SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2019-CRI-000001

Dated: 20 November 2019

ON APPEAL FROM REDETERMINATION

REGINA v MILLER

TEESSIDE CROWN COURT

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

CASE NO: T20170253

LEGAL AID AGENCY CASE

DATE OF REASONS: 28 JUNE 2019

DATE OF NOTICE OF APPEAL: 26 JULY 2019

APPLICANT: WATSON WOODHOUSE	SOLICITORS	

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

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns whether, under the provisions of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013, the Appellant is entitled to payment for a one-day trial or to a fixed cracked trial fee. The Representation Order was dated 16 March 2017, and the 2013 Regulations apply as in effect that date.

2. A short extension of time for the appeal has been requested and granted.

Background

3. The Appellant represented John Miller ("the Defendant") who was charged with thirteen counts of fraud.

4. The case against the Defendant was that he had been offering a financial product through which prospective purchasers were to rent a property for a period during which they could save sufficient funds for the purchase. The scheme entailed that they provide the Defendant with a deposit, to be held securely on their behalf and refunded if they abided by the terms of the tenancy agreement. The payments were, however, appropriated by the Defendant and used to make personal and business payments.

5. The case was listed for trial on 8 January 2018. On 7 January, Mr Duffy, counsel for the Defendant, prepared an application to stay or adjourn the trial based on three areas of complaint. These were that the Crown had seized the Defendant's relevant business records and had not given his defence team access to them; that following the arrest and interview of the Defendant and seizure of his papers the Crown had failed to undertake investigations fundamental to the trial; and that the police had seized legal documents subject to legal professional privilege and litigation privilege, which had been read and exhibited in the case.

6. The following summary of events is extracted from the Determining Officer's review of the court file. On 8 January 2018, the case came on at 11.33 a.m. The Crown applied to vacate the hearing as further evidence had recently been found, apparently amounting to thousands of emails. (According to the Appellant, this comprised a body of email correspondence between the Defendant and various witnesses, held on a cloud server, which should have, but had not been downloaded). The defence confirmed that the Defendant was unwell and the case was released at 11.41. At 12.45, the case resumed and the trial date reset for 1 October 2018.

7. The case was next heard at 11.05 a.m. on 3 October 2018. The defence confirmed that there was now a second indictment and that the Defendant pleaded guilty to count 13. The Crown confirmed that counts 1 to 11 were encapsulated in count 13 and that count 12 was to lie on the file. The case was referred for sentencing on 6 November.

8. The Appellant offers a slightly different version of events, referred to below.

The Appellant's Submissions

9. The Appellant, whilst accepting (in written submissions to the Determining Officer) that no trial took place, submits that the hearing of 8 January 2018 should properly be regarded as a preparatory hearing ordered under section 7 of the Criminal Justice Act 1987 or section 29 of the Criminal Procedure and Investigations Act 1996. The court log does not reflect that but one must, says the Appellant , have regard to the content of the hearing, not the way in which it is described by the court clerk.

10. 8 January 2018, says the Appellant, should have been the first day of trial. Instead, the trial judge, HHJ Rippon, identified issues which were likely to be material to the determinations and findings likely to be required during the trial. Those involved complex breaches of legal professional privilege by the Crown and the extent to which, if at all, they could be remedied, together with a material breach of the Crown's disclosure obligations in relation to an electronic evidence and, according to Mr Wells, a wholesale failure to investigate and disclose evidence that might have put the alleged offences in context, such as a contract devised by the Defendant's solicitors to ensure that participants in the scheme were not misled and records of standard bank checks evidencing the nature and purpose of accounts opened by the Defendant.

11. Those issues having been identified, it is common ground that following submissions the trial judge set a timetable for their determination. The Appellant says that counsel for the Crown and for the defence spent a significant period of time discussing the issues of privilege (and how if at all it could be remedied) as well as of the service of electronic evidence and requirements for expert evidence, coming to a pragmatic agreement for resolving those problems. A significant amount of work took place in reliance on what was agreed on 8 January 2018. This formed the basis for the preparation of the case as a whole.

12. That is why, says the Appellant, the hearing on that date should be characterised as a preparatory hearing. The Appellant refers to *R v Jones* (unreported, 2000) as authority for the proposition that a trial begins at the start of a preparatory hearing.

13. As for 3 October 2018, the Appellant confirms that no jury was selected or sworn. Nonetheless, says the Appellant, the court had to deal with substantial matters of case management. Following protracted negotiations between the Crown and Mr Duffy for the Defendant, the Crown conceded that the Defendant's business had begun as a legitimate enterprise. Further discussion resulted in the drafting of the new count 13 and the Crown's offer that should the Defendant to plead guilty to that count, count 12 would be left to lie on the file and not guilty verdicts entered to counts 1-11.

14. The Appellant relies upon *R v Coles* (SCCO 41/16, 15 March 2017, Master Whalan) and *R v Sallah* (SCCO 281/18, 18 March 2019, Master Rowley) in arguing that that matters of substantial case management were addressed at

both hearings on 8 January and 3 October 2018. Had they not been agreed by counsel, they would have been addressed by the trial judge and there could be no doubt that a trial had started.

Conclusions: Preparatory Hearing

15. The Appellant has been unable to produce a copy of the judgment in *R v Jones*. I note from the judgment of Master Gordon-Saker in *R v Dowd* (SCCO 111/18, 18 April 2019) that the Legal Aid Agency's Crown Court Guidance (2018) confirms that a preparatory hearing shall be deemed as the start of the trial and included in the length of trial calculation, but also that if no jury is sworn thereafter because the client pleads guilty, or the case comes to an end for any reason, the case is either (depending on the circumstances) a Cracked Trial or a Guilty Plea. A brief reference to *R v Jones* at paragraph 5.57 of the 2016 edition of "Criminal Costs" by Anthony Edwards cites the decision as authority for the proposition that "A trial begins at the start of a formal preparatory hearing".

16. The word "formal" does tend to support my own view that that the hearing of 8 January 2018 cannot properly be characterised as a preparatory hearing ordered under section 7 of the Criminal Justice Act 1987 or section 29 of the Criminal Procedure and Investigations Act 1996.

17. Both those sections provide for the court to order a preparatory hearing under specified circumstances, notably where a fraud is of such seriousness or complexity, or a trial of such potential length, that it is appropriate to arrange a preparatory hearing hearing for the purposes of identifying the issues and dealing with other substantial matters of case management.

18. It is not suggested here that the court made any such order, nor that the trial judge was asked to or did treat the hearing of 8 January 2018 as a preparatory hearing. Mr Wells submits rather that it was akin to a preparatory hearing, which is not the same thing.

19. Ms Weisman for the Lord Chancellor points out that the fact that the hearing may have had characteristics in common with a preparatory hearing does not mean that it was one. The making of an order for a preparatory hearing has specific procedural consequences. There are specific appeal procedures, for example in section 9 of the Criminal Justice Act 1987. For that reason, she says, when such an order is made it must be clearly identified as such.

20. That seems to me to be correct. The suggestion that the hearing of 8 January 2018 can be characterised as a preparatory hearing is, in my view, misconceived.

21. Having reached that conclusion, it seems to me that the real question is whether, by reference to the relevant authorities, the trial began on either 8 January 2018 or 3 October 2018. If it did, then a trial fee is due. If not, then a cracked trial fee is due.

Whether the Trial Began: Authorities and Submissions

22. Authoritative guidance is to be found in the judgment of Mr Justice Spencer in *Lord Chancellor v Ian Henery Solicitors Limited* [2011] EWHC 3246 (QB), summarising the principles at paragraph 96:

> ' (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…
>
> (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…
>
> (4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the 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…
>
> (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…
>
> (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 purpose of the graduated fee schemes. It will 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 began, 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….'

23. No such request appears to have been made of the trial judge in this case.

24. As I have mentioned, the Appellant relies upon *R v Coles* (SCCO 41/16, 15 March 2017, Master Whalan) and *R v Sallah* (SCCO 281/18, 18 March 2019, Master Rowley). Ms Weisman refers me to *R v Abdullah* (SCCO 281/15, 30 November 2015, Master Simons) to *R v Wood* (SCCO 178/15, 30 November

2015, Master Simons) and to *R v Dowd*, in which Master Gordon-Saker found that an important case management hearing in February 2017 had not been a predatory hearing, nor could it properly be characterised as the first day of a trial that actually opened in May 2017.

25. In *R v Abdullah* and *R v Wood* Master Simons took the view that the words "the court is dealing with substantial matters of case management" entailed that the trial judge would be dealing with issues that require rulings regarding the trial, evidence etc. Discussion, negotiation and agreement of schedules between the Defence and the prosecution case management were matters normally dealt with prior to trial. They were going to be of assistance to the court and might have led to the shortening of the trial, but they were not in themselves enough to show that the trial had started in any meaningful sense.

26. In both cases he referred, as does Ms Weisman, to the observations of Mitting J in *R v Dean-Smith & others* (December 2005, unreported), to which Spencer J (at paragraph 70) referred in *Lord Chancellor v Ian Henery Solicitors Limited*, and with which Spencer J's judgment was evidently intended to be consistent.

27. At paragraph 70 of the judgment of Spencer J, Mittting J was quoted, from a transcript, as saying:

> ""Trial" as far as I could determine, is not defined in the Regulations. I would simply say this: that if without an express statutory definition "trial" were to be interpreted by those responsible for assessing fees as meaning the moment which the jury is empanelled until the moment of delivering a verdict … I would regard that as a misconstruction. In a case such as this (which will be increasingly common in the future) where important preliminary rulings have to be given as part of the trial process, then in my view, and for the purpose of assessing the appropriate fee, "trial" means and should be taken to be the date upon which those submissions are first made to the trial Judge in a continuous process which results in the empanelling of a jury without break of time and in the leading of evidence and the returning of a verdict…"

28. Based upon this passage, Ms Weisman argues that whilst the empanelment of a jury may not be determinative of the point at which a trial starts, in a case such as this, which has never reached the point of jury empanelment, it cannot be said that a trial has started.

29. Ms Weisman also cites in support *R v Barrowman*, in which Master Brown, observing that submissions had not begun as part of a continuous process resulting in the empanelling of a jury, found that a trial had not begun, and *R v Boland* (SCCO 33/16, 26 April 2016, Master Rowley). In that case the defendant pleaded guilty before the jury was sworn and the Master found that no substantial matters of case management had not been addressed. He also observed that the fact that work had been done for previous ineffective, adjourned trials could not justify the conclusion that a trial had begun.

30. Turning to the decisions relied upon by the Appellant, in *R v Coles* and *R v Sallah* Masters Whalan and Rowley, respectively, took the view that if the parties had managed matters of substantial case management, so saving the need for a judge to address them, then it could be right to conclude that the trial had started in a meaningful sense. To conclude otherwise, as Master Whalan put it, would penalise unfairly constructive, pragmatic advocates and encourage unreasonably less cooperative advocates content to rely on directed judicial intervention as a means of establishing greater remuneration.

Conclusions: Whether a Trial Started

31. In this case it seems to me that one cannot identify a day that can properly have been said to have marked the start of a trial.

32. Substantial matters of case management were indeed discussed by the parties before being put to the judge on an agreed basis on 8 January 2018, but the whole thrust of the Defendant's case at that stage was that the trial was not ready to start (and, at least arguably, that it should never start). One cannot characterise that as the starting point for a trial which did not come back to the court for another nine months.

33. This leaves the hearing on 3 October 2018. What happened on that date was that (the issues raised on 8 January having been resolved) the indictment was, following discussions between prosecution and defence, amended and a plea accepted without a jury being selected or sworn. Those were not matters of case management that would otherwise have fallen to be determined by the trial judge. They were typical last-minute negations leading to a cracked trial. I agree with Ms Weisman that this, as in *R v Boland,* was a cracked trial.

34. For those reasons, the appeal must fail.

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