When does a Trial begin for purposes of Legal Aid funding?

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Inroduction

1. In the recent Senior Courts Costs Office case of R v Joseph Rooney, SCCO Ref: SC-2019-CRI-000021, decided on 21 February 2020, Costs Judge Rowley examined when a trial begins for purposes of Legal Aid funding.
2. This was a Litigators Graduated Fee costs appeal by Blackfords LLP. Other solicitors (who were granted interested parties appeal status) 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 argued that the trial had not commenced when legal aid to represent the defendant was transferred to them from the previous solicitors on 9 March.
4. The Legal Aid Agency determining officer had 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 by Blackfords.
5. The question at the heart of the appeal was identified as whether or not the trial had begun at the time that the Legal Aid Representation Order was transferred.
6. 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. In the Written Reasons, the determining officer in R v Rooney referred to the selection 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:

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

8. The Determining Officer did not expand 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.

Submissions

9. Blackfords argued at the appeal hearing, that no significant case management activity had been carried out prior to their involvement in the case, as the Defendant Joseph Rooney had no confidence in his first legal team. The main matter dealt with was a jury questionnaire, which previous counsel had not taken Joseph Rooney's comments on.

10. When Joseph 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 the defendant'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, the 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.
11. The second strand of Blackfords' submissions 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..."

- “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.”

12. From these various pronouncements of the judge to the jury, the defendant and to the court in general, Blackfords 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.

13. These submissions were accepted by Costs Judge Rowley as indicated in his decision:

“*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*.”

“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.”

“*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.

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.

"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.

On 8th March the Jury selection was completed, the jury was sworn."

14. Having considered various costs decisions Costs Judge Rowley decided substantial case management involves important decisions for the trial judge to make (or possibly for the advocates to agree) see for example
    - R v Bullingham, Master Campbell referred to a voir dire regarding the admissibility of evidence
    - comments made by Spencer J in 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.

- 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."

15. Costs Judge Rowley decided, in the Rooney appeal, that no important or substantial issue had been dealt with, let alone anything difficult for the trial judge to consider, prior to Blackford's involvement:

"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.

"*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."

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."

…[Previous counsel] 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 ….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….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.

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.

Conclusion

16. A trial will start in a meaningful sense if substantial matters of case management importance have been undertaken, such as legal arguments as to the admissibility of evidence, abuse of process applications, as opposed to routine matters dealing with jury questionnaire, batting order of witnesses.

What amounts to substantial case management will vary and depend on the facts of each case.

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