SENIOR COURTS
COSTS OFFICE

SCCO Ref: 58/13

Dated: 28 February 2014

ON APPEAL FROM REDETERMINATION

REGINA v JOHNSON

NEWCASTLE CROWN COURT

APPEAL PURSUANT ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007 (AS AMENDED)

CASE NO: T2010 7028

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 21 JANUARY 2013

DATE OF NOTICE OF APPEAL: 12 FEBRUARY 2013

APPLICANT:	SOLICITORS	Abbey Solicitors DX 28612 Withington

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

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

C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION

1. For the reasons given in the annexed General Observations the appeal against the decision of the Legal Aid Agency to recoup fees in this case is allowed. It follows that the Appellant has received the correct fees due for its work in this case, so no sum falls to be repaid, save that the Legal Aid Agency must pay the Appellant the £100 court fee on the appeal, together with costs to be assessed if not agreed.

TO: Wanda Hall
Legal Aid Agency
Nottingham Office
DX 10035
Nottingham 1

COPIES TO: Abbey Solicitors
DX 28612
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The Senior Courts Costs Office, Royal Courts of Justice, Thomas More Building, London, WC2A 2LL.
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SENIOR COURTS
COSTS OFFICE

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

REGINA v NETTLETON
JOHNSON
GRAHAM
LEE

APPEAL TO A COSTS JUDGE

Advocates: Mr Edwards for Graham
Mr Rode for Nettleton and Lee
Mr Wells for Johnson

GENERAL OBSERVATIONS

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1. Of several issues in dispute in these four appeals, one matter common to all Appellants is whether there was only one trial in the Crown Court at Newcastle (as the Legal Services Commission ("LSC") contends) (now called the Legal Aid Agency) ("LAA") or two trials (as Mr Edwards for the Defendant Graham submits) or three trials (the position contended for by Mr Rode for the Defendants Nettleton and

Lee and by Mr Wells on behalf of the Defendant Johnson) in this multi-hander. For that reason it is appropriate to deal with the question of "trial" by way of General Observations. Where the points under appeal are not common to the Appellants, they will be dealt with in individual written reasons. For convenience, I shall refer to the LAA as the LSC throughout.

2. Upon my decision on the issue of "trial" will turn the crux of these appeals, namely whether the LSC was correct to exercise its powers under paragraph 26 of the Criminal Defence Service (Funding) Order 2007 (as amended) ("the Funding Order") to recoup payments it had previously paid to the solicitors who had acted for Messrs. Nettleton, Johnson and Lee for their work on behalf of those Defendants under the Litigator Graduated Fee Scheme ("the Scheme") which was implemented via the Funding Order.

3. That is the position so far as the Solicitors for the Defendants Nettleton, Lee and Johnson are concerned. Mr Graham's solicitors situation is different for reasons which I shall explain (see paragraph 8 post).

4. Paragraph 26 of the Funding Order provides as follows:

> *"Recovery of Over Payments*
>
> (1) This Article applies where a representative is entitled to be paid a certain sum ("the amount due") by virtue of the provisions of Schedules 1, 2 or 4 and, for whatever reason, he is paid an amount greater than that sum.

(2) Where this Article applies, the appropriate officer may –

(a) require immediate payment of the amount in excess of the amount due ("the excess amount") and the representative must repay the excess amount to the appropriate officer; or

(b) deduct the excess amount from any other sum which is or becomes payable to the representative by virtue of the provisions of Schedules 1, 2 or 4.

(3) The appropriate officer may proceed under paragraph (2)(b) without first proceeding under paragraph (2)(a)."

5. ABR Solicitors (formerly Clarion Advocates) acted for the Defendant Lee. Against the firm, the LSC seeks to recoup £49,306.10 under Regulation 26.

6. JGT Solicitors (now called Steele Ford & Newton) acted for the Defendant Nettleton. Against the firm, the LSC seeks to recoup £49,306.10 under Regulation 26.

7. Abbey Solicitors acted for the Defendant Johnson. Against the firm, the LSC seeks to recoup £24,653.05 under Regulation 26.

8. The fourth firm involved is Appleby Hope and Matthews, who acted for the Defendant Graham. At the conclusion of the proceedings, the firm submitted four

LF1 claim forms, representing claims for a five day trial, a six day re-trial, a three day re-trial and a 39 day re-trial. Those claims were paid, but on the basis that there was only one trial, so that the question of recoupment, so far as that firm is concerned, does not arise. However, if the outcome of the appeal is that the LSC was wrong to determine the claim as a trial, *per se*, an additional amount will be due to Appleby Hope and Matthews under the Scheme. It follows, as I have said, that the issue common to all Appellants in this multi-hander is whether there was (i) one trial or (ii) one trial with one re-trial or (iii) one trial and two or even three re-trials.

BACKGROUND

9. The background is uncontroversial but needs to be set out in order to understand why the LAA served its recoupment notices.

- 1 November 2010: the trial of all Defendants listed before Her Honour Judge Bolton at the Crown Court at Newcastle on an indictment alleging conspiracy to supply class A drugs. No jury sworn but Judge stated that this is to be the first day of trial.

- 2 November 2010: jury sworn.

- 3 November 2010: trial day.

- 4 November 2010: jury discharged.

- 5 November 2010: trial day

- 8 November 2010: matter listed for trial.

- 9 November 2010: new jury sworn.

- 10, 11, 12 and 15 November 2010: trial days.

- 16 November 2010: jury discharged. Arrest of Her Honour Judge Bolton (subsequently the Judge was convicted of an offence under the Dangerous Dogs Act and retired from the Circuit Bench with effect from 1 January 2012).

- 7 March 2011: matter listed before His Honour Judge Whitburn QC. No jury sworn.

- 9 March 2011: jury sworn and discharged.

- 10 March 2011: jury brought into court, asked questions but not sworn.

- 14 March to 23 May 2011: trial days (excluding 18 March 2011, 15 April 2011 and 17 May 2011).

THE DETERMINATIONS

(a) Mr Lee

10. On 9 January 2011, Clarion Advocates lodged claim form LF1 seeking fees for a five day trial before Her Honour Judge Bolton, followed by a re-trial. Both claims were determined by the LSC. On 10 June 2011, the firm lodged a further LF1 for a second re-trial lasting 39 days. That claim was also assessed. In the result, Clarion Advocates claimed and were paid, respectively, £24,653.05 for a class B re-trial lasting seven days, a fee of £24,653.05 for a class B re-trial lasting 39 days, plus £98,612.18 for a class B trial lasting seven days.

11. On 14 September 2012, the senior case worker at the LSC Nottingham Office wrote to Clarion Advocates in the following terms:

> "A review of the data held on CCLF and information provided to us by the Crown Court at Newcastle and fees paid to other litigators in this matter shows that the correct claim should have been for only one trial class B 54 days.
>
> Amount paid including VAT x 3 claims = £147,918.28.
>
> Amount allowable (including VAT) £98,614.18.
>
> Over payment (including VAT) £49,306.10.
>
> Recovery of over payments.

We believe that you have received £49,306.10 in excess of what should have been paid for this case and therefore propose to recoup this amount in accordance with paragraphs 26(1) and 26(2)(a) of the … [Funding Order]."

12. On 3 October 2012, Clarion Advocates submitted Form LF2 to the LSC objecting to the notification of the intention to recoup. Annex A said this:

"We made three claims, two of which were submitted in January 2011 and the third was submitted in June 2011. The claims were made in good faith in accordance with LSC Guidance (we refer to paragraph 3.15 of the LSC Guidance and to Schedule 2, Part B, paragraph N of the Criminal Defence Service (Funding Order) 2011 as amended). These claims were then assessed by senior case workers at the LSC and paid. The LSC initially disallowed some of the disbursements on one of the claims but at no point was any issue raised in relation to the litigator fees.

The amount that the LSC is seeking to recoup £49,306.10 is a significant sum … All of our fees in this case were paid between March and September 2011. To seek recoupment of such a large sum now would take away profitability from this practice …"

13. On 4 February 2013, the LSC provided reasons for its decision to recoup as follows:

"Thank you for re-submitting your claim for a determination.

Points in Issue

The matter to be determined is whether the litigator is entitled to claim additional trial fees.

Legislation and Guidance

I enclose a copy of the Cost Judge decision in *Regina v Cato*. I refer you to Section 6 and 7.

The relevant legislation is the … [Funding Order] …

Facts of the Case

You submitted and have been paid for 1 x trial and 2 x re-trials for the above named client.

Redetermination

The LSC makes the following submissions.

A copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision.

You are entitled to written reasons from us explaining our assessment of your claim. We intend this letter to be our full written reasons under Article 29(8) of the Funding Order ... You are entitled to appeal this matter to a Costs Judge. Should you wish to appeal the decision you may do so within 21 days of receipt of this letter by giving notice in writing to the Senior Costs Judge."

14. Notice of appeal was duly given and the appeal was referred to me.

(b) Mr Craig Nettleton

15. JGT acted for Mr Nettleton. In its LF1, the firm claimed a class B six day trial relating to the period between 1 November and 4 November 2010, totalling £96,557.76. For the period between 8 to 16 November 2010, the firm lodged a second LF1 claiming a class B six day re-trial in the sum of £24,693.04. Following the conclusion of the proceedings before His Honour Judge Whitburn QC, a third LF1 was submitted for a class B 40 day retrial in the sum of £24,653.04.

16. According to the Notice of Appeal, all these claims were checked, approved and paid by the LSC.

17. On 3 October 2011, the firm received a letter from the LSC in the following terms:

"As you will be aware, the [LSC] took responsibility for the administration of payments made to providers under the Crown Court Litigator Graduated Fee Scheme ("LGFS") for representation orders granted or after 14 January 2008.

A review of payments made under LGFS is currently underway to provide assurance that we operate sufficient financial control and that all claims paid fall within the rules of the Scheme.

As a result, during routine internal review we have found one case dealt with by your firm where we believe there has been a potential mis-claim and corresponding overpayment.

You represented Craig Nettleton in this case ... in the Crown Court at Newcastle. You have claimed (and been paid) fees of £96,557.76 (class B six day trial, before trial transfer (...) £24,653.04 (class B six day re-trial ...) and £24,653.04 (class B, forty day re-trial ...) a total of £145,863.84.

A review of the court record in respect of one of the co-defendants shows that after the discharge of the first jury on 4 November 2010, the following remarks/order by the Judge "... arrangements being able to be made for Monday. We can call in sufficient jurors to resume the trial" and "although jury discharged, the trial still continues as a single trial from today. The Judge declares that Monday was the first day of trial." It is, almost certain that this was only one trial followed by one re-trial and should have been billed as such.

This means there has been a potential overpayment of £24,653.04 ...

Recovery of overpayments

We believe that you have received £24,653.04 in excess of what you should have been paid for this case and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) …"

18. On 18 December 2011, Steele Ford and Newton submitted Form LF2 challenging the recoupment but, according to the Notice of Appeal, did not receive any response.

19. In August 2012, the firm then received the following letter dated 17 August 2012 from a senior case worker at the LSC as follows:

"During the review of claims that have been made, and paid, under the Litigator Graduated Fee Scheme, we have found a case dealt with by your firm where we believe there has been a potential overpayment.

You represented one defendant, Craig Nettleton, in this case … in the Crown Court at Newcastle. You have claimed (and been paid) a fee of £24,653.05 (class B, re-trial 40 days), a fee of £24,653.05 (class B, re-trial six days) plus a fee of £96,557.76 (class B before trial transfer six days).

A review of data held on CCLF and information provided to us by the Crown Court at Newcastle and fees paid to other litigators on this matter, shows that the correct claim should have been for one trial class B, 52 days …

Amount paid (including VAT) x 3 claims = £145,863.85.

Allowable amount (including VAT) £96,557.76.

Overpayment (including VAT) £49,306.10.

Recovery of overpayments.

We believe that you have received £49,306.10 in excess of what should have been paid for this claim and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) …"

20. JGT requested re-determination. In reasons given by letter dated 22 January 2013, the LSC repeated *seriatim* the wording used in the letter to ABR following redetermination and then continued as follows:

"Litigator/Advocate Submissions

In your LF2, you say

you claimed there was only one trial and two subsequence (*sic*) re-trials.

Redetermination

The LSC makes the following submissions: a copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision."

21. It is against this decision that the Appellant now appeals.

(c) Mr David Johnson

22. On 17 December 2010, Abbey Solicitors submitted its LF1 to the LSC which sought one trial fee for the firm's work before Her Honour Judge Bolton. That claim was determined and paid. Subsequently on 18 August 2011, Abbey Solicitors submitted a second bill claiming 25% uplift for a litigator's fee for a re-trial in respect of the proceedings before His Honour Judge Whitburn. That claim was also accepted by the LSC and paid in full.

23. On 19 September 2012, the firm received a letter from the LSC in terms similar to those written to the Solicitors for Messrs Lee and Nettleton. The salient points said this:

"You represented one defendant, David Johnson, in this case … in the Crown Court at Newcastle. You have claimed (and been paid) a fee of £24,653.05 (class B, re-trial 51 days), a fee of plus a fee of (sic) £96,557.76 (class B trial six days) … a review of the data … shows that the correct claim should have been for only one trial, class B 48 days.

The amount paid (including VAT) x 2 claims = £121,210.81.

Allowable amount (including VAT) £96,557.76.

Overpayment (including VAT) £24,653.05.

We believe that you have received £49,306.10 in excess of what should have been paid in this case and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) of the … [Funding Order]."

24. According to Mr Wells' skeleton argument (the supporting material was not deployed in support of the appeal) the LSC have accepted that the figure of £49,306.10 was an error and that the amount which the LSC proposes to recoup is £24,653.05 (class B re-trial 51 days). It is from that decision that the Solicitors now appeal.

(d) Mr Ian Graham

25. Appleby Hope and Matthews represented Mr Graham. According to the Notice of Appeal, the firm:

"claimed four bills for the four trials that took place on the following dates:

Bill 1: trial 1 November 2010 – 5 November 2010

Bill 2: re-trial 9 November 2010 – 16 November 2010

Bill 3: re-trial to 7 March 2011 – 9 March 2011

Re-trial 3: 14 March 2011 – 23 May 2011.

26. The Notice of Appeal continues :

"The LSC rejected our four bills arguing that this was one trial, albeit with significant gaps.

They have paid the following:

hardship payment	£42,445.97
LF1 paid us only one 59 day trial	£56,166.21
Total litigator fee paid	£98,612.18
Plus special preparation payment	£4,892.40
	£103,504.58"

27. Dissatisfied with the determination, Appleby Hope and Matthews sought redetermination. This did not lead to a change of heart by the LSC. Written reasons dated 21 August 2012 said this:

"Redetermination

The LSC makes the following submissions. A copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision.

You are entitled to written reasons from us explaining our assessment of your claim. We intend this letter to be our full written reasons under Article 29(8) of the Funding Order ..."

28. It is from that decision that the Solicitors now appeal.

FURTHER FACTORS

29. The following further points need to be made.

30. First, Counsel for Mr Nettleton, Mr Gerard Doran submitted a claim under the Advocates' Graduated Fee Scheme (see Part 1 of Schedule 1 of the Funding Order) for a trial and re-trial in respect of the hearings which took place between respectively 1 November and 4 November 2010 and 9 November to 16 November 2010 before Her Honour Judge Bolton. That claim was refused on the basis that, according to information provided by the Court, the Judge had ordered that the period 1 November to 16 November 2010 be considered "as a single trial despite the discharge of only one jury and the swearing of a second one".

31. Mr Doran's appeal against that determination failed before Master Gordon-Saker. In written reasons dated 14 November 2012, the Master said this:

> "I am afraid that I cannot conclude that this was a trial and retrial. The timescales are identical to those in *Seivwright*, save that in that case there was a mention hearing on the Friday. I concluded in that case that there would not be a new trial if it was part of the same procedural and temporal matrix as the first trial and that, on the facts of that case, there had been only one process.
>
> ...
>
> 14. I am not persuaded that "an order [was] made for a new trial". Secondly because it seems to me that the trial which started on 8th November was part of the same process that started on 1st November."

For those reasons the appeal failed.

32. Second, it will be observed that the LSC dealt with these claims inconsistently. Those in respect of the Defendants Johnson, Nettleton and Lee were initially all determined on the basis that there was a trial and two re-trials. In respect of Graham, however, the LSC's position has been that there was one trial. It follows if that be right, that Appleby Hope and Matthews will have received the correct amount due under the Scheme, but that the litigators for the other Defendants will have been overpaid, so that the sums sought to be recouped by the LSC must be returned.

THE LAW

33. In order to decide whether the LSC was correct in its decision to recoup fees in these cases I need to set out the law (such as it is), there having been no appeal yet on this point to a Judge of the High Court on the question of trial, re-trial and recoupment.

34. Paragraph 2 of Schedule 1 to the Funding Order provides as follows:

> "(3) Sub paragraphs (4) and (4A) apply where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where—
>
> (i) the defendant is an assisted person at both trials; or
>
> (ii) the defendant is an assisted person at the new trial only; or
>
> (iii) the new trial is a cracked trial or guilty plea.
>
> (4) Subject to sub-paragraph (4A) in respect of a new trial, or if he so elects, in respect of the first trial, the trial advocate will receive a graduated fee calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee will be reduced by—

(d) 25 percent where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial."

35. The Litigator Graduated Fee Scheme Guidance published by the LSC provides practical guidance to litigators about the how Scheme is intended to work, for example by directing litigators to the correct forms to use when submitting claims. It is updated regularly, but is not a rule of law.

36. At one time, before later amendment, paragraph 3.15 said this:

> "If a trial is aborted and another jury is sworn in either on the same day or the following working day, then the case is considered to be one trial. If there is a gap of more than one working day then it is normally considered to be a re-trial ..."

37. I did not agree with that guidance when I wrote reasons in *R v Cato* (SCCO Ref: 155/12). I preferred submissions that had been made on behalf of the Lord Chancellor in *R v Bunga* (84/10) as follows:

> "We submit that in the common situation where a jury is discharged for reasons such as a juror knowing someone involved in the case, or some other issue arising, that means the whole jury is discharged, but the trial resumes with a fresh jury, it is wholly artificial to say that this has occurred "following a trial" or that "an order has been made for a re-trial". Rather, we submit that this situation has arisen during the course of the trial and that no order is needed for a re-trial, because the empanelment of a fresh jury is a logical

consequence of the discharge of the original panel during the course of the trial. This can be distinguished from the situation where the trial has run its course and the jury have failed to reach verdicts, when it is by no means inevitable that there will be a re-trial, as the prosecution usually wish to consider their position in the light of the evidence in the original trial ..."

38. Having considered these submissions, I then said this:-

"To my mind, these passages explain succinctly why the appeal must be allowed in this case. It is common ground that the original trial did not "run its course" leading to the discharge of the jury and an order for a re-trial. No order was needed for a re-trial because a fresh jury could be empanelled simply as a logical consequence of the discharge of the original panel during the June trial. Had that empanelment taken place within a day or two of 17 June 2010, I doubt that the LSC would have taken the stance that it has done upon receipt of the LF1. The problem that has arisen is the lengthy gap between 17 June 2010 and 27 September 2010. The LSC contends that the hiatus means that the hearing on 27 September 2010 must have been a re-trial. I disagree. There may have been many reasons why the second jury was not empanelled immediately – availability, or lack of it, of witnesses comes immediately to mind, or perhaps a dearth of available jurors in the middle of the week. Added to that is the fact that the Guidance contains the word "normally" which I have emphasised. In so far as it is necessary for me to do so, I would hold that this is a situation which is not "normal" and that it does not follow that because there has been a long gap, the September hearing must have been a re-trial. In the result, the appeal must be allowed. I agree with the submissions of the Appellant and with those of the Lord Chancellor albeit cited not in this appeal, but in *R v Bunga*"

39. It follows, in my judgment, that the fact that a trial commences but is not concluded on consecutive court days because, for example, the jury is discharged, does not mean that it cannot be "a trial". On the contrary, even if there is a long gap between the end of the first stage and the resumption (as was the case in *R v Cato*) that can still constitute a trial, if it is a continuous process. I respectfully agree, in this context, with Master Gordon-Saker's reasons in *Nettleton* that there would not be a new trial if, on resumption, matters were part of the same procedural and temporal matrix as the first trial so that there was only one process.

THE PARTIES SUBMISSIONS

(a) For Mr Graham

40. Mr Edwards accepts, following Master Gordon-Saker's decision in *R v Nettleton* that the proceedings before Her Honour Judge Bolton constituted one trial and not a trial and a re-trial as previously argued. However, so far as the proceedings before His Honour Judge Whitburn were concerned, Mr Edwards contends that this was a re-trial. Whilst he accepts that for there to be a re-trial, the original trial must have run its course and come to an end, for example, where the jury cannot agree on a verdict and the Judge makes an order for a re-trial, in the present case there *had* to be an order for a re-trial because the original Judge was unable to complete the case owing to her arrest. For that reason the temporal and procedural matrix was broken. Here, there had been a five month hiatus between the removal of the first Judge and the case beginning again before His Honour Judge Whitburn, and in the interim, the Crown had served a further 2718 pages of evidence, in addition to which had been a new

witness who had subsequently given evidence over a period of about two weeks. For these reasons what had occurred before before Her Honour Judge Bolton had been a trial and there had then been a re-trial before His Honour Judge Whitburn. It followed that, subject to the concession that the November proceedings were a trial, the appeal against the decision to recoup should be allowed.

(b) Mr Lee and Mr Nettleton

41. Mr Rode does not accept the concession made on behalf of Mr Graham that the proceedings before Her Honour Judge Bolton constituted a single trial. On the contrary, he argues that the trial days until the discharge of the first jury amounted to a trial and that the proceedings thereafter until the arrest of the Judge constituted a re-trial. In addition, for the reasons given by Mr Edwards, when matters resumed before His Honour Judge Whitburn, Mr Rode that that had been a further re-trial.

42. In Mr Rode's submission, the Solicitors had lodged their claims in accordance with paragraph 14(4) of the Standard Criminal Contract 2010. A commercial decision had been taken not to make a claim for "special preparation" under paragraph 15 of Schedule 2 of the Funding Order because the claims had been accepted and paid on the basis of a trial and re-trial. Now, however, the firms had been served with notices of recoupment some two years after those claims had been approved and paid, and upon which tax and VAT had then been accounted for to Her Majesty's Revenue and Customs. In addition, the effect of the recoupment notices was to apply *R v Cato* retrospectively. That was grossly unfair and a breach of natural justice.

(b) Mr Johnson

43. For Johnson, Mr Wells adopts Mr Edwards' submissions that the temporal and procedural matrix changed. Within four weeks of the conclusion of the proceedings before Her Honour Judge Bolton, Abbey Solicitors had submitted their LF1 claim for payment. There was then a five month gap before matters resumed before a different Judge, HH Judge Whitburn, which resulted, two months later, in a jury verdict. Within three months thereafter, Abbey had sent a second bill to the LSC for payment seeking a 25% uplift for a re-trial. Both claims had been accepted, assessed and paid in full. Now, however, the LSC was attempting to recoup payments it had previously approved. No written reason or explanation had been given for doing so. The actions of the LSC had created great economic uncertainty and offended against the principle of finality of payment and put at risk the financial planning of firms of solicitors conducting defence work. Recoupment would be appropriate in cases of fraud or miscalculation but not where, as here, the LSC had determined the claims themselves. *R v Cato* should not be permitted to have retrospective effect.

DECISION

44. In my view Mr Wells is rightly critical of the written reasons which have been provided in these cases. Whilst it is correct that paragraph 26 does not oblige the Appropriate Officer to provide written reasons, as would be required following a

request for a determination under paragraph 29(8) of the Funding Order, it is implicit, in my view, that he should do so when exercising powers under paragraph 26. I say this because in the present case, all four litigators submitted their claims in accordance with paragraph 14(4) of the Standard Criminal Contract 2010. That provides that "in making a claim, you [the litigator] must have regard to the content of the relevant Costs Assessment Manuel".

45. That has been done in all cases and due regard has also been given to the Guidance whereby the claims were all submitted within the time limits set out in the Regulations and in circumstances where they were processed and approved by the LSC's very own staff. Here, the reasons given for the recoupment are terse in the extreme, still less have any written submissions been lodged on behalf of the Lord Chancellor which might have assisted the parties and the Court on these appeal, nor was there any representation on his behalf at hearing. Little wonder that the litigators have complained. I also have every sympathy with them about the unsatisfactory way in which paragraph 26 has been deployed in these cases, many months, years even, after the firms have been paid, have accounted to HMRC for tax and have closed their files, in circumstances where the LSC's own staff approved the claims in the first place and there is no suggestion whatsoever of any fraud.

46. It is accepted that the Graduated Fee Schemes are rigid (see, for example *Meeke v Secretary of State for Constitutional Affairs* [2006] 5 Costs LR 808). However, Mr Edwards submits that there is still some flexibility, see for example the guidance given by Spencer J in *Lord Chancellor v Ian Henery Solicitors Ltd* [2009] 1 Costs LR 205 about "when does a trial begin?" I agree. Where, as here, the applicable parts of the Regulations to which the Court must have regard, do not provide a

definition of "trial", it is likely that each case will be fact sensitive. This one certainly is; it may well be, both with regard to the appeals in point and for the future, unique that the trial collapsed because the Judge herself was placed under arrest. In my judgment, that factor of itself, was sufficient to alter the temporal and procedural matrix. In the first place, I would hold and agree with Master-Gordon-Saker that there was one trial before Her Honour Judge Bolton for the reasons he gave in *R v Nettleton*. Second, I consider that there must have been a re-trial because the original trial Judge was unable to complete the case. This was not a situation such as that which occurred in *R v Cato* where it was possible, expressed colloquially, to say "we will pick up from where we left off because the first trial did not run its course". On the contrary, that could not be the position here because from March 2011, the trial was taking place before a different Judge who had not listened to the many days of argument and evidence that Her Honour Judge Bolton had heard four months earlier. Thus, it was not a case of picking up from the position reached on the last occasion as part of a continuous process, but, on the contrary, was one of starting again with a new Judge, new jury and for some, new counsel. When that factor is added to the temporal position, specifically that the resumption was nearly four months after the proceedings before Her Honour Judge Bolton had concluded, I am satisfied that the LSC is mistaken in its view that there was one trial in this case.

47. I reject the submission that such an outcome is unfair because it applies *R v Cato* retrospectively. In fact, that appeal merely followed the reasons given in *R v Bunga* which was decided on 13 September 2010, also by Master-Gordon-Saker. It follows that I am unable to accept the contention advanced on behalf of Mr Graham that there were two re-trials before His Honour Judge Whitburn. In my judgment, the hearing days that took place before the learned Judge were all part of one continuous

process as was the case in *Bunga* and *Cato*. For that reason, Mr Wells' submission on that point fails.

48. Having reached these conclusions, I would add that I do not agree with Mr Edwards that the mere fact that the Crown served additional evidence and relied on a new witness, meant that the March trial *must* have been a re-trial. I would not go so far as to say that such an eventuality could never be sufficient to alter the procedural and temporal matrix, but on the facts here, I do not agree with him. There is nothing unusual in the Crown relying on further evidence not contained in the committal bundle. Indeed, it is common place for additional material to be served after committal, up to, and even during the trial with a notice of additional evidence, so that the page count can be updated. It follows, in my judgment, that I do not consider the fact that the Crown may serve more evidence during the hiatus (if I may so describe the gap between the end of the initial trial days and the resumption) is sufficient to categorise the original trial days as "the trial" and the succeeding trial days as "the re-trial". As was the case in *Cato,* it may all be part of a continuous process so that there is, in reality, only one trial but for the reasons I have given, that was not the situation here.

49. In the result, I agree with the LSC case worker's decision as set out in her letter of 3 October 2011 to Steele Ford and Newton that there was a trial followed by a re-trial and that the litigators' claims should have been billed as such. She expressed it that "It is *almost* [emphasis added] certain that this was only one trial followed by one re-trial" but for the reasons set out above, I would go further than that. However, I consider that the case worker was wrong to have asserted in the subsequent letter of

17 August 2012 that the claim should have been for "one class B trial for 52 days", an assertion repeated in the letters of 14 September 2012 to Clarion Advocates, 19 September 2012 to Abbey and 21 August 2012 to Appleby Hope and Matthews, albeit that the actual number of trial days differ. It follows that the outcomes of the appeals are as follows:

(i) Mr Lee- claimed and paid for one trial and a re-trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn : adjustment by way of recoupment to be made so that the firm is paid for one trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn.

(ii) Mr Nettleton- claimed and paid for one trial and a re-trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn: adjustment by way of recoupment as for R v Lee.

(iii) Mr Johnson- claimed and paid for a trial before Her Honour Bolton and a re-trial before His Honour Judge Whitburn : the position is correct so the appeal is allowed against the decision to recoup.

(iv) Mr Graham- claimed for a trial and re-trial before Her Honour Judge Bolton and two re-trials before His Honour Judge Whitburn : paid for one trial. The appeal is allowed to the extent that the firm should be paid for a trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn.

50. So far as Messrs. Lee and Nettleton are concerned, the appeals have been unsuccessful save to the extent that the recoupment will be for sums less that the LSC is contending for. At the conclusion of argument I was asked (should the appeals

fail), whether I would be willing to certify a point of principle of general importance. Given, as I have said, that there is no guidance on appeal to a High Court Judge on this point, I would be willing so to certify.

51. Costs. Messrs Johnson and Graham will have their costs of the appeal. I suggest that schedules are lodged at this Court within 14 days of the date of these reasons and I shall decide the amounts on paper. So far as Messrs. Lee and Nettleton are concerned, although the recoupments will stand, there has been success in so far as the amounts to be recouped will be less than those contended for by the LSC. In these circumstances, I would be minded also to order that the LSC should bear the costs of the appeals but if a contrary view is taken, the LSC should notify the Court and the Appellants within 14 days of the date of these reasons and I shall decide the point on paper.