IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 397 (Admin)

No. CO/4339/2019

Royal Courts of Justice

Tuesday, 9 February 2021

Before:

LORD JUSTICE DAVIS
MRS JUSTICE MCGOWAN DBE

(In Private)

B E T W E E N :

THE QUEEN
on the Application of
DIRECTOR OF LEGAL AID CASEWORK — Applicant

- and -

CROWN COURT AT SOUTHWARK — Respondent

- and -

IAN SWINGLAND — Interested Party

MR N. TROMPETER (instructed by the Government Legal Department) appeared on behalf of the Applicant.

THE RESPONDENT was not present and was not represented.

MR J. LENNON appeared on behalf of the Interested Party.

J U D G M E N T

(Transcript prepared from CVP recording)

LORD JUSTICE DAVIS:

Introduction

1 This is an application for judicial review brought by proceedings filed on 31 October 2019 by the Director of Legal Aid Casework ("the Director").

2 In essence, although in the proceedings below in the Crown Court the points perhaps were rather obscured by the sound and fury of some of the arguments being deployed, what is involved here is, first, a question of the proper interpretation of Regulation 26 of the Criminal Legal Aid (Contribution Orders) Regulations 2013 ("the 2013 Regulations") and, subject to that question of interpretation, second, the proper application of that Regulation to the circumstances of this particular case.

3 The decisions in question sought to be challenged in these judicial review proceedings are orders made by His Honour Judge Pegden QC, sitting in the Crown Court at Southwark, dated 5 April 2019, 19 June 2019 and 3 October 2019. Johnson J, on the papers, granted permission to apply for judicial review in respect of the challenges sought to be made against the last two orders. However, he refused permission with regard to the first of such orders, that is to say the order of 5 April 2019. He refused permission in that respect on the footing that the challenge to that particular order had been brought unacceptably out of time.

4 Before us today, the Director has been represented by Mr Trompeter. The defendant, Southwark Crown Court, has played no part in the proceedings. The Interested Party, Professor Ian Swingland, was represented before us by Mr Jonathan Lennon. It was common ground before us that the present claim had been properly brought in this court by way of judicial review proceedings.

The Crown Court proceedings

5 The background, shortly put, is this. Professor Swingland has, as it has been said, been very interested and concerned in environmental matters for many years. In around 2005 he became in some way involved in a company supposed to be engaged in environmental research. It was controlled principally by a man called Blakey. The proposed scheme involved suggested possibilities of legitimate tax avoidance for would-be investors and, furthermore, the potential availability of tax-free loans for such investors. Unfortunately, as transpired to be the case, it was all part of a complex revenue fraud.

6 In 2006 Her Majesty's Revenue and Customs had started a civil investigation into the legitimacy of the carbon tax scheme. The tax authorities demanded, amongst other things, proof that genuine environmental research was being undertaken. Documentation for this purpose was sought from Professor Swingland, who provided such documentation. Some of this turned out to be seriously misleading.

7 At all events, the inquiry turned into a criminal inquiry. In due course, Blakey, and four other individuals, were prosecuted. Professor Swingland was one of those defendants. He was accused of involvement in the alleged carbon fraud conspiracy. He also was accused of misleading the tax authorities in the civil inquiry, fraud by false representation being alleged in this regard.

8 There was, in due course, a trial in the Southwark Crown Court. It started on 13 September 2016. The trial judge was Judge Pegden QC. The trial lasted 105 days. We were told that Blakey himself gave evidence over some 16 days. Professor Swingland gave evidence, as we were told, over just some three days in total; most of his evidence related to the carbon fraud conspiracy count. At the conclusion of the trial, Blakey and others were convicted and received substantial custodial sentences. Professor Swingland was acquitted on the conspiracy count. But he was convicted, on 3 March 2017, in respect of the count of fraud by false representation relating to his misleading answers in the civil inquiry. He was, on 10 March 2017, sentenced by the trial judge to a suspended term of imprisonment. Confiscation proceedings were also initiated at the time against Professor Swingland. In due course, a confiscation order in the sum of around £154,000 was made against him on 20 December 2017.

9 During the criminal proceedings Professor Swingland had been receiving legal aid, albeit being required to make some contributions out of income. The scheme is such that he would have been required to have been notified, and we have no reason to think that he was not notified, of the potential for a capital contribution order to be made against him in due course. In any event, his experienced criminal solicitors would have well known that.

10 Following the conclusion of the trial, the Director then made investigation into the amount of the cost of the representation of Professor Swingland at the trial, and an investigation into the sum to be recovered from him by way of contribution, to be assessed. In this regard, we should note that his case had been conducted under the Very High Criminal Cost Cases Regime in view of the complexity of the matter. To assist in the calculations it appears that the Director had retained a company called Rossendales Limited, in effect to act as agent to assist in recovery of any sum due these respects.

11 At some date – it is not entirely clear from the evidence – the Director, or Rossendales, had following trial and sentence calculated Professor Swingland's costs of representation for the Southwark proceedings in the sum of £916,229 (ignoring pence). On 21 January 2019 Rossendales wrote to Professor Swingland. He was informed that the defence costs were £916,229. He was further informed by such letter, that his disposable capital had been assessed in the sum of £171,499 (ignoring pence). In addition he was informed that there was a further income contribution order payable in the sum of £5,225. He was required to pay the resulting total balance of £176,724 within 28 days. I will, for convenience, call that figure "the capital contribution " even though it includes a small element of income contribution. It is to be noted that, having received that demand, Professor Swingland duly paid the full amount of £176,724.

12 Then, on 30 January 2019, Professor Swingland's trial solicitors wrote to the Southwark Crown Court enclosing Rossendales' letter of 21 January 2019. The solicitors sought a "review/appeal" under the 2013 Regulations. They also wrote to Rossendales to like effect. At the time Judge Pegden QC responded saying that the matter was nothing to do with the court. The solicitors, however, after some intervening correspondence with Rossendales, wrote back to the court on 13 March 2019 drawing attention, amongst other things, to the terms of Regulation 26 of the 2013 Regulations and, in effect, saying that it was indeed a matter for the court. A hearing then was directed for 5 April 2019.

The 2013 Regulations

13 In order to give some context to what was going on, I should at this stage refer to some of the Regulations contained in the 2013 Regulations themselves. Regulation 2 includes a number of definitions, including "cost of representation" defined to mean: "the cost of

representation of an individual calculated in accordance with regulation 25." There is also a definition of "recoverable costs of representation". Part 2 relates to the situation concerning Crown Court trials, and reference can be made to the provisions from Regulation 6 onwards. Regulation 8, for example, concerns an assessment by the Director of income liability to make a payment. Regulation 12 also concerns the determination by the Director of liability to make a payment out of income. It is also provided by Regulation 12(2) that the Director in the circumstances there set out: "must . . . notify the individual that the individual may also be liable to make a payment out of capital." There is, as we have said, no reason to think that such notification was not given in the present case.

14 Critical for present purposes are Regulations 25 and 26:

> "**Assessment of the cost of representation on the conclusion of the proceedings**
>
> 25. Where—
>
> (a) an individual is sentenced or otherwise dealt with for any offence following conviction in the Crown Court;
>
> (b) the trial judge considers that there are exceptional reasons why an individual who is acquitted in the Crown Court should be liable to make payments under a contribution order; or
>
> (c) the determination under section 16 of the Act that an individual qualifies for representation for the purposes of the criminal proceedings to which this Part applies is withdrawn,
>
> the Director must calculate the cost of representation of the individual in the proceedings in the Crown Court.
>
> **Assessment by the court of proportion of the cost of representation**
>
> 26.—(1) This regulation applies where an individual is—
>
> (a) charged with more than one offence; and
>
> (b) convicted of one or more, but not all, such offences.
>
> (2) The individual may apply in writing to the judge for an order that the individual pay a proportion of the amount of the cost of representation in the proceedings in the Crown Court, on the ground that it would be manifestly unreasonable to pay the whole amount.
>
> (3) An application under paragraph (2) must be made within 21 days of the date on which the individual is sentenced or otherwise dealt with for the offence following conviction in the Crown Court.
>
> (4) The judge may—
>
> (a) make an order specifying the proportion of the cost of representation for which the individual is liable; or

(b) refuse the application.

(5) An order under paragraph (4) must not require any other individual to pay any of the cost of the individual's representation.

(6) In this regulation 'judge' means the trial judge or a judge nominated by the resident judge for the purpose of deciding the application."

Thereafter, Regulations 27 to 39 are detailed provisions as to the assessment required to be made by the Director of capital and the liability to make a payment.

The hearings in the Crown Court

15 At the hearing of 5 April 2019, Professor Swingland was represented by his trial counsel, being Mr Nelson QC and Mr Lennon. For reasons never satisfactorily explained, no one appeared for the Director. Although there had been an amount of correspondence in the interim with Rossendales, the clear tenor of the responses of Rossendales was to the effect that they did not intend to appear at that hearing but simply awaited upon the judge's decision. Nor, it seems, did Rossendales inform the Director, or the Legal Aid Agency, of the proposed hearing.

16 Written submissions had been put in on behalf of Professor Swingland. The hearing itself, of which this court has seen a transcript, was short. It is self-evident that there was no discussion about any issue on time limits, albeit the judge had been referred to the terms of Regulation 26. It is also evident that the argument on behalf of Professor Swingland had been conducted on the footing that no apportionment application under Regulation 26 could be made until the capital contribution order had been received, and what was being stressed was that had only occurred very recently by the letter of 21 January 2019. It is plain from the written submissions and, indeed, the transcript, that that was the basis upon which Professor Swingland's representatives approached matters and on which the judge then proceeded. Thus it was that the judge made no reference at all to any need for an extension of time. He plainly took the relevant date as being 21 January 2019, when the capital contribution was notified to Professor Swingland. The judge then referred to the course of the trial, which had taken place before him some two years previously.

17 The judge then, in his short Ruling, said this, according to the transcript:

> "However, doing the very best I can, it seems to me that it would be manifestly unreasonable in the circumstances that I have outlined, to use the phraseology of the Regulations, for Professor Swingland to pay the £171,499 which is sought. Exercising my discretion under the Regulations it seems to me that the role in those factors which I have outlined merits an order of something approximating 15 per cent of that figure, and making a rough calculation of that it is £25,000, and that is the order that I make. I exercise my discretion accordingly, for the reasons I have set out, with some little care. Actually, I correct myself, the balance that was sought was £176,724, not £171,000, still, the £25,000 figure is approximately 15 per cent of that figure."

It is evident from those remarks that the judge was intending to specify a proportion of 15 per cent, and then applying that percentage not to the cost of representation (that is,

£916,229 as set out in the letter of 21 January 2019 by Rossendales) but to the amount of the capital contribution as set out in that letter in the sum of £176,724.

18 The order, as actually drawn up, was in a standard pre-prepared form, although for some reason mistakenly referring to the predecessor 2009 Regulations. As drawn up, the order, in the relevant respects, said this: "It is determined by the court that" and then against a crossed box: "The applicant pay 15 per cent of their legally aided representation costs." That, of course, reflects the percentage of 15 per cent as applied to the cost of representation: and that, on the face of it, accords precisely with Regulation 26. It does not, however, reflect a 15 per cent proportion of the capital contribution of £176,724, which it appears the judge had been intending.

19 There was then more correspondence between Rossendales and Professor Swingland's solicitors. In the light of the order as drawn up, Rossendales understandably calculated the sum payable as 15 per cent of £916,229, being the representation costs; that came to £137,434. But, by now, Professor Swingland had paid the previously demanded £176,724. So Rossendales refunded Professor Swingland the balance of £39,348. Although, in his written submissions, Mr Lennon saw fit to criticise Rossendales for doing that, it seems to me that all they were doing, as they were required to do, was giving effect to the order of 5 April 2019 as drawn up.

20 However, the solicitors for Professor Swingland were dissatisfied. They considered that the order as drawn up did not accord with what the judge had intended. They considered that only some £25,000 was due, representing 15 per cent of the capital contribution. Accordingly, they sought a further hearing before Judge Pegden QC. That was arranged for 20 June 2019. They lodged written submissions. Again, as the correspondence shows, Rossendales acted on the footing that they were not proposing to attend that hearing. However, at a very late stage the Director was, in some way, notified of the proposed hearing on 19 June 2019. A witness statement of Mr Rimer, on behalf of the Legal Aid Agency, has been put in in this respect. Although, in his written submissions, Mr Lennon saw fit to criticise that statement as being in some respects disingenuous I entirely reject that. There is no reason not to accept everything that Mr Rimer has said. The simple fact is that this hearing proposed for 20 June 2019 had only recently, at this very late stage, had come to the attention of the Director. In fact, there was no hearing on 20 June 2019. Instead, the judge made an order on the papers on 19 June 2019, that order being made in terms proposed by the representatives of Professor Swingland themselves. That order read as follows:

> "Upon the Legal Aid Agency being invited to attend the hearing on 20th June 2019 and/or be represented and declining such invitation and upon reading the submissions on behalf of Ian Swingland dated the 17 June 2019, the following should be noted by any concerned party and specifically the Legal Aid Agency:
>
> 1. The Judicial Apportionment Order of this Court, dated 5/4/19, in relation to the applicant Ian SWINGLAND must be understood as meaning that the final liability that Ian SWINGLAND has in relation to the defence costs is £26,508.61.
>
> 2. If the Legal Aid Agency or Rossendales wish to dispute this figure, or make further demands of Ian SWINGLAND in excess of

> this figure, then they must notify this Court of their intention of doing so within 7 days of this Order."

21 It was now the Director's turn to be dissatisfied. At all events, the Director did apply within the seven days on the face of it allowed by paragraph 2 of the order, applying on 25 June 2019. The application was to set aside the order of 5 April 2019 and the order of 19 June 2019. The matter thus came back yet again before Judge Pegden QC. There was a hearing on 3 October 2019. On this occasion the Director was represented, being represented by Mr Trompeter. Professor Swingland continued to be represented by Mr Nelson QC and Mr Lennon. The indications from the transcript are that, by now, Mr Nelson may have been beginning to appreciate that the original order that the judge had indicated he was intending to make on 5 April 2019 did not accord with the terms of Regulation 26. However, what he then submitted to the judge was that the judge was *functus* and simply had no jurisdiction to interfere with any of the previous orders made. That submission was accepted by the judge. He ruled that he was *functus* and that any remedy available to the Director had to lie in judicial review proceedings in the High Court.

22 The judge's Ruling was short. He said this, amongst other things:

> "The Ruling I make is, in these circumstances, first of all as I indicated to the parties the court, in my judgment, had a discretion to entertain the application for apportionment in April of this year, there being no authority that definitively says the s.26(6) application must be made within 21 days of sentence, or the case otherwise being dealt with following conviction in the Crown Court . . ."

The judge then referred to no one appearing on behalf of the Director in April. He said:

> "No representations were made . . . but the application, the s.26 apportionment application, was time barred. In the circumstances I view this court as *functus*, and if there be any challenge to the order that was made, even though based on the incorrect amount, then such challenge should be made by way of judicial review in the High Court. That in no way detracts from my conclusion in April, confirmed in June, that the correct apportionment was, indeed, 15 per cent."

By order of that date the Director's application was thus dismissed. These proceedings then followed, as I have said, on 31 October 2019.

23 All this reveals, it has to be said, a lamentable state of affairs. The Director or Rossendales never attended the first hearing. Then, when the alleged error was identified, and when the Director sought to apply under the liberty to apply contained in the order of June 2019, the Director was, in effect, told that it is too late, and the judge was by now *functus*.

Disposal

24 At least somethings are, to my mind, wholly clear cut. Mr Trompeter in no way has suggested that the proportion of 15 per cent was not one properly open to the judge to reach. He has always accepted that that was a proper figure to be selected by the trial judge. But 15 per cent of what? As I read Regulation 26, it is clear. The proportion to be specified by the judge is required to be the proportion of the costs of representation for which the individual is liable: that is the proportion for which the individual is liable. The trial judge is, at this stage, in no way concerned with the *quantification* of the amount of those costs.

25 The submissions made to the judge by leading counsel on 5 April 2019 were, with all respect, misplaced. There is no call whatsoever for the judge on such an application to be informed of the amount of the capital contribution. Indeed, in many (perhaps most) such cases, the amount of the capital contribution may not even be known at the time of the Regulation 26 application. What matters, therefore, for this purpose is the proportion for which the individual is liable in respect of the costs of the representation. Moreover, there is no obvious unfairness in the 21 day time limit in this regard; indeed, it can be inferred that the aim is that such a time limit was introduced just because matters would then still be fresh in the mind of the trial judge. The actual quantification of the sum of the costs to be paid can then follow at a later date; *quantification* is not a matter for the judge at all, it is for the Director.

26 Consequently, with all respect to the judge, he was persuaded into error at the hearing of April 2019. But the actual order of 5 April 2019, as drawn up was, as I read it, correct in law. That correctly focused on the percentage of the costs of representation, not on the percentage of the capital contribution. Consequently, as I see it, it should not have been purportedly corrected by the subsequent order of June 2019 as it was. The same unfortunate misapprehension, on the part of the defence legal team, and on the part of the judge, was then repeated and now reflected in para. 1 of the June 2019 order. Fortunately, as I see it, a liberty to apply was included, and very sensibly so, in that particular order. It was, therefore, another unfortunate feature of this case that, notwithstanding that liberty to apply had been included, the judge was somehow persuaded at the October hearing that he was now *functus*. In my opinion he demonstrably was not. He had specifically retained jurisdiction, precisely by virtue of the effective liberty to apply contained in paragraph 2 of the order of 19 June 2019.

27 We asked Mr Lennon what it was that the defence legal team was trying to achieve by taking the stance that it took at the October hearing. I have to say I did not, myself, get a very clear impression of what they were trying to achieve. All that can be said is that the stance they had taken, which persuaded the judge, has necessarily meant that the Director had to institute judicial review proceedings in the High Court.

28 It seems to me, in such circumstances, that the order of 3 October 2019 cannot stand. It also follows that the purported amendment contained in paragraph 1 of the order of 19 June 2019 also cannot stand. It cannot stand just because under Regulation 26 the judge had no power to provide for a figure which was a percentage of the capital contribution rather than, as required by Regulation 26, a percentage of the representation costs. The original order as drawn up on 5 April 2019 should thus have been left to stand.

29 But here arises yet another complexity in this case: because the Director says, by ground 1 of the proposed appeal, that the Judge had no jurisdiction to make the order of 5 April 2019 at all; and, by ground 2, if he did have jurisdiction he should have refused to extend time, in his directions. In this regard we have to deal with the point that the single judge, Johnson J, refused permission to apply so as to challenge the order of 5 April 2019. As we indicated at the outset of the hearing this morning, we took the view, and certainly I take the view, that, with all respect to the single judge, he was wrong not to grant permission on this. It was very unfortunate that there was no representation on behalf of the Director at that period, but the reality is the order of June 2019, and the order of October 2019 were inextricably linked to the original order of April 2019. It simply would be a recipe for confusion and potential unfairness if some of those orders could be challenged, and the original order not. Further, a question of jurisdiction arises with regard to the order of 5 April 2019; and, yet further, it is understandable that the Director did not apply at the time with regard to the hearing of 5

April 2019, just because all these other proceedings were going on before Judge Pegden in the Crown Court and the process did not terminate until October 2019. In my view, therefore, permission and the necessary extension of time should be granted to the Director for the purposes of these present judicial review proceedings in order to pursue grounds 1 and 2, raising a challenge to the order of 5 April 2019.

30 So far as that order is concerned, it is the position of the Director that the judge, in law, had no jurisdiction to entertain the application under Regulation 26, made on behalf of Professor Swingland at all. What is submitted is that the Regulation, in terms, specifies 21 days from the date of sentence or other disposal following conviction. On any view, this application was thus well out of time. What is submitted is that the 2000 Regulations contain no express power to extend time, either within Regulation 26 itself or by way of general overriding regulation. Thus, so the argument goes on, no order at all could be made once the 21 day period elapsed. Accordingly, it is submitted the sum properly payable by Professor Swingland was in the full amount of the capital contribution: and that is so even though that exceeded by some £39,348 the figure representing 15 per cent of the representation costs.

31 These submissions thus raise a not unfamiliar problem, where a statute or statutory regulation has stipulated a time limit or other requirement for doing something, but has not stipulated the consequence if the time limit or other requirement is not complied with. It has long been settled that to assess whether time is or is not intended to be "of the essence", or whether time or some other requirement, as the case may be, is "mandatory" or "directory" is unhelpful. To use such language merely describes the consequence without addressing the underlying Parliamentary intention. It is crucial, therefore, to assess the correct interpretation by placing the particular provision in question into the context and purpose of the measure itself: see by way of example the case of *R v Soneji* [2005] UKHL 49, [2006] 1AC 340.

32 The statutory context of that particular case related to confiscation and so was different from the present case. However, in the course of his speech Lord Steyn, at para.17, after referring to authority, deals in broad terms with issues where there is a failure to observe time limits laid down by regulations such as arose in that case. He went on to say, by reference to authority, that if a complaint is made about non-fulfilment of a time limit the giving of relief will usually be discretionary. He also went on to say, at paragraph 23, that in such situations:

> ". . .the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

Lord Carswell, in his speech, also dealt with the approach that may be appropriate to be adopted. He said this at paragraph 67 of his speech:

> "The other avenue is by means of holding that if the time limit is not strictly observed the confiscation is nevertheless not invalidated. It is here that the doctrine of substantial performance may offer some assistance. I would not regard it as justified to extend the time limit indefinitely, for I do not think that Parliament would have so intended. Nor would it be sufficient to ask merely if it would be fair and reasonable to accept the validity of an act done out of time. I would suggest that one should ask if there has been substantial observance of the time limit. What will constitute substantial performance will depend on the facts of each case, and it will always be

> necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid."

33 In the present case the fact that Regulation 26 says: "must" does not of itself seem to me to take matters very much further. All requirements as to time limits necessarily involve a requirement for compliance. As said in the case of *Osman v Natt* [2014] EWCA Civ 1520, [2015] 1WLR 1536 at paragraph 39 of the judgment of Sir Terence Etherton, Chancellor:

> " . . . I do not consider that the legislature's use of the word 'must' at the beginning of section 13(3) gives any independent indication of the consequences of non-compliance. As Lord Woolf MR observed in *Ex parte Jeyeantham* at p. 358H, the words 'shall' and 'must' are both synonymous as denoting something which is required to be done as opposed to something which is intended to be merely optional. Both words impose an obligation but, detached from the statutory scheme as a whole, they throw no particular light on whether the legislature intended non-compliance to result in invalidity and nullity."

34 In the present case, Mr Trompeter was in a position to point to Regulation 35, 39(2) and 43(1)(a) of the 2013 Regulations which in terms indicate that where certain stipulated times are not met then some other period may be agreed by the Director and the individual concerned, or may be extended where there is a reasonable excuse. That is a point of some force: although it may be noted that the express possibility of extension of time in such instances involves situations involving the Director rather than the court. Moreover, as Mr Trompeter was also in a position to say, in the concurrent Criminal Legal Aid (Remuneration) Regulations 2013 there are quite frequent references to extensions of time being available where there is, for instance a "good reason" or there are "exceptional circumstances". But, as Mr Trompeter observed, these 2013 Regulations do not say that, either in Regulation 26 itself or elsewhere by any general regulation to that effect. Mr Trompeter further bolstered his arguments by pointing out that the requirement under Regulation 26 does not connote any great complexity or formality. All that is required is that the Crown Court be notified in writing. Moreover, as he understandably emphasised, the reason for the time limit is clear enough: namely that the trial judge be alerted to the point while matters relating to the trial are still fresh in his or her mind.

35 I see force in these arguments. Indeed, that strict approach to interpreting Regulation 26 was accepted in the Leeds Crown Court in a case entitled *Hannibal Riley* in 2016 by His Honour Judge Marson QC. But, on balance, I would not accept this argument. It seems to me that so strict an approach could lead to great unfairness. One can take some extreme examples. Say, for example, an application under Regulation 26 is sent by courier in time to the Crown Court, but the courier then drops it and never tells anybody. Or, for example, a fee earner having the sole conduct of the defence case at trial is taken seriously ill immediately after sentence and is wholly unable to address the matter in the 21 day period. Or take the instance where the application is just one day late for good reason given, and where the judge in any event has been on holiday for the intervening 21 days and there is no prejudice to anybody. It may be that these are extreme examples; nevertheless extreme examples can sometimes be a useful way of at least testing the interpretation of a particular statutory measure and of seeking the underlying intention.

36 Although Mr Lennon, with all respect, rather vaguely sought to introduce Convention rights as having a bearing on the issue, I think they have no bearing whatsoever. A defendant is perfectly entitled to protect his position by giving a notice under Regulation 26. All that the Regulation then does is to impose a time limit for doing so. But where, as will be gathered,

I do think that Mr Lennon is on rather stronger ground is that Regulation 26 is ultimately designed to achieve fairness. Of course, fairness cuts both ways. It cuts both in favour of a defendant and also cuts in favour of the Director and, ultimately, the taxpayer. But, in my view, it could – and in a meaningful way – defeat justice and fairness if a Crown Court has no power whatsoever to entertain a Regulation 26 application once the 21 day period after sentence, or other disposal, has expired. I can see no clear or obvious purposive intention for achieving so harsh or draconian result. Indeed, it may be noted in this regard that although a time is set for making the application, no time thereafter is set for when the judge should deal with it, nor, indeed, is any procedure set for how the judge goes about it. He may, for example, wish to direct a hearing: which may take several weeks, if not months, to arrange.

37 It seems to me also that whilst one also can legitimately have regard to the actual provisions of the 2013 Remuneration Regulations, one does have to have regard to the fact that those particular Remuneration Regulations do allow for an extension of time where there is good reason or exceptional circumstances. True it is, as Mr Trompeter stresses, that provisions of that kind that appear in those Remuneration Regulations do not appear in these Regulations. But one really does have to ask why there should be some degree of flexibility conferred for the purpose of the Remuneration Regulations but such flexibility be wholly denied in the situation arising under Regulation 26. It thus is not obvious to me why there should have been intended to be so inflexible an outcome with regard to Regulation 26 as argued on behalf of the Director.

38 Mr Trompeter further objected that there is no yardstick for assessing when an out of time application under Regulation 26 is to be entertained. That is true, of course. There is no specified yardstick, just because the Regulation is silent on the matter. But that sort of consideration did not prove any bar in a case such as *Soneji*. It seems to me that an appropriate underlying yardstick is to consider whether or not material injustice and material unfairness would arise if an out of time application is not entertained and whether an acceptable explanation for the delay has been given. That seems to me to accord with the approach set out in *Soneji*, and it seems to me give the appropriate flexibility to the Crown Court judge whilst, at the same time, giving due focus on the requirement of the 21 day time limit. So to hold is not to denude the time limit of 21 days of all force. To the contrary, that time limit is there and it is to be observed. The Crown Court will not, I apprehend, extend time in the absence of cogent and compelling reason advanced. Moreover, this is reinforced by the general approach of the courts nowadays to compliance with time limits: as illustrated by the case of *Denton v White* [2014] EWCA Civ 906, [2014] 1WLR 3926. Accordingly, it is the responsibility of defendants and their solicitors (where instructed) to give notification within the 21 day period. If they fail to do that, they run the significant risk of the Crown Court thereafter refusing to extend time.

39 On the footing, therefore, contrary to the Director's submission, that jurisdiction to extend time exists, that then leads to the final question of whether that jurisdiction should be exercised in this particular case. That is a matter of discretion. It was in truth never exercised by Judge Pegden QC, as he was inadvertently misled in April 2019. He clearly thought that the application had been made within time, he taking that as being 21 days of the notification of the amount of the capital contribution of 21 January 2019. However, although the Crown Court judge did not exercise any discretion to extend time on any proper basis, indeed did not exercise discretion at all, it would serve absolutely no purpose whatsoever for this court now to remit the matter back to the Crown Court for a fresh determination on a correct understanding of Regulation 26. That would be a pointless technicality and, indeed, Judge Pegden QC has, himself, in the interim, retired. Consequently, that issue of discretion should, in my opinion, now be decided by this court.

40 I am of the very clear view that discretion in favour of Professor Swingland to extend time should not have been exercised, and should not now be exercised, in his favour in this case. This application was many, many months out of time; and that is so even if one takes the relevant date as being the date of the confiscation order, 20 December 2017, rather than the date of actual sentence, 10 March 2017, as the starting point – something I actually think may be questionable. But even assuming, without deciding, that for present purposes the starting date was 20 December 2017, a very great period of time elapsed before the purported Regulation 26 application was made. No explanation of any kind has been given in evidence for this delay. The inference presumably therefore to be drawn is that Professor Swingland and those advising him misunderstood Regulation 26 and had not seen the need to apply within 21 days of the date of sentence. But a misunderstanding of the law of this kind and over so long a period cannot possibly, in my view, of itself be taken as a sufficient justification or good reason for granting so lengthy an extension of time. Indeed, examples can be taken from cases recorded in appendix G-222 of the supplement to **Archbold** (2021 edition) in the context of the corresponding position arising under the 2013 Remuneration Regulations. Consequently, a misunderstanding of or overlooking of the law cannot, of itself, in this case be a sufficient justification. Moreover, I have to say that the stance taken by Professor Swingland's advisers in 2019 and maintained thereafter hardly elicits much sympathy; in fact, so far as I am concerned, it elicits no sympathy at all. Furthermore, in at least some cases of this kind – I need say nothing about this case – there may well be instances where the individual defendant is not left without remedy, as he may have a remedy against his defence solicitors who failed to advise him of the need to apply to the Crown Court within the 21 day period.

41 In the result, therefore, I consider that all of the principal grounds of review as formulated on behalf of the Director in these proceedings (save for the jurisdiction point) are well founded. I would quash each of the orders of 5 April 2019, 19 June 2019 and 3 October 2019. I would therefore dismiss the respondent's application under Regulation 26 to the Crown Court of 30 January 2019 seeking the specification of a proportion of the costs of representation. I would allow this claim for judicial review accordingly.

42 There is, however, one other thing I would add. As I have said, Rossendales had, after the April 2019 order was made, sent to Professor Swingland a refund of £39,348 representing the difference between 15 per cent of the cost of representation and the amount of the capital contribution. It thus would potentially follow, on the view that I have taken, that Professor Swingland is, in turn, liable now to restore that payment of £39,348. During the course of this hearing we asked Mr Trompeter to ascertain and obtain instructions from the Director as to whether it is indeed the intention to seek recovery from Professor Swingland of that sum. As Mr Trompeter has informed us, having taken instructions, the Director, to my mind conspicuously commendably and fairly, has indicated that the Director does not propose to seek recovery of that particular sum, given the very unusual circumstances of this particular case. That is a very fair stance to be adopted and I trust that Professor Swingland is at least duly grateful for that. However, I should observe that the Director has made it clear that that concession is purely geared to the circumstances of this particular case. It is no way intended to indicate any kind of precedent of the stance which may be taken for any other case under Regulation 26.

MRS JUSTICE MCGOWAN: I agree.

CERTIFICATE

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This transcript has been approved by the Judge.