

## IFFO Appeal Decision

R v [REDACTED]

On [REDACTED] September 2018 a Panel comprising of members of the LAA's Executive Team and a Bar Council Representative met to consider a dispute in relation to the payment due to Counsel under their IFFO Contracts in the above case. The members of the Panel were: [REDACTED]. The Panel's unanimous decision and reasons are set out below.

- i. The subject of this dispute is whether the Stage 3 Instalment due to Counsel instructed in this case [REDACTED] should be reduced under Clause 14.8D of the IFFO Contract as the trial had underrun by more than 10 days.
- ii. The Panel considered the Appeal Bundle and in particular Clause 14.8D of the IFFO Contract which reads as follows:

*In circumstances where the actual duration of the Client's trial continues for more than ten days in excess of the period listed for such trial (for whatever reason), or concludes more than ten days before the end of the period listed (as per the court listing extant at the date of this Contract as set out in the Background to this Contract) then a proportionate adjustment will be made to the Stage 3 Instalment in order to reflect what will be regarded as a material variation to the original anticipated duration of the trial. Such adjustment shall be calculated by adding or subtracting (as applicable having regard to the adjusted length of the trial) a pro-rata daily rate to/from the original value of the Stage 3 Instalment stated in this Contract. The said daily rate shall be calculated by dividing the total Stage 3 Instalment by the total number of working days falling within the period originally listed for the trial (as per the court listing extant at the date of this Contract set out in the Background to this Contract) and then multiplying that amount by the number of days by which the actual trial exceeds or falls short of the anticipated trial period. This amount shall then be added to or subtracted from the original Stage 3 Instalment in order to calculate the new final payment to be made to you.*

- iii. The Panel determined that the actual duration of the trial was only 3 days less than the period listed. In the circumstances, Clause 14.8D was not triggered and no reduction should be applied to Counsels' Stage 3 Instalments.
- iv. The Panel noted that the dispute had been framed as a dispute as to whether the term "trial day" should be interpreted as a "business day" (as contended by Counsel) or as a "sitting day" (as contended by the LAA), when determining whether the trial has over or under run in accordance with Clause 14.8D. However, looking at Clause 14.8D in detail the Panel considered that the interpretation of the term "trial day" was not relevant to this dispute.
- v. In particular, the Panel noted that Clause 14.8D comprises of two separate sub-clauses: the first sets out the test for determining whether the trial has over or under run; and the second sets out the method by which the fee adjustment should be calculated. The second sub-clause will only be relevant to cases where the test set out in the first sub-clause is met.
- vi. The Panel noted that Clause 14.8D uses, at various points, the terms "days", "working days" and "actual trial days". For the purposes of determining whether the

trial has over or under run the relevant term used in sub-clause 1 is “days”. The LAA appear to have interpreted that as “sitting days”. However, the Panel considered that in order to have that construction the clause would have to specify that it was only sitting days that should be taken into account. The reference to the actual number of trial days (which may be reasonably interpreted as “sitting days”) appears only in the second sub-clause and is therefore only relevant in the context of calculating the appropriate adjustment to the Stage 3 Instalment.

- vii. The Panel noted that the IFFO fee is intended to remunerate Counsel for preparation in the case as well as advocacy. If the Court is not sitting on a specific day within the trial period it does not necessarily follow that Counsel will not be undertaking work connected to the case on that day. The Panel considered that it must be right to exclude non-working days such as weekends or bank holidays from the calculation of the trial period.
- viii. In order to determine whether Clause 14.8D is met it is necessary to ascertain when the trial would have finished based on the original trial estimate and then consider whether the actual finish date is within 10 days of that date.
- ix. The Panel noted that in this case the original trial estimate was 88 days and calculated that the number of days (excluding weekends or bank holidays) actually elapsed (including the 18 days of legal argument and interlocutory appeals) was 85 days. Consequently, the Panel determined that the trial did not conclude more than 10 days before the end of the period listed and therefore no reduction should be made to the Stage 3 Instalment.