Case 60

R

v

Fury

[2011] 5 Costs LR 919

Senior Courts Costs Office
17 September 2010

Before:
Andrew Gordon-Saker, Costs Judge

Headnote

The question the costs judge had to decide in this appeal was whether two indictments were "heard concurrently" under para 23(2) of Schedule 4 to the Criminal Defence Service (Funding) Order, so as to entitle counsel to one fee with a "number of cases uplift", rather than, as he claimed, to two separate graduated fees.

Reasons for Decision

1. These are appeals by Mr Swift QC and Mr Benson QC against the decisions of Mrs Calland, a Determining Officer, to disallow the graduated fees claimed by them.

2. Mr Swift was instructed to lead Mr Benson (then a junior) in the defence of Russell Fury who was one of ten defendants on an indictment containing eight counts. On 3 December 2007 the indictment was amended. Counts 1 to 6 were stayed. Count 7 was severed to become indictment B. Count 8 was severed to become indictment C. A new twelve count indictment – indictment A – was preferred.

3. As a result of that. Fury was charged on indictment A with three

counts of assisting another person to retain the benefits of drug trafficking and two counts of being concerned in an arrangement to facilitate the acquisition retention use or control of criminal property. On indictment C he was charged with conspiracy to defraud. This related to the obtaining of a mortgage. He was not named in indictment B.

4. On 30 June 2008 a trial date of 22 April 2009 was set for indictment A. Mr Swift told me that the time estimate was three to four weeks. On 23 July 2008 a trial date of 1 June 2009 was set for indictment C. Mr Swift told me that there would be a two to three week gap between the two trials.

5. A pre-trial issues hearing was fixed for 3 April 2009. On that day Fury pleaded guilty to indictment C (the mortgage fraud) and the prosecution offered no evidence against him on indictment A (the money laundering). Fury was then sentenced to 27 months' imprisonment for the mortgage fraud and the court ordered not guilty verdicts on indictment A.

6. Counsel claimed separate graduated fees for each case. The Determining Officer allowed only one fee with a "number of cases uplift", applying sub-paragraph 23(2) of Schedule 4 to the Criminal Defence Service (Funding) Order 2001:

> "Where two or more cases to which this Schedule applies involving the same trial advocate are heard concurrently (whether involving the same or different assisted persons):
>
> (a) the trial advocate shall select one case ('the principal case'), which shall be treated for the purposes of remuneration in accordance with the previous paragraphs of this Schedule;
>
> (b) in respect of the main hearing in each of the other cases the trial advocate shall be paid a fixed fee of 20% of:
>
> (i) the basic fee for the principal case, where that is a case falling within para 2, or
>
> (ii) the fixed fee for the principal case, where that is a case falling within para 3."

7. The narrow issue which arises on this appeal is whether the two cases (indictments A and C) were "heard concurrently". At the hearing of the appeal Mr Swift developed a further argument that sub-

paragraph 23(2) does not apply where, as here, the two cases are cracked trials.

8. In their grounds of objection counsel accepted that the main hearing for each case took place on 3 April 2009. They explained that although some of the paperwork was common to both indictments, the issues were completely different. In the event, following negotiations with the prosecution, "a satisfactory 'deal' was reached and the case was listed for hearing on April 3 so that the cases could be disposed of". Counsel pointed out that if the indictments had been dealt with as cracked trials on their respective listed days, there could be no dispute that separate graduated fees would be payable for each case. They (then) accepted however that under the wording of the regulations if the two indictments were heard concurrently then the Determining Officer had adopted the correct approach. But they submitted that the two indictments, although heard on the same day, were heard consecutively rather than concurrently. They explained what happened at the hearing, in para 11:

> "… the case against the defendant on indictment C was heard and completed and proceeded to sentence without any need for either party (or the judge) even to refer to indictment A which was always going to be dealt with at the conclusion of the hearing on indictment C. At the end of the hearing of indictment C, the defendant having already pleaded not guilty to indictment A on an earlier occasion, all that was necessary was for the Crown to offer no evidence, to invite the recording of verdicts of not guilty and to explain to the judge why they were proceeding in that way."

9. Counsel went on to submit that the obvious intention of sub-para 23(2) was to prevent the over-remuneration of an advocate dealing with guilty pleas and committals for sentence at the same hearing. It could not have been intended to penalise an advocate who, for the convenience of the parties and the court, deals on a single date with more than one case which had been prepared for contested trials. Counsel have calculated that the effect of the Determining Officer's decisions is a reduction in Mr Swift's fees of over £40,000 and a reduction in Mr Benson's fees of over £24,000.

10. The Lord Chancellor has lodged written submissions on the appeals but did not wish to make oral submissions at the hearing. He submits that the appeal should not be decided on the "precise timing"

of the discussion of the two cases at the hearing on April 3. In the event that I am minded to decide the appeal in that way, the Lord Chancellor would seek an adjournment so that a transcript of the hearing could be obtained.

11. As to counsels' submission that it was not intended that sub-para 23(2) would cover what happened in this case, the Lord Chancellor submits that there is no reason to limit the provision to uncontested guilty pleas and nothing to show an intention to exclude cracked trials. If that were the intention, the draftsman could easily have made that plain.

12. The Lord Chancellor explains that no distinction is made in the graduated fee scheme between cases which are concluded by a guilty plea and cases which are not proceeded with. Rather, the distinction is made as to the point in the process at which the case is concluded. The reasoning is that the work involved in preparing a case up to the plea and case management hearing will be broadly the same whether the defendant pleads guilty or the prosecution offers no evidence. If Fury had pleaded guilty to any of the counts on indictment A at the hearing on April 3, it would be difficult to argue that the two cases were not heard concurrently. The mitigation and sentencing in the two cases would be mutual. That the prosecution did not proceed with indictment A should not, it is submitted, make a difference.

13. In their written response to the Lord Chancellor's representations, counsel develop their argument that sub-paragraph 23(2) "is not properly to be used to alter the entitlement to two cracked trial fees by listing the cases together whether heard concurrently or consecutively". Although they agree with the Lord Chancellor that these appeals should not be decided on the order that things were said at the hearing, they maintain that indictment C was opened by the prosecution, counsel then mitigated and sentence was passed. Indictment A "formed no part of that procedure".

14. Had it been appreciated that the Funding Order would have been applied as it has, it would have been simple and perfectly proper to have had indictment C called on and disposed of and then had indictment A called on. That would have created two separate hearings.

15. Counsel rely on the dictum of Master Campbell in *R* v *Frampton* [2005] 3 Costs LR 527 at 531 that:

> "... the cracked trial fee is set at a figure which provides some element of compensation for the loss of further refreshers and trial length increments, which otherwise would have been payable."

16. They point out that when graduated fees were first introduced they covered only trials lasting up to ten days and other short hearings. The intention of the "number of cases uplift" was to ensure that counsel was not paid multiple fees for a single hearing, especially where the hearing was the principal piece of work. As the scheme was extended cracked trials became remunerated in a way that reflected the work done for a case that survived beyond the plea and directions hearing. Apart from cracked trials, all cases which fall to be dealt with under para 23 are cases which conclude either at or before the plea and case management hearing. Cracked trials would only ever be heard at the same time in the very rare circumstances in which a single defendant was awaiting trial on two or more separate indictments which were dealt with on the same occasion. Cracked trials are to be remunerated under Part 3 of Schedule 4 and had the draftsman intended that two cracked trials heard on the same occasion should be remunerated under para 23 rather than Part 3 that could have been stated.

17. At the hearing of the appeals Mr Swift gave other hypothetical examples to show the unhappy working of sub-paragraph 23(2). If a defendant facing two indictments goes to trial on one and pleads guilty to the other (or the prosecution abandons the other) after the plea and case management hearing, the main hearing on the first case (the trial) would conclude with the verdict unless the sentence was imposed immediately. If sentencing was adjourned the cracked trial would be dealt with at the sentencing hearing which would then be the main hearing for the second case. Counsel would be entitled to two fees. Why should he be paid more for the cracked trial than counsel in the present case?

18. Mr Swift submitted that it could not have been intended by Parliament that there should be different fee outcomes where a defendant faced two separate indictments, both of which resulted in cracked trials, just because they were disposed of on the same occasion.

19. I do not have a transcript of the hearing and I agree with both the Lord Chancellor and counsel that these appeals should not be decided on an examination of the order of what was said on 3 April

2009. I do however have a copy of the court log for that hearing and I should mention that it shows that indictment C was in fact quashed and a new indictment – indictment D – added. That new indictment alleged conspiracy to defraud. The Determining Officer alluded to this in her written reasons when she explained that the "indictment was amended on 3 April 2009 to further particularise the offence". I do not think that this makes a difference to my decision.

20. It is not in issue that the "main hearing" (as defined in sub-para 1(1) of Schedule 4) in relation to each indictment was held on 3 April 2009 and clearly that is right. The narrow issue remains whether those hearings were "concurrent".

21. "Concurrently" means: *in a concurrent or concurring manner; in concurrence* (OED online ed.). It should not come as a surprise to classics scholars that "concurrent " means: running together in space, as parallel lines; going on side by side, as proceedings; occurring together, as events or circumstances; existing or arising together; conjoint, associated (*ibid*). Further definitions suggested by the OED are: (1) meeting in or tending to the same point; *esp*. in modern *Geom.* of three or more lines (2) acting in conjunction; co-operating; contributing to the same effect (3) accordant, agreeing, consistent, harmonious; expressing concurrence (4) *Law*. Covering the same ground (hence, in the case of titles = conflicting); having authority or jurisdiction on the same matters; co-ordinate.

22. Proceedings or indictments can exist at the same time and run in parallel independently of each other. A hearing, on the other hand, cannot deal with two or more cases in parallel. Either the hearing deals with one case then the other case, or it deals with the two cases together – that is, in some form of combination. If the court deals with one case then the other case independently of each other, then it hears them consecutively. In my judgment hearings are concurrent only if they are combined or conjoined or somehow interlinked. This will be so in the more common situation where the main hearings of a number of cases against the same defendant are listed together and the defendant either pleads guilty or is to be sentenced in all of the cases. The cases will impact on each other either as to the directions that are given for sentencing or as to the sentences that are imposed. The cases will not be considered independently of each other. For example there would be one speech in mitigation covering all of the cases, not a separate speech for each.

23. Where however the defendant pleads guilty in one case and the other case is dismissed, the cases will have no bearing on each other. The second case will end. The first case may end or go to another hearing. But the hearing of the second case will have absolutely no bearing on the first. Nor will the hearing of the first case have any bearing on the second. The hearings of the two cases neither run together nor in parallel. Nor do they combine or conjoin. There may be confluence of people and place but the *cases* exist and are heard independently.

24. The same would apply where both cases are dismissed.

25. Accordingly, in my judgment, indictments A and C/D were not heard concurrently on 3 April 2009 and sub-paragraph 23(2) is not engaged. It follows that the appeals are allowed and counsel should be entitled to separate graduated fees for each case.

26. While it is not strictly necessary for me to address the wider issue raised by Mr Swift – namely whether sub-paragraph 23(2) applies to cracked trials at all – in deference to his careful submissions I should express a view.

27. Sub-paragraph 23(2) appeared in a part of Schedule 4 entitled "Miscellaneous" and which contained provisions which clearly applied to the calculation of graduated fees under Parts 2 and 3. Paragraph 24 for example made provision for the effect on the calculation of graduated fees where two counsel are instructed.

28. There is nothing in para 23 to suggest that it did not apply to all graduated fees calculated under parts 2 and 3. It seems to me that the exclusion of cracked trials from sub-paragraph 23(2) would require express provision. There is no obvious reason to imply such provision. That the application of sub-paragraph 23(2) to cracked trials may produce anomalies is not a good reason. As has often been stated the graduated fee scheme involves "swings and roundabouts". As David Clarke J said in *Meeke and Taylor* v *Secretary of State for Constitutional Affairs* [2006] 1 Costs LR 1, even where the regulations produce a "harsh anomaly" they must nevertheless be applied in a mechanistic way. There is no equity in the scheme.