SENIOR COURTS
COSTS OFFICE

SCCO Ref: 83/19

Dated: 5 August 2019

APPEAL FROM REDETERMINATION

REGINA v McHUGH

CHESTER CROWN COURT

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

CASE NO: T20150145-415

LEGAL AID AGENCY CASE

DATE OF REASONS: 11 February 2019

DATE OF NOTICE OF APPEAL: 13 March 2019

APPLICANT/APPELLANT: Advocate

This appeal is successful for the reasons set out below. The Appellant should be paid his claim for wasted preparation together with his reasonable costs of the appeal which I would assess at £1,450 to include the appeal fee of £100.

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. The issue arising in this appeal is as to whether the Appellant is entitled to a wasted preparation fee pursuant to paragraph 18 of Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013.

2. At the hearing on 30 July 2019 the Appellant, counsel, appeared on his own behalf. The Legal Aid Agency (the LAA) were not represented and provided no written submissions. I was informed that the Lord Chancellor was content to rely on the written reasons provided by the Determining Officer for rejecting the application for the fee claimed.

3. The Appellant represented the Defendant who was charged with seven counts of fraud by false representations on five counts of failing to comply with the terms of a serious crime prevention order. He was alleged to have been behind a series of companies which were involved in insolvency work in debt recovery and which defrauded others of at least £120,000.

4. The material parts of paragraph 18 provide as follows:

Fees for wasted preparation

> *(1) A wasted preparation fee may be claimed where a trial advocate in any case to which this paragraph applies is prevented from representing the assisted person in the main hearing by any of the following circumstances—*
> *…*
> *(c) the trial advocate has withdrawn from the case with the leave of the court because of the trial advocate's professional code of conduct or to avoid embarrassment in the exercise of the trial advocate's profession;*
> *…*
>
> *(2) This paragraph applies to every case on indictment to which this Schedule applies provided that— (a) the case goes to trial, and the trial lasts for five days or more; or (b) the case is a cracked trial, and the number of pages of prosecution evidence exceeds 150.*

5. It was accepted by the Determining Officer that the Appellant had become professionally embarrassed in the case and that ground at para. 18 (1) (c) had been made out.

6. As I understand it, the Defendant had a long history of criminal offending including an involvement in complex frauds. The Determining Officer states that he had over 100 recorded convictions; such a history was confirmed to me by the Appellant. The Appellant had had to withdraw from the case before trial after having undertaken a substantial amount of work. The PPE (pages of prosecution evidence) in respect of electronic evidence were later assessed at 4,628 pages in addition to which there were 1,052 pages of paper evidence. A letter in my papers indicates that the data provided on disc in electronic form required close consideration and such was

the importance of this material, and of potentially missing digital items, the LAA authorised funding for a forensic/computer expert to examine the integrity of the material served by the prosecution. The Appellant claimed 121.25 hours as wasted preparation. The Determining Officer stated that she had "*no issue at all the time [the Appellant] spent preparing this case*". Indeed, she stated that she was fully aware of the "*difficulties and challenges*" the Appellant faced when dealing with the Defendant.

7. The issue that concerned the Determining Officer was as to whether the case subsequently went to trial or was to be regarded as a 'cracked trial' for the purposes of paragraph 18 (2). As indicated above, it is clear from the documentation provided to me, and confirmed by what I was told by the Appellant, that the PPE exceeded 150. Thus, if the case was to be regarded as a 'cracked trial' a wasted preparation fee was payable. But, if the case was be regarded as having gone to trial no fee was payable because the trial- if there was any- did not last five days.

8. The Determining Officer held that the matter had gone to trial and therefore refused any fee.

9. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is 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 1 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;

….

10. The matter was listed for trial to commence on 14th November 2016; the issue that arises is as to whether the case had '*gone' to trial* and whether it had *'proceeded' to trial,* the two phrases appearing to be synonymous: the underlying question is whether any trial had begun. If it had not, then it followed from the definition provided above, that the case was to be regarded as a 'cracked trial'.

11. In *Henery* Spencer J gave the following guidance as to whether or not a trial has begun:

(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 a 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 this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [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 practice 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."

12. The Determining Officer stated that she was refusing the claim to the Appellant because the newly instructed advocate had claimed and been paid a two-day trial graduated fee. She set out the contents of an email received from the Appellant's clerk. This email stated as follows:

"We submit this claim has been rejected on incorrect grounds. The trial as listed did not go ahead as the defendant did not appear on the first day and a warrant was issued for his arrest, he then attended the following day and pleaded guilty which was an acceptable basis of plea. There was no jury sworn (confirmed by counsel for the prosecution in the attached email). The case therefore proceeded as a 'cracked' trial, per the court record. The court have also confirmed that the client did not attend on the first day and a bench warrant was issued. Therefore, the basis of the claim in behalf of [the Appellant] *is correctly made under paragraph 18(2) (b)* [of the relevant regulations]*."*

12. The decision records that the Determining Officer was provided with a copy of the transcript of the hearing of 14 November 2016 which she had herself passed on to the AGFS team (which I understand to be the Advocates Graduated Fee Scheme team within the LAA) together with other documentation. The team had replied as follows:

"The relevant dates for this case are the 14th and 15th of November 2016. The newly instructed advocate … initially submitted a claim for a two-day trial on the

14th and 15th of November 2016. Note from the additional information section in Mr Keane's claim state 'Trial Readiness/Fitness to plead listed on 14/11/2016 & 15/11/16 (effective 2-day trial).' This case was therefore paid as claimed by the advocate…

The Exhibit Live Court Record confirms that on the first day of trial (14th) a witness was cross examined, as such because evidence was put before the court this is deemed to this to be an opening day of trial. The Defence team tried to return the case on the 14th, however the judge declined and ordered them to attend next day of trial.

On the second day of trial (15th) at 10:35 am this, again from the Crown Court record, the judge opened the case stating, 'Note second day of trial' at 11:58 AM the defence asked the judge for time for possible pleas. The defendant changed his plea at 14.14 p.m.

On this basis, the case is considered to be a two-day trial in which the correct payment has been authorised under the Advocate's Graduated Fee Scheme."

13. The Determining Officer also refers to the following comment made by the Judge on 14 November, found on page 78 of the transcript:

"*At some stage the court has to say enough is enough, and I'm afraid that time has come. I am not going to vacate the trial again. This trial will start tomorrow. I direct of course that the defendant is to attend."*

The Determining Officer notes that the transcript then finishes with "*Thank you very much. So, 10.30 tomorrow, please*."

14. The Appellant had relied upon email communications with the Prosecutor and the following comment made by him in the email exchange:

"*Having attended on Day 2 DMH (the defendant) then saw the error of his ways aided by the usual overgenerous offer from yours truly…Anyway this is how it was only a two-day trial*."

15. Reliance thus appears to have been placed by the Determining Officer upon the decision of the AGFS based in turn, it would appear, on the fact that the evidence was given as described above on 14 November, the description given in the records as to whether a trial had started and the Prosecutor's comments -albeit these seem to be at odds with the comments of the learned Judge. The Determining Officer does not however expressly address the guidance in *Henery*.

16. As the transcript of 14 November 2016 reveals, the evidence that was taken on 14t November was in respect of an application to vacate the trial on the grounds, so it was alleged, that the Defendant was unfit to attend: It was not evidence as part of the trial. The excerpt from the letter from AGFS upon which the Determining Officer relied does not make clear that the evidence was not taken as part of the trial and indeed suggests that it was. Having regard to the guidance in *Henery,* to my mind the Determining Officer was clearly wrong to have placed reliance (as she appears to have done) on

the assertion by AGFS that because a witness was cross examined and because evidence was put before the court on 14th November 2016, that date was therefore deemed to be an opening day of trial. No jury had been sworn in (this is made clear by the correspondence with the Prosecutor)*;* the case was therefore not opened before the jury and no evidence had been called in the trial.

17. Pursuant to the guidance in *Henery* even if a jury were to have been empanelled that would not necessarily mean that a trial has commenced; there will not have been a trial in a meaningful sense if before the case can be opened the Defendant pleads guilty. But a trial may have commenced even before a 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*" or after selection if there are substantial matters of case management.

18. In the course of the hearing on 14 November the instructed advocate sought formally to withdraw from the case along with his instructing solicitor because of an inability to take instructions from the Defendant. The judge rejected this application saying as follows (per page 51 of the transcript]:

> *"*[The Defendant] *needs to be given the chance to engage. He needs to be told by me that I have taken a decision that* [he] *either cooperates with you gives proper instructions, or I'm going to discharge his representation order, and until that option has been taken you and your solicitors can't withdraw from the case. If he doesn't take that opportunity well that is a matter entirely for him but I'm not just going to pull the rug from under his feet. I'm directing that he must be here tomorrow, he must still be represented by those who instruct him, whether that is you personally or somebody else, I'm not saying that you personally have to attend, the trial hadn't started in any effective way, unless you would seek to say that this is the first day of trial. If it is the first day of trial and obviously you have got to carry on"*

19. The instructed advocate, responds as follows:

> *"I don't seek to say that, your honour. It's- there are approximately 1,000 pages and that is the very bare minimum, that is a skeleton of the case, that we would need to take instructions, and it, with the best will in the world would take a fortnight with this defendant."*

20. The Judge then says*:*

> *"Well I'm sorry, I'm not going to just jump to conclusions, I'm going to give him the opportunity to engage. And then if he engages it may well be that you would say "Alright, I need an adjournment now to deal with the defendant who is now engaging"."*

21. As appears from the transcript, the instructed advocate's position was that the Defendant was not in a sufficient state (for reasons relating to his physical or mental health) to give instructions. The Judge stated that he had reached his conclusions in rejecting the application made by the Defendant and that he was satisfied that with proper adjustments the Defendant was physically fit to stand trial and that he was not

persuaded by any evidence of any metal unfitness that he was unable to take part in the trial. Later on in the course of the hearing on 14 November the instructed advocate sought to vacate the trial so that a clinical assessment could be carried out as to whether the Defendant was capable of communicating with his legal team in giving proper instructions; that application was refused by the judge who said as follows*:*

> *"At some stage the court has to say enough is enough, and I'm afraid that time is come. I am not going to vacate the trial again. This trial will start tomorrow. I direct of course the defendant is to attend. If he fails to attend, he should know that I would issue a warrant for his arrest. If he is successfully arrested he should not expect to get his bail although I'm not saying he won't get his bail, I'm simply saying he shouldn't expect to get his bail, but if he does attend voluntarily then in those circumstances I* [will] *be unlikely to change his bail situation unless there were any further irregularities. The purpose of the hearing tomorrow is to allow the defendant an opportunity to engage with his legal advisers. If he chooses not to engage with his legal advisers, if they are presented with a situation where they have to withdraw, I will have explained to the defendant the consequences and I would hope the legal advisers would at least feel be able to remain in the case until those consequences have been explained to the defendant.*
>
> *Now, I know that there may be problems then, even if he does seek to instruct his advisers, and that they may then be faced with the situation of dealing with things during the course of the case, but unfortunately that sometimes happens. We may need to take adjournments, even extensive adjournments, to allow instructions to be taken so the case can be dealt with properly and fairly. I also say this; that although I'm not prepared to adjourn the case to allow the defence a separate opportunity to seek a clinical assessment, there is no reason, in my judgement, that the defence, if they think it right, shouldn't obtain a clinical assessment for themselves during the course of the trial, and if that clinical assessment is something that should properly put before me, it can be put before me, and of course the court always has an inherent jurisdiction to discharge the jury for whatever reason the judge thinks necessary. So, I haven't closed the door in fact on anything, but I'm determined, so far as I am able now, to progress this case. It stays in as before. Alright."*

22. Bearing all these matters in mind and following the guidance in *Henery* set out above, the trial had not, in my judgment, commenced in any meaningful sense on 14 November. The submissions made to the judge could not , in my view, be regarded as a "*continuous process leading to the empanelling of the jury*"; nor were they substantial matters of case management of the trial itself. The court was concerned with whether or not the trial should be vacated. If the submissions of the Appellant had been acceded to there would have no further listing on 15th and no question of the matter having proceeded to a trial. Moreover, in the course of the hearing on 14th the Judge had made it clear- and counsel had agreed- that the trial had not started in an effective way. Nothing that occurred after this exchange changed the position materially.

23. The LAA rely only upon the reasons given by the Determining Officer as set out above, to the effect that there was a two-day trial commencing on 14th November. I am not bound by the decision of the AGFS team - nor was the Determining Officer -

and I have set out above why I consider that the Determining Officer should not have accepted the assertion made by the AGFS team without addressing the *Henery* guidance. Moreover, I am not persuaded that assertions as to whether a trial had begun based on contents of the court's records and the comments of the Prosecutor are decisive as to what happened on 14 November, given the availability of the transcript. Indeed the Prosecutor's comments have to be seen in the context of a request by the Appellant (who did not himself know what occurred) as to why the trial had not lasted for two weeks as it had been listed to do. It would seem unlikely that the Prosecutor had in mind the issue which I am required to address (namely, whether there was a trial); indeed he is clear that no jury was sworn. I also note that the court listing of 15th November does not show a part-heard trial, which one might expect it to do if the LAA were correct.

24. On the basis of the evidence before me as to what actually happened on 14 November, the Determining Officer was, in my view, in error. Given that the LAA rely only upon the reasoning of the Determining Officer, this conclusion may well be sufficient to dispose of the appeal in the Appellant's favour. The LAA have chosen not to argue that there might be some alternative basis for concluding that the matter had not proceeded to trial.

25. In the event, no transcript has been obtained of the events on 15 November. However, given the comments of the learned Judge cited above, it is clear that it was anticipated that this day would be used to permit the Defendant to engage with his representatives. Moreover it appears from the Court records that no trial started in any meaningful sense on this day either. The Court records do not indicate any substantial discussion as to the case management of trial or that submissions had been made to the Judge as part of a "*continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence*". It appears that the morning of 15th was given over to permitting the Defendant to do just as the Judge had envisaged – namely engaging with his lawyers. As I understand it, by reason of the work undertaken by the Defendant, which as I have already commented was substantial in nature, the Defendant's representatives were able to give advice on the appropriate pleas- even if they were not in a position (as they were not the previous day) to proceed to trial.

26. There has already been significant delay in the processing of a fee for work done in 2016. It was suggested that there may have been some delay on the part of the newly-instructed advocate (who, I was told, was aware of this claim) in putting in his claim for a fee but there was no evidence on these matters before me. Be that as it may, on basis of the evidence before me, in my judgment the case was a 'cracked trial' such that the Appellant is entitled to a wasted preparation fee.

27. The appeal is, accordingly, allowed.

28. The Appellant should, in addition, be paid his costs of the appeal. A significant amount of work was undertaken in preparation of this appeal. I have been provided copies of the relevant authority which clearly been considered in detail by the Appellant. The transcript also would have required careful consideration albeit that the costs that may be claimed are only those relevant to the appeal. I have allowed a

reasonable sum for the attendance at the hearing, preparation for the hearing and preparation of a detailed (and helpful) Grounds of Appeal.

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