SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2019-CRI-000062

28 April 2020

ON APPEAL FROM REDETERMINATION

REGINA v OJAPAH

CROWN COURT AT PRESTON

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20187086

DATE OF REASONS: 23 SEPTEMBER 2019

DATE OF NOTICE OF APPEAL: 30 SEPTEMBER 2019

APPLICANT: SOLICITORS DRUMMOND SOLICITORS LTD

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

The appropriate additional payment, to which should be added the sum of £750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

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

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Drummond solicitors Ltd of Bradford against the decisions of the determining officer in calculating the fee payable to the solicitors under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Louis Ojapah who, together with others, was charged with conspiracy to possess a firearm with intent to endanger life.

3. It appears that the trial commenced on 5 March 2019 but by 2pm on 6 March, Mr Turner of counsel indicated to the judge in chambers that Ojapah did not want him to act for him any further. The dissatisfaction with his counsel did not extend to Ojapah's view of his solicitor and so the solicitor sought to obtain new counsel in Bradford, Leeds and Manchester, but without success.

4. The judge recalled the jury that had been sworn and informed them that Mr Turner been dismissed by his client but that the solicitor was still on record and was attempting to obtain new counsel. The jury were then sent away until the following day.

5. The judge then discussed with the advocates how this turn of events would affect the other defendants. Mr Barton, the prosecuting counsel, informed the judge that all of the counsel felt it was unlikely that any other barrister would be in a position to pick up this brief at short notice. Ojapah could not act in person and Mr Barton proposed the trial should be adjourned to the following week.

6. Mr Duffy, counsel for one of the other defendants, said, according to the court log, that:

> "Mr Duffy explains that there is a solution to assist that would involve discharging this jury and starting again on Monday with a new panel – the reason for this request is due to funding issues."

7. On the following morning, Mr Stranex of counsel was able to appear in substitution for Mr Turner. However, he informed the judge that in order properly to prepare the case he needed some more time and asked for the trial to be adjourned until the following Monday. He also applied for the jury to be discharged and a new panel selected. Although one of the other counsel indicated that he did not feel the jury need to be discharged, the judge ruled that the jury would be discharged and a new panel sworn in on Monday.

8. On 11 March a new jury was empanelled (and then sent away) whilst a PII application was dealt with. According to the court record, at 14:28 on 11 March 2019:

> "Judge addresses advocate
> Judge states that today is day 1 of the trial – stated this last week too.
> The comment is to assist Mr Stranex."

9. Based on this exchange, the solicitors say that the correct description of the court proceedings is that the trial took place from 5 March until 7 March and that a new or retrial began on 11 March until its conclusion. The determining officer concluded that these events demonstrated that in fact a single continuous trial had occurred from 5 March until conclusion and paid the solicitors under the graduated fee scheme accordingly. The point in issue, as described in the determining officer's written reasons, is as follows:

"Whether or not the hearing at the Crown Court, sitting in Preston, 05/03 – 07/03/2019 and 11/03-18/04/2019, constitute a single trial fee as paid (£66,704.14), or a trial (£66,704.11) and retrial (£22,493.78) as claimed."

10. The determining officer's task is to apply paragraph 13 of schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013 which provides that:

> "13.- (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 –
>
> (a) in respect of the first trial, the 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."

11. In order to assist the determining officer, the case of R v Nettleton [2014) 2 Costs LR 387, a decision of Master Campbell and which followed on from his decision of R v Cato, discusses at some length the approach to be taken. In essence, there needs to be a rupturing of the factual and temporal matrix between the two limbs of the hearings for there to be a retrial rather than simply the continuation of the original trial.

12. I do not need to go into any detail in respect of the guidance given in Nettleton since, based upon it, there is no doubt that the facts of this case lead to the inevitable conclusion that a single continuous trial has taken place. The original limb of 5 to 7 March comes nowhere near to satisfying the need for the case to have reached a conclusion, albeit inevitably an incomplete conclusion, before a retrial was required. Although counsel for Ojapah changed, none of the other representatives or the judge changed; no further evidence was adduced; nor any other new factor which would alter the factual matrix. The gap between the ending of the first limb and the beginning of the second is a matter of days and that clearly does not disrupt the temporal matrix. Consequently, based upon Nettleton, the decision of the determining officer cannot be faulted.

13. The solicitors' case, as argued by Mr Turner, who represented the solicitors on the appeal hearing, is, however, that Nettleton has no bearing on this case because the judge did indeed order a retrial. On that basis, paragraph 13 of the Regulations clearly applies and the two fees are payable.

14. Mr Turner was able to flesh out the terms of the court log which I have set out above. Having informed the judge that Ojapah wished to change counsel, Mr Turner and the solicitor set about seeking new counsel. However, they were unable to find anyone willing to take on the brief. This was squarely because of the lack of remuneration that would follow. The brief fee payable to Mr Turner would have to be shared with the second counsel according to the regulations and that was not attractive to any other counsel (nor Mr Turner presumably).

15. The fact that remuneration would not be available in any simple fashion was explained to the judge and this is the context for the comment of Mr Duffy about "funding issues" and the need to discharge the jury and to start again with a new panel. The whole purpose of that was the need for there to be two trials so that Mr Turner would be paid for one and Mr Stranex would be paid for the other.

16. The need for two trials also explains HHJ Lloyd's statement on 11 March that today was day one of the trial and that she had stated this last week too, presumably on 5 March. Expressly it states that her pronouncement was to assist Mr Stranex.

17. Mr Rimer, who appeared on behalf of the Agency, produced written submissions prior to the hearing which largely concentrated on the applicability of the test in Nettleton. I do not repeat any of those submissions since, as I have indicated above, that position is clearly correct insofar as Nettleton applies.

18. In paragraph 16 of his written submissions, Mr Rimer stated that in the absence of an order for a retrial "(which per the Regulations would be determinative of the issue)" the guidance in Nettleton would apply. Mr Turner's main point was that an order for a retrial clearly had been made by HHJ Lloyd and as such the issue of a retrial had been determined.

19. Mr Rimer did not accept that it was clear that any order had been made by the judge as opposed to some helpful comments made to Mr Stranex. That submission was linked to the concept that the help to Mr Stranex for his claim under the advocates scheme had no relevance to the claim by the solicitors here under the litigators scheme.

20. Furthermore, Mr Rimer said that in fact the comments were unnecessary for Mr Stranex because, under the regulations, counsel should have shared the brief fee in the manner that I have described above. Although it appeared that the determining officer for the advocates scheme had allowed Mr Stranex his fee, this did not assist the solicitors who continued to be instructed by the defendant throughout.

21. In Mr Rimer's submission, the judge needed to have been very clear in ordering a retrial given the short distance that the hearing reached at the point that counsel changed. The case certainly had not run its course and so it was not actually clear that the judge had ordered a retrial.

22. Mr Turner also relied upon an email dated 5 August 2019 sent by Steve Rybowski, a court clerk at the Crown Court at Preston, in response to an email from the solicitors dated the same day. After a couple of introductory paragraphs, the solicitors asked:

> "Could the court clearly clarify that it was a retrial commenced on 11 March 2019? If the court can not do so then could you please provide us with a copy of the court logs?"

23. Mr Rybowski's response was "Correct, there was a retrial on 11th March, with the first jury being discharged the week before…"

24. Mr Rimer queried the value of that email which was produced three months after the trial had finished. Mr Turner indicated that it was only a month after the sentencing hearing but he accepted that it was longer since the conclusion of the trial at the end of May.

25. There is no evidence before me as to the investigations pursued by Mr Rybowski to be able to respond to the email from the solicitors. It may be that he specifically talked to HHJ Lloyd before sending the email so that it was very much her view of events. Equally, it may simply have been responded to with a relatively brief look at the court log. The fact that it was produced at 8am in response to an email sent at midnight the night before might suggest that it was more likely to have been produced without consultation. It does not seem to me to add greatly to the court log comments in any event.

26. In the case of the Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB) Holroyde J (as he then was) gave guidance on various contentious matters regarding service of electronic documents and whether they should count as Pages of Prosecution Evidence. If the defence and prosecution teams could not agree amongst themselves, Holroyde J expressly indicated that the trial judge should be asked for their view.

27. In the case of R v Furniss [2015] 1 Costs LR 151 Haddon-Cave J (as he then was) expressed his view as the trial judge about claims for the payment of PPE and that decision caused a number of other decisions to be produced regarding payment of defence teams for their work. Amongst these decisions were references to the case of Brownlee in the Supreme Court [2014] UKSC 4 which considered that the defendant's Article 6 rights for effective representation in criminal proceedings required sufficient remuneration of the defence team for that right to be accessed.

28. It seems to me that decisions such as these point very clearly to the fact that the trial judge may, in the exercise of his or her case management powers, take the view that in order for the defendant to be properly represented, a trial may have to be stopped and a new trial started. In so doing, the case management decision would deliberately affect the fees payable under the relevant schemes. In my view, that is what has happened in this case.

29. Mr Rimer queried whether an order for a re-trial had actually been made but it seems to me clear that it had. The only comments in the various pages of the court log that I have received that are capitalised are the ones set out confirming that 11 March was the first day of trial as indeed had been stated the previous week. That comment to me can only mean that there had been two trials of this particular case. The "comment" says specifically that it was to assist the new barrister which must mean help in respect of his fee. Whilst the word "comment" is used, it seems to me to be stretching matters well beyond breaking point to indicate this is not a ruling by the judge in the same way that any other order for a re-trial would be pronounced in court and then recorded in the log. The emphasis of capitalisation – whether at the behest of the judge or otherwise – points to the comment having been made with emphasis. It has been set out in open court, rather than in chambers, to ensure (in my view) that it was recorded on the court log as a formal decision.

30. The entry also ties in with the earlier entry that Mr Stranex specifically made the application for the jury to be discharged and a new panel selected when he first addressed the court. The intention of the judge in my view is plain.

31. Whilst it may not be the intention of the regulations for a trial judge to take the approach of Her Honour Judge Lloyd here, I have no doubt that she has ordered a retrial and that payment of both advocates' fees resulted directly from it.

32. It is often said that there are swings and roundabouts in the graduated fee scheme and the litigators (and indeed advocates) are to take the rough with the smooth. Here, the effect of the trial judge's decision to order a new trial has caused an advantageous result for the solicitors. If there were two trials as far as the advocates were concerned, it seems to be inevitable that there were two trials for the solicitors as well.

33. Accordingly, this appeal succeeds.

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