Neutral Citation No. [2022] EWHC 1275 (SCCO)

Case No: T20217239 / T20227001

SCCO Reference: SC-2022-CRI-000013

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 19 May 2022

Before:

COSTS JUDGE ROWLEY

REGINA
v
DOYLE

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

Appellant: RH Law Solicitors Ltd

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

The appropriate additional payment, to which should be added the sum of £750 (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 RH Law Solicitors Limited against the decision of the determining officer to calculate the solicitors' fees on the basis of a cracked trial for the purposes of the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Nicholas Doyle in respect of an indictment containing several counts involving drugs offences. He pleaded guilty to the lesser offences including the supply of ketamine but pleaded not guilty to the first count on the indictment which was a charge of conspiring to supply a Class A controlled drug, namely cocaine. The trial of that count was transferred from the Crown Court at Manchester to Bolton for a hearing starting on 4 January 2022.

3. In November 2021 the solicitors wrote to the Crown prosecutor offering a plea of guilty on their client's behalf on the basis that he was no more than a "street dealer." That plea was not acceptable to the Crown and preparations for trial took place including the provision of apparently "voluminous" disclosure on the day before the trial.

4. Mr Harrison of the appellant solicitors, who appeared before me on the appeal in this case, had described the disclosure as voluminous. He also indicated, both orally and in his written submissions, that there had been several attempts to resolve the case in the manner indicated in the previous paragraph. Indeed, at 9:45am on the morning of the trial such a proposal was rejected once more by the Crown prosecutor.

5. Mr Harrison explained that the trial in this matter was the only one listed at the Crown Court at Bolton on that day. Given the impasse between prosecution and defence, a trial appeared to be inevitable. The parties asked the court for time to deal with the recent disclosure as well as other matters that Mr Harrison described as complex legal issues. The trial judge, he said, encouraged the parties to resolve matters as far as possible and that he was to be kept informed of progress. A jury panel was available for selection but given the prevalence of the Omicron variant of Covid-19 at the time, the decision was made not to select and swear in a jury until the last moment. The judge indicated that he would like to swear in the jury at 2pm. In Mr Harrison's submission, the work done during the morning would usually have occurred after the jury had been sworn and the case opened.

6. The recent disclosure came from the EncroChat encrypted messaging platform and consisted of two separate schedules of messages which had been obtained by the French law enforcement bodies, having managed to infiltrate the platform. The schedules were 69 and 75 pages long. They required editing and cross-referencing with existing schedules and attribution evidence and "Sequence of Events" documents that had already been produced. The agreed facts and Prosecution Opening also required further editing.

7. Mr Harrison told me that the defence team prepared applications to resist efforts to admit the material as hearsay and to exclude materials due to concerns as to its reliability, particularly in the absence of some of the co-conspirators.

8. During the course of the morning. and in the discussions between the prosecution and defence teams, it became apparent, according to Mr Harrison, that there had been significant errors in the way in which the prosecution had previously presented some

of the transactions that involved the defendant. In particular, the newly served evidence cast doubt on the existing evidence for the prosecution's case that the transactions concerned cocaine rather than ketamine.

9. The case was called on before the judge just before 11:30am. The court log records the Crown counsel addressing the judge in the following terms:

> "We have not asked for deft to come in at this point. We would like to raise with yourself that there are some significant case management issues which we need to address which may resolve the case if we may have more time."

10. The defendant's counsel agreed with that description and the judge allowed the parties a further hour in order to resolve the issues. An hour later, the prosecution sought leave to prefer a new indictment and for the defendant to be re-arraigned on count six of that amended indictment and to which he pleaded guilty. According to Mr Harrison, that amended count reduced the charge against the defendant to one of supplying cocaine as a street dealer. In other words, the prosecution had retreated from its position at the beginning of the day and accepted the offer that had been put forward by the defence both on the day and previously. Mr Harrison asked, somewhat rhetorically, why the prosecution would take that step if there had not been substantial matters of case management in between the original rejection of the defendant's offer and the re-arraignment and plea.

11. In his written reasons, the determining officer set out the definition of a "cracked trial" and explained that he assessed that fee on the basis that the court logs did not show a trial took place in a meaningful sense. He did not accept that there had in fact been substantial matters of case management based on the court log. There were no legal arguments that appeared to have taken place and the trial was not required because the defendant had changed his plea to guilty.

12. There is no doubt that the bald facts of this case fit the definition of a cracked trial. The Criminal Legal Aid (Remuneration) Regulations 2013 define a cracked trial as follows:

> "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;

13. In this case the defendant changed his plea from not guilty to guilty on the day listed for the trial. Unless it can be shown that the case actually proceeded to trial, then a cracked trial fee is appropriate. Both Mr Harrison and Mr Orde, who appeared on behalf of the Legal Aid Agency at the hearing of the appeal, agreed that the question was "when does a trial begin?" in order to establish whether this case had proceeded to that point. That "vexed question" to quote Spencer J in the case of Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) has regularly come before costs judges on appeal from determining officer's decisions in order to decide whether in any particular case a trial fee or a cracked trial fee would be appropriate. As Spencer J pointed out, a decision as to when the trial began can also be relevant for the purposes of graduated fees in various other circumstances.

14. 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 begun, 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".

15. The first three paragraphs of the guidance show that the swearing in of the jury is not conclusive and that if the case has been opened by the prosecution then a trial will have begun. The last two paragraphs of the guidance make clear that consideration of this question may well have to be done retrospectively and possibly with the benefit of the input of the trial judge. Those five paragraphs do not generally cause much difficulty. It is paragraphs 4 to 6 on which different interpretations are regularly encountered.

16. On the face of it, paragraph 4 simply describes an archetypal cracked trial in that the defendant pleads guilty before the trial commences. Indeed, that was the situation in the Henery case itself. Spencer J described circumstances which he said commonly occurred week in week out in the following terms:

> "A trial is listed to start in the afternoon. The judge is part heard in another case. He is assured that it is a firm trial, and to minimise inconvenience to jurors and to save time next day, the jury is empanelled, sworn and sent away. Next day, before the defendant is formally put in the jury's charge, the prosecution decide to accept a plea of guilty to a lesser charge. The indictment is amended, the guilty plea is entered, and the jury is discharged. For the purpose of the graduated fee schemes, has the case "proceeded to trial"? If so, the advocates and litigators must be paid the fees prescribed for trial. If not, they must be paid the fees prescribed for a cracked trial."

17. At paragraph 89 of his judgment, Spencer J concluded that on the facts of that case there was nothing to justify the conclusion that a trial had started in any meaningful sense. Notwithstanding that conclusion, it is plain from the way that he framed the question and then analysed the case law that a guilty plea before the trial judge does not automatically mean that only a cracked trial fee is payable. The question of whether the case "proceeded to trial" requires a more detailed investigation of events. Consequently, the guidance given at paragraph 4 can only be in respect of cases where the defendant's plea of guilty (or the prosecution's offering of no evidence) occurs more or less as soon as the case is called on, even though the jury may previously have been sworn in.

18. In respect of paragraph 5, it was Mr Orde's submission that it could only apply where a trial did indeed take place. The continuous process described in that paragraph runs

to the leading of evidence and by which time there is obviously no argument that a trial has begun.

19. In a similar way, Mr Orde submitted that paragraph 6 of the guidance only related to cases where a trial had taken place. He submitted that its purpose was to establish whether a trial should be calculated as having taken say 22 days rather than 19 days taking into account substantial matters of case management which occurred before the prosecution opened the case. It seemed to me that Mr Orde's argument led to paragraphs 5 and 6 therefore being seen as leading into the retrospective comments at paragraphs 7 and 8 in calculating the appropriate graduated fee.

20. These comments in respect of paragraph 6 were the basis for Mr Orde's primary submission that the phrase "substantial matters of case management" had wrongly been elevated into a stand-alone test for determining whether a trial had begun. In Mr Orde's submission, paragraph 6 only applied where a trial had actually started and issues regarding the length of the trial were germane. It could not, therefore, apply where the trial did not go ahead.

21. The correct test, according to Mr Orde was simply to consider whether the trial had begun in a meaningful sense. He compared the circumstances in this case with some of the cases referred to in Henery. For example, in the case of R v Bullingham there were questions of late service of additional evidence and of non-disclosure of relevant material which required a voir dire in relation to the admissibility of the evidence. Once that had taken place, the judge gave rulings in favour of the defence which caused the prosecution to consider its position and agree to accept lesser pleas from the defendant. In R v Wembo two days were taken up with arguments as to whether anonymity orders should be made in respect of some of the witnesses. The arguments were considered to be central to the trial and the court had to consider the evidence that the relevant witnesses would be giving. Mr Orde accepted that in such cases the trial had started in a meaningful sense. Wembo was a case where the jury was then sworn and the trial went ahead. The "when did the trial begin?" question concerned additional days prior to the swearing in of the jury being added to the trial length.

22. By contrast, the court should, in Mr Orde's view, be reluctant to conclude the trial has started in a meaningful sense in circumstances where a defendant pleads guilty before the jury is sworn. He did not put that threshold so high that it could never be the case but where the parties were entering into discussions about evidential matters which may lead to a guilty plea, it would be unlikely that a trial could be said to have begun in any meaningful way.

23. Mr Harrison urged upon me to take a broad and pragmatic approach to this case. The unique circumstances caused by the Covid issues had led to a jury not being sworn whilst the late served evidence was dealt with. Normally, in Mr Harrison's view, a jury would have been sworn before such matters had been decided. As it was, the pragmatic approach taken by the parties to dealing with the evidence and which led to the prosecution accepting that its case on the count before the court was considerably weaker than it had believed, ought to be rewarded rather than penalised. Both Spencer J in Henery and Costs Judge Whalan in R v Coles refer to the unattractive alternative of defence lawyers requiring juries to be sworn and trials begun so that there was no doubt that they were entitled to a trial fee in the sort of circumstances in this case and the others described in Henery.

24. By a quirk of listing, I heard Mr Orde's submissions on this point in two separate cases on the same day. He was commendably consistent in those submissions. Having had the chance to hear them twice I have however come to the conclusion that, although there is some force in the arguments, there is ultimately little to be gained by concluding that the substantial case management reference in paragraph 6 should be limited to cases where a trial has clearly begun.

25. When the determining officer (and the costs judge) comes to decide upon whether a trial has begun in a meaningful sense, if the "substantial case management" approach is not used, then what should take its place? As I have described above, the early paragraphs of the guidance deal with the swearing of the jury in situations where the case has been opened by the prosecution. Consequently, the fact of whether a jury was or was not sworn is something to take into account but it is not, given the express wording of paragraph 1, the conclusive factor.

26. In the sort of circumstances of this case, there has been no prosecution opening nor the leading of any evidence. There is no indication from the trial judge and so, adopting the retrospective wording of paragraph 7 of the guidance, there is a need to "see how events have unfolded" to determine whether there has been a trial in any meaningful sense.

27. The question becomes what events need to be looked at? In this case, it is plainly the consideration of the disclosure, the applications to prevent evidence being admitted as hearsay et cetera which I have set out in paragraphs 6 and 7 above. As Mr Harrison submitted, if there had been no change in position by the prosecution, then the judge would have to have been asked for a ruling on admissibility. It seems to me that another way of describing these "events" is whether or not they amounted to substantial matters of case management? As such, there is no benefit in my view in restricting paragraph 6 to case which unarguably proceeded to trial because the test for those which conclude beforehand require a test of the same nature in any event.

28. Regardless of the utility of dispensing with the test, I reject Mr Orde's argument for two reasons. The first applies to all cases and is that, unlike paragraph 5, there is no reference in paragraph 6 to any continuous process or similar which compels the idea that the case must have gone ahead to the point where it has undoubtedly started.

29. More importantly, in the case of Henery itself, the case did not go ahead because the defendant pleaded to a lesser charge in the same manner as occurred here. Paragraph 4 of the guidance deals with straightforward guilty pleas as I have set out above. Where there are evidential issues leading to discussions between the parties and, often, indications or rulings by the trial judge, then there needs to be an analysis of the substance of those case management matters.

30. Spencer J took the view in Henery that there was nothing in the events which occurred to consider that the trial had begun in any meaningful sense. He did so by a comparison with cases such as Bullingham and Wembo. Mere "housekeeping" matters are obviously not sufficient. At the other end, are issues involving several days on the voir dire. There are however a considerable range of issues that come between these two extremes. For example, issues of substance regarding evidence come in many shapes and sizes and are inevitably case specific. In this particular case, I would not characterise the editing and amending referred to in paragraph 6 above as being

substantial but is a commonplace activity to limit the scope of the evidence needing to be given. The applications regarding admissibility of the evidence, however, seem to me to be much more substantial. The flaws in the evidence are said to be the cause of the Prosecution's change of approach. Given events following the consideration of the evidence, I entirely accept Mr Harrison's submission that applications to the judge would have followed if the Prosecution had not blinked.

31. Here the Prosecution made it clear that the defendant was to be tried and in support of that position served evidence at the last minute in order to bolster its case. It was only upon going through that evidence that the flaws in the Prosecution's case came to light. In these circumstances, it seems to me to be entirely artificial to describe the work carried on by the prosecution and defence on what would have been the first day of the trial as not being the beginning of the trial in a meaningful sense simply because case management decision of the judge kept the jury safe and allowed the parties time to narrow issues outside of the courtroom.

32. I have no doubt that the events in this case satisfy the test of the trial beginning in a meaningful sense and as such the solicitors should be remunerated on the basis of a trial fee rather than a cracked trial fee. The solicitors have been successful in their appeal and so they are also entitled to costs in respect of it.