



Neutral Citation No. [2023] EWHC 2926 (SCCO)

Case No: T20207215
SCCO Ref: SC-2022-CRI-000168

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 6/11/2023

Before :

COSTS JUDGE NAGALINGAM

Between:

R

-v-

Stephen Hart, Conrad Deprese and Mark Scarborough

and

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

Jerman, Samuels & Pearson LLP

Appellant

- and -

The Lord Chancellor

Respondent

Hearing date: 15/09/2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

1. The appeal has been successful for the reasons set out below. The appropriate additional payment, to which should be added the sum of £100 paid on appeal and £1,500 costs (plus VAT where applicable), should accordingly be made to the Appellant.
2. The Appellant is a firm of solicitors who represented Stephen Hart, Conrad Deprese and Mark Scarborough. On 16 July 2021, Mr Hart pleaded guilty to counts 1, 2 and 4. On 27 May 2021, Mr Deprese pleaded guilty to counts 1 and 6 and not guilty to count 2. Mr Scarborough contested the case against him to trial.
3. As at the time of hearing this appeal, the Appellant claims 1,893 hours of Grade B time in special preparation. The accepted PPE page count in this case is 6,168 pages which is made up of 822 pages of witness statements, 5,265 pages of exhibits and 81 pages of forensic reports.
4. In addition, and based on using A4 size for the purpose of calculating a page count, there are a further 60,373 pages of electronic telephone material which is confirmed as served and used. Thus the total number of pages is 66,541 of which 56,541 pages is eligible for a claim in special preparation.
5. As against the 1,893 hours of Grade B time now pursued and maintained in this appeal, the Determining Officer allowed 360 hours. This is made up of 320 hours at Grade C and 40 hours at Grade B.
6. The Respondent provided confirmation in writing before the hearing of this appeal that they did not intend to attend and instead place reliance in the Determining Officer's written reasons.
7. This judgment therefore has regard to the written reasons dated 3 November 2022, the grounds of appeal and accompanying documents, and the submissions of Mr Toomey, counsel instructed on behalf of the Appellant.

Background

8. The three defendants represented by the Appellant in this matter were charged for their varying degrees of involvement in a conspiracy involving 11 defendants, across a 7 count indictment.
9. All three of the represented defendants were involved in a conspiracy to supply a Class A drug, contrary to section 1(1) of the Criminal Law Act 1977, in that between 30 July 2019 and 7 October 2020 the represented defendants conspired together and with others to supply a controlled drug of Class A, namely cocaine.
10. All three of the represented defendants were involved in the transferring of criminal property, contrary to section 327(1)(d) of the Proceeds of Crime Act 2002, in that between 30 July 2019 and 7 October 2020 the represented defendants, along with others, transferred criminal property, namely cash, knowing or suspecting it to constitute a person's benefit from criminal conduct.

11. Stephen Hart and Conrad Deprese were involved in producing a drug of Class B, contrary to section 4(2)(a) of the Misuse of Drugs Act 1971, in that between 1 January 2020 and 7 October 2020 they produced a quantity of cannabis, a controlled drug of Class B, in contravention of section 4(1) of the Misuse of Drugs Act 1971.
12. Stephen Hart was additionally charged with:
 - i) Possessing a prohibited firearm, contrary to section 5(1)(a) of the Firearms Act 1968, in that between 30 July 2019 and 7 October 2020 without the authority of the Secretary of State, had in his possession a firearm, namely a Laurona Magnum 12-bore shotgun, which was less than 60 centimetres in length overall.
 - ii) Possessing a prohibited weapon, contrary to section 5(1)(b) of the Firearms Act 1968, in that between 30 July 2019 and 7 October 2020 without the authority of the Secretary of State, had in his possession a weapon designed or adapted for the discharge of any noxious liquid, gas or other thing.
 - iii) Possession of a controlled drug with intent, contrary to section 5(3) of the Misuse of Drugs Act 197, in that on 7 October 2020 he unlawfully had in his possession a controlled drug of Class A, namely MDMA, with intent to supply it to another contrary to section 4(1) of the Misuse of Drugs Act 1971.
13. The conspiracy concerned an organised crime group ('OCG') based in the UK that acquired and distributed at least 30kg of cocaine across the east and south of England.
14. Following an operation by French and Dutch police in early 2020 to infiltrate the "Encrochat" encrypted communications system, data related to this OCG was provided to UK Police via Europol. This data assisted a UK investigation of the OCG.
15. The OCG was concerned with the importation of cocaine, directed the activities of the other co-defendants, supervised major transactions and carefully managed revenues and costs.
16. Stephen Hart's role was principally to supervise and guard the location where the OCG's drugs were prepared and money stored. He lived on site, where a shotgun and another weapon were discovered during searches on 7 October 2020. He was said to have made collections of imported shipments. He was also involved in handling, weighing and testing the purity of the cocaine, as well as being partly or wholly responsible for paying the OCG's drugs couriers.
17. Mr Hart originally intended to plead not guilty. However on 16 July 2021 he entered guilty pleas, which the Crown agreed to whilst letting any remaining charges to remain on file.
18. Conrad Deprese was said to be a runner who delivered small quantities of cocaine at locations the OCG directed him to. He lived at least part of his time at the base where the drugs and money were stored, and was arrested during the course of the searches on 7 October 2020.
19. He pleaded guilty on 27 May 2021 with consideration to be given to a basis of plea upon completion of review of his telephone data.

20. Mark Scarborough was observed to be in the company of one of the courier co-defendants and subsequently forensically linked to cocaine moved by that courier. Upon the execution of a search warrant on 7 October 2020, drugs paraphernalia together with trace amounts of cocaine were found at a location where he had been residing.
21. He contested the charges against him and intended to proceed to trial until he entered a guilty plea on 26 November 2021.
22. For all three defendants represented by the Appellant, the evidence considered was a mixture of “Encrochat” messages (which five of the defendants used under pseudonyms) and downloaded data from unencrypted devices, including smartphones, as well as billing records.

Regulations

23. (The Criminal Legal Aid (Remuneration) Regulations 2013 (‘the 2013 Regulations’) apply in this appeal. Schedule 2 to the Regulations outlines the following relevant provisions:

20.—(1) This paragraph applies in any case on indictment in the Crown Court—

(a) where a documentary or pictorial exhibit is served by the prosecution in electronic form; and—

(i) the exhibit has never existed in paper form; and

(ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence; or

(b) in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000,

and the appropriate officer considers it reasonable to make a payment in excess of the fee payable under Part 2.

Decision

24. The underlying case in the crown court concerned a conspiracy involving eleven defendants and this appeal concerns the time spent in special preparation in relation to three of those defendants, and the grade or grades of fee earner required to undertake the work.
25. A significant aspect of the defence of all three defendants was the extent to which, if any, they were involved in the conspiracy. To varying degrees, and at various stages, the three represented defendants denied prior knowledge or association with the co-defendants, or otherwise admitted to innocent contact only.
26. To varying degrees, the three represented defendants also denied knowledge of the tools of the conspiracy (whether that be in the form of weapons or the production and/or supply of Class A and B drugs) or alternatively offered innocent explanations of their possession of, or interaction with, such tools.

27. Of the eleven defendants said to have participated in the conspiracy, five were concluded to have utilised phones installed with an application (app) called 'Encrochat'. Data from devices with this app fell to be considered alongside more traditional and well known communication methods and applications.
28. In order to understand the extent of the role played by the three represented defendants, it was necessary to understand not only on what occasions they had been involved in direct communications with the co-defendants, but also to understand where they themselves had been referenced in conversations between others where such conversations were capable of then explaining meetings involving any of the three represented defendants.
29. The context of the messages was also of importance given the admissions of innocent contact, possession or interaction.
30. Questions arose such as to whether certain meetings were for innocent or nefarious reasons. Questions arose as to whether the tools of the conspiracy found in the possession of the defendants were for innocent use or to carry out the crimes alleged. Questions arose as to whether drug references were in relation to cocaine or cannabis (given the lesser punishments carried by the latter). Questions arose as to whether communications were references to production, supply or both.
31. Matters were complicated by the use of pseudonyms and nicknames for those involved, or where common names arose. For example two of the defendants, Mark Scarborough and Mark Gooch, share the same first name, meaning that whilst a search of the word 'Mark' could narrow the field, every such entry would still require closer scrutiny for context and to discover which "Mark" was being referenced.
32. On other occasions, members of the conspiracy were referred to simply by the first initial of their name. For example, Mark Scarborough or Mark Gooch simply being referred to as "M". Conducting a search based on a single letter yielded too large a field of results to be practicably useful.
33. Thus the need to understand the context and scenarios in which the three represented defendants had been referenced arose, accounting for the use of nicknames, pseudonyms, first initial, or indeed epithets ascribed to them by other members of the conspiracy.
34. In terms of the tools of the conspiracy, the provision of an explanation of innocent possession required exploration. For example, whether possession of tools or certain chemicals related to previous occupations in plumbing, or to deal with a rat problem, or were in fact tools of the conspiracy.
35. There was also an issue with respect to how the tools of the conspiracy were referenced, such that slang terms, or 'terms of art', were of relevance. This was an organised crime group who were not readily using words and terms in communications which made it obvious what was being discussed. They were actively seeking to evade detection in the language they used.
36. There was also the issue of Conrad Deprese's admissions in relation to cannabis production, but denials with respect to cocaine production. This required a distinction

to be drawn between messages which were consistent with cannabis production, and his denied involvement in cocaine production and supply.

37. There is no dispute between the parties that the majority of phone data is in raw Excel format which can be manipulated and searched for key terms, words or numbers. The agreed page count takes into account the format of the evidence, including where the format is Excel.
38. The essence of the dispute, in my view, is the extent to which Excel data readily lent itself to being searched as a whole, as compared with a page by page approach. One must also be careful not to apply the benefit of hindsight where relevant material is not identified following a search.
39. There was a burden on the Appellant to address questions of provable association with others, the extent to which associations were attributable to the offending, or the extent to which absence of data equated to proof of no association. Such cases are also concerned with the discovery of known mutual associates not involved in the conspiracy.
40. I accept, in general terms, that not all cases involving phone data and co-conspirators involve a simple search of numbers to establish the extent of associations and contact. Increasingly, messaging apps are not linked to a particular number and so the relevance of other indicators of contact and links come to the fore.
41. I accept that many of the would-be search terms the Appellants identified would have potentially returned large amounts of pages such that a page by page approach would still have been required.
42. However, in my view a hybrid approach ought to have been deployed. Grade C fee earners could have been tasked with using search terms to narrow the number of pages requiring closer scrutiny, with a Grade B thereafter deployed to utilise their experience when conducting a page by page analysis.
43. Further, whilst I can accept that context is important, and matters are complicated where a defendant provides an explanation of innocent association, possession or use (as compared with bare denials), I am concerned that the Appellant has at times engaged in an approach more befitting of the prosecution which has led to an over-deployment of resources, when considering their role as representatives of the defendants.
44. I also take into account that the pages subject to a claim in special preparation are beyond the scope of Excel format only. The claim also includes pages of image data, including images which are screenshots of text.
45. This was an organised drugs and weapons conspiracy of considerable size, involving multiple defendants and significant efforts made to hide potential evidential trails leading to both the offending and the offenders. Where straightforward search terms are not available, or indeed even where such terms may be deployed to narrow the pages of evidence requiring closer scrutiny, the deployment of a fee earner with sufficient experience to recognise the slang / terms of art an OCG may typically use is warranted.

46. However, set against that is the fact that the role of the defendants' legal representatives is not to find potential examples of offending not yet identified by the prosecution, but rather to address the allegations faced and consider to what degree the evidence is consistent with those allegations as compared with being consistent with the defendants' versions of event.
47. I am also not of the view that all of the allowed time should be permitted at a Grade B rate.
48. The allowance I make is 320 hours at Grade C (as allowed by the Determining Officer) and an increase in Grade B time to 400 hours. The appeal is therefore allowed in those terms, plus the Appellant's costs (as set out above).

COSTS JUDGE NAGALINGAM