Neutral Citation No. [2024] EWHC 22 (SCCO)

Case No: T20210648

SCCO Reference: SC-2023-CRI-000053

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 8th January 2024

Before:

COSTS JUDGE WHALAN

R
v
GORDON LAMONBY

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

Appellants: Alatf Solicitors

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

The appropriate additional payment, to which should be added the £100 paid on appeal, and assessed costs of £1,000.00 (+ any VAT payable), should accordingly be made to the Appellants.

Costs Judge Whalan

Introduction

1. Altaf Solicitors ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the fee allowed for the hearing on 28th July 2022 should be paid as a trial, as claimed or as a 'cracked trial', as allowed.

Background

2. Mr Gordon Lamonby ('the Defendant') was charged at Bradford Crown Court on an indictment alleging three counts of making indecent photographs of children. He pleaded not guilty at a Pre-trial Preparation Hearing on 10th September 2021 and his trial was listed on 28th July 2022, with a time estimate of two days. The prosecution alleged that the Defendant had been searching the internet and downloading numerous indecent pornographic images. His defence was that he had downloaded images which were pornographic but not unlawful. Both sides instructed experts, whose evidence was directed towards whether or not the images were unlawful. At the PTPH the court made a direction that there should be a meeting of experts no less than fourteen days before trial, with the production of a joint expert report.

3. On 28th July the parties attended court for trial. However, contrary to the court's direction, there had been no meeting of experts prior to the trial. Accordingly, HHJ Burn ordered that the experts meet and prepare a report that morning, with the start of the trial adjourned until the afternoon. During the short adjournment, but prior to the process of producing a joint experts' report, both prosecution and defence counsel were allowed to question the experts. Ultimately a joint report was prepared, which essentially exonerated the Defendant. That afternoon, therefore, the prosecution offered no evidence against the Defendant on all three counts, and he was formally acquitted.

The Regulations

4. The applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended.

5. The Determining Officer cites paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations, which states:

> "*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places 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 plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place…*

Case Guidance

6. I was referred by both the Appellant and the Respondent to the guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

> *96. I would summarise the relevant principles as follows:*

(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 the 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) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the 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 and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (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 practise 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 purpose of the graduated fee schemes. It will 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 began, 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.

7. I am referred additionally to R v. Fallah [2019] SCCO Ref: 281/18 and R v. Barnes [2022] EWHC 1539 (SCCO).

The submissions

8. The Respondent's case is set out in Written Reasons dated 17th May 2023 and in Written Submissions drafted by Ms Francesca Weisman and dated 14th December 2023. The Appellants' case is set out in the Grounds of Appeal and in a Skeleton Argument dated 4th December 21023. Mr Wells, counsel, represented the Appellants at the oral hearing on 15th December 2023.

My analysis and conclusions

9. The Respondent, in summary, notes that no jury was selected or sworn and the prosecution case was not opened, while acknowledging that these factors are not determinative. Ms Weisman's key point was that the expert discussions that took place on 28th July should have happened before as part of the pre-trial preparation. "Had such a meeting taken place in mid-July or earlier", submits Ms Weisman, then the issues would have resolved prior to the start of the trial, meaning that "the parties would likely have attended court already knowing that there would be an acquittal".

10. Ms Weisman cites and relies on the case of R v. Barnes (ibid), a recent decision of CJ Rowley, in which the court noted that 'substantial' case management 'must mean more than the expected pre-trial preparation regarding matters such as bundles and evidence'. CJ Rowley also noted that 'modern practice' had developed pragmatically since Henery, particularly during and as a result of the pandemic, with the result that it was more common for tasks that would historically have been undertaken before the hearing to be dealt with during the trial.

11. The Appellants, in summary, rely on the guidance at paragraph 96(6) of Henery (ibid), citing that the events of 28th July constituted 'substantial matters of case management' with the result that the trial had been begun 'in a meaningful sense'. Mr Wells acknowledges that the joint experts' meeting/ report should have taken place prior to the trial, but he points out that, as a matter of fact, it did not. Thus, both the prosecution and defence attended court with the settled expectation that there would be a contested trial, and that both advocates had prepared for trial.

12. The Appellants cite and rely on the decision of Fallah (ibid), where CJ Rowley, confronted with (broadly) similar circumstances as those of this appeal, concluded that matters amounting to 'substantial matters of case management' had taken place, with the consequence that the trial had begun in a meaningful sense.

13. The facts of this case are, perhaps, finely balanced. But, in my conclusion, one core point tips that balance in favour of the Appellants. While the joint experts' meeting should have taken place before the start of the trial, it had not, in circumstances where neither side appears to have borne any procedural responsibility for this failure. More importantly, the process engaged at court on 28th July included an opportunity for both counsel to question the experts, albeit informally. This would certainly not have happened if the expert meeting had formed part of the pre-trial preparation and, when considering the papers carefully, this element seems to have been a determinative factor of the prosecution's decision to offer no evidence. Thus, in my conclusion, substantial matters of case management took place and while the trial was necessarily short, it was still a trial.

14. For those reasons, this appeal is allowed and I direct that the Appellants' LGFS claim be assessed as a trial and not a cracked trial.

Costs

15. The Appellants have been successful, and I award costs of £1000 (+ any VAT payable) along with the £100 paid to issue the appeal. The Appellants claimed costs of £1500 and Mr Wells noted that his brief fee was actually £3000. I note that the fee includes the preparation of the Notice of Appeal and the Skeleton Argument, as well as attendance at the (short, remote) hearing on 15th December. I am satisfied that £1000 (+ VAT) is a reasonable figure on assessment.

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