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IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 11/11//2022

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Abada

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

CARSON KAYE SOLICITORS (1)
RIA BANERJEE (2)
JAMES MARTIN (3)

Appellants

-and-

THE LORD CHANCELLOR

Respondent

1. This is my decision in all three appeals. The third appeal, brought by Mr. Martin, was lodged out of time. An extension of time sought by him to bring the appeal was not opposed and I grant it. However all three appeals have been unsuccessful for the reasons set out below.

2. The issue arising in all the appeals is whether under the provisions of the Legal Aid (Remuneration) Regulations 2013 ('the AGFS'/the '2013 Regulations') the Appellants are entitled to two separate fees in circumstances where two indictments were joined to form one indictment. The Appellants have been paid a fee on the basis that there was one indictment and one case.

3. At the hearings on 26 October and 9 November 2022, which took place by video link, the First and Second Appellants were represented by the third Appellant, Mr Martin, Counsel. The Respondent was represented by Mr. Orde who is an employed lawyer. There were matters which I thought had not been adequately addressed at the first hearing and I required a further short hearing on 9 November to consider some of the queries that I had following the first.

4. Although there was some debate about the number of representation orders made in this case and the 'T' numbers attributed to them, I have seen in the last bundle[1] (of the three submitted) that a Representation Order was made for the benefit of the Defendant in July 2020 in respect of other solicitors. I understand from a document lodged on Ce-file by the First Appellant that that on 19 April 2021 the First Appellant was substituted for these solicitors and thus had the benefit of the order. That order was amended to authorise the instruction of two junior counsel on 8 September 2021.

5. The background to the matter is complicated and the nature of the case that has been put has changed over time in the course of the appeal (indeed between the two hearings in the appeal).

6. I am told that in the initial stages of the criminal proceedings there were multiple joinders of indictments in relation to different defendants. The important factual position so far as is relevant to this appeal (and as it was put at the final hearing of the appeal) was that the Defendant at one stage faced two indictments: one indictment, 'B3' with case number T2021782, included a court of conspiracy to supply Class A drugs with three defendants; and another separate indictment, 'B6' with case number T20217125, which included a count of conspiracy to commit robbery and various others offences with two other and quite different defendants. This, I understand. to be agreed for current purposes. It is also common ground that the indictments were joined on 8 June 2021.

7. Although I was given no clear history of the matter I understand that the joined indictment went through further amendments. At a later date, two indictments (referred to as 'B11' and 'B12'), were said to have been preferred against the Defendant. The difference between the two was, as I understand it, that in respect of one count of a conspiracy (Count 3, it appears) there were in the later version (B12) the words "*and others unknown*" which were not in B11. Thus, whilst B11 alleged what was referred to as a 'closed' conspiracy, B12 alleged an 'open' conspiracy,

8. The Defendant pleaded guilty on 20 October 2021 and the matter was listed for sentence on 10 and 11 January 2022. There was a dispute as to the amount of Class A drugs which were subject of at least some of the counts. That issue was resolved on submissions from both sides on the evidence of a witness Mark Wright. On the second day of the hearing, after final submissions, the judge, I understand, found in favour of the of the Defendant. The

[1]Labelled 'Full File Solicitors Carson Kaye Updated and Final'

hearing was considered a 'Newton hearing' within the meaning of the relevant provisions of the AGFS such that the Appellants were entitled to a fee calculated on the basis of a trial.

9. I understand that an issue arose as to whether the Defedant was sentenced on the basis of indicment B11 or indicment B12 following which it was confirmed that B11 was the indictment against which the pleas were taken. It appears from the written reasons in the second third appeals, indictement B12 was formally quashed. Mr. Martin's Note suggests other indictments were also quashed at this stage.

10. Initially in this appeal it was said that the two indictments B11 and and B12, were separate indictments and that these two indictments gave rise to two separate cases and it was on this basis that a claim was made for a second fee; alternatively, it was said in the appeal of the second and third appeals, that there were other indictments giving rise to two separate cases and hence, it was said, an entitlement to two fees.

11. Shortly before the appeal hearing on 26 October 2002 what appeared to be the Appellants' primary case (that indictments B11 and B12 gave rise to separate cases) was abandoned and at the first appeal hearing the only case that was argued that the existence of two separate indictments one of the referred to as 'B1' and the other, B3, meant there were two cases. In the final submissions however the material indicments for the contention that there were two separate cases by virtue of there being two indictments were those I have identified above, B3 and B6 and it is in respect of these separate indictments that the arguments were ultimately focussed.

12. According to the Determining Officer in the first appeal the additional fees sought by the First Appellants are £29,664.55. (including VAT). This is on the basis that there was a second case in respect of which a 'cracked fee' is due. I should however say that this figure was not verified to me nor was I told what the fees additional fees claimed were for counsel. Neither party was able to tell me at the hearing the amount of fees at stake in the second and third appeals. In any event I understand that substantial sums are at stake.

13. In their written reasons the Determining Officers allowed only one trial fee for each of the Appellants and it is from these decisions which the Appellants appeal. Both Determining Officers decided that there was only one case for the purposes of the AGFS and refused the claim for a fee in relation to what is said to be a stayed indictment (referring, it appears, to indictment B12). They both addressed the issue as to indictments B11 and B12 gave rise to a separate cases, a point which is not longer pursued. But it is perhaps helpful to look at the reasons given by the Officers

14. The Determining Officer in the first appeal said where defendants are joined to one indictment or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, there was one case and the litigator may claim one fee. He held that this is what appeared to have taken place in this case, and all the indictments were consolidated to form one indictment and form one case. He commented that there appeared to have been no significant changes to the presentation of the case, and that the indictments were stayed in order to make amendments and join co-defendants under one single indictment and add additional counts. Further, he said, that it seemed reasonably clear that the court simply amended the indictment a number of times, and each time this happened, a clean/new version of the amended indictment was uploaded to the DCS resulting in a defence request that the earlier version of the indictment be stayed.

15. The Determining Officer in the second and third appeals said that the indictments were substantially the same, and that in any event she preferred a line of decisions by Costs Judges, which I will refer to below, to the effect that where two indictments are effectively joined, whether the court prefers new indictments and quashes another or formally joins two indictments, there is only one indictment and one case. She held that there was no prospect of the Defendant ever having faced the alternative indictment B12.

16. Both the second and third Appellants had, prior to the written reasons of the Determining Officers, been paid a separate an additional fee (on top of the trial fee) on the authorisation of a Case Worker, so it would appear, on the basis that there were two separate indictments with different charges. If the subsequent decisions of the Determining Officers are correct then these payments were made in error and are subject to recoupment under the 2013 Regulations.

Legislation

17. Schedule 1 and Schedule 2 of the 2013 Regulations applied to the Second and the Third Appellants (as 'advocates') and the first Appellant (as 'litigator') respectively. Both provisions provides the following:

> ***Interpretation***
> ….
> *"case" means proceedings in the Crown Court against any one assisted person—*
> *(a) on one or more counts of a single indictment;*
> *…*

The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each "case".

Guidance

18. I have also been referred to the applicable Crown Fee Court Guidance which provides at para. 2.2. and 2.3 as follows:

> *A case is defined as proceedings against a single person on a single indictment regardless of the number of counts. If counts have been severed so that two or more counts are to be dealt with separately, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees. [2]*
>
> *Conversely where defendants are joined onto one indictment or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, this would be considered to be one case and the litigator may claim one fee. Refer to Costs Judge decision: Eddowes, Perry, and Osbourne (2011) which held that in cases involving multiple defendants represented by the same solicitor one claim should be submitted with the appropriate uplift for the relevant number of defendants. [3]*

19. I remind myself that this is just guidance for those who operate the scheme on a day to day basis and is not a source of law.

Previous decisions

20. It was made clear in *R v Eddowes, Perry, and Osbourne* [2011] EWHC 420 (QB) that where multiple defendants are tried together on the same indictment payment is to be made on the basis that there was one case; this is notwithstanding that the different defendants may allocated different case numbers. The judge in that case. Spencer J, said this:

> *The definition of "case" in para 1(1) of the Schedule cannot possibly lead to the conclusion that if a litigator represents seven defendants charged and tried on the same indictment that litigator is entitled to be paid on the basis of seven separate cases, each calculated identically, producing remuneration totalling seven times the amount the litigator would be paid for representing just one of those defendants. Such an interpretation would not only be nonsensical but would make wholly redundant the concept of and requirement for "defendant uplifts" provided for in the Scheme.*

21. As to the allocation of different case numbers the learned judge went on to say this this:

> *41. Nowhere in the provisions of Schedule 2 (or in the Funding Order generally) is there any mention of case numbers, i.e. the "T" numbers allocated to a case by the CREST case management system at the Crown Court. For the reasons already explained the allocation of case numbers is a purely administrative act which cannot conceivably have any bearing upon the proper interpretation of the Scheme provided for in Schedule 2 . No doubt it has been convenient administratively for fee claims to be processed by reference to case numbers but, as the present appeal demonstrates, the allocation of case numbers can be and often is entirely random, bearing no relation to the realities of the form in which the proceedings on indictment take place or the way in which the litigator prepares for those proceedings.*
>
> *42. It follows that there is no justification whatsoever for treating as the touchstone for the basis of remuneration the case numbers randomly allocated at the Crown Court as a purely administrative function. It appears that it was by pure chance that EPO found themselves representing four of their defendants under one case number, and their other three defendants under three separate case numbers. The proper calculation and payment of substantial public funds cannot be governed by chance.*

22. In respect of earlier Crown Court fees guidance (similar if not the same as that which I have set out above), the judge said that it "*did, at least seem to confirm the principle that where defendants are joined in one indictments, one claim and one claim only should be made by that litigator in respect of the indictment*."

23. Following this decision two different approaches emerged in a series of decisions by Costs Judges in the situation where multiple indictments were preferred, in particular where rather than formally joining two or more indictments in the manner envisaged by the Crown Court Fee Guidance, a judge prefers a fresh indictment and stays the existing indictments and then following trial or sentence the stayed indictments are quashed. Although I have been referred to a large number of decisions on this point, but as appears below I am not at all sure that they provide a complete answer to the issue that now arises in this appeal (as Mr. Orde first appeared to suggest). I will address the decisions briefly.

24. In *R v Hussain & Others* [2011] 4 Costs LR 689, it appears that there had been four indictments against the same defendant. Indictments 1 and 2 ("the second indictment") had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 ("the third indictment"), which went to trial and resulted in a conviction. Costs Judge Gordon-Saker (as he then was, now the Senior Costs Judge) held that where there been had been more than one indictment and no joinder there were two cases and two fees were due. He said this:

> *15. Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the prosecution to elect which will proceed to trial: Practice Direction (Criminal Proceedings: Consolidation), para IV.34.2.*
>
> *……*
>
> *18. It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, <u>there were two indictments which were not joined</u>, then there must be two cases and two fees.*
>
> [my underlining]

25. Costs Judge Whalan took essentially same approach in *R v Ayomanor* SC-2021-CRI-000146 and *R v Mohamed* SC-2020-CRI-000179: In the latter, the judge said this:

> *" Where…. the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable."*

26. However that approach was not followed by others including myself (see by way of examples, *R v Arbas- Khan* [2019] SCCO Ref: 219/18, and the decisions of Costs Judge Rowley in *R v Hall* SC-2020-CRI -000225 and *R v Wharton* [2021] SC-2021-CRI-000195). Whilst it is plain that preferring a new consolidated indictment, staying old indictments and then quashing them might look different from the joinder of indictments there was no difference as a matter of law and fact. As Costs Judge Leonard commented in *R v Nash* [2020] SC-2020-CRI- 000177, agreeing with the approach set out in *Arbas- Khan*, that it may be that the practice of preferring new indictments of what were effectively joined indictments had come about as a matter of prudence and caution, this could not affect the position where as a matter of fact and law, the indictments had been joined.

27. That there was no practical difference in practice between the two processes was, as I I understand it, confirmed by enquiries made by Costs Judge Rowley of the judge in the criminal proceedings who had made an order to stay an indictment and prefer a indictment in *R v Wharton* (see para 10) (see too *R v Hall* at para. 19). This appears to have persuaded Costs Judge Whalan in *R v. Gary Moore* [2022] EWHC 1659 (SCCO) to take a different approach from that which had previously taken.

28. One of the difficulties with the approach set out in *Hussain*, as I see it, it that every time previously separate indictments (with different defendants or with same defendant but

different charges, or variations of this nature) are followed by a new indictment and there was a stay this was liable to create a new case. The amendment of indictments, indeed severance of indictments (on the ground, for instances, there were too many defendants such that a trial was unwieldy) or joinder might be regarded as reasonably commonplace. Indeed joinder or severance could conceivably occur on multiple occasions and this could lead to not just one additional fee but multiple additional fees for was what was, at least in substance, one case (as indicated in *Arbas Khan* see para. 27; see too *R v Hall* para. 18 and SC- *R v Ghafoor* SC-2021-CRI 000132)- a situation which Costs Judge Rowley suggested in *Hall* would be absurd.

The contentions in this appeal

29. As I understand tit, he Appellants do not take issue with this this latter approach ie the one in *Arbas Khan/ Wharton* etc. In any event I see no reason to depart from it. I note however in passing that the other approach, which might be said to attach importance to the form in which orders are made, nevertheless proceeds on the understanding that where there is a formal joinder of two indictments there is then only one indictment and one case (as my underlining of the citation from *R v Hussain*, above, sought to indicate). So, despite the extensive reference to these decisions I am not sure that either line of decisions is particularly helpful to the Appellants in circumstances where it is agreed as I understand it, that there was formal joinder of B3 and B6.

30. As I understand it the Appellants' argument is in effect that whilst joinder gives rise to one indictment the Determining Officer should consider the position before the joinder took place. At that point there were in the circumstances outlined two separate indictments. Alternatively, as I understand it, notwithstanding joinder there were two indictments - one that was amended and on the other was stayed. This situation, they say, is different from the position in *Eddowes* where there were different defendants on different indictments: the Defendant Abada faced both indictments which contained different charges involved different co-conspirators, over different periods of time and relying, he says, on quite different evidence; they were in substance different cases.

31. Mr Martin relied on the following passage in *Arbas Khan* to support his arguments*:*
> *"In my judgement I am required to consider what happened as a matter of law: as to that, I think, for the reasons set out above, that there was only one indictment against the Defendant which was joined with others on 7 April 2017; and thus, as a matter of law, there was only one case against this Defendant."*

It is said what underlies the approach in that case is that whilst joinder did not *create* a new indictment following what is said to be the logic of that decision there was at one stage two indictments, which are said to give rise be two very different sets of proceedings as against one Defendant notwithstanding a later merger. In this instance there were two indictments, B3 and B6, with different case numbers and these were two different cases. Alternatively, as I think it is also put, where one indictment is amended to add the contents of the other, the other remains in existence until it is quashed.

32. I was taken to the detail of the two indictments. In B3 (number 20207125) there was one count against the defendant Abada, a conspiracy to supply a controlled drug Class A, being crack cocaine, with other defendants Bukhaarki, Foster and Merouche between 3 March 2020 and 20 March 2020. B6 (number T20217082) alleged a conspiracy to possess a firearm

with other defendants Hussain and Evans between 6 May 2020 and 25 June 2020 (count 1), a conspiracy to supply a controlled class A drug, heroin, with Hussain and Evans between 28 March 2020 and 26 May 2020 (count 2), conspiracy to supply a controlled Class A drug, cocaine, with Hussain and Evans between 12 March 2020 and 26 May 2020 (Count 3), conspiracy to rob with Hussain on 29 July 2019 and 4 August 2019 (count 4), having a firearm with intent with Hussain (count 5), having an offensive weapon with Hussain (count 6) and doing an act tending to pervert the course of justice on 30 July 2019 (count 7).

33. Mr Martin also sought to draw further support from the passage cited above in *Mohamed* and the following *R v Ayomanor* 2021 SC-2020-CRI-000146:

> *"This was not a case of amendment or joinder, nor can it be described as mere 'house-keeping', but rather a case of two indictments, the latter being a substitute for the former when the former was quashed."*

Decision

34. I think the answer is clear. To my mind it is plain that the 2013 Regulations cannot be read in the way contended for by the Appellants. At the stage where there were two indictments, B3 and B6, the position was inchoate and liable to change. The effect of the joinder was that there was one indictment and one case under the scheme. There was no effective indictment that left stayed as the two indictments were joined to one. It is accepted as I understand I that subsequent amendments leading to B11 did not give rise to further cases. The case following joinder effectively therefore proceeded to a Newton hearing on the joined indictment and the trial fee has been paid on the basis of the joined indictment (not simply on either B3 or B6).

35. It seems to me that it plainly cannot be right for a trial fee to be payable on the basis of joined indictment and further fee to be payable for this same case on the basis that it was a 'cracked trial'. In considering whether there was one case the Determining Officers have to look what happened in the case to determine the fee due. They cannot be expected to divide up or unpick what was joined.

36. I do not think there is any room for the evaluative approach which Mr. Martin asked me to take; that is to consider whether the case in one indictment was substantially different from the allegations that were put in another indictment at some other earlier stage (and the evidence relied upon). Indeed resort to such an approach seems to be inimical to the mechanical nature of the scheme, a matter which would appear to confirm the correctness of the approach taken by the Determining Officers. Accordingly it is not necessary for me to make further enquiries with the trial judge to ascertain the circumstances in which the B3 and B6 were joined and the extent to which indictments B3 and B6 relied on different evidence.

37. Moreover, as was illustrated in argument it is plain that there would be substantial difficulties administering the scheme if one were to take the approach that Mr. Martin was advocating: the Determining Officer might, for instance, have to investigate, in the case of a litigator's claim for payment whether the pages of prosecution evidence ('PPE') (which may well in this case be factor in determining a fee) was attributable to one or other of the cases pre-joinder. Plainly this approach would not fit with the mechanical nature of the scheme.

38. I had some difficulty seeing how the reasoning in my decision in *Arbas Khan* could provide support for the contention that there were more than one case for the purpose of

payment in this case. In that case I had said that the effect of the joinder was that the previous allegations against the different defendants were joined into one indictment. The effect of the joinder might also be said to be subsume previous allegations into one, not that it left open other indictments that have to be stayed.

39. It is true that there is a possible distinction to be made between the joining of indictments against two different defendants and the joining of indictment with different changes against one defendant. But to my mind it makes no difference to the proper approach for current purposes. Moreover if the Appellants were right it is not clear to me why advocates and litigators could not get two fees where they represented two defendants in circumstances where separate indictments against two different defendants were joined, contrary to the guidance in *Eddowes*.

40. Further, it is clear from the passages in *Eddowes* that I have referred to above, that the use of different 'T' numbers for cases does not assist Mr. Martin's arguments (neither in respect of their use on indictments nor representation orders – even assuming that he was right in submitting that there were other such orders I had seen). Nor in my view do the passages which he refer to in *Mohamed* and *Ayomanor*: these cases address a different point, ie the two schools of thought referred to above, whereas in this instance the relevant indictments were formally joined.

41. Even if I were to make the assumption that it was appropriate to look at either B3 or B6 as separate cases it was unclear to me, looking at the rules, how the determination of the second fee due on the additional case could fall to be treated as a 'cracked trial' (in circumstances where the allegation which formed the basis of one of the indictments was joined to an indictment which led to one Newton hearing). Schedules 1 and 2 provide 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];*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person 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;*

42. After I raised this matter, Mr. Martin submitted that rather than a separate 'cracked fee' being payable a separate trial fee was payable. It is, to say the least, difficult to reconcile any entitlement to such a fee with the fact that the Appellants have already received a trial fee for the joined indictment.

43. To my mind there is nothing obviously unfair about the outcome the Determining Officers reached. The legal representatives have been paid for the case on the indictments as joined. As I understand it the fact that indictments had to be joined did not seem to give rise to any extra work that is not ordinarily covered by the graduated fee. As I think others have commented amendments to cases, joinder and severance are an ordinary incidence of case management. I would add that it would seem from the amendment to the Representation Order in September 2021, that in this case at least one of the Appellant advocates was not instructed in the case at a point prior to the relevant joinder.

44. Further, it would not, it seems to me, matter that on these particular facts the indictment as joined did not (at least as I was told) justify a higher fee under the Banding Scheme than each indictment would if they gave rise to a separate case following separate Newton hearings: that is an outcome which flows from the nature of the graduated fee scheme. Nor, it seems to me would it matter, as Mr. Martin suggested, if the allegations (on these particulars facts) could not initially have been drafted as one indictment (albeit it is perhaps difficult to see why they could not, at least in principle).

45. If however the Appellants were right it would lead, it seems to me, to the same problem identified above: that multiple fees could be claimed for what in substance was one case.

46. None of this detracts from the position which arises where an indictment is quashed in circumstances such as in *R v Sharif* [2014] SCCO Ref 168/13 where that the prosecution has essentially to start again, and where two fees may clearly be claimed.

47. It follows, I assume, although there has been no argument specifically addressing this issue, that there should be recovery of overpayment under regulation 25 of schedule 1 in respect of the Advocates' claims.

COSTS JUDGE BROWN