



Neutral Citation No. [2024] EWHC 3170 (SCCO)

Case No: T20227048

SCCO Reference: SC-2024-CRI-000108

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 9 December 2024

Before:

COSTS JUDGE LEONARD

R
v
LEE

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

Appellant: **Garrick Law (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. The Appellant solicitors, Garrick Law, represented Christian Lee (“the Defendant”) in proceedings before the Crown Court at Maidstone.
2. The Defendant was legally aided, and the Appellant’s right to payment for representing the Defendant is governed by the Litigators’ Graduated Fee Scheme (“LGFS”) at Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013.
3. The question on this appeal is whether the Appellant, following the transfer of legal aid from another firm of solicitors, is entitled under Schedule 2 to a full trial fee or a 50% trial fee. The relevant provisions of the 2013 Regulations are as follows.
4. Schedule 2 starts at paragraph 1(1), with this definition:

“In this Schedule—

“case” means proceedings in the Crown Court against any one assisted person—

(a) on one or more counts of a single indictment...”

5. Paragraph 13 of Schedule 2, under the heading “Retrials and Transfers”, identifies what is payable to legal representatives for retrials and on the transfer of legal aid funding to new representatives:

“(1) Where following a trial an order is made for a retrial and the same litigator acts for the assisted person at both trials the fee payable to that litigator is—

in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and

(b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances of the retrial, in accordance with the provisions of this Schedule.

(2) Where—

(a) a case is transferred to a new litigator; or

(b) a retrial is ordered and a new litigator acts for the assisted person at the retrial,

the fee payable to the original litigator and the new litigator is a percentage of the total fee, calculated in accordance with the table following this paragraph, as appropriate to the circumstances and timing....”

6. The relevant parts of the table referred to at sub- paragraph (2) above are as follows:

<i>Scenario</i>	<i>Percentage of the total fee</i>	<i>Case type to be used to determine total fee</i>	<i>Claim period</i>
Before trial transfer (original litigator)	75%	Cracked trial	

Before trial transfer – trial (new litigator)	100%	Trial	
During trial transfer (original litigator)	100%	Trial	Claim up to and including the day before the transfer
During trial transfer (new litigator)	50%	Trial	Claim for the full trial length
Transfer before retrial (original litigator)	25%	Cracked trial	
Transfer before retrial (new litigator)	50%	Trial	Claim for the full retrial length

The Procedural History

7. The Defendant, alongside two co-defendants, faced trial on an indictment incorporating two counts: of conspiracy to fraudulently evade the prohibition on the importation of a class A drug, and of conspiracy to supply a class A drug. The Defendant pleaded not guilty to both counts at a Plea and Trial Preparation Hearing on 8 February 2024. A trial date was fixed for 15 April 2024.
8. What happened between 15 and 25 April 2024 is helpfully described in an email from the trial judge, Her Honour Judge Moore, to the Appellant, dated 31 July 2024:

“Together with his co-defendants, Mr Lee’s case was listed for trial on 15 April 2024. He was at that time represented by Kenneth Barrow & Co. A jury was sworn and put in charge of the indictment and the prosecution began to open the case. During the course of the Crown’s opening an issue arose in respect of one of the jurors. It became quite clear that for personal reasons she could not remain on the jury and, having heard submissions, she and the rest of the jury was discharged on 18 April 2024.

Because this was a case which was due to last for some weeks, I was not prepared to start the case on Friday 19th April and the case was therefore listed for trial on 22 April when I anticipated that a new jury panel would be in the building.

It was expected that the new trial would start on 22 April and the case was listed “for trial” that day. Mr Lee continued to be represented by Kenneth Barrow & Co. However, I was told that morning that Mr Lee’s representatives needed some time with him before the case could be called into court. Later that day I was told that his solicitors and counsel were professionally embarrassed and could no longer represent him. No jury had been chosen or sworn - indeed no panel even brought into court.

I adjourned the case overnight to allow Mr Lee some time to try to find alternative representation. I was told that Garrick Law might be in a position to deal with the case with fresh counsel, but there was no certainty as to the position on 22 April.

On 23rd April I transferred Legal Aid to Garrick Law and he was represented

by you and Mr Harris for the first time. Some time was allowed in the following days for instructions to be taken in the case and for the necessary preparation to be started. A jury was sworn on 25 April.

Although it is right to note that the case was listed “for trial” on 22 April, the second trial did not start before the transfer of legal aid.”

9. The trial process that got back under way on 25 April concluded with the conviction of the Defendant on 25 May 2024.

Payment and Appeal

10. The Appellant submitted to the Legal Aid Agency (“LAA”) a claim for payment of a 100% trial fee, appropriate (to adopt the terminology of the 2013 Regulations) to a new litigator on a before trial transfer. The LAA’s Determining Officer has allowed the 50% fee appropriate to a new litigator on a during trial transfer.
11. The Appellant is appealing that decision. I understand that another Determining Officer, responsible for assessing the fees of one of the advocates instructed by the Appellant, may have taken a different approach to the Determining Officer who assessed this claim. That in itself does not assist: such inconsistencies arise from time to time. I have to take my own view.
12. I should first observe that in April 2024, the Appellant firm was required to do a great deal of work in a very short time to ensure that the trial window was not lost as a consequence of the Defendant’s change of solicitors. Their efforts will have been of assistance to the court and will have benefited the public purse. Understandably, they take the view that those efforts should be recognised and adequately rewarded.
13. The 2013 Regulations, however, operate mechanistically: the fees due under those regulations may not reflect the amount of work that has had to be done by the advocate or litigant. I will explain why I have concluded that this is one of those cases.
14. The Determining Officer has paid to the Appellant the fee appropriate to a transfer during trial on the basis that the trial started on 15 April 2024 and the transfer took place on 23 April. The Defendant’s appeal from that decision relies, as I understand it, upon two lines of argument.
15. The first is that, on 15 April 2024, a trial did not begin in a meaningful way. Trial actually started on 25 April, after the transfer of Legal Aid to the Appellant. The Appellant is, accordingly, due the fee payable on a transfer before trial.
16. That argument does not assist the Appellant, because I am bound by the judgment of Spencer J in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).
17. At paragraph 96 of his judgment, following consideration of a line of authorities on the point, Spencer J identified the criteria by which the question should be determined. Paragraph 96 included this finding, at subparagraph (3):

“(3) A trial will... 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...”

18. It inevitably follows that the Defendant’s trial started on 15 April 2024, when the Prosecution opened the case. In fact, the Prosecution opening appears to have continued for more than three hours, over three days, before the jury was discharged on 18 April. That is well beyond the “very few minutes” identified by Spencer J as sufficient to start a trial.
19. The Defendant’s second line of argument is that it is right to take the view that a “new trial” began on 25 April 2024, after the transfer of Legal Aid, so that (again) the fee payable is that due on a transfer before trial.
20. I can see the logic of that argument but on the correct construction of Schedule 2, it cannot succeed.
21. I have set out above the definition of a “case” at Schedule 2, paragraph 1(1). Only one set of fees, calculated in accordance with the provisions of Schedule 2, is payable for each case.
22. The fee structure in Schedule 2 does not allow for more than one trial in any one case. It pays for only one trial, with provision for further, lesser retrial fees to be paid if appropriate. So, for example, if a trial proves abortive and there is, before the trial process gets back under way, a break in the procedural and temporal matrix sufficient to justify the conclusion that there was a second, “new” trial (see *R v Nettleton*, [2013] 1 Costs L.R. 186) then a litigator can under schedule 2 claim both a trial fee and a retrial fee, but not a second full trial fee for the “new” trial.
23. Costs Judges have recognised this for years, a recent example being the judgment of Costs Judge Brown in *R v Jamadar* [2024] EWHC 1979 (SCCO).
24. Having found (as I must) that a trial started on 15 April 2024, then only two conclusions are open to me regarding the fee payable to the Appellant. The first is that (as the Determining Officer found) the proceedings that got under way on 25 April represented a continuation of the trial that started on 15 April, so that there was a transfer during trial. The second is that a retrial started on 25 April, so that there was a transfer before retrial. In fact I agree with the Determining Officer, but it makes no difference to the Appellant because either way, the same fee is due.
25. The Appellant has referred me to the judgment of Costs Judge Whalan in *R v Charlie George* [2023] EWHC 2187 (SCCO), in which he upheld a claim for payment for both a “first trial” and a “new trial”. The claim in question was, however, made under the Advocates’ Graduated Fee Scheme at Schedule 1 to the 2013 regulations, which uses the words “new trial” rather than “re-trial” (but, as with Schedule 2, provides for a lesser fee to be paid for the “new trial”). *R v Charlie George* does not assist the Appellant.
26. For the above reasons, this appeal cannot succeed and must be dismissed.