SENIOR COURTS COSTS OFFICE

SCCO Ref: 99/18

28 May 2019

ON APPEAL FROM REDETERMINATION

REGINA v MOONEY

CROWN COURT AT CANTERBURY

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20177045

DATE OF REASONS: 26 APRIL 2018

DATE OF NOTICE OF APPEAL: 16 MAY 2018

APPLICANT: SOLICITORS HARRIS SOLICITORS

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

The appropriate additional payment, to which should be added the sum of £500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Harris solicitors of Bradford against the sums allowed by the determining officer under the Litigators Graduated Fee Scheme. In particular the solicitors challenge the number of Pages of Prosecution Evidence ("PPE") allowed by the determining officer when calculating the graduated fee.

2. The solicitors were instructed on behalf of Henry Mooney who, together with two others, was charged with a conspiracy regarding the importation of cocaine into the United Kingdom. The relevant events took place between the 4th and 9th July 2015 when the defendants made journeys to and from Calais. One of the co-defendants (a Mr Smith) was found to be in possession of cocaine in his bag and he pleaded guilty to the offence of conspiring to import cocaine. Mr Mooney denied being acquainted with either of his co-defendants. From the telephones recovered from all three defendants the prosecution sought to demonstrate contact between the defendants during the relevant period.

3. After the trial, the solicitors claimed a graduated fee based on 10,000 pages PPE including the telephone data that had been served electronically. On determination, the determining officer allowed 4,673 pages including just over 2,000 pages of telephone evidence. By the time of the hearing before me, that figure had increased to 5,225 pages allowed by the Legal Aid Agency.

4. The solicitors contend that a figure of 10,000 pages as the maximum PPE allowable is justified. In order to get that figure, the solicitors rely upon exhibit DB/01/15/09/2015 which was referred to as the "Smith dongle" because it related to information taken from the co-defendant who pleaded guilty. One of the reasons for considering this information, according to the solicitors, was in order to distinguish the lifestyle of Smith in comparison to that of Mooney. Smith was said to be an international drug smuggler and there are certainly images in the papers that I have seen which would suggest that they would be relevant in establishing this.

5. In their original claim, the solicitors relied upon roughly 14,000 pages of electronic evidence to support the claim for 10,000 pages to count towards the graduated fee. Some of those electronic pages were duplicated and consequently the relevant page number has come down by a considerable margin and cannot, even on the solicitors' best case, support a claim of 10,000 pages.

6. As a result, the solicitors now also claim for some or all of the 6,500 images on the dongle to count towards the PPE. This was not a claim that was put before the determining officer at any point. Mr Rimer, who appeared on behalf of the Agency at the hearing before me, objected strongly to this late augmentation of the pages claimed. An appeal to the costs judge is from the decision of the determining officer. If the determining officer has not had the opportunity to consider the relevant pages /images, it would be inappropriate in Mr Rimer's submission for an appeal to take place from that non-decision.

7. At the hearing, a schedule running to 40 landscape-oriented pages was produced of information contained on the Smith dongle. It set out various categories of documents within the electronic evidence together with the comments of both the Agency and the solicitors. It indicated how many pages were claimed, whether any were agreed and how many pages were therefore in dispute.

8. It is often said that the application of the graduated fee scheme is intended to be mechanistic. By that I understand it to mean that it is simple to apply and avoids deliberation and discretion of the determining officer. It ought to be the case that the number of pages of PPE can be found from the prosecution's own documents and to that proxy can be multiplied the other factors to calculate the graduated fee. As is apparent to everyone involved in the calculation of fees under the graduated fee scheme, the advent of electronic pages of evidence has caused the system to become problematic.

9. The relevance or importance of the electronic PPE has to be considered by the determining officer in order to establish whether it is truly PPE or is simply evidence which can be remunerated through the special preparation provisions for reading the evidence served by the prosecution. This is so, even where, as here, it has been served along with the paper evidence.

10. Nevertheless, it does not seem to me that the regulations and in particular the High Court decisions which have interpreted those regulations in this area have suggested that the determining officer is required to contemplate on literally a page by page basis the electronic PPE contained within a disc in order to establish whether each page is important enough to count as PPE in itself. The regulations (at paragraph 1(5) to Schedule 2) refer to the "nature of the document" and whether to include "it" in the PPE. Obviously, a document may well run to many pages. There is nothing to say that each page needs to be considered individually.

11. As Holroyde J pointed out in Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB) a served witness statement is a document on which not all of the evidence is relied upon by the prosecution. By analogy, in my view, not all of an electronic document needs to be important for it to be counted as PPE. I would go further to say that, in order to make the mechanistic system workable, not all of a category of documents is required to be sufficiently important for that category to be allowed as PPE.

12. But a page by page consideration is clearly what has happened in this case and that approach continued in the appeal before me. The first three entries in the 40 page schedule are:

"5 claimed, LAA says 0 or 3";
"427 claimed, 425 agreed, 2 pages in dispute"
"136 claimed, 129 allowed, map searches in dispute – 7 pages".

13. Whilst I commend the thoroughness with which both Mr McCarthy, counsel for the solicitors, and Mr Rimer tackled the contents of the Smith dongle – both in

production of the schedule and in advocacy – it seems to me that the application of the regulations in determining PPE has gone wrong in this case.

14. It is agreed that it was reasonable for the solicitor to look at 129 pages of a total of 136 in a particular category of documents. In determining what was a reasonable course of action, the use of hindsight has to be guarded against. I ask, perhaps rhetorically, how the solicitors could reasonably be expected to know which documents could reasonably be studied for the purposes of PPE and which only merited reading time for a claim for special preparation? The artificiality of this situation is stark. By the time a litigator (or counsel) has considered each document, time has been spent reasonably on those documents which ultimately appeared to be less relevant with the benefit of hindsight than others. In my judgment, the determining officer ought to take a rather broader approach to what has been allowed than has been demonstrated by the schedule before me. Where a category is clearly reasonable to view in principle, the correct approach ought to be to allow all of those entries. The same is true in this case, where 425 of 427 documents have been agreed. It seems to me that if a category has been allowed in part then it would be an unusual case where it ought not to be allowed in full.

15. The piecemeal approach in this case has resulted in differing numbers of pages being claimed, challenged and ultimately agreed. This makes it very difficult to establish exactly how many pages are still in dispute between the solicitors and the Agency notwithstanding the granular approach that has been taken. That cannot be an appropriate use of the limited resources of the determining officer and other members of the Agency as well as the court. Nor is it appropriate for solicitors and indeed counsel to have to spend inordinate amounts of time justifying individual pages as has occurred here.

16. It is often said that there is no equity in the scheme and that a swings and roundabouts approach is required. In my view that approach needs to be applied more readily to electronic PPE than has occurred in this case.

17. As referred to above, I have had the advantage of seeing some of the photographs in the Smith dongle. They are clearly relevant to demonstrating Mr Smith's lifestyle. I appreciate that they were not put before the determining officer and in the general course of events, it would be appropriate to return this case to the determining officer for a further redetermination.

18. However, it seems clear to me that in order to reach the PPE cut-off, only a proportion of those photographs would have to be allowed by the determining officer in addition to the items which I have indicated ought to be allowed (where some of that category have already been allowed.) In these circumstances it is plain to me that the solicitors can justify the 10,000 page figure and it would serve no useful purpose to return this particular assessment to the determining officer. The regulations give me the same powers as the determining officer to make an assessment of the PPE and I use those powers in this case to find that the solicitors are entitled to a graduated fee based on a calculation using 10,000 pages as the PPE figure.

19. Accordingly, this appeal succeeds.

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