Neutral Citation No. [2022] EWHC 2842 (SCCO)

Case No: T20207295

SCCO Reference: SC-2021-CRI-000123

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 November 2022

Before:

COSTS JUDGE LEONARD

R
v
THOMAS

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

Appellant: **Hussain Solicitors**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

REASONS FOR DECISION

1. Hussain Solicitors ("the Appellant") represented Sadique Thomas ("the Defendant") in proceedings before the Crown Court at Bristol. The defence was funded by Criminal Legal Aid under a Representation Order dated 9 December 2020 and the Appellant is entitled to payment from public funds in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013. The Appellant argues that under the 2013 Regulations, two trial fees are payable. The Legal Aid Agency ("LAA")'s Determining Officer has concluded that only one case fee is payable.

Rules and Authorities

2. The appeal turns on whether, for the purposes of the 2013 Regulations, there was (as the Determining Officer found) only one indictment, or (as the Appellant contends) there were two indictments, against the Defendant. The relevant provisions are to be found in the Litigators' Graduated Fee Scheme at Schedule 2, as in effect at the date of the Representation Order.

3. Schedule 2 starts at paragraph 1(1), with this definition:

> "In this Schedule—
> 'case' means proceedings in the Crown Court against any one assisted person-
> (a) on one or more counts of a single indictment…"

4. Schedule 2 incorporates the "graduated fee" scheme for litigants like the Appellant, who conduct criminal litigation on behalf of legally aided defendants. Schedule 1, which incorporates a graduated fee scheme for advocates, includes an identical definition of a "case".

5. The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each "case". For that reason, if an indictment against a defendant is severed into two separate indictments, there may be two "cases" under the regulations and the litigator or advocate representing that defendant may in consequence receive two graduated fees. In contrast, if two separate indictments against a given defendant are joined into one, then there may be only one "case" against that defendant and only one graduated fee payable. It follows, inevitably, that the graduated fee or fees payable to a litigator or advocate in either circumstance may not reflect the amount of work undertaken.

6. This is true not only of the 2013 Regulations, but of identical graduated fee provisions in the Criminal Defence Service (Funding) Order 2007, which preceded them.

7. I have been referred, by Mr McCarthy for the Appellant and Mr Rimer for the Lord Chancellor, to a number of Costs Judge decisions. The decisions of Costs Judges are not binding, but they may set down principles which are incorporated into the LAA's Crown Court Fee Guidance and followed by the LAA's determining officers on assessing graduated fee claims.

8. I do not find it necessary to refer to all of the decisions to which I have been referred. That is partly because they are fact-specific and partly because the principles that they embody are helpfully summarised in some of the cases to which I will refer. I will however be focusing on the consideration given in some recent decisions to practice and procedure with regard to indictments preferred through the Crown Court's Digital Case Management system ("DCS").

9. One of the most frequently quoted Costs Judge decisions on the subject of whether, as a result of multiple indictments, there has been one or more "case", is that of Master Gordon-Saker, now the Senior Costs Judge, in *R v Hussain and Others* [2011] 4 Costs L.R. 689.

10. In *R v Hussain and Others* it appeared that there had been four indictments against the same defendant. Indictments 1 and 2 ("the second indictment") had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 ("the third indictment"), which went to trial and resulted in a conviction.

11. The Senior Costs Judge found that, by reference to the 2007 Order, there had been two cases, for which two graduated fees were payable. A trial fee was payable (and had been paid) for the third indictment. On the facts of that particular case, a cracked trial fee was also payable for the second indictment.

12. At paragraphs 15 and 18 of his judgment, he expressed his conclusions in this way:

> "Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the Crown to elect which will proceed to trial…
>
> It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, there were two indictments which were not joined, then there must be two cases and two fees."

13. In *R v Ayomanor* (SC-2020-CRI-000146, 12 January 2021) Costs Judge Whalan considered a case in which a defendant had entered not guilty pleas on an indictment alleging six counts of fraud and converting criminal property. That indictment was quashed, and at the time of Costs Judge Whalan's judgment the defendant was facing trial on a second indictment. Judge Whalan found that two graduated fees were payable. Having reviewed a series of Costs Judge decisions, at paragraph 19 of his judgment he offered this summary:

> "The principles to be taken and applied from these cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable."

14. In *R v Wharton* (SC-2020-CRI-000195, 1 February 2021), Costs Judge Rowley considered the way in which indictments are managed within the DCS.

15. *R v Wharton* concerned an assault in the course of which the defendant had injured his partner. He first faced two counts of occasioning actual bodily harm and common assault. In the course of a bail hearing, the offences with which he was indicted changed in that his assault on his partner was alleged to have caused grievous bodily harm.

16. The appellant in that case, Mr Turner, claimed two case fees, relying upon DCS entries which indicated that an application was made by the Crown and leave given to prefer a new indictment, the original being stayed. Judge Rowley, in accordance with regulation 29(11) of the Criminal Legal Aid (Remuneration) Regulations 2013, made enquiries of the Trial Judge. He summarised the outcome of those enquiries, and the conclusions he drew from it, at paragraphs 9 to 14 of his judgment:

> "9. Following the hearing… I wrote to the trial judge, HHJ Teague QC to see if he was able to shed any light on the issue here. On 25 November 2020, he responded and the relevant part of that response is as follows:
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> > 'What tends to happen is that the prosecuting advocate applies for leave to amend. I then make a quick assessment as to whether I should simply grant the application or stay the original bill. If I think the latter course may be easier, I suggest staying the existing bill of indictment and preferring the amended version in its place and ask whether the prosecuting advocate is happy for the application to be dealt with in that way. They nearly always agree to my suggestion, as does defence counsel. That is very likely to be what happened in this case.'
>
> 10. The trial judge confirmed to me that there is no practical difference as to which option is taken. His practice depended on how much amendment was required. A typographical error or similar would be amended. A more significant change typographically would render it simpler to stay the indictment and prefer an amended version.
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> 11. I was referred to several other cases at the hearing where costs judges have given decisions. But these are fact sensitive questions and the cases to which I was referred could only amount to examples of what occurred in other situations. Nevertheless, I should refer to the case of *R v Abbas Khan*, where Master Brown distinguished whether there were two indictments as a matter of fact from whether there were two indictments as a matter of law.
>
> 12. In this case, Wharton was charged with causing actual bodily harm when the indictment was first produced, but upon consideration by the Crown counsel, a more serious charge was available. Having pointed out that evidence which was already on the DCS, Crown counsel indicated his intention to revise the indictment at the hearing on the following day. Mr Turner's response specifically referred to whether there was a need to amend the indictment if his client pleaded to the lesser charge. It seems to me that this was an accurate description of the change in the case facing Wharton and that there is no room to suggest that the change in the indictment is any more than an amendment in those circumstances.

> 13. The fact that two separate documents have been uploaded rather than annotating the original indictment in some fashion is simply how modern technology is likely to be employed. Ease of practice dictates this approach as was confirmed by the trial judge. It does not enable further claims to be made for fees in respect of what is very much the same work. The case of R v J, on which counsel relied, regarding the uploading of an indictment automatically being preferred does not assist in this situation. That case clearly came to the conclusion that no more was required than uploading to prefer an indictment in the situation where any more formal preferment had been overlooked before the defendant had been tried. It does not add anything to the question of whether there are two operative indictments.
>
> 14. This case reveals another instance where the workings of the 2013 Regulations do not walk entirely in step with criminal practice. The only rationale for counsel's argument is that a stayed indictment may mean there are two cases and therefore two fees. There was no prospect of Wharton ever facing counts of both ABH and GBH. The second superseded the first by what can only be described as an amendment to the indictment faced. Once the amendment had been made, Wharton was never in any danger of being tried for ABH. As such, although there were two indictments in fact produced in order to reflect the change in the offence faced by Wharton, there was, as a matter of law, only one indictment containing offences with which Wharton was being prosecuted. That indictment was amended but this does not mean that there was more than a one case as defined in the 2013 Regulations."

17. In *R v Moore* [2022] EWHC 1659 (SCCO) a defendant pleaded not guilty to counts on a first indictment of conspiracy to commit fraud (count 1), obtaining a money transfer by deception (count 2) and fraud (counts 3-5). He subsequently pleaded guilty to counts on a second indictment in which some of the counts from the first indictment were varied and the period of offending on the fraud count was changed. The first indictment was stayed.

18. The appellants in *R v Moore* submitted that two graduated fees should be paid, as there had been two indictments which were not joined. The second indictment superseded the first, which was formally stayed by the court. The changes in the second indictment were, it was submitted, not merely cosmetic or reflective of "housekeeping", but comprised substantive changes to the criminality alleged against the Defendant. As the period of offending was completely different, the evidence adduced to prove the case was also different. It was this fundamental change that had led to the Defendant changing his pleas to guilty.

19. Costs Judge Whalan revisited the relevant principles in the light of *R v Wharton*. At paragraphs 12-15 of his judgment he set out his analysis and conclusions:

> 12. It is acknowledged that the 2013 Regulations, as amended, impose a technical regime, the mechanical application of which can produce a 'swings and roundabouts' approach to remuneration. One potential consequence of this mechanical application was recognised by Senior Costs Judge Gordon-Sakar in Hussain (ibid) and in my decision of Ayomanor (ibid).

13. However, I consider that the decision of CJ Rowley in Wharton (ibid) represents an important development in the assessment of costs under the LGFS where two fees are claimed. Senior Costs Judge Gordon-Saker concluded in Hussain that where an original (or previous) indictment was stayed or quashed, in favour of a second (or subsequent) indictment, there would be, on a mechanistic application of the Regulations, two cases and two fees, notwithstanding that in reality there 'was really only one case'. This was also my conclusion in Ayomanor. It is clear from Wharton, however, that judges in the Crown Court often adopt a more pragmatic or flexible approach when the Crown seeks to change an indictment. As such, whether or not the original (or previous) indictment is to be stayed or quashed, depends very much on the typographical nature and extent of the changes sought by the Crown and the consequent practice selected (often, it seems to me, quite informally) by the trial judge. In this context, the fact that an indictment was stayed or quashed is not, of itself, an indication that the subsequent indictment represents a second (or new) case.

14. In this appeal, the changes affecting the Defendant were limited essentially to count 3. Mr Wells is quite right that the changes to the case particulars (a complete change in the alleged criminality from September 2019 to January-February 2019), were substantive, rather than a mere tinkering or tidying up of the charge. Yet, the offence was essentially the same and there was never a suggestion that the Defendant would or could face trial on (in the context of count 3) two separate charges of fraud. In other words, the second count 3 superseded and replaced the original count 3, in circumstances where the Defendant would only be charged on one such count.

15. I must conclude, therefore, that the approach of CJ Rowley in Wharton be preferred to that followed by SCJ Gordon-Saker in Hussain (ibid) and myself in Ayomanor (ibid). I find that in effect the second indictment in this case was merely an amendment of the original indictment. It could not be said that there were two cases and the Appellants are only entitled to one fee. The appeal is accordingly dismissed."

20. Mr McCarthy has referred me to *R v Jessemey* [2021] EWCA Crim 175, in which the Court of Appeal provided some useful guidance upon the preferment of indictments through the DCS. The following passages are taken from paragraphs 15-19 of the transcript of the court's judgment, as delivered by Mr Justice William Davis on 5 February 2021:

"15. The preferring of indictments is dealt with in Part 10 of the Criminal Procedure Rules. Part 10.2(5) is in these terms:

'(5) For the purposes of section 2 of the Administration of Justice Miscellaneous Provisions) Act 1933-

(a) a draft indictment constitutes a bill of indictment;

(b) the draft, or bill, is preferred before the Crown Court and becomes the indictment-

(i) where rule 10.3 applies (Draft indictment generated electronically on sending for trial), immediately before the first count (or the only count, if there is only one) is read to or placed before the defendant to take the defendant's plea under rule 3.24(1)(d),

(ii) when the prosecutor serves the draft indictment on the Crown Court officer, where rule 10.4 (Draft indictment served by the prosecutor after sending for trial), rule 10.5 (Draft indictment served by the prosecutor with a High Court judge's permission), rule 10.7 (Draft indictment served by the prosecutor on re-instituting proceedings) or rule 10.8 (Draft indictment served by the prosecutor at the direction of the Court of Appeal) applies, or

(iii) when the Crown Court approves the proposed indictment, where rule 10.6 applies (Draft indictment approved by the Crown Court with deferred Crown agreement)."

16. We are concerned with the position governed by sub-paragraph (b)(ii). The relevant Criminal Practice Direction is CPD Part 10A.8:

"It requires the prosecutor to prepare a draft indictment and serve it on the Crown Court officer, who by CrimPR 10.2(7)(b) then must serve it on the defendant. In most instances service will be by electronic means, usually by making use of the Crown Court digital case system to which the prosecutor will upload the draft (which at once then becomes the indictment, under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 and CrimPR 10.2(5)(b)(ii))."

17. The import of these provisions was summarised by this Court in R v W(P) [2016] 2 Cr App R 27 at [20]:

"An indictment is preferred within the meaning of s.2(1) of the 1933 Act, once it is electronically entered onto the Court digital system at the Crown Court. The consequence is, as s.2(1) provides, that 'it shall thereupon become an indictment and be proceeded with accordingly'."

18. Nowhere in the Criminal Procedure Rules or in the Criminal Practice Direction, is it said that the indictment must be uploaded to a particular part of the DCS. Mr Jarvis's submission was that the uploading must be to the “Indictment” section of the DCS. An indictment uploaded to another part of the DCS will not have been preferred. Were it otherwise confusion and error would be the likely result. If the indictment were not in the right section there would be no reason for anybody to look for it. In our judgment, although nothing is said whether in the rules or the Practice Direction as to the relevant section on the DCS onto which the indictment should be loaded, we agree with Mr Jarvis that in order for it to be preferred the indictment must be loaded into the "Indictment" section. For it to be otherwise would be a recipe for chaos.

19. There can of course be two or more indictments outstanding against a defendant at any one time in the course of proceedings in the Crown Court: see R v MJ [2019] 1 Cr App R 10 at [51]. If two indictments have been uploaded to the "Indictment" section (as will frequently occur in the course of proceedings) both will have been preferred. As was explained in MJ the Crown will be required to elect the indictment in respect of which they intend to proceed…."

The Procedural History of This Case

21. According to the parties' submissions, indictments uploaded to the "indictments" section of the DCS are given a section reference such as "B1", and identified by that reference. That is reflected to some extent in the court log for this case, although not consistently enough to be helpful: other terms such as "indictment 1" are used. It would also appear that some references, such as "B8-B9" may refer to page numbering, so the same indictment may be referred to in different ways or given a different description.

22. The following sequence of events has been pieced together, as best I can, from the court log and the parties' submissions.

23. According to the Appellant, the Defendant was sent from the Magistrates Court on 7 December 2020 and an indictment preferred and uploaded to the Crown Court's digital case system ("DCS") on 8 December 2020. That indictment is referred to in the Appellant's written submissions as indictment B2, although I have found no reference to B2 in the court log, which records counts being added on 7 January 2021 to "indictment 1". Whatever the underlying detail, the position is that the Defendant, jointly with at least one of his co-defendants Jay Campbell and Donnelly McNeil, was charged with attempted murder.

24. The trial began on 21 June 2021. On that date, according to the court log, the Crown mentioned an "indictment issue". An indictment (B5) naming all three defendants (McNeil, Thomas & Campbell), was preferred. That indictment incorporated counts of Attempted Murder, with an additional Assisting an Offender count against Campbell.

25. The court log records, on 24 June, the Crown mentioning the "potential for an amended indictment" and the trial judge, HHJ Lambert, outlining issues arising from amendment and on 28 June, the Crown advising the court that an amended indictment had been uploaded to the DCS.) Mr McCarthy thought that this might have been an error, not followed up, and suggested that there might have been elements of duplication in the uploading to DCS). On 29 June the court log records that "the indictment at B5 is stayed and indictment at B8-B9 with alternative counts is preferred".

26. The indictment preferred on 29 June is referred to by the Appellant as B7. Mr McCarthy indicated that the description B8-B9 in the court log refers to page numbering in the DCS. It incorporated counts of Attempted Murder and alternative counts of (according to the Appellant) Wounding with Intent and also (according to Mr Rimer) Unlawful Wounding. By what appears to have been an oversight, the defendants did not immediately plead to the new counts.

27. On 1 July 2021 the court log records counts 3 and 4 "on indictment 1 added to defendant Sadique Thomas" and the renumbering of counts on "indictment 1", and HHJ Lambert clarifying the position regarding the amended indictment with the jury. The court log for 2 July 2021 records Not Guilty pleas by the Defendant to counts 1 or 2 and 3 on "indictment 1" and the deletion and addition of various counts on that indictment.

28. It would appear from the court log that on 5 July 2021 negotiations were taking place between the Crown and the defendants with a view to agreeing pleas. In the afternoon, the Crown applied for McNeil and the Defendant to be re-arraigned on count 2, which I understand to be the count of Wounding with Intent, and advised the court that if they were to enter guilty pleas to count 2 the Crown would take no further action on count 1, which I understand to be the count of attempted murder. The Crown also formally applied for the amendment of "indictment B10". Mr McCarthy indicated that on this date an indictment, which he referred to as B8, was uploaded to the DCS at pages 10-11. That would seem to be the same indictment. Mr McCarthy suggested that it duplicated B7 (presumably, as the court log indicates, with some amendment). The Defendant and McNeil were duly rearraigned and pleaded guilty to count 2. Not Guilty verdicts were directed on all other counts.

29. The Appellant has produced a screenshot from the DCS which records that an indictment preferred in open court by HHJ Lambert on 29 June 2021 was stayed by HHJ Lambert on 7 July 2021. This would appear to refer to indictment B5.

The Claim for Two Fees

30. The Appellant has been paid for the trial, but has made a separate claim for a second full trial fee in relation to the stayed indictment B5. The Determining Officer refused the claim on the basis that this was an example of an indictment being amended and that the reference to an indictment being stayed was effectively an administrative exercise.

31. The Appellant's case rests on the stay of indictment B5, and its replacement by the indictment referred to as B7 (or one of what may have been several incarnations of that indictment). Mr McCarthy argues that on being stayed, indictment B5 ceased to exist. It was replaced by indictment B7. There were, as against the Defendant, two indictments and in consequence two cases.

32. The Appellant maintains that once the Crown preferred the new indictment at B7, there were two co-existing indictments running in parallel. Importantly, the more serious count which was charged in the earlier, subsequently stayed, indictments (Attempted Murder) was not proceeded with and Not Guilty verdicts were directed. The nature of the criminality referred to in the stayed indictment and the indictment to which the Defendant pleaded guilty, was radically different and the potential penalty for the offence to which a Guilty plea was entered, much less severe. The effect of the preferment of the new indictments and the timing of them supports, says the Appellant, a claim to a separate fee for the stayed indictment at B5 and on the indictment that proceeded at B7. That justifies two full trial fees.

33. The alternative possibility of a full trial fee and a "cracked trial" fee was also mooted, but the basis upon which such a fee might be claimed is not clear to me and in view of my conclusions I do not believe that it is necessary to address the point.

34. Mr McCarthy argues that the logic of *R v Wharton*, having been decided before the Court of Appeal's judgment in *R v Jessemey* on 5 February 2021, needs to be revisited in the light of the guidance given by the Court of Appeal (to which, it would appear, Costs Judge Whalan's attention was not drawn in *R v Moore*). That guidance, he submits, makes it clear that the approach taken by the Senior Costs Judge in *R v Hussain* and by Costs Judge Whalan in *R v Ayomanor* is to be preferred.

35. Mr Rimer refers to the court log for 24 June, 28 June and 1 July 2021. His interpretation of the record is that alternative counts of wounding with intent and unlawful wounding were on 1 July 2021 added to the indictment at B5 and that there was a brief discussion between the judge and the Crown about how the jury would have the additional counts on the indictment explained to them.

36. The intention seems, he says, to have been to add the alternative counts to the indictment at B5 with count 1, attempted murder, to remain and that to that end, an amended (consolidated) indictment showing all three offences was uploaded at B10-11 on the DCS which included the alternative counts. This was followed by the acceptance, on 5 July 2021, of a plea to the offence, as described above.

37. Mr Rimer submits that whilst it may appear that there were, administratively, two indictments, in reality (and in law) there was only one indictment which was amended part of the way through the trial to include lesser, alternative charges, which they could have been directed to consider under section 6(3) of the Criminal Law Act 1967. The Appellant is he says seeking a windfall by taking advantage of the way in which the DCS presents an amendment to an indictment as if a separate indictment had been preferred

38. On the hearing of the appeal Mr Rimer emphasised the change in day to day Crown Court practice following the introduction of the DCS. Paper indictments could easily be amended by hand. The use of the DCS and of indictments stored electronically in PDF format, makes that impracticable. In consequence, what is effectively an amendment to an indictment may have to be achieved by replacing one form of indictment with another. That does not, he submits, provide the Appellant with a pretext for claiming two full trial fees where the criminal conduct for which the Defendant faced trial had never changed and the only real change was, in accordance with common practice, the addition of a less serious offence in respect of that same conduct, to which the Defendant was willing to plead.

Conclusions

39. Since I heard this appeal, Costs Judge Rowley has himself had the opportunity, in *R v Shabir & Khan* [2022] EWHC 2232 (SCCO) to consider the extent to which, if at all, *R v Jessemey* bears upon the logic of his decision in *R v Wharton*. It would be to oversimplify the thorough and careful analysis set out in his judgment to say that he found that *R v Jessemey* does not undermine either the logic or the conclusions set out in *R v Wharton*, but that seems to me to be the essence of it. I respectfully agree with both his reasoning and his conclusions.

40. As I understand it, *R v Jessemey* builds upon the Criminal Procedure Rules and the accompanying Practice Direction so as to clarify what needs to be done in order for indictments to be preferred through the DCS. In its judgment the Court of Appeal also reiterated the established principles, first that (as the Senior Costs Judge put it in *R v Hussain*) if two indictments exist at the same time for the same offence against the same person on the same facts, the court will not permit both to proceed, and second that the indictment that does not proceed must be appropriately disposed of.

41. The Appellant argues that, consistently with the procedure and principles outlined in *R v Jessemey*, on 29 June 2021 indictment B5, which had been preferred on 21 June, was stayed and the indictment referred to by the Appellant as B7 preferred. It follows, says the Appellant, that for the purposes of the 2013 Regulations, there have been two indictments against the Defendant and that two fees are payable.

42. That does not seem to me necessarily to follow. In order to explain that I should start by referring to some of the observations made and the conclusions reached by Costs Judge Rowley in *R v Shabir & Khan*. At paragraphs 6 to 8 of his judgment:

> "Prior to the digital age, it was clear which indictment a defendant faced since it was produced on paper. If it was replaced by another indictment then some action, such as quashing or staying the first indictment had to be taken and this would lead to a fee being payable in respect of that first indictment such as occurred in the case of R v Sharif (168/13). A further fee would be payable in respect of the second indictment when the case concluded. If the paper indictment was simply amended, then the typed or manuscript amendment would be clearly seen on the indictment.
>
> The preferment of the indictment is now usually carried out by the uploading of it onto the Digital Case System. Where the prosecution reviews the counts on the indictment and wishes to change them, then a new document may be uploaded rather than any amendment being made to the original document even where what would traditionally have been described as an amendment, rather than a new indictment, was required.
>
> From the appeals now regularly being received by costs judges, it would appear that this change in practice has resulted in there being numerous iterations of indictments existing on the DCS and which need to be dealt with at the end of the trial. As a result, numerous claims have been brought for more than one fee which was a comparative rarity prior to the use of the DCS..."

43. Judge Rowley pointed out that in *R v J* (the case referred to by the Court of Appeal in *R v Jessemey* as *R v MJ*) the Court of Appeal regarded the substitution of an indictment on the DCS by another containing additional counts was in effect a process of amendment (the issues in that particular case arising from the fact that the application for amendment had never been made). At paragraph 34 to 36 of his judgment he added:

> "… Unless there has been a severing of the indictment so that the defendant has to face two separate trials, or there is something equally distinct about the indictments being faced by a defendant (as in Jessemey), then the process of amendment of the indictment up to and including the trial is only one case which the defendant is facing and entitles the defendant's legal representative to one graduated fee.

> The court is regularly faced with appeals where the advocate or litigator is seeking two trial fees where the first trial has proved ineffective for some reason. The regulations clearly do not provide for this and a reduced fee is payable for one of the trials. This is so, notwithstanding comments made by the first trial judge that the second hearing is a new trial etc. The only way two fees can be sought under the 2013 Regulations is if the two trials involved different offences brought by different indictments.
>
> In a similar way, in this situation, the trial judge may quash earlier iterations of the indictment as a matter of housekeeping as clearly occurred in this case. But that does not necessarily mean that there have been two (or more) cases for the purposes of claims for graduated fees. Where an indictment is quashed in circumstances such as in R v Sharif so that the prosecution has essentially to start again, then two fees may clearly be claimed. But that is, I suspect likely to be a relatively rare event, and is not to be equated with a proliferation of indictments which has grown out of an iterative attempt to be efficient in the use of modern technology. That is the situation here and does not provide the solicitors with the opportunity for claiming more than one fee."

44. As I have already indicated, I agree with all of those observations. I might put the point another way by considering what is meant at paragraph 1, Schedule 2 to the 2013 Regulations by "a single indictment". In a working environment in which even minor changes to an indictment may be (or may have to be) implemented by the preferment of a second form of indictment and the quashing or stay of the first, rather than the physical alteration of an existing one, it would be inconsistent with the purpose of the 2013 Regulations and unworkable in practice to reach the conclusion that two graduated fees are, in consequence, payable. There must be a real distinction between the relevant indictments, sufficient to justify the conclusion that there has been more than one "case". Otherwise there is, for the purposes of the 2013 Regulations, a single indictment.

45. In this case, as the references to "amendment" in the court log make clear, the way in which the case against the Defendant developed was that the indictment of Attempted Murder against the Defendant was amended to add lesser offences of wounding, to which the Defendant was willing to plead guilty. The criminal conduct concerned was precisely the same. In those circumstances, it seems to me that I cannot properly be said that there was more than one "case" for the purposes of the 2013 Regulations.

46. I might add that it is far from clear that the indictments referred to as B5 and B7 were, strictly speaking, the only indictments preferred in this case. It may well be, as Mr McCarthy suggested, that there was an element of duplication in the uploading of some indictments to the indictments section of the DCS. If so, a on strict interpretation of the principles relied upon by the Appellant, arguably each of those indictments should be taken to have been preferred, should have (and might have) been quashed or stayed, and each potentially might give rise to a claim for another fee. That seems to me to illustrate the problematic nature of the approach advocated by the Appellant.

47. For those reasons, this appeal does not succeed and is dismissed.