SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2019-CRI-000021

21 February 2020

ON APPEAL FROM REDETERMINATION

REGINA v ROONEY

CROWN COURT AT LEICESTER

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

CASE NO: T20177564

DATE OF REASONS: 17 AUGUST 2019

DATE OF NOTICE OF APPEAL: 3 SEPTEMBER 2019

APPLICANT: SOLICITORS BLACKFORDS LLP

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

The appropriate additional payment, to which should be added the sum of £1,250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Blackfords LLP ("Blackfords") against the fee allowed by the determining officer under the Litigators Graduated Fee Scheme.

2. Highgate solicitors ("Highgate") were originally instructed on behalf of Joseph Rooney who was charged with a number of offences regarding assault occasioning actual bodily harm and requiring various persons to perform compulsory labour contrary to section 71 of the Coroners and Justice Act 2009.

3. The trial of the defendant on these charges was due to start on 6 March 2018. On that date, the jury was selected but not sworn in until 8 March. Blackfords say that the trial had not commenced when legal aid to represent the defendant was transferred to them from Highgate on 9 March.

4. The determining officer has allowed a graduated fee calculated on the basis that the transfer between solicitors of the representation order occurred during the trial rather than before it began. On that basis a fee of £44,987.56 has been allowed rather than the fee of £89,975.11 which was claimed.

5. If Blackfords are successful in their appeal, the corollary will be that the fee paid to Highgate will be reduced from the one currently paid. As such Highgate are an interested party and I gave them permission to appear on this appeal in that guise. It occurs to me that Mr Brookes, the original counsel for Mr Rooney, may also be in the same situation.

6. The question at the heart of this appeal is whether or not the trial had begun. There are many costs judge decisions on this question since it affects the calculation of many fees and not simply those where the representation order has been transferred. The leading case is the Lord Chancellor v Ian Henery Solicitors Ltd [2012] 1 Costs LR 205 and the essence of Spencer J's decision, as far as providing guidance for cases such as this are concerned, is to be found at paragraph 94 as follows:

> "(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) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened, the Defendant pleads guilty (R v Brook, R v Baker & Fowler, R v Sanghera, The 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 purposes of the Graduated Fee Schemes. It would 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 begun, 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".

7. Usually, it is sufficient simply to recite the foregoing guidance and then to apply the facts of the particular case to that guidance. Whilst that is still the ultimate requirement, I have, on this occasion, also found assistance in some of the facts of the individual cases mentioned in parentheses above.

8. In her written reasons, the determining officer refers to the selection, but (seemingly erroneously) not swearing, of the jury and the issue of whether there have been substantial matters of case management. In her conclusion several substantial matters were dealt with on 6 and 8 March (the court did not sit on 7 March) that should be considered to mean that the trial had begun in a meaningful sense. These are listed as follows:

1. Batting order, in draft;
2. Drafted amended indictment;
3. Bad character application and Joseph Rooney's antecedent history;
4. Index to condensed bundle of witness statements;
5. Draft prosecution agreed facts;
6. Jury questionnaire

9. The written reasons then refer to the agenda for the hearing on 6 March which is appended to those reasons and which refers to matters including those referred to in the preceding paragraph.

10. The determining officer has not expanded upon the matters which she considered to be substantial matters of case management and there was no attendance by the Legal Aid Agency at the appeal hearing before me. I have seen an email from Ms Wilton of the Agency which indicates their view that this appeal is really a matter between Blackfords and Highgate. There is a good deal of truth in that position, but it may not be appropriate in respect of an appeal which I have addressed at the end of this decision.

Submissions

11. Colin Wells of counsel appeared on behalf of Blackfords at the appeal hearing. He had drafted the grounds of appeal and also a skeleton argument for the appeal hearing.

12. Mr Wells' submissions concentrated upon the events of 8 and 9 March based largely upon the court transcript for 8 March. In respect of events on 6 March, he argued that no significant case management activity had been carried out on that day. In his view, this was presumably on the basis that Mr Rooney had no confidence in his legal team. The main matter dealt with was the jury questionnaire based on the written submissions of Tariq Khan QC who appeared on behalf of Highgate.

13. There were two strands to the various entries in the transcript of 8 March to which Mr Wells referred. The first was an apparent lack of instruction held by Mr Brookes who was then counsel for Mr Rooney. For example, the trial judge, at the beginning of the day, discussed a number of the potential jurors who did not appear to be suitable for the case. Prosecution counsel was asked to comment and then the judge said, *"and Mr Brookes probably feels not sufficiently instructed anyway."* The judge then continued:

> "But there we are. All right. Thanks, gentlemen. When he gets here, I want him up. I'm not going to permit a conference, not at this stage, and we're going to get on with the jury. He will have the opportunity of a conference at some point, but I'm not prepared to have the jury process delayed even by a minute."

14. Mr Khan sought to suggest in his submissions that the judge's comments regarding Mr Brookes' lack of instruction emanated from Mr Rooney being delayed in being present in court (as this quotation makes clear.) However, I prefer Mr Wells' view of these comments which was to suggest that the judge assumed Mr Brookes felt that he was without instruction from Mr Rooney because he had indicated a wish to disinstruct him. As such, he did not even ask Mr Brookes to comment on the potential jurors, by way of example.

15. According to Mr Brookes' own note regarding fees, he was informed, after court had risen for the day on 6 March, by Mr Rooney that he no longer wished Mr

Brookes to be his trial advocate or for Highgate to represent him. Mr Brookes informed the prosecuting counsel and arranged for a message to be sent to the trial judge. Since the court did not sit on 7 March, the first discussion between the judge and Mr Brookes occurred on 8 March in court.

16. When Mr Rooney was produced before the court on 8 March, the judge addressed him directly about whether he wished to represent himself; or if he wished to continue with his existing representation; or if he wished for different representation. The judge very clearly considered the latter to be the least desirable option, at least initially, given the delay that would cause to the trial. He then discussed with the prosecution counsel the need for an advocate to appear on Mr Rooney's behalf, even if he represented himself, in order to deal with the cross examination of vulnerable witnesses for the prosecution (since Mr Rooney was charged with modern slavery offences). It appears that, during this exchange, the judge came round to the conclusion – given that Mr Rooney was adamant that he would not continue to instruct his existing representation – that the choice was either that he represented himself or was fully represented by a new team. Consequently, Mr Chowdhury, the Highgate solicitor in court, was tasked by the judge with seeking to obtain the services of counsel who could begin the following Monday. Ultimately it transpired that Blackfords had been approached by Mr Rooney's sister and it was thought that they could also attend the following day.

17. The second strand of Mr Wells' submissions regarding the transcript related to the various comments made by the judge about the need for the trial to start. For example:

- "This case can be opened this morning. And that is what I want to happen and I need a lot of persuasion that that should not happen."
- "Once we get through the preliminary stages of the case, we will reduce to 12."
- "We are not ready to commence this trial just yet."
- "[We] will have you back sometime this morning, either to begin the case with [prosecution counsel's] opening or to give you a progress report and update on timings."
- "I will, if I have to do, make you represent yourself and we start this case today."
- "We're not ready to start. We won't be ready to start before lunch…that's not a promise we will do something, but I will certainly tell you 2:15pm whether we can…"
- "One [option] is that we start the trial today and you represent yourself… The other is that on Monday – I'm pausing because I will have the case listed tomorrow; it's not a day off tomorrow – but on Monday a QC would come here".
- "It will start on Monday. Whatever lawyers are here on Monday must understand that they must be ready to deal with the opening of the case."
- "I won't ask [prosecution counsel) to open it because if you're going to have new barristers in place, they need to hear the opening or ought to hear the opening of the case."

18. From these various pronouncements of the judge to the jury, the defendant and to the court in general, Mr Wells submitted that the judge clearly did not think the trial had commenced and that that was the best indication of whether the trial had begun in any meaningful sense.

19. Mr Khan referred to submissions in a document headed "Recoupment" which I understand to have been written by Highgate, which similarly refers to the judge saying things such as *"**this trial** will start today"* and that he will *"still list **this trial** tomorrow".* In Mr Khan's submission these comments confirmed that the trial had in fact already started.

20. I have no difficulty in preferring the submissions of Mr Wells on this point. It seems to me to be entirely clear that the trial judge did not think that the trial had commenced. On 6 March he had begun the process of jury selection and on 8 March that process was concluded with 14 jurors being sworn. It is equally clear that at that point the two reserve jurors had not been dismissed and from the judge's comments that was because the preliminary stages had not been completed.

21. I do accept Mr Khan's submission that by the time the judge made the comments I have set out that the only preliminary issue remaining was in fact Mr Rooney's legal representation. That seems to be clear from the judge's indication to Mr Rooney that if he represented himself there was no reason why the trial could not start on 8 March. It was only when the judge reluctantly concluded that other representation needed to be arranged that the opening of the case was pushed back until the following Monday.

22. The transcript of 8 March demonstrates, as Mr Wells submitted, from at least the beginning of 8 March, Mr Brookes, and indeed Mr Chowdhury, did not enjoy the confidence of Mr Rooney and so any submissions made to the court at that point regarding preliminary matters would have to be made without instruction and as such would be of little use to the court. Indeed, Mr Brookes understandably does not appear to seek to make any such submissions.

23. As I have indicated, the trial judge's view of the case was that it had not started when he was describing the state of play to the jury and to the defendant. But it is clear from the Henery guidelines that, for the purposes of the Remuneration Regulations, the start of the trial may begin before the swearing in of the jury where substantial matters of case management have occurred and I do not think that it was likely the trial judge was contemplating the niceties of such case management when explaining to the jury why the trial had not started.

24. Consequently, I need to consider what took place on 6 March onwards to decide whether or not substantial matters of case management had taken place. As I have recorded at the outset of this decision, the determining officer concluded that this was so. Mr Brookes' note suggests that he was only disinstructed at the end of 6 March and so may have played a different role on that date from the one which he was obliged to play on 8 March.

25. I do not have a transcript of 6 March and so do not know how long the parties were before the court on that day. In Mr Brookes' note he records the following:

> "8. The trial began on 6 March 2018 before HHJ Tim Spencer QC. On that date jury selection commenced.
>
> 9. Further legal arguments occurred on 6th and 8th March when issues such as jury questions, admissibility of evidence, interview editing and case management were heard. The prosecution produced an agenda. The agenda dealt with issues such as amending the indictment, the admissibility of draft admissions, bad character applications of the defendant and non-defendant applications. There was argument presented before the judge as to what was to be admitted in terms of agreement and what was not agreed. A copy of the Agenda is enclosed at Appendix 5.
>
> 10. On 8th March further work was conducted in terms of jury selection given the nature of the long trial anticipated. I refer to the agenda the discussion concerned the issues of Directions and timetable re ground rules Hearing, VWI Recordings and transcripts. Special measures applications, Video link applications and the Protocol for Vulnerable witness with the Judge determining as to whether he required questions to be drafted by the defence for approval prior to the questions being put to the vulnerable witnesses.
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> 11. On 8th March the Jury selection was completed, the jury was sworn."

26. I was referred by Mr Khan to an email from prosecuting counsel to Mr Brookes on the night before 6 March which provided the batting order in draft; the draft amended indictment; the bad character application; the index to the condensed bundle of witness statements; the draft prosecution agreed facts; and the jury questionnaire. Mr Khan then took me to the various draft documents which had been appended to Highgate's submissions on recoupment.

27. It was clear, in Mr Khan's submission, that the totality of these various documents, which required input from the defence on each one, could only properly be described as substantial matters of case management for the smooth running of the trial. Whilst the admissions, for example, might in themselves not amount to substantial case management, they needed to be taken together with the other documents to form the whole picture. This work was done outside the courtroom, at least in part, and therefore again needed to be considered in whole rather than simply reviewing the transcript of what occurred in the courtroom.

28. Mr Khan also made the point, as has been recognised in some costs judge decisions, that these issues did not necessarily need to go before the trial judge for determination in order to amount to substantial case management. Otherwise there would be a benefit in counsel being uncooperative rather than pragmatic and that could not be correct.

29. The fact that the Agency has accepted Highgate's position that the case had commenced before the transfer took place was, according to Mr Khan's skeleton, strong evidence in support of his assertion that substantial matters of case management had taken place. The same was true in relation to the payment of counsel's fees on this basis.

30. The trial judge was clearly keen to get the case under way and the only impediment to that was Mr Rooney's decision partway through the hearing to decide that he did not wish to have Highgate and Mr Brookes representing him. That view was unreasonable according to Mr Khan and, in his submission, was found by the judge to be so. If Mr Rooney had not taken this approach, the case would have been opened to the jury and nobody could then have argued that the trial had not begun.

31. Mr Khan's counterfactual argument is no doubt correct but that is not the situation that ultimately occurred. Mr Rooney did take the view that he did not wish to be represented by Mr Brookes and Highgate and consequently the case was not opened. The fairness or reasonableness of that decision is not something which sounds in the costs to be paid under the Remuneration Regulations.

32. In the cases which were reviewed by Spencer J in the Henery decision, a number of them set out what work was done prior to the case being opened. For example, in Henery itself, the case was called on at 3:05 pm with the judge confirming that it was an effective trial. A prosecution witness was not available and the defence confirmed that he was not required. Spencer J records that:

> "There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made."

33. The jury was then empanelled and the jurors were sworn before being sent home to return at 12 noon the following day. The case was in fact called on at 11am with the judge allowing counsel more time for discussions. At 12:40pm the prosecution applied successfully to add a second count to the indictment. The jury was then discharged and the defendants pleaded guilty. On those facts, Spencer J concluded that the case had not started in any meaningful sense.

34. Spencer J quoted from the case of R v Dean Smith and others where Mitting J said the following:

> "I have been asked to state when in my view the trial began for the purposes of the assessment of counsel's fees on the graduated fee scheme. When I made preliminary rulings in this case of some importance and substance, and no little difficulty, I did so exercising among other powers my inherent powers as trial judge. I did so before

> a jury was sworn, in accordance with modern and helpful and economical practice."

35. This quotation confirms that substantial case management involves important decisions for the trial judge to make (or possibly for the advocates to agree). Similarly, in R v Bullingham, Master Campbell referred to a voir dire regarding the admissibility of evidence and Spencer J clearly accepted Master Campbell's view that the circumstances were similar to those in the case heard by Mitting J.

36. Similar comments are made by Spencer J in relation to the case of R v Brook, a decision of Master Rogers where an abuse of process argument was heard before the trial was considered to have started and R v Wembo where Master Gordon-Saker concluded that the case had started when an argument as to whether anonymity orders should be made in respect of some of the witnesses was heard and which was, according to Spencer J, central to part of the trial and the court had to consider the evidence that the relevant witnesses would be giving.

37. In Henery Spencer J says, at paragraph 89:

> "On the facts of the present case there was nothing which took place on the afternoon of the first day…which could be categorised as in any way similar to extended legal argument (R v Dean Smith, R v Wembo) or evidence on the voir dire (R v Bullingham) such as to justify the conclusion that a trial had started in any meaningful sense. The jury was sworn, quite properly, for the convenience of the jurors, and the convenience of the administration of the court, and not because the trial was at that moment beginning. The very clear indication in the court log that the jury was not "put in charge" serves to underline the judge's intention that the trial would not begin until the following day."

38. In this case, Mr Khan placed weight on the fact that the jury was put in charge of the defendant, having been sworn in and the defendant arraigned. In Mr Khan's written submissions that stage could only have been reached if significant case management decisions had already been made up to that point.

39. As I indicated to Mr Khan at the hearing, it was my impression from the transcript that Mr Rooney was not arraigned on the day because he had previously been arraigned and the judge did not think there was any need to do so given that he had previously pleaded not guilty to all matters. That is in fact recorded between D and E of page 7 of the transcript. The judge then goes on to say that he is inclined to put the jury in charge at this stage; *"[g]ive them what I'll call the standard directions and then send them away to some future time; I think still this morning, in the first instance."*

40. At this point the judge was clearly hoping that the case would be opened shortly. Prosecution counsel indicated that he was ready to start as soon as the trial judge wished him to open the case. He then said *"[w]hether that is this morning*

or this afternoon, or on some other day within the next two or three days is entirely a matter for the court. But we are ready to go."

41. Based on these comments, I accept Mr Khan's submission that by this point on 8 March the defendant had been arraigned, the jury sworn and was ready to be put in charge. It does not seem to me necessarily however that it must follow that this could only have occurred if significant case management decisions had already been made.

42. The nub of the problem, as I see it, for Highgate to demonstrate that the case had already begun, is that there is nothing in Mr Brookes' note or the various documents which I have seen which actually suggest that there was an important or substantial issue which had been dealt with, let alone anything difficult for the trial judge to consider. In every case there must be a batting order of witnesses and an attempt made to agree facts to limit what needs to be proved to those matters which are properly in dispute. It is undoubtedly the case that such agreements may prove to be difficult and require the intervention of the trial judge for rulings. But it does not seem to me that it is inevitable that they can be described as substantial matters of case management which are akin to the trial having already opened.

43. There may be little that is contentious in these matters in any given case and, if so, they would be better described simply as ordinary case management (rather than substantial matters of case management) to be dealt with to streamline the trial. Similarly, in respect of the jury questionnaire, on which most time seems to have been spent on 6 March, there was a requirement for the jury to look through an extensive list of people of whom they may already be familiar or to businesses they had been involved with. However, it is not obvious to me that that document required significant debate or indeed argument as to its terms.

44. It is apparent that there was a very large amount of documentation used for this trial as well as related trials and the task of going through the documentation to ensure that all of the names of individuals and companies were captured on the jury questionnaire would undoubtedly have taken some time. But that does not seem to me to amount to substantial case management.

45. I have to say that I am troubled by Mr Brookes' note suggesting that further matters were dealt with by the judge on 8 March having seen the transcript for seemingly the entirety of that court day. The record indicates periods of 30 minutes and 40 minutes during the morning as well as an hour and a half during the lunch period when it would have been possible for the advocates to liaise about matters in issue. But by that point it was clear that Mr Brookes did not have any authority to be agreeing matters with the prosecution and his time was expected to be spent in seeking to repair his relationship with the defendant as he puts it in his own note. On that basis, the description of further work being conducted on 8 March at paragraph 10 of his note (see paragraph 24 above) suggests that a good deal of the work on the agenda was dealt with on 8 March in a manner which must have been essentially uncontested given Mr Brookes' lack of instructions. Mr Brookes' note adds to the impression that I have gained

that actually the case management was relatively straightforward and that might perhaps be expected given that this was the third trial in relation to similar matters.

46. Consequently, I have come to the conclusion that the events on 6 March, as I understand them, together with those on 8 March do not amount to substantial matters of case management and as such the trial had not commenced in any meaningful sense so as to establish that the transfer of the representation order took place during the trial. My decision is that it took place before the trial and consequently this appeal must be allowed.

47. During the course of preparing this decision it became plain to me that the question of what is and is not substantial case management continues to evolve. What was modern practice at the time of Mitting J's judgment in 2005 may not be quite so modern these days. Many of the cases reviewed by Spencer J in Henery are based on the 2007 Funding Order rather than the current Regulations (which have themselves been modified over time). Indeed, some of the decisions are old enough to involve some fees being dealt with on an ex post facto basis rather than a graduated fee.

48. With this in mind, it seems to me that the time may well be right for further authoritative guidance on this question to be given by a High Court judge who will be dealing with current Crown Court practice as part of their role. One obvious change since Spencer J handed down his decision in Henery is the dawn of the "digital age" regarding court paperwork.

49. I am also aware of the fact that a substantial amount of money will be recouped from Highgate, and possibly Mr Brookes, as a result of this decision. An appeal against the recoupment could be brought but that would only lead to a further costs judge decision before there would be any prospect of an appeal to a High Court judge.

50. In these circumstances I would ask the Legal Aid Agency to consider whether there is either (a) a general point of importance which would justify the Agency appealing this decision or (b) allowing for Highgate essentially to step into the shoes of the appellant in these proceedings in order to bring a further appeal should they wish to do so. If, as appears currently the case, the Agency are neutral in respect of this case, I would presume that they would be willing to assist in shortcutting the full procedure in order to minimise the cost of bringing this case in front of a High Court judge if that is desired.

TO: BLACKFORDS LLP
DX 2617 CROYDON

COPIES TO: CARMEL CURRAN
LEGAL AID AGENCY
DX 10035 NOTTINGHAM

HIGHGATE SOLICITORS
56 MANNINGHAM LANE
BRADFORD
BD1 3EB

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.