



Neutral Citation No. [2022] EWHC 1778 (SCCO)

Case No: T20197168

SCCO Reference: SC-2022-CRI-000009

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 June 2022

Before:

COSTS JUDGE LEONARD

REGINA

v

ONWU

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

Appellant: Imran Khan & Partners (Solicitors)

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

COSTS JUDGE LEONARD

1. The Appellant represented Charles Onwu (“the Defendant”) in confiscation proceedings under the Proceeds of Crime Act 2002. This appeal concerns payment for that work, which is governed by paragraphs 26 to 29 of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant representation order was made on 24 September 2020, so the regulations apply as in force at that date.
2. Broadly speaking, regulations 26 to 29 provide for a Determining Officer to authorise remuneration for prescribed categories of work, including case preparation, at prescribed rates (subject to provisions for enhancement or reduction in appropriate circumstances), limited to such work as appears to the Determining Officer to have been reasonably done in the relevant proceedings.
3. There are two issues on this appeal. The first concerns the Determining Officer’s refusal to allow enhanced rates of payment, as to which the relevant provisions are at Paragraph 29:

“(1) Upon a determination the appropriate officer may, subject to the provisions of this paragraph, allow fees at more than the relevant prescribed rate... for preparation, attendance at court where more than one representative is instructed, routine letters written and routine telephone calls...

(2) The appropriate officer may allow fees at more than the prescribed rate where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that—

- (a) the work was done with exceptional competence, skill or expertise;
- (b) the work was done with exceptional despatch; or
- (c) the case involved exceptional complexity or other exceptional circumstances...

(4) Where the appropriate officer considers that any item or class of work should be allowed at more than the prescribed rate, the appropriate officer must apply to that item or class of work a percentage enhancement in accordance with the following provisions of this paragraph.

(5) In determining the percentage by which fees should be enhanced above the prescribed rate the appropriate officer must have regard to—

- (a) the degree of responsibility accepted by the fee earner;
- (b) the care, speed and economy with which the case was prepared; and
- (c) the novelty, weight and complexity of the case.

(6) The percentage above the relevant prescribed rate by which fees for work may be enhanced must not exceed 100%.

(7) The appropriate officer may have regard to the generality of proceedings to which these Regulations apply in determining what is exceptional within the meaning of this paragraph.”

4. The second issue concerns the Determining Officer's allowance of time deemed reasonable for the review of documentary evidence.

The Timing of this Appeal

5. The Appellant's appeal notice refers to the fact that in her written reasons, the Determining Officer referred to a number of Costs Judge decisions, which were supplied on request to the Appellant. The Appellant complains that although the decisions were requested on 23 December 2021, they were not supplied until 5 January 2022. The Appellant contends that time for this appeal to be filed should in any case run from the date upon which the decisions were supplied, but that the appeal notice was in any case filed within the period permitted by the regulations (the answer given to the standard question "Do you need an extension of time to pursue this appeal?" Is "no").
6. As far as I can see, the appeal has not in fact been filed in time. The Determining Officer's written reasons, supplied in accordance with regulation 28(8) of the 2013 Regulations, were provided to the Appellant on 23 December 2021. The Appellant had, in accordance with regulation 29(2), 21 days from that date within which to file an appeal. That period expired on 13 January 2022. According to the court's file, this appeal was filed on 21 January 2022, 8 days out of time.
7. The alternative proposition that time for appeal "ought to" run from the date that the LAA supplied to the Appellant copies of the judgments referred to in the Determining Officer's written reasons is, with all due respect to the Appellant, hopeless. Time for appeal is set by the 2013 Regulations and does not turn on the supply to the Appellant by the LAA of copies of Costs Judges' decisions. Nor is the LAA responsible for keeping the Appellant informed about such decisions. The LAA's response to the Appellant's request was a courtesy and should have been recognised as such. It also seems to me (given the intervention of the Christmas period) to have been undertaken quite promptly.
8. Had the Appellant requested a short extension of time for the purpose of obtaining relevant decisions, or for that matter due to the intervention of the Christmas period, I have no doubt that any Costs Judge would have been sympathetic to the request. No such request, however, was made. Instead the Appellant appear to have miscalculated the time available for filing an appeal and to have asserted in the alternative a non-existent right to file an appeal out of time. In consequence it seems to me that the appeal, having been filed out of time with no request for an extension, must be dismissed.
9. In case I am wrong about any of that I will explain my reasons for concluding that this appeal would not have succeeded anyway.
10. Before I do so I need to express my concern at the way in which some of the Appellant's submissions have been worded. I believe that I have had occasion before to suggest to Mr O'Donnell, who has represented the Appellant on similar appeals before me, that he might phrase his submissions in such a way as to avoid any

impression of gratuitous discourtesy to the Determining Officer whose decision is under appeal. I am sorry to have to do so again, this time more formally.

11. My point in this particular case is that I regard the Appellant's use, with reference to the Determining Officer's reasoning, of faux-objective terms such as "disconcerting", or "worrying" as unnecessary, discourteous and (again, for reasons I shall give) wholly unjustified.
12. Determining Officers, in carrying out their duties under the 2013 Regulations, are not immune from criticism. (Nor for that matter are Costs Judges). It is however perfectly possible to take issue with their decisions without implying, as the Appellant has done in using such terms, that they are in some way incompetent or deluded. This is not just a matter of common courtesy (although that is important: it is not appropriate to use the appeal process as a pretext for venting personal resentment at an unwelcome decision). In putting its submissions in this way, the Appellant casts doubt on its own judgment and so undermines its own case.
13. There follow my reasons for saying that this appeal, even if it had been filed in time, would not have succeeded.

The Background

14. The following narrative of the underlying prosecution is extracted from the Determining Officer's written reasons. The narrative of the confiscation proceedings is extracted largely from the Appellant's submissions to the Determining Officer and to this court.
15. Operation Freeze was a Hampshire Constabulary investigation into a conspiracy to commit fraud. The fraud took place over approximately two years, between May 2014 and 27 July 2016, when search warrants were executed and the fraud brought to a halt.
16. The fraudulent operation was nationwide, but Hampshire Constabulary's investigation focused on instances where property was fraudulently ordered and directed for delivery in Hampshire, often within the city of Portsmouth.
17. The fraud involved the large-scale theft, largely through phishing emails, of personal details of members of the public. The stolen identities were then used to make transfers or fraudulently to order high value goods, including watches, jewellery, electronic goods and computers, ordered in the defrauded persons' names but delivered to addresses unrelated to them.
18. Operation Freeze identified three principal suspects behind the fraudulent conspiracy. They were the Defendant, Festus Emosivwe and Victor Ngo. The home address of the Defendant, over the conspiracy period, was used as a delivery address for fraudulently obtained goods.
19. The Defendant was shown to have been in telephone contact with many of his co-defendants, and items that had been delivered to his address were found at least one co-defendant's address. A phone belonging to the Defendant contained data relating

to fraudulent orders, photos of items ordered or similar to items ordered, and requests for payment in goods.

20. On 27 July 2016, when search warrants were executed, the Defendant was not found, having moved address. He was subsequently arrested. During his interview he provided a prepared statement in which stated he did not recognise any of the mobile numbers or email addresses provided during disclosure. He answered 'no comment' to all other questions.
21. Following the initial arrests additional suspects, addresses and linked mobile numbers were identified, resulting in further arrests and searches. A total of six defendants appeared before the Crown Court.
22. At a Plea and Trial Preparation Hearing at Portsmouth Crown Court on the 6 December 2019, the Defendant pleaded not guilty. Trial commenced on 15 January 2020. On the second day of trial the Defendant pleaded guilty to conspiracy to commit fraud by false representation and conspiracy to convert criminal property. On 19 February 2020 he was sentenced to 43 months' imprisonment. It would appear from the papers filed for this appeal that no basis of plea was ever agreed, so that the Defendant was sentenced on the basis that he played a leading role in the fraudulent conspiracy.
23. Confiscation proceedings followed. In an initial Section 16 statement, which I understand to have been dated 8 September 2020, the Prosecution put the case against the Defendant on a "Joint Benefit" basis, valuing the conspiracy at an RPI adjusted figure of £361,428.
24. The Defendant's Representation Order was transferred to the Appellant on 24 September 2020. More than seven months had passed since the Defendant had been sentenced and the initial confiscation timetable had been set. The Defendant had however not filed any signed statements, in a wholesale failure to comply with the court's timetable which looks to have arisen from the lockdown and other measures brought in response to the pandemic from late March 2020.
25. The court set an amended confiscation timetable which required the Defendant to file a Section 18 statement and a section 17 statement by 22 October 2020, four weeks from the date that the Appellant assumed conduct. According to the Appellant this required extensive work, carried out over weekends, mostly at Grade C level with limited Grade B input also claimed at Grade C.
26. Section 17 and section 18 statements were duly served by the Appellant on behalf of the Defendant. The section 18 statement was served on 23 October 2020, one day late, and the section 17 statement on 26 October 2020, two working days late.
27. The section 18 statement, in the normal way, outlined the Defendant's financial circumstances and asset position. The section 17 statement, informed says the Appellant by a detailed and thorough examination of substantive case papers, challenged the framing of the prosecution case as one of joint benefit.

28. The Prosecution response to the Defendant's section 17 statement included significant concessions and a revised benefit figure of £164,863.99, a reduction of more than 55% to the original prosecution figure.
29. There followed a Mention on 4 December 2020 during which the Prosecution and the Defence exchanged views regarding orders which the Appellant had, over the course of its detailed review of the case papers, identified as denied, reversed, rejected, and incomplete.
30. The Court directed that the Appellant submit a revised draft schedule outlining the Defendant's position in relation to those orders. The Appellant had already provided a revised draft schedule to the Prosecution several days prior to the Mention and re-submitted it to the Prosecution on 07 December 2020.
31. The Appellant claims to have chased the Prosecution regularly thereafter but not to have received a substantive response until 05 February 2021, more than two months later, when the Prosecution filed a further section 16 statement with a revised benefit figure of £97,211.83.
32. There followed discussions between the Appellant and the Defendant, which were delayed and complicated by the restrictions associated with the ongoing pandemic: correspondence sent through the prison system could, I was advised by Mr O'Donnell for the Appellant, take between days and weeks to arrive.
33. These discussions resulted in an agreed order which was certified by the Court on 15 April 2021, less than seven months after the Appellant assumed conduct of the proceedings. The order provided for a benefit figure of £97,211.83, with the available amount at a nominal £1.
34. The Appellant's claim for payment for undertaking the confiscation proceedings on behalf of the Defendant included a claim for enhancement at 75%, and for 140.9 hours' work reviewing 6,995 pages of the substantive trial documents. The Determining Officer allowed 119.1 hours for reviewing the substantive trial documents and no enhancement.

Decisions Cited

35. As I have mentioned, in her written reasons the Determining Officer referred to a number of Costs Judge decisions, as has the Appellant. They include *R v Asif* SCCO (SC-2021-CRI-000091, 8 December 2021), *R v Boucheklia* (SCCO 112/17, 9 November 2017), *R v Haq* (SCCO 204/19, 29 May 2020), *R v Hussein-Ali* (SCCO SC-2019-CRI-000150, 8 June 2020) *R v Mayes* (SCCO 26/17, 19 October 2017), *R v Ozbay* (SCCO 41/18, 27 March 2020), *R v Ruto* (SCCO SC-2020-CRI-000011, 22 September 2020), *R v Usman* (SCCO SC-2020-CRI-000200, 27 April 2021) and *R v Waseem* (SCCO SC-2020-CRI-000093, 14 December 2020).
36. These non-binding decisions are of necessity fact-specific and so of limited value but they do serve as a useful reminder of some observations made repeatedly by Costs Judges on appeals of this kind. They include that that the requirement of exceptionality restricts enhancement to those cases which are truly exceptional (*R v*

Wharton 90/14, 19 September 2014); that a substantial reduction in claimed benefit is not uncommon and is not in itself evidence of exceptional competence; that it is not uncommon for at least some analysis that might otherwise be undertaken by a forensic accountant to be undertaken by solicitors instructed to defend confiscation proceedings; that the complexity of work is not to be measured by reference to the experience of the persons undertaking it; that the award of any enhancement is based upon experience rather than some sort of arithmetical methodology; that compliance with a tight court timetable does not in itself establish exceptional dispatch; and that an allowance of 2 minutes per page, whilst not in itself a formula for calculating the time to be allowed for reviewing documents, may in at least some cases offer a useful cross-reference.

Document Time

37. The Determining Officer's reduction of the time allowed for perusal of the substantive trial documents was not, it would seem, based upon the proposition that the Defendant had spent too much time in perusing relevant documents. It was based rather upon her concern that the review extended to documents not pertinent to the Defendant's case, including telephone logs that did not include the Defendant's number and some 947 pages of recorded taped interviews of other defendants.
38. The Appellant responds to the effect that this represents a "worrying misunderstanding" of the fact that this was a joint benefit case, and that in order to advance an argument for several benefit the Appellant would have had no choice but to consider such papers. The Appellant also submits that the Determining Officer's decision is not sufficiently clearly justified to say more.
39. I will not repeat my observations on the Appellant's choice of words. It suffices to say that I find myself unable to accept either argument. From the limited papers in my possession, it would seem that the Appellant succeeded in obtaining substantial concessions from the Prosecution first by identifying orders actually delivered to addresses associated with the Defendant and second by the further identification of orders that were denied, reversed, rejected, and incomplete, so that the Prosecution was persuaded by way of compromise to move away from a "joint benefit" approach to agree a figure specific to the Defendant.
40. This all seems to have been very sensible, efficient and effective, but I have seen nothing to explain why, in pursuing that strategy, any substantive amount of time was (or should have) been spent on reviewing telephone records that that did not concern the Defendant or records of interviews with other defendants.
41. As for the Determining Officer's allowance, it was plainly a fairly broad-brush figure based upon what the Determining Officer had seen (which is more than I have seen). Her decision did not have to be calculated down to the last page, and I can find no reason to suppose that her conclusions were incorrect.

Enhancement

42. The Appellant says that the Determining Officer observed that this was a straightforward case (this is the reasoning described as "disconcerting"). The

Appellant says that the Determining Officer “must” defer to the expertise and case knowledge of the financial investigator instructed in Operation Freeze, who referred a “... sophisticated conspiracy to commit fraud...”.

43. Again leaving aside the Appellant’s unfortunate choice of words (and for that matter the proposition that the Determining Officer “must” in exercising her discretion defer to anything other than LAA guidance and decided cases) I really should not have to point out that this is not an accurate representation of what the Determining Officer said.

44. To quote from her written reasons:

“I must disagree that “This work is invariably carried out by or with the assistance of a Forensic Accountant, particularly in cases involving a high degree of ‘sophistication’” is a statement that is applicable to this case. The solicitors were not investigating a ‘money trail’ or hidden assets, but a far more straightforward analysis of whether or not all the goods ordered had actually been delivered or if some of the orders had been rejected, which would affect the benefit figure in relation to this defendant.

The task before the solicitors did not require analysis of multiple bank accounts or considerable disentangling of legitimate from illegitimate income. The defendant did not have a particularly complicated financial history with multiple limited companies and businesses as well as investment properties, international elements or particularly large sums of money as can often be the case in POCA proceedings. Indeed, on 19 August 2020 defence counsel described the financial situation of this defendant as not having “any property of value” and only having “£30 in the bank”.

I accept that the modus operandi of the conspiracy itself was “sophisticated”, but not the role of this defendant within it...”

45. I cannot find anything with which to disagree in those observations. The analysis carried out by the Appellant cannot be compared with the sort of work that might have to be undertaken in the sort of high-value, complex fraud that would justify a substantial enhancement.

46. With regard to dispatch, I appreciate that the timetable set for the Defendant was tight, but the exercise undertaken by the Appellant was, within that timetable, a limited one. I am not assisted by Mr O’Donnell’s references to the Appellant’s production, within a week of being ordered to do so at the mention hearing, of a revised draft schedule which represented a summary of investigations already undertaken and as such had already been prepared and served, nor with his repeated comparisons to the complete lack of progress made by previous solicitors. Exceptional dispatch is not measured by comparison with doing nothing at all.

47. The 140.9 hours claimed for reviewing the substantive case papers in order to prepare the Defendant’s section 17 and section 18 statements comes to about 3.5 working weeks, which seems to fit manageably enough into the four-week timetable imposed by the court. The 119.1 hours allowed by the Determining Officer for considering the

pertinent documentation, which would seem to be the right figure for present purposes, comes to about 3 working weeks.

48. I can see no reason for work to have to be undertaken at weekends in order to fit 3 weeks' worth of work into 4 weeks, unless (as would not be uncommon in a busy practice) the Appellant's team was undertaking other cases at the same time. That, obviously, would not find a claim for exceptional dispatch in this particular case. In oral submissions I understood Mr O'Donnell to indicate that preparation was hindered by slow prison communications, but his written submissions confirm that the preparation of the section 17 and section 18 statements was based on document analysis rather than detailed instructions from the Defendant, so I don't think that that can have been a significant problem.
49. Looking at the broader picture, the Appellant says that "the claim for despatch really relates to the period from 24 September 2020 to 05 December 2020 and from 07 April 2021 to 15 April 2021, a total period of 11 weeks. To conclude confiscation proceedings arising from a sophisticated conspiracy to commit fraud within 11 weeks, without a forensic accountant and without Counsel input, speaks for itself."
50. This does not seem to me to follow. The Determining Officer has rightly observed that large reductions to Prosecution benefit figures are common and that solicitors in confiscation proceedings commonly achieve such reductions through negotiation without the assistance of counsel. Despite what Mr O'Donnell says that observation does not need to be "supported" by anything but the Determining Officer's own experience.
51. As I have already observed, the Appellant overstates the complexity of the task in hand, and whether there was exceptional dispatch turns upon the facts of the case, not upon some broad assumption about the time needed to manage confiscation proceedings. The true impression is, as the Determining Officer said, of the diligent and careful (not to mention effective) preparation of a case for the Defendant in a relatively straightforward and modest confiscation case, within a tight but manageable timetable.
52. For those reasons, even if this appeal had been filed in time, it would not have succeeded.