Neutral Citation No: [2019] NIQB 25	*Ref:* **MAG10874**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **19/02/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2018 No. 102083

BETWEEN:

DEPARTMENT OF JUSTICE

Appellant;

-and-

PADRAIG TIERNAN

Respondent.

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MAGUIRE J

Introduction

[1] The court has before it an appeal initiated by the Department of Justice (hereinafter "the Department") against a decision of the Taxing Master taken in the context of taxation of criminal legal costs payable to a solicitor arising out of a criminal trial where the solicitor was acting on behalf of the defendant.

[2] At the centre of appeal is how certain provisions in the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules") should be interpreted.

[3] The particular appeal right at issue is found at Rule 15 paragraph (5) of the Rules under which the Department, if dissatisfied with the decision of the Taxing Master on an appeal to her, may appeal to the High Court against that decision.

[4] There is no dispute between the parties that on an appeal to the High Court of this nature, the role of the court is to determine the matter in question *de novo*. Mr McGleenan QC and Mr Henry appeared for the appellant and Mr Michael Duffy BL appeared for the respondent. The court is grateful to them for their helpful oral and written submissions.

The factual background

[5] It is convenient for the court to describe briefly the factual background to the appeal before going on to consider the issues of interpretation which arise.

[6] The underlying factual matrix concerns a criminal trial which took place at Newry Crown Court. The defendant at that trial was John Paul Walker and he was represented at the trial by solicitor and counsel. The defendant had the benefit of a criminal legal aid certificate. The defendant faced an indictment which contained six counts. On 7 June the defendant was arraigned before the court and pleaded "not guilty" in respect of all counts. The matter then came before the judge again on review on 12 August and later on further review on 14 September. By the latter date, there had been a development in the case. On this occasion, the judge was asked to have the defendant re-arraigned. The judge agreed to do so and on re-arraignment the defendant pleaded guilty to five of the six counts on the indictment. In respect of the remaining count, a count alleging threats to kill, it appears that the prosecution asked the court to "leave it on the books" not to be proceeded with without the consent of the Crown Court or the Court of Appeal. The judge agreed to this. The judge then fixed a date for a sentencing hearing and, in the usual way, initiated the process for procuring a pre-sentence report. The sentencing hearing took place before the judge on 20 October and the defendant, following a plea in mitigation by defence counsel, was sentenced. Thus, the criminal process in the respect of the defendant, ended, subject only to the fact that the threats to kill count in certain circumstances could, with the leave of the Crown Court or the Court of Appeal, be resurrected and later tried.

[7] Thereafter the defendant's solicitor, as would be expected, sought to recover the fees due to him under the Criminal Legal Aid Scheme. This involved him making an application to the Legal Services Agency and this was done.

[8] It is not necessary in this judgment for the court to set out all of the details of the defendant's solicitor's application, as the great bulk of the items contained in his application are not contentious. It will suffice to focus on the issue which has divided the parties, which can be summed up, succinctly, as being as to whether the solicitor was entitled to what is known, under the Rules, as a basic trial fee ("BTF") or whether, alternatively, he was entitled to a trial preparation fee ("TPF").

[9] In this case the difference, financially, between these alternatives, is the difference between a figure of £2,017 in respect of a BTF as against a figure of £1,604 in respect of a TPF – a difference of some £413.

[10] The Legal Services Agency ("LSA") considered the application administratively in due course and decided that the defendant's solicitor was entitled to a TPF but not a BTF. When notice of this was provided to him, he decided to seek a redetermination of the issue by what is known as the "Criminal

Redetermination Panel" of the Agency. This is in effect an in-house form of appeal. In fact, the defendant's solicitor attended and addressed the Panel members. The Panel, however, maintained the original decision. At this point, the defendant's solicitor exercised his right under the Rules to appeal to the Taxing Master and a notice of appeal was prepared and served on the Taxing Master and the LSA.

[11] Ultimately this led to the appeal being determined by the Taxing Master. In fact, neither the solicitor nor the LSA made representations to the Taxing Master and she appears to have dealt with the appeal as a paper exercise. The Taxing Master produced a short written decision which rehearsed the background, cited Rules 3, 20 and 26 of the Rules, and then concluded:

> "The appellant is entitled to make a claim for payment claiming a Trial Fees [sic] for the charge of threats to kill. The trial preparation fee is not the appropriate fee in the circumstances of the case where the defendant did not plead guilty to that count; it was 'left on the books'.
>
> The appellant has, as he is entitled to do, claimed the contested charge and he should be paid accordingly.
>
> … The appeal [will] be allowed."

[12] In other words, the Taxing Master considered that the defendant's solicitor was entitled to a BTF rather than a TPF.

[13] It is because the appellant is dissatisfied with this decision that it has been appealed to this court.

The Rules

[14] At the hearing before the court there were extensive references to the 2005 Rules. There was, however, general agreement that where a case, as here, falls within the notion of Standard Fees, as both sides agree they do in this case, the key provisions which apply to the calculation of solicitors' costs are those found within Schedule 1. Schedule 1 is made up of five parts which when read together form a detailed code for the calculation and assessment of costs. This descends to a high level of particularity.

[15] While there are some general sentiments referred to in the Rules – particularly in Rule 4 and Rule 8(1) - the court finds it difficult to conclude otherwise than that the payment of the standard fees for solicitors under the 2005 Rules can properly be described as a "rules based system".

[16] One rule, about which there was no controversy, was Rule 20. It was agreed that paragraph (1) of it applied in this case. It reads:

> "(1) Where an assisted person was charged with more than one offence on one indictment, the standard fee payable shall be based on whichever of those offences he shall select for the purpose."

[17] The effect of this Rule, when applied to the solicitor in this case, was that he was perfectly entitled under Rule 20 to select the count on his client's indictment which he could use for the purpose of establishing the standard fee payable to him. The solicitor chose the threats to kill count referred to above and in these proceedings there has been no suggestion that, in doing so, he was in anyway acting improperly. In short, he is entitled to opt for the count which, in his view, maximises his financial advantage and to do so is not an abuse of the Rules but is simply him making use of the Rules, as he is entitled to do, as indeed the Taxing Master acknowledged in her decision.

[18] The most important provisions in the Rules for present purposes are all found within Schedule 1 and are set out below:

(i) As regards a TPF para 3(3).

(ii) As regards a BTF para 3(4).

(iii) By way of elucidation of (1) and (2) above para 3(5).

(iv) Within Part V (Miscellaneous) the provision found at para 26.

[19] For ease of reference the court will set these out:

> "3(3) A [trial preparation fee] shall be payable … in a case where the assisted person pleaded guilty to one or more counts after the first arraignment but before the end of the first day of trial and the trial did not proceed further.
>
> 3(4) A basic trial fee shall only be payable where the assisted person pleaded not guilty to one or more counts and the trial proceeded beyond the first day of trial (or was otherwise completed as a trial within one day).
>
> 3(5) For the purpose of sub-paragraphs (3) and (4) a day shall not be considered as the first full day of trial

unless the prosecution has opened its case and the first prosecution witness has begun to give evidence.

26. Any case in which:

(a) The prosecution offered no evidence (or no further evidence) and which was discontinued, or

(b) The prosecution entered a nolle prosequi,

shall be treated as a substantive trial and a basic trial fee, together with refresher fees, if applicable, shall be payable in accordance with paragraphs 6 and 7."

[20] For completeness, the court will advert momentarily to another concept within paragraph 3 and that is the concept of a "guilty plea fee". This fee is an important part of the scheme of payment within the Rules but, as is self-evident from its terms, it has no application to the case before the court. A guilty plea fee, it is noted in paragraph 3(3) "shall be payable in a case where the assisted person pleaded guilty to one or more counts at the first arraignment … and the case did not proceed to trial". As the defendant in the present case pleaded not guilty at first arraignment, it was accepted on all sides that there was no basis for the payment of a guilty plea fee in this case. No more, therefore, need be said in this judgment about it.

[21] From the foregoing it is possible to understand more fully what was the Taxing Master's rationale for her decision to allow the solicitor's appeal to her against the view of the Criminal Redetermination Panel of the Agency. That rationale appears to be that the governing provision in this case was neither paragraph 3(3) nor paragraph 3(4) but was paragraph 26(a). The implicit holding of the Master appears to have been that the case under consideration was one where the prosecution offered no evidence in relation to the threats to kill charge and that the correct way in which to view the matter is that the prosecution was discontinued. If the above is correct, it follows that the requirements of 26(a) are fulfilled, so that the proceedings at issue shall be treated as a substantive trial and a basic trial fee shall be payable.

The appellant's case

[22] While the appellant's case has been presented *via* its skeleton argument at some considerable length and the court has carefully considered it, it is unnecessary for the court to seek to replicate in this judgment every point made. Instead, the court will attempt, with no disrespect intended to counsel, to sum up the defendant's main arguments succinctly.

[23] The main points can be captured as follows:

- The court is considering the position where a charge is left on the books and is dealing with a common situation ("used on a daily basis").
- A TPF has the object of rewarding remuneratory work done in preparation for a trial, even though ultimately there is no trial. That is this case.
- In contrast a BTF is intended for use when there actually is a trial.
- A BTF is, therefore, contra-indicated in this case.
- The court should concentrate on the terms found in paragraph 3 of Schedule 1. Therein lies the answer.
- It should not allow para 3 to be bypassed by going straight to para 26(a).
- Para 26(a) was not intended to deal with this case, though it is accepted that a layman might think it was.
- This is not a case, for the purpose of para 26(a) of the prosecution "offering no evidence".
- There was no verdict in this case and therefore there was no trial.
- The court should keep in mind that para 3 is the key provision. As regards the BTF the language used is that it shall only be paid in accordance with the words found in para 3(4).
- If the Taxing Master's interpretation was correct, it would allow absurdities and inconsistencies to appear frequently.
- The court should prefer a "less offensive" interpretation where another interpretation would lead to absurdity or inconsistency.
- The Taxing Master's interpretation of 26(a) departs from the basic structure of the legislation.
- The Master's interpretation will allow lawyers who have undertaken lesser amounts of work to receive greater payments than those in other cases who have undertaken significantly more work.

The respondent's case

[24] As might be expected, the respondent's case seeks strongly to support the view of the case adopted by the Taxing Master. As before the court, while having considered the respondent's skeleton argument in detail, is of the view that, with no disrespect intended to counsel, it should only seek to summarise the essence of the response made by the respondent.

[25] The main points can be captured as follows:

- The system for remuneration of solicitors found in the Rules is a rule based one.

- Contrary to earlier schemes for dealing with these general issues, the Rules now found in the legislation seek to be highly specific and can properly be viewed as operating on a "swings and roundabouts" basis.
- This will mean that there will be on occasions anomalies but these ought to be dealt with by regular reviews and, if necessary, amending legislation.
- Consequently, the role of the court should be to simply give effect to the language used in the Rules – no more and no less.
- In this case, the language used within para 26 of Schedule 1 is clear.
- This case plainly falls within paragraph 26 which is designed to deal with circumstances which do not neatly fit into the primary definitions found in Schedule 1.
- Accordingly, the Taxing Master's interpretation in this case was correct and the appeal should be dismissed.

The court's assessment

[26] The court accepts, as the starting point, that the scheme found in 2005 Rules is designed to deal in detail with how solicitors (and counsel) are to be remunerated for the work they do when their client has had the benefit of a criminal aid certificate. It seems appropriate to accept the description that what the legislation represents is a "rule based system" which, like any system of this type, from the point of view of the payor and payee alike, will have its swings and roundabouts.

[27] The detail in the Rules is exceptional and the intention appears to be to provide a specification of what is payable in respect of the great bulk of situations which may arise.

[28] It seems to the court, therefore, that every rule and paragraph is intended to have a function.

[29] Undoubtedly, it is correct that para 3 is intended to deal with the operative rules for the generality of Crown Court cases but it does not follow from this that it will provide the answer in every case, even though, as has been pointed out, Rule 3(4), dealing with the definition of a basic trial fee, says that it "shall only be payable" in the case set out in that paragraph. As will be seen later, there are other provisions in the Rules which ultimately involve the payment of a basic trial fee outside paragraph 3.

[30] It is also useful to stand back and bear in mind that the Rules are written in plain language and accordingly ordinarily should be given their natural meaning. In particular, it seems to the court that it should seek to avoid stretching the language unduly in order to promote any particular outcome. If, on a straightforward reading of the provision, a payment should be made, even if there are arguments which can be made against interpreting the provision in that way, the court should be wary

about trying itself to find a way around it. After all, the Rules, if inconvenient, can relatively easily be the subject of amendment if this is necessary.

[31] In the court's view, there are three possible applicable provisions in this case. These are:

(a) Para 3(3) dealing with a trial preparation fee.

(b) Para 3(4) dealing with the basic trial fee.

(c) Para 26(a).

[32] To come within this provision, two tests must be satisfied:

(1) It must be a case where the assisted person pleaded guilty to one or more counts after the first arraignment but before the end of the first full day of trial.

(2) It must be a case where the trial did not proceed further.

On the face of it, it is not entirely clear that both of these conditions are satisfied. While no real question mark can be raised in respect of (1) it seems to the court that it is possible that there could be some debate about what is meant by the wording that the trial 'did not proceed further'.

[33] However, it may be that both conditions are satisfied and that it is correct to say that the trial did not proceed further, though the court will do no more than make an assumption (without deciding) to this effect.

[34] As regards (b), it appears that to come within it two tests must be satisfied:

(1) It must be a case where the assisted person has pleaded not guilty to one or more counts.

(2) It must be a case where the trial proceeded beyond the first full day of trial (or was otherwise completed as a trial within one day).

On the face of it, there appears to be no problem in respect of satisfying (1), but it is not easy to see how (2) is satisfied as the trial has not proceeded beyond the first day and it has not completed, at least on one view, within one day. It has not completed in that (a) it has not started (b) no verdict has been arrived at and (c) there remains the possibility that the offence which has been left on the books could yet be proceeded with with the leave of the Crown Court or the Court of Appeal.

[35] Finally, as regards 26(a) the tests which have to be satisfied are that:

(1) It is a case where the prosecution offered no evidence (or no further evidence).

(2) It is a case which was discontinued.

[36] On the face of it, it would appear that the prosecution has offered no evidence in respect of the threats to kill charge and that it is a case which has been discontinued in the sense that while it has produced no conclusion it could nevertheless be re-continued at a later point if leave was granted by the Crown Court or the Court of Appeal.

[37] The court finds it difficult to accept the appellant's argument to the contrary. The various provisions have to read against the backdrop of rule 20. The situation thus is one in which the solicitor is entitled to stipulate the charge upon which his fee is to be based. In this case that charge was the threats to kill charge which was left on the books. In respect of that charge the prosecution has (to date) offered no evidence, though one assumes they could have offered such evidence if they had wished to. In a practical sense, the matter has been discontinued, though both parties accept that with the leave of the Crown Court or Court of Appeal it could be re-continued at a later date. The word 'discontinued', it seems to the court, is wide enough to embrace the possibility of re-continuance at a later date[1].

[38] The choice of the word 'discontinued' (as opposed to 'ended' or 'terminated' or 'concluded') also seems to the court to be telling as it is pin-pointing a very particular situation. Leaving a charge or charges on the books is such a particular situation.

[39] The context in which paragraph 26(a) is found is also of interest. It is instructive to note that paragraph 26(b) deals with what reasonably may be viewed as an allied situation to that which is dealt with in 26(a)[2]. This is a situation where the prosecution has entered a '*nolle prosequi*'. The consequence of this, in accordance with Schedule 1, is the same as the consequence which arises if the terms of 26(a) are fulfilled *viz* that the case is then treated as a substantive trial and a Basic Trial Fee

[1] For example, Donovan J, speaking of the word 'discontinued' in Postill v East Riding CC [1956] 2 AER 685 said at p.688: "I add only this, that the word 'discontinued' does not necessarily mean permanently discontinued. One discontinues many things that may be discontinued only for a time, and when one resumes what one has discontinued it does not mean that there has never been any discontinuance. There has been a discontinuance followed by a revival or resumption…'.

[2] In both cases the initiative rests with the prosecution and in both cases the result is no evidence is called. The differences appear to be that the court's permission is required where the proposal is to leave a charge or charges on the books whereas this is not required where a nolle prosequi is deployed. Further in the former situation the prosecution can later (with the leave of the court or Court of Appeal) re-activate the particular charge in question whereas a fresh charge would have to be preferred if the prosecution later wished to resurrect a charge which had been the subject of a nolle prosequi. There is a helpful discussion of methods of terminating Crown Court proceedings by the prosecution in Re Graham's Application [2012] NIQB 80 per Girvan LJ at paras [15]-[20].

shall be payable. Having the two situations dealt with in the same paragraph is unlikely to have been coincidental. Moreover, it is a well-established approach to construction of a statute that arriving at the meaning of a particular term can be assisted by considering other words or situations with which it is associated.

[40] It seems to the court that paragraph 26(a) may reasonably be viewed as containing a provision which appears to be closely tailored to the circumstances of a case of this sort where the prosecution apply successfully to have a particular charge or charges left on the books.

[41] If this is correct, the court is left to decide whether it should prefer, as the provision which applies in this appeal, paragraph 26(a) over paragraph 3(3) or *vice versa*. Given these choices, the court has little doubt that it should prefer the former, as it appears to be the provision which most closely meets the requirements of this case, over that found in paragraph 3(3), which may be viewed as a more general provision.

[42] In the light of the court's view above, the court has asked itself whether there is any convincing reason why it should not give effect to it. In this regard, it has considered all of the points made by the appellant but ultimately it is unpersuaded by them. In particular, and without trying to deal *seriatim* with every point made, it is the court's view that:

- If its analysis is sound, it should not be diverted from following it because the situation of leaving charges on the books may be common.
- If the words used in paragraph 26 do indeed cover the case it would be unsound for the court to deny them their meaning on the basis of general policy considerations which may or may not be of importance when dealing with the particular situation before the court.
- Where the rules have included a provision which appears closely tailored to a situation it would be inappropriate to by-pass it by applying a general provision rather than the other way round.
- The court is unconvinced that applying paragraph 26 in the manner it considers to be appropriate would give rise to absurdity or inconsistency of a degree which would merit the court altering its view. This is especially so as it is clear that the view taken by the taxing master in this case had been taken by her in other cases as well and these were not appealed.
- The court does not perceive the interpretation it favours in this case to be an offensive one.
- Invocation of the 'basic structure' of the legislation is of limited weight given the court's view that the legislation contains a rules based scheme which contains swings and roundabouts.

Conclusion

[43] The court upholds the decision of the Taxing Master and dismisses the appellant's appeal.