Neutral Citation No. [2024] EWHC 1324 (SCCO)

Case No: T20217168

SCCO Reference: SC-2024-CRI-000046

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
LOCK

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

Appellant: Shaw Graham Kersh 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 Shaw Graham Kersh solicitors against the decision of the determining officer to calculate the litigators graduated fee by reference to a single trial rather than a trial and retrial under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Terence Lock who, along with numerous others, faced an indictment concerning a conspiracy to supply Class A drugs. Lock's involvement related to his position as an employee of a law firm and through which he gained access to information on the court's Digital Case System.

3. The trial was listed for 10 July 2023 with an estimate of two to three weeks. However, the trial ended on 13 July 2023 and was relisted for 9 October 2023. In fact, the trial apparently restarted on 10 October 2023 and concluded on 25 October 2023.

4. The solicitors made a claim for a 4 day trial and then a 12 day retrial. The determining officer however considered that there had been one continuous trial and calculated the graduated fee on that basis.

5. In coming to his/her decision, the determining officer had regard to the Crown Court Fee Guidance document produced by the Legal Aid Agency. That document describes the most important feature as being whether the judge ordered a new trial as opposed to an order for the trial to restart or to be relisted. The guidance recognises that such an order is rarely made and that was not the case here. The case was relisted for hearing.

6. The guidance then refers the case of R v Nettleton where Costs Judge Gordon-Saker held that if there was no specific order for a new trial then the fee payable was for one trial only unless there had been a break in the procedural and temporal matrix. The matrix test has been applied in numerous cases thereafter. Whilst comparison with other cases may give some context, for example in terms of the gap between the two 'legs', fundamentally the decision in any particular case is dependent upon that case's own facts. The factors set out in the guidance are:

   i) the length of time between the first leg and the second leg of the case

   ii) the stage at which the first leg concluded

   iii) the relative length of the first and second legs

   iv) a change of advocate between the first and second legs

   v) a change of judge between the first and second legs

   vi) a change in the case between the first and second legs

   vii) any comments made by the trial judge in either leg to indicate that there was a new trial

7. It is convenient to take each of these factors in the Guidance in turn, together with the determining officer's application of them to this particular case and the response of

Mr Martin McCarthy KC, who appeared on behalf the solicitors at the hearing of this appeal.

8. (i) – the gap between the two legs – the Guidance suggests that a gap of just a few days may indicate a single trial whereas a gap of several months may indicate a trial followed by a new trial. The determining officer recorded that the gap between the two legs here was nearly 3 months and Mr McCarthy described that as being a large gap.

9. (ii) - the stage at which the first leg concluded – the Guidance refers to the case of R v Forsyth (2010) in which the Costs Judge held that for a trial to be considered as a new trial, the first trial must have run its course which would require the jury to have failed to reach a verdict. In the determining officer's view the first leg could be argued not even to constitute a trial let alone one that had run its course. Overall, she considered this to be more indicative of a single trial than a trial followed by a retrial. Mr McCarthy submitted that the trial had begun the jury having been sworn in. The jury was then discharged after four days which concluded the first leg.

10. (iii) – the comparative length of the legs - the Guidance suggests that a very short first leg followed by a much longer second leg may indicate that this was one trial. The determining officer repeats this comment and records that the first leg lasted for 4 days and the second leg lasted 12 days which would indicate that this was more likely to be a single trial. Mr McCarthy made no specific comment in relation to this point.

11. (iv) – change of advocate - the Guidance suggests this may be a reason to consider it to be a trial and retrial depending upon the reason for the change in advocate. The determining officer states that there was no change of trial advocate. Mr McCarthy informed me that this was in fact incorrect. Elizabeth Marsh KC appeared on the first leg whereas Sean Larkin KC and Tom Doble, junior counsel, appeared on the second leg following the representation order being amended to include a junior as well as a leader.

12. (v) – change of judge - this very unusual situation, which occurred in the case of R v Nettleton, does not apply here.

13. (vi) – change in the case - the Guidance records that a substantial change in the nature of the case may lead to a determination that there was a trial followed by a new trial. The determining officer states that the records do not indicate there to be any change in the case between the two legs. Mr McCarthy informed me that additional evidence was served between the two trials. That material included 45 witness statements and 135 exhibits. The additional witnesses included a statement from a new prosecution drug expert and cell site analyst. The exhibits primarily related to phone data belonging to the defendant as well as an analysis of his access to the Digital Case System. Mr McCarthy produced the judge's recording on the sidebar of the DCS, the existence of the new material and that the advocates were discussing it.

14. (vii) - any comments made by the trial judge - there is no indication of any comment made by the judge according to the determining officer. Mr McCarthy set out in his skeleton argument three separate sidebar entries (including the one above) by HHJ Catherine Tulk, who was the trial judge throughout. In respect of the first leg, the sidebar note records:

> "10/7/23 LOCK trial commences & jury sworn
>
> 11/7/23 Legal argument
>
> 12/7/23 Legal argument
>
> 13/7/23 Jury discharged
>
> Trial refixed 9/10/23 t/e 3 weeks Reserved to HHJ Tulk"

15. As is usually the case on questions of whether proceedings should be described as a single, continuous trial or a trial and retrial, the events which occurred on the first leg are particularly important. Mr McCarthy relied upon a document which was described as counsel's attendance note but which appears, in fact, to have been produced by one of the litigators. It runs to 14 pages and records the interaction between the defendant's leading counsel and the prosecution's leading counsel. In particular, the question was raised regarding access to the DCS which the defendant was said to have had but he denied. The prosecution's attempt to provide an audit report proved to be problematic and by the afternoon of 13 July it could still not be said as to when the report would be ready. A discussion between the judge and the advocates concluded that the case would not be finished within the time allowed. Consequently, it was preferable to relist the case for 9 October 2023 when everybody would be available.

16. From the solicitors' attendance note, two things are apparent, in my view. The first is that what might be described as "substantial matters of case management" occurred during the first leg. Consequently, even if the judge's DCS note (at paragraph 14 above) was not determinative of the first hearing being a trial (which in my view it is), then I would conclude that the trial had certainly started during the first leg. As such, the determining officer's query about whether the first leg even amounted to a trial is not one I accept. I understand that, in fact, the first leg was paid as a trial previously which underlines the point that it had clearly begun in July.

17. The second point made plain by the attendance note is the tension between the defendant and leading counsel in the presentation of the case. Whilst Mr McCarthy was not in a position to confirm that the change of counsel was as a result of the defendant's request, I consider that, from the contents of the attendance note, the changing of counsel was at least as likely to have been brought about in that fashion, as for any other reason.

18. In my view, a number of the factors do not point particularly in either direction. The judge needed to order a further hearing and that is clearly achieved by the sidebar comment. But it is described as being a relisting rather than a new trial and so it is its effect is limited in terms of assisting a determination.

19. Similarly the change in counsel does not particularly assist in my view. There is no direct evidence about why there was a change. If, as I have indicated, it may have been through a disagreement between the defendant and his representation, then it does not seem to me that this assists in deciding whether the second hearing is a continuation of the first, or is a separate trial, in effect.

20. It is not clear to me, in any event, why a shorter first leg should suggest that a longer second leg was somehow a continuation of a single trial rather than a retrial. There is no explanation given in the guidance as to why this is so. It may be that once a trial is up and running for any length of time, it is less likely to require a new hearing. But if it is the case that short, abortive, first legs require further hearings, I do not see why that indicates one option rather than the other, given the myriad of reasons why the first leg ended quickly.

21. By contrast, it seems to me that the gap between the two legs is an important factor. A number of the earlier cases were adjourned for a matter of days, rather than weeks or months. Indeed it appears that at one point the difference between the continuation of a trial or the beginning of a second trial depended on whether the hiatus was for more than a single day. In this case, the gap is no less than three months and that is a considerable period of time for any professional to be expected to keep on top of factual matters and arguments. Realistically, it seems to me, a good deal of further preparation is going to be required and that further preparation is one of the hallmarks of there being a further trial rather than carrying on the original trial.

22. The final factor in this case is the stage at which the first leg concluded. The guidance refers to the case of Forsyth. That decision related to paragraph 10(1) of the Criminal Defence Service (Funding) Order 2007 albeit the wording of the relevant provision is materially the same under the 2013 Regulations. The speed of events was quite different from this case. Paragraphs 3 and 4 of Costs Judge Gordon-Saker's decision set out the background as follows:

> "3. The trial commenced on 4th January 2010. The jury was discharged the next day. A second jury was sworn on 6th January and the trial recommenced. On 12th January, the fifth day of the recommenced trial, one of the jurors informed the judge that he had been diagnosed as suffering from cancer. The second jury was discharged. The next day, Wednesday 13th January, there was legal argument about disclosure (I take that from counsel's claim) and the Judge ordered that a new jury would be empanelled on Monday 18th January.
>
> 4. A third jury was sworn on 18th January. The case was reopened and those witnesses who had already given evidence were recalled. The trial concluded on 11th February when, following legal submissions, the defendants were found not guilty of murder and, following a *Goodyear* indication, pleaded guilty to the conspiracy."

23. Given this concentrated period between 4 and 18 January, it is perhaps not surprising that the discharging of one jury and empanelling another was described as being for "administrative purposes". Moreover, that there was no change to the prosecution case or the trial as a result of the changing jury so that there was sufficient continuity for it to be considered as a single trial.

24. The appellant solicitors in Forsyth argued that a trial can follow different courses without ceasing to be a trial. The legislation did not (and does not) refer to "a trial

running its course." Costs Judge Gordon-Saker dealt with this point along with a number of others at paragraphs 20 and 21 of his judgment in the following terms:

> "20. What I continue to have difficulty with is accepting that paragraph 10(1) was intended to apply to circumstances such as those in the present case. In the ordinary way the bulk of a litigator's work in any particular case is done in advance of the trial. A retrial will not generally involve the case to be prepared again from scratch but it will probably require some additional work. Thus for the retrial the Funding Order allows the litigator a separate fee but only a proportion of the graduated fee for the initial trial.
>
> 21. I think that paragraph 10(1) is aimed at cases such as those where an order for retrial has been made following appeal or where a jury has failed to reach a verdict or where the prosecution obtains an order under s.76 Criminal Justice Act 2003. These are cases where the order for a retrial will cause some more preparation work to be done."

25. The Crown Court Fee Guidance takes the comments in paragraph 21 of Forsyth when saying that if the trial concluded and the jury was unable to reach a verdict any further trial would be considered to be a new trial. But, conversely, if the jury was discharged before all the evidence had been heard and the proceedings continued with a second jury, it would more likely be considered a single trial. The Guidance emphasises the need for the trial to have run its course i.e. the jury failing to reach a verdict so that a further trial is necessary.

26. I accept that this is a conclusion that can be drawn from paragraph 21 of Forsyth but it depends upon the assumption of the aim of the provision. In my view, paragraphs 20 and 21, when taken together, point more towards the issue of further preparation work being required when the second hearing takes place. Should such work be required then it is more likely that the second leg should be described as a retrial rather than a continuation of the original trial. Some of the other factors highlighted in the Guidance, such as the change in the case and the gap between the two hearings, also point in this direction.

27. If it is the case, as I consider it to be, that it is the need for extra work that is fundamental to this issue, then it seems to me that the point at which the first leg concluded is of little relevance. It certainly should not be limited to cases which have reached trial and a hung jury has necessitated a retrial.

28. It is often pointed out that there is no definition of a trial in the 2013 Regulations. Consequently, there are numerous decisions given as to whether a trial has started so as to enable the litigator or advocate to claim a trial fee rather than, for example a cracked trial fee. The guidance given by Spencer J in Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) provides a range of scenarios which may occur. If, for example the jury has been sworn in and the prosecution has opened its case, then a trial will have occurred even if the case ends shortly thereafter, for example, by a change to a guilty plea being proffered. A trial fee is then payable

regardless of the fact that it did not reach the end of the evidence and the jury attempting to reach a verdict.

29. In my view, a short first leg which has to conclude for procedural reasons is just as much a trial as one which reaches the stage at which the judge acquits the defendant or pronounces sentence. In this case, the need for further expert evidence precluded the case being able to finish within the allotted days provided. As apparently occurred, when a claim was made for the first hearing, the first leg was considered to amount to a trial. In deciding whether the second leg was a continuation of that trial, or should properly be described as a retrial, for the purposes of the 2013 regulations, in my judgment, the issues concerning the length of the gap between the hearings, the change in case and potentially representation are the ones which provide the clues, rather than the point at which the first hearing reached.

30. In relation to this case, there was a lengthy gap between the two hearings, a change in the prosecution's case involving new evidence and a change in the representation of the defendant. As such, I conclude that there was a retrial rather than a continuation of the original trial and the litigator's graduated fee should be recalculated on that basis.

31. Accordingly, this appeal succeeds and the claimant is entitled to the costs of the appeal.