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23rd March 2007

Dear Sirs(s)

APPEAL PURSUANT TO THE COSTS IN CRIMINAL CASES (GENERAL) REGULATIONS 1986 AND THE LEGAL AID IN CRIMINAL AND CARE PROCEEDINGS (COSTS) REGULATIONS 1989/PURSUANT TO REGULATION 20(7) OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001

BOURNEMOUTH CROWN COURT

REGINA v MATTHEWS (ROSALIND & OTHERS) (No.2)

CASE NO: T2005 7039

CENTRAL TAXING TEAM CASE: YES

COURT REF:

SCCO REFS: 58/07 & 57/07

DATE OF REASONS: 29 JANUARY 2007; 29 JANUARY 2007

DATE OF NOTICES OF APPEAL: 6 FEBRUARY 2007; 9 FEBRUARY 2007

APPLICANTS: COUNSEL Mr N Haggan QC and Mr William Forster
Both of Carlton Crescent Chambers
17 Carlton Crescent
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The appeals have been dismissed for the reasons set out below.

Yours faithfully

P. R. ROGERS
COSTS JUDGE
REASONS FOR DECISION

1. These two appeals by a Leading and Junior Counsel for one of six Defendants, arise out of the same case that led to my written reasons in an earlier set of decisions, 230/06 and others, in which the reasons were sent out on 9 January 2007.

2. In fact that there were 12 connected appeals dealt with at the same time, because they all raised the same point, and raised the question of the appropriate method of calculating the length of trial uplift (and if appropriate), the length of trial gradient under the graduated fee scheme for a case which lasted more than 40 days, but not as long as 60 days.

3. I found for the Appellants in that case, but I have seen the decision of the High Court Judge granting the Department permission to appeal, and of course that appeal is now pending.

4. Although, as I have said, this appeal arises out of the same prosecution, in my opinion it raises a quite separate point, and can be, and should be, dealt with independently, because, even if were to be held on the final appeal that my decision in *Matthews (No.1)* was wrong, it would not, in my view, affect this case, and therefore it seemed appropriate for this appeal to proceed.

5. Following the conviction of the Defendants at the trial of the offences for which they were charged, confiscation proceedings were started, and, so far as this Defendant was concerned, an additional 812 pages of documentation was served upon defence counsel in connection with those confiscation proceedings.

6. Both Mr Haggan and Mr Forster submitted separate graduated fee claims in respect of that work, but, in deciding how much should be paid to them, the Determining Officer took no account of the additional pages of prosecution evidence served, and it is against that decision that this appeal has been brought.

7. Paragraph 1(2) of Part 1 to Schedule 4 of the Criminal Defence Service (Funding) Order 2001, reads as follows:

> "(2) For the purpose of this Schedule, the number of pages of prosecution evidence shall include all witness statements, documentary and pictorial exhibits and records of interview with the assisted person and with other defendants forming part of the committal [or served prosecution] documents or included in any notice of additional evidence."

8. The Appellant's argument is succinctly put, in paragraph 11 of their Grounds of Appeal:

> "It is submitted that the criteria "or served prosecution documents" is to be read disjunctively. A notice of additional evidence is not required if the pages are served prosecution documents because of the use of the disjunctive "or"."

9. The Appellants develop their arguments in the following paragraphs:

> "12. In her written reasons, the Determining Officer has disallowed the claim on the basis that these words refer only to those pages which are provided on a sending for trial on an indictable only offence under Section 51 of the Crime and Disorder Act 1998. She suggests that there would be no committal in such a case and therefore the words are only included specifically to cover a Section 51 situation. It is submitted that this cannot be correct because:
>
> (i) the Order does not contain any such definition;

(ii) paragraph 1(3), Part 1, of Schedule 4 to the Order provides "in the case of proceedings on indictment in the Crown Court initiated otherwise than by committal for trial the appropriate officer shall determine the number of pages of prosecution evidence as nearly in accordance with the proceeding sub-paragraph as the nature of the case permits." (emphasis added) It is submitted that the situation in respect of Section 51 sendings would be covered by this provision, and there would be need for the words to be included only for the purpose for which the Determining Officer contends.

(iii) One of the main purposes of the Order was to link remuneration to easily quantifiable criteria which would reflect the amount of work involved. A system depending substantially on page count was intended to reflect the volume of material in the case. There is no reason in principle to distinguish confiscation proceedings from the trial for this purpose. Confiscation proceedings are part of a number of orders which the court can make in the event of conviction. It cannot have been intended the flat rate should be paid for confiscation proceedings however much additional material is served solely for the purpose of the same. It might be the case that the prosecution serves more pages in relation to the confiscation proceedings than in relation to the trial, possibly involving many days additional preparation. It is submitted that it would be entirely unfair if no account were to be taken of this under the GFS which was intended to simplify and formularise the calculation of fees.

13. In her written reasons the Determining Officer contends that payment for confiscation hearings is made under paragraph 14, Part 4, of Schedule 4 to the Order. Paragraph 14(2) provides:

> "A hearing to which this paragraph applies shall not be included in the length of the main hearing or of any sentencing for the purpose of calculating remuneration, and the trial advocate shall be remunerated for attendance at such hearing:
>
> (a) in respect of any day where the hearing begins before and ends after the luncheon adjournment, at the daily rate set out in the table following paragraph 22 as appropriate to the category of trial advocate and length of the trial: and
>
> (b) in respect of any day where the hearing begins and ends before the luncheon adjournment, or begins after the luncheon adjournment, at the half-daily rate set out in the table following paragraph 22 as appropriate to the category of trial advocate and length of trial." (emphasis added)

...

15. It is to be noted that paragraph 14 in Schedule 4 of the Order (see paragraph 13 above) says that the advocate should be remunerated "for attendance" only. It is silent as to preparation. It is submitted that this aspect was fairly reflected by inclusion in the page count provision.

16. Paragraph 14 provides that the confiscation proceedings shall not be included in the length of the main hearing or of any sentencing. It does not say that any additional pages served for the purposes of confiscation proceedings should not count. It is submitted that if this was the intention it would have been easy to expressly provide for the same.

...

18. The scheme of the Order is to remunerate Counsel by reference not only to the length of the trial but also to the volume of evidence in the case. The greater the volume the greater the basic fee in effect because the evidence uplift per page does not depend on the length of the hearing, but merely volume of evidence. This is entirely logical and consistent for, generally, the more evidence, the greater the degree of time required to prepare.

19. To suggest that no account at all should be taken of the volume of material served for the purpose of confiscation proceedings, which are an important part of the criminal justice system and of vital importance to the convicted defendant, is both illogical and entirely inconsistent with the provisions of the Order."

10. When these cases were placed before me for listing, it was immediately apparent that they raised a point of principle of some importance, from which the Department's representations would be useful, and accordingly I caused the Department to be invited to submit such representations, which they duly did, and the relevant part reads as follows:

"**LCD's Submissions**

We submit that:

7. On the wording of the Funding Order, it is plain that the graduated fee scheme prescribed by Schedule 4 is a comprehensive scheme providing for the remuneration of defence advocates in criminal legal aid proceedings in the Crown Court. Any case that meets the criteria for graduated fees prescribed under Part 1 of Schedule 4 must be paid. Fees in accordance with the Scheme and with the exception of appeals, committals for sentence and committals to be dealt with for a breach of a Crown Court Order, there is no provision for the advocate to elect, or the Determining Officer to pay, fees other than those prescribed in Schedule 4. Similarly there is no discretion allowing a Determining Officer to choose among the different fees prescribed in Schedule 4 on the ground of reasonableness, or to extend a given fee beyond the cases to which it applies on its wording.

8. To be included in the page count as defined under paragraph 1(2) of Schedule 4, the said pages must form "part of the committal or served prosecution documents or should be included in any notice of additional evidence" (see *R v Sturdy* X9 of the Graduated Fee Guidance). The addition of the words "or served prosecution" in paragraph 1(2) since the decision in *Sturdy* was inserted to reflect the fact that not all cases are not committed to the Crown Court and can be sent or transferred. Consequently the prosecution pages of evidence must be included in either the committal/transfer/sent documents or in any notice of additional evidence.

9. There is no provision under paragraph 14 of Schedule 4, which governs remuneration for confiscation hearings, to pay separately for additional pages of prosecution evidence. There is also no guarantee that the trial advocate, who receives a graduated fee, will attend any subsequent confiscation hearing."

11. The Appellants were given the opportunity, which they have taken, to comment on the above representations, and again the relevant part of their representations read as follows:

"2. *R v Sturdy* was decided before the introduction of the words "or served prosecution documents" by amendment. It is therefore not relevant to their meaning or effect.

3. The ordinary meaning of the words "or served prosecution documents" must be applied. These words are clear and unambiguous. Statutory intent is only relevant in the event that the meaning of the words is unclear or uncertain that is not the case here.

4. Alternatively, if which is denied, the meaning of the Order is unclear, had it been intended to limit the ambit of the plain meaning of the words "or served prosecution documents" to include only those ancillary to sending cases for trial under Section 51, then it would have been perfectly simple to say so. The words "on sending for trial under Section 51" or such like was all that was necessary to achieve the alleged purpose. In any event the suggestion as to the legislative intent is contradicted by the wording of paragraph 1(3), Part 1 of Schedule 4 to the Order which already covered pages served other than ancillary to committal for trial before the amendment was made.

5. With regard to paragraph 9 of the Lord Chancellor's response:

5.1 Whilst paragraph 14 of the Order indeed provides, as an exception, that confiscation proceedings shall not be included in the length of the main hearing, or of any sentencing, it does not say that any served prosecution documents by way of additional pages served for the purposes of confiscation proceedings should not count. It is submitted that if that was the intention it would have been easy to expressly provide for the same while stipulating the other exception.

In any event the meaning of the definition is clear and so intention is irrelevant.

5.2 The point is made on behalf of the Lord Chancellor that there is no guarantee that the trial advocate will attend confiscation proceedings. Firstly it is trial counsel's duty to his client to do so. Secondly, the point highlights the unfairness of the interpretation contended for, because on that basis any replacement counsel would be expected to conduct the confiscation proceedings for a fixed fee which does not take into account the (in this case) in excess of 800 additional pages of served prosecution documents which it was necessary to read in order to conduct the confiscation proceedings on behalf of the defendant. The argument is no-one should be remunerated for reading these papers. Once again the interpretation contended for has grossly unfair consequences and does not flow from the wording of the Order."

12. Both the Department and the Appellants referred to the decision of *R v Sturdy*, which, in addition to being quoted in the Compendium, is fully reported at [1999] 1 Costs LR 1, and is in fact a decision of mine, given on 18 December 1998.

13. That case turned on the question of whether notices of additional evidence had to be in writing, or could be other than in writing, and I decided that they had to be in writing, concluding my judgment with the following paragraph:

> "I have great sympathy for counsel in the position in which he finds himself, but, as a matter of pure construction, it seems to me that a notice of additional evidence must by definition, be in writing. I am quite clear that the Determining Officer's decision here is contrary to the spirit of the Regulations, but in accordance with the strict letter thereof. I regret that the decision has to be to dismiss this appeal because I can well understand that this will affront counsel in this case and perhaps cause additional friction between prosecuting and defence counsel in future cases, but, with the best will in the world, I cannot construe the words "notice of additional evidence" as referring to anything other than a written document. This appeal is accordingly dismissed."

14. As the Department rightly points out, the relevant sub-paragraph of the Regulations did not at that time include the additional words "or served prosecution documents".

15. I consider, as a matter of construction, that those words were added simply to cover Section 51 transfers, which would otherwise not be caught by the previous wording. I do not think that they were intended to have any wider effect, as contended for by the Appellants.

16. I fully understand and appreciate the points made by the Appellants in their response to the Lord Chancellor's representations, not least the point they make concerning counsel, who were not briefed for the trial, but who have to attend the confiscation hearing, and would, on the Department's interpretation of the Regulations, not be paid

for reading what might be substantial and difficult documentation relating solely to that aspect of the case.

17. Nevertheless, I am bound to echo what was said by Mr Justice David Clarke in the case of *Meeke & Taylor v Secretary of State for Constitutional Affairs* [2006] Costs Law Reports 1, at paragraph 19:

> "In my judgment the Determining Officer and the Costs Judge reached the only conclusion that they could properly reach however they might have wished to be able to recognise the harsh anomaly which this factual situation has thrown into such sharp relief. I am acutely aware of the unease of the profession about the graduated fee scheme which has been ever extended and has been in 2004 in the way that I have related. I am aware of a mechanistic, somewhat formulaic way in which it has to be applied, and indeed I have some sympathy with the Crown Court staff, who have to apply it in relation to claims made by counsel and who have no doubt in Exeter just as in other places that I am more familiar with, a good close working relationship with members of the Bar who work regularly in those courts. I cannot, I am afraid, find a way of avoiding the impact of these Regulations."

18. In conclusion, I agree that the result is harsh, but I am driven to the conclusion that the Department's interpretation of the Regulations is the correct one, and accordingly these appeals fail, and are dismissed.

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