

# Funding Decision

**Colin Wells** writes on Transfer of Representation Order in Graduated Fee cases

In *Tuckers Solicitors v Lord Chancellor* [2013] EWHC 3817 (QB) Mrs Justice Andrews, sitting in the High Court Queens Bench Division, on October 18, 2013, considered important funding issues surrounding the transfer of Legal Aid in Graduated Fee Criminal Cases.

The important question of general public importance in relation to Graduated Fee Criminal Costs was certified as follows:

“Does the amendment of a representation order to substitute a new litigator, in circumstances where the new litigator has agreed to accept instructions, amount to a transfer of the case to the new litigator for the purposes of para.10.2(a), sch.2 to the Criminal Defence Service (Funding) Order 2007?”

Mrs Justice Andrews found in favour of Tuckers solicitors, allowing a litigators fee and costs.

## Costs Background to the Appeal

On the December 28, 2012, the Costs Judge disallowed an appeal brought by Tuckers Solicitors, pursuant to art.20 of the Criminal Defence Service (Funding) Order 2007 (“the Funding Order”). The appeal was against a decision by the Legal Services Commission refusing to pay Tuckers a Graduated Fee trial transfer fee (of over £25,000): because the case had not been transferred to them within the meaning of sub-para.10.2 of sch.2 to the Order, despite the fact that the Representation Order had been transferred to them by the Crown Court. Although the Representation Order was transferred to Tuckers, there was nothing to suggest that the case was transferred to them for the purposes of the Funding Order. The Costs Judge was persuaded that there could be no transfer of the case where there was no contact between the solicitor and the client, nothing to suggest that the client gave the solicitor any instructions, and no work of substance was done before the solicitors decided they were unable to act because there was a conflict.

## Criminal Background

The defendant, Marius Nejlovenau, was charged with 37 offences relating to the trafficking of women for the purposes of prostitution. His trial at Manchester Crown Court commenced on the October 28, 2010. On day two of the trial, October 29, his legal team found themselves



professionally embarrassed and the trial was stopped. It was relisted for the November 15. A new defence legal representative had to be found quickly, to represent the defendant. The Crown Court having spoken to the defendant agreed to locate a new defence firm. Provided that the defendant agrees to this course being taken, the court is acting on the defendant’s behalf when it contacts the new firm of solicitors by telephone to ascertain whether they are willing to act.

It is incumbent upon any firm of defence solicitors to carry out a conflicts check before accepting such instructions. However, in an emergency situation such as this, it is likely to be impracticable for the solicitors to do so straight away, and the Crown Court will be looking for a swift answer to its inquiry. Therefore, the solicitors may say to the Crown Court that they are willing to act, but it will be necessarily implicit that their provisional acceptance of instructions to act on the defendant’s behalf is subject to carrying out that conflicts check as soon as practicable and satisfying themselves that they can do so.

The case handler at Tuckers did carry out a conflicts check against the name of the three defendants on October 29, 2010, and found no conflicts. She then made arrangements for a visit to the defendant, who was in custody. On the November 1, she booked a Romanian interpreter for that visit, which was scheduled for the afternoon of November 3. On the same date, Manchester Crown Court transferred the Representation Order, which was backdated to October 29, to Tuckers.

In the meantime the former solicitors had sent Tuckers a number of e-mails with attachments, which included the indictments and witness lists. It was only after perusing that material and speaking to a colleague within the firm that the case handler discovered on the November 1, that Tuckers had acted for a prosecution witness, and that there was a conflict after all. Therefore, they were unable to continue acting for the defendant. Legal aid was transferred to a third firm on the November 2.

### Transfer Funding Provisions

The relevant parts of para.10 in Pt.2(b) of sch.2 provides as follows:

“Where a case is transferred to a new litigator ... the original litigator and the new litigator must receive a per centage of the total fee, in accordance with the table following this paragraph, as appropriate to the circumstances and timing of the retrial, transfer, or withdrawal of the representation order.”

Mrs. Justice Andrews found, at para. [12] of the judgment, that:

“[12] There is nothing in the Funding Order itself to shed light on when a case is transferred to a new litigator. However, in order for the scheme to work, there has to be a defined point at time, which is objectively ascertained, at which this happens. In practice, the signing of the Representation Order transferring the matter to them is seen by solicitors as the green light for them to go ahead and commence work. That is why the amended Representation Order will be backdated, as it was in this case, to the date when instructions were accepted by the new litigator.”

### Lord Chancellor Department's Arguments

The LCD initially submitted that on a purposive construction “transfer” means transfer to someone who is in fact able to take the case on. When it was pointed out that this would result in a solicitor who had carried out a conflicts check, but through no fault of his own later discovered that there was a conflict, not being entitled to payment, the LCD resiled from that position and submitted that transfer means:

“A transfer other than to someone who is not in fact able to accept the instructions and knew or ought to have known that.”

When pressed as to the exact point in time at which the

transfer takes place, the LCD argued that when, having been asked to do so, the solicitor agrees to take on the case and an amendment is made to the Representation Order, save where there is in fact a conflict and the solicitor knew, or ought reasonably to have known that there was a conflict. As a further refinement, the LCD submitted that the transfer takes place when, after having received sufficient papers to carry out a conflicts check on the defendants and prosecution witnesses, the solicitor reasonably satisfies himself that he is not conflicted.

Mrs Justice found, at para.[15] of the judgment, that:

“[15] The problem with all these variants on a theme is that there is no certainty. Indeed, to import notions of ‘reasonableness’ into the mechanics of the graduated fee scheme will create the very uncertainty that it was designed to overcome. In the ordinary sense, a transfer means a handing over by one firm to another. I agree with the Costs Judge that there cannot be a transfer of a case until the new litigator has accepted instructions to act; but in this case the solicitors had done so.”

Leading to an agreed reformulation of the question of general public importance as follows:

Does the amendment of a Representation Order to substitute a new litigator, in circumstances where the new litigator has agreed to accept instructions and carried out a conflicts check, amount to the transfer of the case to the new litigator, for the purposes of para.10.2(a) of sch.2 to the Criminal Defence Service (Funding) Order 2007?

This reformulation makes it clear to the new litigator that they must carry out a conflicts check in order for the case to be validly transferred.

However, Mrs Justice Andrews went on at para.[17] of the judgment:

“[17] ... but it does not mean that the new litigator must do that before he agrees to accept the instructions to act, so long as he does it before the Representation Order is amended to substitute him for the former litigator. If he does not bother to carry out a conflicts check before the amendment is made, then he takes on the matter at his own peril, because if it then turns out that he is conflicted, the Amended Representation Order will be ineffective to transfer the case to him for the purpose of para.10.2(a) of sch.2. In my judgment that is a perfectly fair and reasonable interpretation of the Funding Order, because the making of the Amended Representation Order only signifies the transfer of the case to a solicitor who has been instructed. It cannot be said that the new litigator has been instructed by the defendant until he has satisfied the condition to which his provisional acceptance of instructions is necessarily subject.”

On the other hand, if the litigator has carried out a conflicts check before the Representation Order is amended,

and it subsequently turns out that he is conflicted, that does not affect the fact that the case has been transferred to him for the purpose of the Funding Order and he will be entitled to payment. The advantage of taking that view is that the transfer of the case is aligned with the acceptance of the instructions, and the Crown Court acting upon the information that instructions have been accepted by amending the Representation Order. Thus the practice of treating the Representation Order as the green light to go ahead will be fairly reflected in the way which the court will interpret the effect of such an Order, and indeed, interpret the Funding Order."

The LCD expressed concern about what might happen if the new litigator has a cavalier approach to doing the conflicts check. Mrs Justice Andrews dealt with this by refusing to import notions of reasonableness into the interpretation of the Funding Order, as that would be a recipe for disaster, citing at para.[19] of the judgment:

"[19] There has to be a "bright line" test and it would be wrong in principle to encourage investigation of whether the conflicts check was or was not sufficiently thorough."

Mrs Justice Andrews offered sensible practical advice at para.[20] of the judgment:

"[20] In practical terms it would be desirable if, at the time when the Crown Court sends information to the

putative new litigator, it were to include the indictment, the witness list and, if available, the case summary, rather than leaving it to the former solicitors from whom the case is being transferred to do so. That may well avoid any arguments about the reasonableness or otherwise of a conflicts check, because it would be incumbent on the new solicitors to look at all the material that the court has sent them before confirming that they are able and willing to proceed with the case. That is a matter of practicality; it is not a question of interpretation of the Regulations. It seems that the only way in which these Regulations are going to operate smoothly on the ground is if solicitors can continue to treat the Representation Order as being the definitive act transferring the case to them, once they have in fact accepted instructions and checked for conflicts."

### Conclusion

The decision is one of importance, giving helpful practical guidance to a new litigator in affecting a proper transfer of the Representation Order for funding purposes: the conflict check being of primary importance, with the grant of an amended representation signalling the "green light" to carry out work, which will be remunerated. 

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