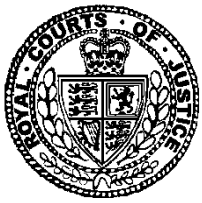

Neutral Citation No. [2025] EWHC 991 (SCCO)

Case No: T20217053

SCCO Reference: SC-2024-CRI-000145

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 23 April 2025

Before:

COSTS JUDGE LEONARD

R
v
SANDEL

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Hussain Solicitors**

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

The appropriate additional payment, to which should be added the sum of £1,500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. The Appellant solicitors represented Lenny Sandel ("the Defendant") in proceedings before the Crown Court at Derby. By virtue of a Representation Order made on 1 August 2021, the Defendant was legally aided and the Appellant is entitled to payment in accordance with the provisions of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013, as an effect on that date.

2. On 9 November 2022, funding was transferred and the Defendant was represented by another firm of solicitors. The issue on this appeal from the Legal Aid Agency's Determining Officer is whether, by reference to paragraph 13 of Schedule 2, the Appellant is entitled to the fee payable for a transfer of funding before a retrial of the Defendant. The Determining Officer concluded that in all the circumstances, there had been only one trial of the Defendant, so that no such fee was payable.

3. Paragraph 13, subparagraph (2) reads:

   "Where following a trial … (b) a retrial is ordered and a new litigator acts for the assisted person at the retrial, the fee payable to the original litigator and the new litigator is a percentage of the total fee, calculated in accordance with the table following this paragraph, as appropriate to the circumstances and timing of the retrial, transfer or withdrawal of the section 16 determination".

4. The amount of the fee that would be payable under the table referred to in paragraph 13(2)(b) is not in issue. The question is whether it is payable at all.

The Background

5. The Determining Officer's written reasons offer a succinct summary of the case history up to the point of transfer, but not of subsequent events. I am grateful to Mr McCarthy KC, for the Appellant, for much of the detail that follows.

6. The Defendant appeared at the Derby Crown Court on an indictment which offences of Conspiracy to steal vehicles and conspiracy to conceal, disguise or convert criminal property. He was arraigned on an indictment uploaded to the Crown Court's Digital Case System ("DCS") on 29 November 2021. He pleaded Not Guilty.

7. The Defendant's trial started on 8 March 2022 before Mr Recorder MacAdam (as he then was). On 25th April 2022, it was aborted. According to a trial attendance note this came about due to a reducing number of jurors (mainly through illness) and to evidential problems. By the time the jury was discharged, the case had taken 30 days of Court time.

8. The Defendant's trial was not re-listed until 3 January 2024, over 20 months later. The trial judge was HHJ Adams. The Defendant was convicted on 9 February 2024.

9. The Appellant has produced copy email correspondence with the Derby Crown Court office between 19 and 20 October 2023. In the correspondence, the Appellant enquired as to the new trial date; explained that the Appellant had represented the Defendant at the 2022 trial and that the Legal Aid Agency was taking the view that the "new" trial would be a continuation of the first, rather than a retrial; and asked the court to confirm the date of re-trial and whether a new judge would be presiding.

10. In his initial reply, a Crown Court listing assistant confirmed to the Appellant that "the date of re-trial is 2 January 2024". When asked again whether the same judge would be presiding, he replied "Please be advised that this can go before any judge for a re-trial".

11. Mr McCarthy advises me that following the end of the first trial, the Crown served a body of additional evidential material. Two new indictments were uploaded. Applications were made for live-link evidence and to exclude pleas of others and substantial submissions proffered support of the exclusion of to exclude evidence against the Defendant. At the close of the Crown case there was a further submission of no case to answer.

LAA guidance and Decided Cases

12. There is no statutory definition of "trial", "retrial" or "new trial" (a term used in the 2013 Regulations, and in the LAA guidance referred to below, interchangeably with "retrial").

13. Some of the older Costs Judge decisions on whether there has been one trial, or a trial and retrial, are helpfully summarised in Appendix P to the LAA's Crown Court Fee Guidance (as applicable in August 2021). Those decisions encompass the provisions of the Criminal Defence Service (Funding) Order 2007, the predecessor to the 2013 Regulations, but there does not appear to be any material difference in the relevant provisions for the purposes of this decision.

14. It should be borne in mind however that the decisions of Costs Judges on trial and retrial are necessarily fact specific. Nor are such decisions binding. Further, the approach of Costs Judges to issues such as retrial (as some of the decisions to which I shall refer seem to me to demonstrate) may evolve over time.

15. Appendix P reads as follows:

> "The decision about whether there is a single trial or a trial followed by a new trial in any case will depend entirely on the facts of that particular case. There are many different variables that must be considered when reaching a decision. Given this, providing absolute clarity is difficult. The purpose of this section of the guidance is to set out the variables that must be taken into account when making a determination in this area…
>
> The single most important factor is whether or not the trial judge makes an order for a new trial (as opposed to an order that the trial re-start or be re-listed)…
>
> ***Where an Order is Not Made for a New Trial***
>
> It is acknowledged by all stakeholders that an order for a new trial is rarely made, and all other relevant factors must be taken into account when making a determination. In cases where there is no order made by the judge, then the LAA will apply the reasoning in Costs Judge decision: **R. v. Nettleton (Mr Doran) (2012)**. In this case, Master Gordon-Saker held that if there is no

order by the judge that there will be a new trial and the second leg of the case is deemed to be part of the 'same temporal and procedural matrix', then the fee payable is for one trial only. In **Nettleton,** despite the fact that there was a gap of two working days after the first jury was discharged, Master Gordon-Saker ruled that the case should be paid as one trial because it was part of the same trial process.

In determining whether a case forms part of the same "procedural and temporal matrix", the LAA will consider the factors set out below:

• The length of time between the first leg and the second leg of the case. A gap of just a few days may, for example, indicate a single trial, whereas a gap of several months may indicate a trial followed by a new trial. Although the LAA will consider the length of gap in light of Costs Judge decision **R. v Cato (2012)** which held that where there is no order for a new trial the length of the delay does not necessarily mean there has been a new trial. The trial must have run its course (i.e. the jury must have gone out to consider its verdict) and an order for retrial must be made.

• The stage at which the first leg concluded. If the trial concludes and the jury is unable to reach a verdict, any further trial will be considered as a new trial. Conversely, if the jury is discharged before all evidence has been heard, and the proceedings continue, it is more likely that this will be considered a single trial. **R. v Forsyth (2010)** held that in order for a trial to be considered a trial and new trial, the trial must have run its course (i.e. jury failed to reach a verdict) and there must be an order for a new trial and not merely a break (whether or not a second jury was empanelled).

• The relative length of the first and second legs. A very short first leg followed by a much longer second leg may indicate that this was one trial.

• A change of advocate between the first and second legs may be an indicator that there has been a trial followed by a new trial, depending on the reason for the same advocate not attending both legs.

• A change of judge between the first leg and the second leg may be an indicator that there has been a trial followed by a new trial. Where the first judge has heard substantial legal argument which needs to be argued again before a second judge, it may indicate a trial followed by a new trial, whereas a change in judge early in the trial, for example because of illness or for administrative convenience, is more likely to indicate a continuing process.

• A change in the case between first and second trial (e.g. a change in indictment, a change in way case is presented, etc.). A substantial change in the nature of the case may lead to a determination that there was a trial followed by a new trial.

• Any comments by the trial judge in either the first or second trial to indicate there was a new trial."

16. Master Gordon-Saker's judgment in *R v Nettleton* (Costs) [2013] 1 Costs L.R. 186 (referred to by the Determining Officer in her written reasons) was the first of two decisions on trial and retrial within the same proceedings. The second was the decision of Master Campbell in *R v Nettleton* (Costs) [2014] 2 Costs L.R. 387 (2014), which has been referred to by the Appellant.

17. In *R v Nettleton* a trial had started before HHJ Bolton on 1 November 2010 and continued until 16 November 2010, during which period the first jury was discharged and another sworn. HHJ Bolton was, on 16 November, herself arrested. Proceedings came to a halt and the jury was again discharged. The trial came before HHJ Whitburn KC on 7 March 2011, in the course of which, before the conclusion of the trial on 23 May 2011, a jury was again discharged.

18. Master Gordon-Saker rejected the proposition that the proceedings before HHJ Bolton constituted a trial and re-trial. Master Campbell agreed. Master Campbell did find, however, that there had been a retrial before HHJ Whitburn KC.

19. Master Campbell adopted the established test of whether, when a trial resumed, "matters were part of the same procedural and temporal matrix as the first trial so that there was only one process" (paragraph 39 of his judgment). At paragraph 46 he said this:

> "It is accepted that the Graduated Fee Schemes are rigid… However, Mr Edwards submits that there is still some flexibility… 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."

20. Mr McCarthy has referred me to some more recent Costs Judge decisions, notably *R v George* [2023] EWHC 2187 (SCCO) and *R v Lock* [2024] EWHC 1324 (SCCO), in which she Costs Judge Rowley (now Senior Costs Judge), referring to the Crown Court Fee Guidance, said at paragraphs 20 and 21 of his judgment:

> "It is not clear to me… why a shorter first leg should suggest that a longer second leg was somehow a continuation of a single trial rather than a retrial. There is no explanation given in the guidance as to why this is so. It may be that once a trial is up and running for any length of time, it is less likely to require a new hearing. But if it is the case that short, abortive, first legs require further hearings, I do not see why that indicates one option rather than the other, given the myriad of reasons why the first leg ended quickly…
>
> By contrast, it seems to me that the gap between the two legs is an important factor. A number of the earlier cases were adjourned for a matter of days, rather than weeks or months. Indeed it appears that at one point the difference between the continuation of a trial or the beginning of a second trial depended on whether the hiatus was for more than a single day. In this case, the gap is no less than three months and that is a considerable period of time for any professional to be expected to keep on top of factual matters and arguments. Realistically, it seems to me, a good deal of further preparation is going to be required and that further preparation is one of the hallmarks of there being a further trial rather than carrying on the original trial."

21. I would tend to agree with those observations.

The Appellant's Submissions

22. Mr McCarthy submits that this must have been a case of trial and re-trial. The first trial began with a jury. The jury was discharged after 30 days. The first trial concluded at that stage. Although not noted on the log, the Court evidently directed there be a re-trial.

23. There was a change of Litigator and of both leading and junior Counsel in the second trial. There was also a change of Judge, and not least there was a gap between the two trials of over 20 months. There were new indictments, new evidence, new unused material and written legal submissions between the two trials. The shape of the Prosecution case changed. The second trial, unlike the first, ran its natural course to a verdict.

Conclusion

24. The Determining Officer's written reasons for the refusal of a transfer before trial fee refer to Master Campbell's judgment in *R v Cato* (SCCO 155/11, 9 March 2012) and Master Gordon-Saker's in *R v Forsyth* (SCCO 155/10, 19th October 2010). Those decisions are cited in support of these conclusions:

> "all the hearing dates appear to be part of the same proceedings/temporal matrix, as the first trial did not run its course… in order for a trial to be considered a retrial there must be an order for a new trial or the trial must have run its course without the jury reaching its verdict… There is no evidence that the trial had run its course or that a new trial was ordered by the judge".

25. There is also, in the written reasons, a focus on timing:

> "There was no evidence that the case was listed for a retrial whilst the original solicitor was instructed in the case…We have therefore refused the claim… as there is no evidence that the case was listed for retrial whilst Hussain Solicitors were instructed… the email provided from the court does not confirm that the case was listed for retrial whilst you were instructed in the case."

26. Timing does not seem to me to be to the point. Paragraph 13 of schedule 2 governs the Appellant's right to a fee for transfer before retrial, and it does not require that the retrial be listed before the transfer takes place.

27. As for whether an order for retrial was made, in *R v Forsyth* Master Gordon-Saker readily accepted that an order for a retrial need not be made in writing. I am advised by Mr McCarthy that directions for a retrial, whilst normally recorded in some form, tend not to be incorporated in a formal order. It will more typically be recorded on the DCS (though apparently not in this case).

28. The LAA's Crown Court Fee Guidance to which I have referred appears to accept that. I read it as indicating there it may be right to conclude, on the facts of a given case, that an order for retrial has been made, even if it is not made in writing or recorded as such on the court record. I would agree with that. In this case the email correspondence produced by the Appellant indicates that such an order was in fact made.

29. I do not agree with the conclusions drawn by the Determining Officer from *R v Cato* and *R v Forsyth*. It is clear from the observations of Master Campbell at paragraph 46 of *R v Nettleton* that he accepted, his own decision in *R v Cato* notwithstanding, that there may be a retrial whether or not the first trial has run its course. I respectfully agree. To the extent that *R v Cato* and *R v Forsyth* might appear to offer guidance to the contrary, they have long been superseded.

30. In summary, there will be cases in which, in all the circumstances, (a) it is right to conclude that an order for a retrial has been made, whether in writing or not and (b) it is right to conclude that the second "leg" of a trial is a retrial, whether or not the first trial ran its course. Both conclusions are appropriate in this case.

31. The additional evidence and unused material, and the applications apparently made for the purposes of the January 2024 trial, would not in themselves justify the conclusion that it was a retrial. One must however look at the circumstances in which that evidence was served and those applications were made.

32. Having regard to the very long interval between April 2022 and January 2024, along with the change of both judge and defence team, it seems to me that it is quite unrealistic to characterise the January 2024 hearing as anything other than a retrial. It cannot sensibly be said that the January 2024 trial formed part of the same procedural and temporal matrix as the March/April 2022 trial.

33. This appeal, accordingly, succeeds.