

INTERIM FIXED FEE OFFER APPEAL

[REDACTED]

V

THE LEGAL AID AGENCY

APPEAL PANEL DECISION

Appeal Panel: [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 [REDACTED] February 2023. The hearing was virtual and neither the appellant nor a representative from the Legal Aid Agency (LAA)'s Criminal Cases Unit (CCU) were present.
2. The Panel was assisted in this appeal by a report prepared by the LAA's CCU, which set out the background to this appeal and summarised the matter in dispute. The Panel was also provided with the IFFO contract at issue, copies of correspondence between the parties and the submissions prepared by the appellant.

Background:

3. The appellant was instructed as junior counsel representing [REDACTED], charged with fraud, in criminal proceedings before the [REDACTED] Crown Court.
4. The case was classified as a crime Very High Cost Case (VHCC) with funding to be administered by the LAA's CCU in accordance with the appropriate contract. It is current practice for counsel in VHCCs to be funded in accordance with Interim Fixed Fee Offer contracts (IFFOs)¹.
5. The appellant duly signed an IFFO contract for funding from the LAA in relation to representing [REDACTED] as a led junior on 19 August 2022 ("the IFFO Contract"). At the time of signing the IFFO Contract the trial was listed for 80 days.

¹ IFFOs are headed "VHCC Individual Case Contracts for self employed advocates"

6. The trial (which involved several defendants including [REDACTED]) started on 20 September 2022. On 22 September 2022 [REDACTED] pleaded guilty to matters against him. He was sentenced on [REDACTED] November 2022. The total number of trial days for [REDACTED], including sentencing, is agreed between the appellant and the LAA as 7.
7. Following conclusion of the trial, a dispute arose between the appellant and the LAA in respect of payment under the IFFO Contract, and specifically, the correct calculation of the Stage 3 Instalment, as adjusted in light of the shortened trial.

Terms of the IFFO Contract:

8. The IFFO Contract provided that the LAA would pay the appellant a fixed fee relating to the instruction to act as junior counsel for [REDACTED]. The amount of the fixed fee was settled and agreed between the LAA and the appellant as £96,200. The fixed fee was payable in three stages, defined at the start of the IFFO Contract as:

“Stage 1 Instalment” means, subject to clause 3.15B below, the first instalment in the sum of **£32,066.67** being a one third share of the Fixed Fee which, subject to your satisfactory provision of Contract Work in accordance with the requirements of this Contract, shall be payable by us to you, within thirty (30) days of the Contract Start Date;

“Stage 2 Instalment” means, subject to clause 3.15B below, the second instalment in the sum of **£32,066.67** being a one third share of the Fixed Fee which, subject to your continuing satisfactory provision of Contract Work in accordance with the requirements of this Contract, shall be payable by us to you, within thirty (30) days of receipt of your Claim following the commencement of the full trial and for the avoidance of doubt “trial” is not taken to commence on the date of a preparatory hearing;

“Stage 3 Instalment” means the third and final instalment in the sum of **£32,066.66** being a one third share of the Fixed Fee which, subject to your continuing satisfactory provision of Contract Work in accordance with the requirements of this Contract, shall be payable by us to you, within 30 days of receipt of your Claim following the date on which the trial of the Client concludes and for the avoidance of doubt the scope of “trial” in this context shall include sentencing following conviction but exclude any appeal following conviction of the Client, [retrials] or confiscation proceedings;”

9. The basis of the fixed fee under an IFFO is linked, in part, to the length of the trial period. The IFFO Contract stated that: “As of the date of this Contract the court listing for the trial in this Case is **80 days**”. However, the trial concluded in 7 days, which was 73 shorter than the original listing. Clause 14.8D of the IFFO Contract provides that where the trial concludes more than 10 days before the end of the period listed

then “a proportionate adjustment will be made to the Stage 3 Instalment”. The LAA and the appellant agree that given the number of days that the trial of [REDACTED] went short of the original listing, clause 14.8D applied in relation to payment of the Stage 3 Instalment.

10. The clause says:

“14.8D 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 as 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.”

11. The dispute concerns *how* clause 14.8D was to be applied, and specifically what calculation should be carried out.

12. The Panel noted the correspondence between the LAA and the appellant in relation to the application of clause 14.8D which demonstrate that differing interpretations of how clause 14.8D applied have been put forward:

(a) The Panel notes that the LAA provided a calculation for the adjusted Stage 3 Instalment by email on 29 November 2022 which was set out as follows:

“The calculation as per your contract is as follows:

Junior: 7 days at trial/sentencing

£96,200/3 (IFFO Stages) = £32,066.66 (per IFFO stage)

£32,066.66/80 days expected at trial = £400.83 daily rate

400.83 x 7 (trial days) = £2805.81 + 561.16 (Vat) = £3,366.97”

(b) The Panel also notes the appellant’s submissions which suggest that the daily rate should be calculated, multiplied by the number of days the trial ran, and then that amount deducted from the Stage 3 Instalment. “*The clause suggests that the only way a material adjustment can be made is to subtract the 7 days*

we sat on the trial (using the daily refresher calculation) and reducing the final third payment by £3,366.97.”

- (c) The LAA’s internal review of the matter then provided a further interpretation of how to apply clause 14.8D, but concluded that the amount due as an adjusted Stage 3 Instalment, was the same as had previously been calculated by the LAA.

How to apply clause 14.8D of the IFFO Contract:

13. Having considered the submissions and the information provided, the Panel find that clause 14.8D of the IFFO Contract contains a clear 3-step process:

- (a) **Step 1:** *“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 as set out in the Background to this Contract);”*
- (b) **Step 2:** *“and then multiplying that amount by the number of days by which the actual trial exceeds or falls short of the anticipated trial period.”*
- (c) **Step 3:** *“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.”*

14. Practically, this would be done as follows:

- (a) **Step 1.** First, a daily rate is calculated by dividing the total Stage 3 Instalment by the total number of days listed for trial at the time the contract is entered.
- (b) **Step 2.** The daily rate is then multiplied by either the number of days which the trial **exceeds or falls short** of the original trial length. Importantly it is not multiplied by the number of days the actual trial ran.
- (c) **Step 3.** The amount calculated in step 2 is then either **added to or subtracted** from the original Stage 3 Instalment to produce the “new final payment”. For trials which exceed the original listing, the amount calculated in step 2 will be added to the Stage 3 Instalment. For those trials which fall short of the original trial length, the amount calculated in step 2 will be subtracted from the Stage 3 Instalment.

15. The Panel finds that that applying these three steps in trials that fall significantly short of the original listing results in a larger deduction from the Stage 3 Instalment. Those which fall short by the minimum, ie only 10 days, will see a smaller amount deducted. Conversely, trials which significantly exceed the original listing result in a larger addition to the Stage 3 Instalment, than those which exceed the listing by fewer days.

16. In this way the stated object of clause 14.8D is achieved, namely *“a proportionate adjustment is 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.”*

Findings

17. In light of the above, the Panel found that:

- (a) the LAA's initial approach to applying clause 14.8D, (outlined at paragraph 12(a) above) was not in accordance with the three steps as identified above. It applied Step 1 in finding the daily rate and then multiplied this by the number of days which the trial ran;
- (b) the appellant's interpretation seemed to omit Step 2 and simply deduct the days the trial ran from the Stage 3 Instalment. As well as being contrary to the clear wording of the contract, this had the rather counter-intuitive effect of not paying counsel for the days she actually attended the trial;
- (c) the LAA's letter dated 19 December 2022, did identify the same three step process in clause 14.8D.

18. Turning to the Stage 3 Instalment payment in this particular case, the Panel finds that correct calculation in applying clause 14.8D is as follows:

- (a) Step 1: $\text{£}32,066.66 \div 80 = \text{£}400.83$ [Stage 3 Instalment \div the trial listing = daily rate]
- (b) Step 2: $\text{£}400.83 \times 73 = \text{£}29,260.53$ [daily rate \times days trial fell short of original listing = amount by which to reduce the Stage 3 Instalment]
- (c) Step 3: $\text{£}32,066.66 - \text{£}29,260.83 = \text{£}2,806.13$ [Stage 3 Instalment – step 2 amount = adjusted amount of Stage 3 Instalment]

19. Accordingly, the Panel finds that applying clause 14.8D of the IFFO Contract would result in a final payment of $\text{£}2806.13$ (plus VAT).

This is the agreed decision of the IFFO Appeal Panel, [REDACTED] March 2023.

[REDACTED]

[REDACTED]

[REDACTED]