



Neutral Citation No. [2022] EWHC 1272 (SCCO)

Case No: T20190223

SCCO Reference: SC-2021-CRI-000131

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 18 May 2022

Before:

COSTS JUDGE ROWLEY

REGINA

v

DEINDE-LABIYI

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

Appellant: Newgate Solicitors

The appeal has been successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Newgate solicitors against the number of pages of prosecution evidence (“PPE”) allowed by the determining officer when calculating the appropriate fee under the Litigators Graduated Fee Scheme.
2. The solicitors were instructed on behalf of Elizabeth Deinde-Labiyi, who was charged with a single offence of concealing, disguising, converting, transferring or removing criminal property.
3. As part of the prosecution evidence, a telephone download was served which contained, amongst other things, 18,914 images. When making the claim for the graduated fee, the solicitors created a PDF document of all those images, which ran to 1,966 pages.
4. The determining officer originally allowed 5% of those pages when determining the solicitors’ fee. During the course of the redetermination procedure, that percentage was increased to 10%, which amounts to 199 pages. In doing so, the determining officer sought to follow the decision of Senior Costs Judge Gordon-Saker in R v Sereika where he concluded that in some cases, it was appropriate to allow a proportion of the images to be claimed as PPE rather than either all of them or none of them as had been the case up to that point.
5. The solicitors have asked me to deal with this appeal without a hearing. Mr Michael Rimer, on behalf of the Legal Aid Agency, has put in written submissions supporting the determining officer’s conclusion. He described the appeal as being simply:

“Whether or not the determining officer exercised their discretion [correctly] to allow 10% of the images section (being 199 pages), or whether they should have included the entire section which was 1,966 pages.”

6. The solicitors say that this formulation of the issue misunderstands the appeal that has been made. The 1,966 pages is not a section of the original download but is the PDF document created subsequently by the solicitors. As said above, the download included 18,914 images and the solicitors say that it is this figure from which the 10% should be calculated. For simplicity, the solicitors had simply asked for the pages making up the PDF document to be allowed but strictly speaking the 10% ought to amount to 1,891 pages.
7. In the written reasons, the determining officer concluded as follows:

“We have considered the images section, the vast majority appear to be emoji/memes, personal images such as selfies, family pictures and girls, clearly irrelevant images. As the majority of the images are clearly irrelevant it would not be reasonable to consider each individual image as a single page.

On the information provided 10% of the individual images would be a disproportionate representation of the amount of images of central importance to the prosecution’s case. As such 10% of the pages of images seems to me to be a reasonable

allowance in relation to the amount of images that held evidential value to the prosecution.”

8. The solicitors’ response to this approach is to say that the determining officer has essentially “double counted” on the 10% calculations. The PDF has incorporated roughly 10 images per page so that the number of pages is 10% of the number of images. By then allowing 10% of the pages, the returning officer has only allowed 10% of 10% i.e. 1% of the images and that is neither appropriate nor in accordance with Sereika.
9. It is worth setting out exactly what the Senior Costs Judge said in Sereika. At paragraph 18 he concluded:

“It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than “rough justice, in the sense of being compounded of much sensible approximation”: per Russell LJ in *In re Eastwood* [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs.”

10. It seems to me that the solicitors accept that this is also a case where a percentage or proportion of the images should be claimed as PPE with any further fee to be claimed by way of special preparation. It also appears to be accepted that 10% of the images is an appropriate proportion. It is simply a question of whether the images should be considered individually i.e. one image per page or considered on a page basis where there are multiple thumbnail images on that page?
11. The Senior Costs Judge’s final paragraph in Sereika says this:

“19. The solicitors have produced 120 examples of images that may have been of relevance. The impression I have gained is that the vast majority of the images would not have been of relevance and would not have required any consideration. Doing the best that I can it seems to me that it would be appropriate to allow no more than 1,000 pages of images. That is approximately 5% of the total...”
12. Earlier in the judgment the Senior Costs Judge refers to 5,762 and 14,846 “pages of images” on the discs in question. If those “pages” each included multiple images then the number of images themselves would be astronomical for a case which involved a one-count indictment. I think it is plain that the Senior Costs Judge was treating the images individually in Sereika.
13. On that basis the solicitors here are correct to say that the 10% figure ought to be calculated on the 18,914 images served by the prosecution. The solicitors have produced a screenshot of the download which refers to this number of images.

14. I am aware that some Prosecution extraction reports will produce the images as thumbnail images in the manner that appears to have occurred on the PDF created by the solicitors. Where that happens, the calculation of the proportion allowed is based on the pages rather than the images themselves. It might be thought therefore that there was something of a discrepancy between the approach described by the Senior Costs Judge in Sereika and the approach used by determining officers via extraction reports.
15. However, that apparent discrepancy is explained, in my view, by the entitlement of the solicitors to argue for the images to be paid for individually where the nature of the case requires consideration of the images in a larger format than thumbnails.
16. In this case there does not appear to have been any reduction of the images to thumbnails in the evidence served by the prosecution. If that had been the case, I am sure the determining officer would have alluded to that fact. The only thumbnails produced have been via the solicitors' own efforts and that cannot be any basis on which the determining officer should alter the Sereika calculation. The determination must be based on what was provided by the Prosecution not by the solicitors.
17. As such, on the facts of this case, the images were provided in the same manner as in Sereika and the 10% figure ought to be calculated on the number of images. In other words, I conclude that the solicitors are entitled to PPE being calculated on the basis of 1,891 pages in respect of images rather than the 199 pages allowed and the graduated fee needs to be recalculated as a result.
18. Since this appeal has been successful, they solicitors are entitled to the costs of appeal including the court fee.