



Neutral Citation No. [2023] EWHC 3365 (SCCO)

Case No: 07WZ1002821

SCCO Reference: SC-2023-CRI-000005

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 29 November 2023

Before:

COSTS JUDGE ROWLEY

R
v
MASSEY

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

Appellant: Gray & Co (Solicitors)

The appeal has been dismissed for the reasons set out below.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Gray & Co solicitors against the decision of the determining officer to assess the fee payable under the Litigators Graduated Fee Scheme by way of a guilty plea rather than a cracked trial fee as described in the Criminal Legal Aid (Remuneration) Regulations 2013 (as amended).
2. The solicitors were instructed on behalf of Jeffrey Massey who was charged with seven counts of indecent assault and four counts of indecency with a child. The case first came before the court for a PTPH on 18 July 2022. The litigator attended but counsel did not, owing to the bar strike. Counsel did however place comments on the DCS beforehand which asked for the defendant not to be arraigned at the PTPH. No pleas were entered but the case was listed for a trial date in the week commencing 12 June 2023 and the timetabling of other directions regarding a fitness to plead assessment were concluded.
3. A further PTPH was listed for 26 September 2022 and, at that hearing, the defendant was represented by his litigator but not his advocate. Counsel had again placed comments on the DCS to indicate that the defendant would be pleading guilty to all charges and that is what happened at the PTPH. The defendant was subsequently sentenced on 17 November 2022.
4. The definition of a “cracked trial” in the litigators’ scheme is set out at paragraph 1 of Schedule 2 to the 2013 Regulations 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; or
 - (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;
5. From the history of the proceedings set out above, limb (a) clearly does not apply since the defendant did not enter a plea of not guilty at any stage.

6. The solicitors say that limb (b) is satisfied, however, because a trial listing was given at the first PTPH and no plea was taken at that hearing. The solicitors rely upon paragraph 15 of the Crown Court Fee Guidance which states:

“A Cracked Trial is a case that is terminated between the PTPH (or FCMH) and the first day of Trial. A case where no PTPH (or FCMH) took place, but the case was listed for Trial and did not get to Trial or Newton Hearing, is also deemed to be a Cracked Trial.”
7. The second sentence refers to the limb (b) situation. The determining officer refers to the solicitors’ reliance on this limb in the written reasons. But the submission is dismissed on the basis that it only applies to cases where no effective PTPH took place and by which the word effective appears to mean that pleas were entered. Since guilty pleas were entered at the second PTPH, the determining officer has concluded that this case does not come within the definition of a cracked trial and so a guilty plea fee is payable instead.
8. The solicitors have asked for this case to be decided without an appeal hearing. As such, I only have their written submissions on the Appeal Notice. There the solicitors describe paragraph 15 as fitting the circumstances of this case and that the determining officer has not addressed why it is said that it does not apply. My reading of the determining officer’s reasoning is set out in the preceding paragraph. The solicitors refer to the same passage in the written reasons as being the determining officer’s conclusion. They then describe the determining officer as relying on a conclusion that the first PTPH was ineffective in the absence of any pleas being entered and then relying on the second PTPH as being effective “to erase the existence of the first PTPH at which a trial date was fixed.”
9. The solicitors’ argument is not a new one and, on first reading, there is some force to it. But, there have been previous costs judge decisions, e.g., Costs Judge Leonard in R v Jarir [2022] EWHC 2231 (SCCO), which have concluded that limb (b) is not satisfied simply by there being a PTPH at which a trial listing is given but where no plea is taken (for whatever reason.)
10. In his decision in R v Lamin (175/19), Costs Judge Brown considered in detail the original drafting of the 2013 Regulations and the subsequent amendment in 2015 in respect of the definition of a cracked trial. Under limb (b), the wording set out in paragraph (4) above replaced the original description of a case which was “listed for trial without a plea and case management hearing taking place.”
11. That earlier description made it clear that limb (b) was intended to cover cases where no PTPH took place at all, and the case was simply listed for trial. The revised wording concentrates on whether a hearing takes place at which the defendant enters a plea. If, at any point, the defendant enters a plea before the trial then that will be determinative of whether a cracked trial fee or a guilty plea fee will be payable. For the solicitors to succeed in their appeal in these circumstances, the defendant had to plead not guilty originally before changing his plea. If the only plea put forward by the defendant is one of guilty, then a guilty plea fee is payable even if, as in this case, an earlier hearing took place at which no plea was required.

12. With due apologies for the length of time that it has taken me to be able to produce this decision, I confirm that this appeal fails.