



Neutral Citation No. [2024] EWHC 702 (SCCO)

Case No: T20187090

SCCO Reference: SC-2023-CRI-000052

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

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

Date: 18<sup>th</sup> March 2024

**Before:**

**COSTS JUDGE WHALAN**

**R**

**v**

**WILLIAM MCGINLEY**

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

Appellants: Mr Stephen Donnelly

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Appellant.

## COSTS JUDGE WHALAN

### Introduction

1. Mr Stephen Donnelly, Counsel ('the Appellant') appeals the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim under the Advocate's Graduated Fees Scheme ('AGFS'). The issue for determination is whether the Appellant is entitled to a 'cracked' trial fee, as claimed, or a re-trial fee, as allowed. The disputed fee followed a trial and several re-trials.

### Background

2. The Appellant represented Mr William McGinley ('the Defendant') who appeared at Stafford Crown Court with five co-defendants (Martin, Simon, Anthony, Barney and Bridget Philomena McGinley), on an indictment alleging eight counts relating to 'modern slavery'.
3. Their trial, according to HHJ Gosling, "had a protracted and uniquely troubled history". The background is set out in a Note drafted by the trial judge on 12<sup>th</sup> October 2022.
4. The first trial commenced on 5<sup>th</sup> November 2018 and the jury was discharged on 30<sup>th</sup> January 2019.
5. The first re-trial began on 17<sup>th</sup> September 2019, but that jury was discharged on 4<sup>th</sup> November 2019.
6. The second re-trial was delayed by the Covid pandemic. It began on 2<sup>nd</sup> March 2022, but the jury was discharged on 11<sup>th</sup> March 2022. This was because an important witness for the prosecution, whose evidence had been recited to the jury in opening, was by then unwilling to give evidence.
7. A fresh jury was sworn on 15<sup>th</sup> March 2022. Looking at the Note of HHJ Gosling, it seems to me that this represented the start of a third re-trial, rather than a continuation of the second re-trial that had begun on 2<sup>nd</sup> March. Various difficulties characterised the progress of this hearing. The first jury panel was discharged when a number of jurors cited timetabling issues. Thereafter, some of the co-defendants suffered

episodes of ill-health, so that in May 2022 Simon McGinley was severed from the indictment. The Crown closed its case on 25<sup>th</sup> May 2022 and there were submissions of ‘no case’ by the four remaining co-defendants. On 7<sup>th</sup> June 2022, HHJ Gosling delivered judgment on the defence submissions, directing that not guilty verdicts should be entered in the cases of Anthony and Barney McGinley, leaving the Defendant and Martin McGinley as the remaining co-defendants. Thereafter, progress of the trial was affected by recurrent illness, affecting the judge, as well the co-defendants, and then the jury. The jury had been told initially that the trial ought to conclude by 24<sup>th</sup> June 2022. When this prediction was undermined by circumstance, several jurors had to be discharged. The case followed a stop-start progress during June and July 2022. It was also affected by ‘the Bar Action’, essentially a series of strikes pursued by barristers in protest at the rate of Legal Aid remuneration. This action ended on 10<sup>th</sup> October 2022 and the trial was relisted on 12<sup>th</sup> October 2022. By that stage, however, HHJ Gosling saw no alternative but to discharge the jury, for reasons set out (at some length) in his Note.

8. At that point, on 12<sup>th</sup> October 2022, it seems clear that the Crown anticipated proceeding to (what would have been a fourth) re-trial. The case was adjourned to 18<sup>th</sup> November 2022, “to allow time for the prosecution to consider whether there was to be a re-trial”. At the same time, however, the court’s Listing Officer, on the direction of the trial judge, set down a re-trial date of 8<sup>th</sup> April 2024. No time estimate was recorded in the court log, but it does seem that this listing was viewed as a ‘fixture’.
9. At the hearing on 18<sup>th</sup> November 2022, however, the Crown indicated that the prosecution had abandoned its intention to proceed to a re-trial and so no evidence was offered against the remaining defendants. It seems that the Crown had conveyed this indication to the defence on 17<sup>th</sup> November 2022.
10. The Appellant submitted his AGFS claim and the Respondent’s assessment to payment for a ‘cracked’ trial fee. On 28<sup>th</sup> December 2022, however, the LAA reversed its decision; it wrote to the Appellant to state that the cracked trial fee had been paid in error and that “we must recoup the money paid”.

#### The Regulations

11. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended, apply. Reference is made to the definition of 'case' and 'cracked trial' in paragraphs 1, 2 and 3 of Schedule 2 to the 2013 Regulations. The Determining Officer also refers to the relevant sections of the Crown Court Fee Guidance which provide as follows:

26. Where a trial is aborted, or a jury is unable to reach a verdict, with the prosecution later offering no evidence, a Cracked Trial fee should not be paid for the second or any subsequent intended trial unless the case was again considered ready for trial by being given a fixture listing or placed in a warned list. Adjourning the proceedings to allow the prosecution time to decide whether or not to proceed further – with the case subsequently being listed for mention at which the prosecution offer no evidence – would not qualify for a Cracked Trial fee.

27. Refer to Costs Judge decision: R v. Pelepenko (2002) was held that a Cracked Trial fee can only be paid after an aborted Trial, where the prosecution has confirmed that they are proceeding to another Trial, and the case subsequently cracks.

12. I am directed to the decision in R v. Pelepenko [2002], 3<sup>rd</sup> October, SCCO Ref: X27A, a decision of Costs Judge Rogers.

#### The Submissions

13. The Appellant did not request an oral hearing and has asked that this appeal be determined on the papers.
14. The Respondent's case is set out in Written Reasons dated 9<sup>th</sup> February 2023. The Appellant's case is set out in Grounds of Appeal lodged on or about 6<sup>th</sup> June 2023. I directed that the parties could, if so advised, file any additional written submissions by 4<sup>th</sup> February 2024. The Respondent submitted a short e-mail on 5<sup>th</sup> February; no supplemental submissions were received from the Appellant.

#### My analysis and conclusions

15. The Respondent, in summary, states that the facts of this case fall squarely within the ambit of R v. Pelepenko (ibid). On 12<sup>th</sup> October 2002, the judge adjourned the case until 18<sup>th</sup> November 2002, specifically for the prosecution to determine whether it intended to proceed to another re-trial. On 18<sup>th</sup> November 2002, pursuant to an indication conveyed the day before, the prosecution offered no evidence and the

defendants were discharged. This does not, submits the Respondent, attract a cracked trial fee, notwithstanding the fact that the Determining Officer concluded originally that it did.

16. The Appellant, in summary, submits that on the 12<sup>th</sup> October 2022 it was the assumption of the prosecution and the defence that the case would proceed to another re-trial. The case – not least because of its protracted history – was ready for trial. The Listing Officer, on the direction of HHJ Gosling, accordingly placed it in the list as a fixture, with a start date of 8<sup>th</sup> April 2024. The protracted delay between October 2022 and April 2024 bore no reflection on the case, but rather the collective convenience of the judge and counsel and, more particularly, the fact that Crown Court lists had become terribly congested by the effects of the Covid pandemic and the barristers' Bar Action.
17. This case, it seems to me, straddles a boundary in the circumstances anticipated by the Regulations and the Crown Court Guidance. On the one hand, on 12<sup>th</sup> October 2022, the case was adjourned for mention on 18<sup>th</sup> November 2022, for the prosecution to determine whether it would seek another re-trial. On the other hand, it seems that at that stage it was the settled intention of the prosecution and the defence (and indeed the court), that there would be another re-trial, and that the case was considered ready for hearing. Accordingly, it was given a fixture of 8<sup>th</sup> April 2024. This listing, quite obviously, was directed in part by the protracted background (which I suspect was unusual but not unique), but also by the fact that as the two remaining defendants had experienced four trials over (what was almost) a four-year period, another trial was reasonably predictable. This, therefore, is a borderline case.
18. It seems to me, however, that on the particular facts of this case, the original decision of the Determining Officer to allow a 'cracked' trial fee was correct. Looking at the applicable (and, to my mind, correct) Cracked Court Guidance, the essential elements – readiness for trial and listed as a fixture on a warned list – were satisfied. The Respondent, in my conclusion, to reverse its original decision and purport to reclaim the fee paid as an overpayment.

19. It follows, for the reasons set out above, that the Appellant's appeal is allowed and I direct that his AGFS claim be assessed to include a 'cracked' trial fee for 18<sup>th</sup> November 2022.

Costs

20. The Appellant should be remitted the £100 paid to lodge his appeal. There is no other claim or award of costs.

TO:

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