substantial case management which justify concluding that the trial had begun in a meaningful sense.

25. Accordingly this appeal succeeds and the solicitors are entitled to a recalculation of the graduated fee and to the costs of this appeal.