

INTERIM FIXED FEE OFFER APPEAL

V

Legal Aid Agency

APPEAL PANEL DECISION

Appeal Panel: [REDACTED]
[REDACTED]

Introduction:

1. This was an appeal under clause 3.20 of the Interim Fixed Fee Offer (IFFO) contract. The appeal was decided by the panel on the [REDACTED] September, 2021. The hearing was virtual and neither the appellants nor a representative from the LAA's Criminal Cases Unit (CCU) were present.
2. The Panel was assisted by a consolidated report on this appeal, dated the 9th September, 2021. The report was prepared by the LAA's CCU and included the background history, details of the standard contractual arrangements, representations from leading counsel instructed in the substantive case and relevant correspondence between the parties to the appeal. The Panel also had the benefit of outline submissions prepared by the appellants and which were dated the 23rd September, 2021.

Background:

3. The appellants are instructed as junior counsel to represent [REDACTED] the defendant in a Serious Fraud Office prosecution. This is a complex prosecution and counsel are being led by a QC. In 2019, all three counsel agreed and signed individual IFFO contracts.
4. Since 2019 there has been a series of delays to the start of the trial with a total of six abortive trial dates to date. The case is now listed for trial in May 2022. Delays have been caused by a combination of factors including: the prosecution not being ready, the Covid emergency and the illness of the original defence QC which led to her returning the brief and the instruction of a new QC. There is no suggestion that either appellant has been responsible for, or contributed to, any of the various adjournments.
5. Since agreeing their IFFO contracts, as per the terms of the contract (as varied), both appellants have received instalment 1 and instalment 2a and 2b payments. The latter

payments were expedited in line with steps taken by the LAA to mitigate the risk of financial hardship caused by the global Covid pandemic.

6. Owing to the time that has elapsed and the repeated adjournments (and resulting need to re-prepare), the appellants asked the LAA to treat this case as if it involved a re-trial. Clauses 14.8 G-H of the contract provide for additional payments to be made if there is a re-trial. Such payment is intended to remunerate counsel for the extra work which is required to prepare for a fresh trial. The LAA has declined to make such a payment. The ground for this refusal is that such a payment is not permissible under the relevant provisions of the contract which refer only to re-trial and not adjourned hearings.
7. The appellants conceded in their written submission that this is not a re-trial but state that this is analogous to the situation which arises in such cases. They refer to a '*conceptual similarity*' and argue that as such the mechanism provided for re-trials should be utilised here.
8. In the alternative, the appellants have asked that the LAA make an immediate further payment to reflect the service of additional material. This material is substantial and was served after the IFFO contract was agreed and signed by the appellants. The contract does provide for payments to be made when additional material is served but only at the conclusion of the case. Again, the LAA has declined to make such a payment on the basis there is no contractual mechanism for so doing.

Oral hearing:

9. Before considering the substantive questions posed, the Panel considered a preliminary issue with regard the form of the decision-making process. In their original submission to the LAA, the appellants requested an oral hearing. This request was declined by the LAA as not being provided for within the contract. The relevant clause, clause 3.20, is silent on this point.
10. The Panel noted that the contract makes no reference to the possibility of an oral hearing (in contrast to clear provisions in the Standard Contracts for legal aid providers which permit such a hearing in contract termination reviews). The absence, however, of a specific provision did not necessarily preclude the possibility of an oral hearing.
11. Although the LAA had declined to arrange an oral hearing, the Panel was aware that the LAA had invited the appellants to make additional points in support of their request for an oral hearing, should they wish to do so. The Panel noted that whilst the appellants had provided further submissions on a number of points, those submissions had not included any arguments in support of an oral hearing.
12. In light of this, it was agreed that it was not necessary for the Panel as constituted to determine whether an oral hearing was permissible. It was acknowledged that a future Panel may need to reach a view on this question.

Does this amount to a re-trial?

13. Having considered the appellants' submissions and the relevant contract clauses, the Panel was satisfied that this was not a case of a re-trial. The Panel was of the view that the contract did not allow for a payment to be made where a case had been adjourned multiple times. Nor did the panel accept that this was analogous to a re-trial and that the contract could be read in those terms.
14. The Panel was agreed that this ground of appeal should be rejected.

Can an additional payment be made at this stage?

15. The Panel was of the view that the contract was clear that payments for additional material were payable only at the conclusion of the trial. There were good reasons for this approach as it avoids multiple payments and recalculations. This arrangement ensures counsel are properly remunerated for all material served in a case – the assessment of which is only possible at the end of a trial. The Panel was therefore agreed that the contract with the appellants did not permit such a payment.
16. The Panel noted, however, that as a result of the Covid emergency the LAA had agreed to facilitate additional instalment 2b payments. This was clearly a variation of the contract and was permissible as both parties were agreeable to the amendment. It was accepted that this is standard contract practice where there is a contract and circumstances have changed and both parties wish the contract to be varied to reflect this. The Panel recognised also that this earlier variation, whatever the reason for it, had established a precedent for varying the contract.
17. The Panel was agreed, therefore, that a variation to the contract to facilitate a different form of additional payment could, in principle, be made.

Should an additional payment be made?

18. Having determined that it was possible to vary the contract, the Panel considered if the circumstances of this case merited such a variation.
19. The Panel took note of the appellants' representations and in particular the commitment to seek no further payment at the conclusion of the trial. It is possible that no additional material, or no significant volume of additional material, will be served between now and the end of the trial. If that assessment is correct, then whether the monies are paid now or at the conclusion of the trial is of no significance to the public purse – the sum due would remain the same.
20. Equally, if the appellants were prepared to agree not to seek further payment, this arrangement would potentially be to their detriment should additional material be served before the trial concludes. Whilst the LAA (or indeed the Panel) could not

impose such a condition upon the appellants, given that the appellants themselves had raised the possibility it was appropriate for the Panel to consider it as an option.

21. As the Panel had agreed a variation was possible, the question was whether it was appropriate to do so in this case. Given the suggestion that no further additional payments would be sought; and that the sum to be paid would be the same whether paid now or later, the Panel was agreed that such a payment could be justified.

22. Given the unusual approach taken by counsel as to seeking no further payments, the Panel was of the view that this would not set a prejudicial precedent. To the contrary, such an approach was in the wider public interest and ensured the public purse was protected.

Conclusion:

23. With regard the first ground of appeal, namely that the circumstances in this case were akin to a re-trial and a re-trial payment should be made, the Panel agreed that this limb should be dismissed.

24. With regard the second ground of appeal, the Panel found there was a power to vary the contract and that the particular and exceptional circumstances of this case justified this being done.

Orders:

25. The Panel ordered that the LAA amend the contracts in discussion with the appellants to facilitate an additional payment at this stage of the case. This payment would be in full and final settlement of any sum payable under the additional material payment scheme. This arrangement would be contingent upon the appellants formally agreeing in writing to this course of action.

26. It was further ordered that the LAA and appellants enter now into negotiations as to the level of such payment.

27. It was not necessary, at this stage, for the Panel to determine the process for assessing and determining the level of payment. The Panel reserved the right, however, to hear further representations should there be a further dispute as to the value of the sum to be paid.

This is the agreed decision of the IFFO Appeal Panel, [REDACTED] September, 2021:

[REDACTED]
[REDACTED]
[REDACTED]