

NEUTRAL CITATION NUMBER 2013 EWHC 3817 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: QB/2013/0197

Strand
London
WC2A 2LL

Friday, 18th October 2013

Before:
MRS JUSTICE ANDREWS DBE

B E T W E E N:

TUCKERS SOLICITORS

and

LORD CHANCELLOR

Transcript from a recording by Ubiquis
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MR C WELLS appeared on behalf of the CLAIMANT
MR D BEDENHAM appeared on behalf of the DEFENDANT

JUDGMENT
(Approved)

MRS JUSTICE ANDREWS:

1. On the 28th December 2012, Costs Judge Gordon-Saker issued a decision in an appeal brought by the appellants, Tuckers, pursuant to Article 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 trial transfer fee. That decision was made on grounds which the Lord Chancellor did not seek to uphold before the Costs Judge. Instead, it was argued successfully that Tuckers were not entitled to any fee, because the case had not been transferred to them within the meaning of subparagraph 10.2 of Schedule 2 to the Order, despite the fact that the Representation Order had been transferred to them.
2. Costs Judge Gordon-Saker dismissed the appeal by Tuckers. He decided that 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.
3. In a case such as the present, where the fee in question was substantial, (in the order of £25,000) it is perfectly understandable why there would be a natural resistance to the suggestion that the graduated fee scheme, mechanical though it is, could result in a firm getting paid a huge amount of money at public expense for doing little or nothing.

4. The Costs Judge certified the following question of general public importance:

‘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 paragraph 10.2(a), Schedule 2 to the Criminal Defence Service (Funding) Order 2007?’
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5. It is for Tuckers to demonstrate that the decision of the Costs Judge was plainly wrong. In my judgment they have so demonstrated.
6. The defendant, Marius Nejlovenau, was charged with offences relating to the trafficking of women for the purposes of prostitution. Three defendants faced 39 counts between them. This particular defendant faced 37 of those counts. His trial commenced on the 28th October 2010. On day two of the trial, Friday 29th October, his legal team found themselves professionally embarrassed and the trial was stopped. It was relisted for the 15th November. As is normal in such cases, a new law firm had to be found, and found quickly, to represent the defendant. Unless the defendant tells the court that he wishes to instruct a specific firm, he will be told that the court will appoint one on his behalf. Provided that the defendant agrees to this course being taken, the court must be acting on the defendant’s behalf when it contacts the new firm of solicitors by telephone to ascertain whether they are willing to act.
7. It is incumbent upon any firm of solicitors to carry out a conflicts check before accepting 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.

8. However, having carried out such a conflicts check it is not the practice for the firm to then revert to the Crown Court and tell the court that they are satisfied that they can act. There must be an assumption, therefore, that everything is in order if the new solicitors continue to act and no message gets to the Crown Court to say that they are unable to do so before the amended Representation Order is made.
9. The case handler at Tuckers did carry out a conflicts check against the name of the three defendants on the 29th October 2010, and found no conflicts. She then made arrangements for a visit to the defendant, who was in custody at HMP Manchester. On the 1st November she booked a Romanian interpreter for that visit, which was scheduled for the afternoon of the 3rd November. On the same date, Manchester Crown Court made a Transfer Representation Order, which was backdated to the 29th October.
10. In the meantime the former solicitors had sent Tuckers a number of emails 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 1st November 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 2nd November.
11. The relevant parts of paragraph 10 in Part 2(b) of Schedule 2 provides as follows:

‘Where a case is transferred to a new litigator... the original

litigator and the new litigator must receive a percentage 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.’

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.
13. Mr Bedenham 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, Mr Bedenham 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.’*
14. When pressed as to the exact point in time at which he submitted that the transfer takes place, Mr Bedenham submitted that it takes place 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, he 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.

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. I would also agree with Mr Bedenham’s submission that a transfer cannot be one-sided and that there is no transfer simply because a litigator has received the papers. That is not what Mr Wells suggested. There may be situations in which the Representation Order is made before the solicitor has accepted instructions, but they must be rare, because the court is unlikely to make such an order without first being satisfied that the solicitor has done so. In any event, that is not the scenario postulated in the question of general importance with which this court is concerned.

16. There is a serious matter of concern to be addressed here. Simply to answer the question yes, without some refinement, could lead to the possibility of abuse or unfairness, if the litigator concerned failed to carry out a conflicts check before the Representation Order was made. For that reason, it seems to me that if one were to slightly reformulate the question, the answer would be yes, the reformulation being 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 paragraph 10.2(a) of Schedule 2 to the Criminal Defence Service (Funding) Order 2007?

17. Mr Wells was minded to agree that that refinement should be made. In my judgment that is a sensible concession, because it makes it clear that the new litigator must carry out a conflicts check in order for the case to be validly transferred to him, 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 paragraph 10.2(a) of Schedule 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.
18. 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.

19. Concern was expressed about what might happen in circumstances in which the new litigator has a cavalier approach to doing the conflicts check, but as I have already indicated, to import notions of reasonableness into the interpretation of the Funding Order would be a recipe for disaster. 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.

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.

21. For those reasons, and subject to the small modification referred to above, the question of general importance certified by the Costs Judge is answered in the affirmative, and this appeal is allowed. The Respondent is to pay the Appellant’s costs. I have had the advantage of being able to consider the schedule of costs that is put forward on behalf of Tuckers. Overall the figures appear to be reasonable, but there is a claim for VAT, which should not

be there. Therefore I have carried out a summary assessment of the costs in the sum of £9,000.

End of judgment.
