



Neutral Citation No. [2022] EWHC 1933 (SCCO)

Case No: T20180305

SCCO Reference: SC-2022-CRI-000050

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 15 July 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
MOHAMAD

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

Appellant: (EBR Attridge LLP Solicitors)

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

COSTS JUDGE LEONARD

1. This appeal concerns a claim for enhanced remuneration for the conduct of confiscation proceedings under the Proceeds of Crime Act 2002 (“POCA”). The relevant payment provisions are at paragraph 29 of Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013:

“(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.”

2. The Appellant represented Mohamad Hassan Mohamad (“the Defendant”) in confiscation proceedings in the Crown Court at Southwark. The Defendant had been charged, along with seven co-defendants, with the fraudulent evasion of duty, contrary to section 170(2) of the Customs and Excise Management Act 1979.
3. This was the outcome of a police investigation into an organised crime group involved in the distribution and sale of smuggled tobacco products, including cigarettes and hand-rolling tobacco, through a network of retail premises in Kent. The loss to HMRC caused by the group’s activities was said to be £355,869.04.
4. The Defendant was described as having an operational, supervisory role in the group. He acted as guarantor on the lease of one of the retail premises involved and was the

ratepayer on another. Phone numbers used in the rental of other premises and on business registration were linked to him. Substantial amounts of contraband, and co-suspects, were found at his home address. Aliases used by the Defendant appeared throughout the substantial tobacco-related ledgers seized during the investigation and produced as exhibits in the prosecution.

5. The prosecution was split into two trials. The prosecution evidence, according to the Appellant, consisted of over 10,000 pages, the indictment period spanning 1st June 2009 to 29th April 2017. The Defendant was convicted and on 26 June 2019, sentenced to 3 years' imprisonment.
6. The confiscation proceedings followed, with representation transferring to the Appellant (which had not represented the Defendant on the original prosecution). The Crown alleged against the Defendant a benefit from criminal conduct of £386,205.90. Available assets were put at £2,450.59 along with hidden assets.
7. On 12th February 2021 an agreed order was made certifying benefit of £354,000 and a confiscation order against available assets of £2,335.33 (6 weeks to pay, with a sentence in default of 37 days).
8. The Appellant claimed an enhancement on the standard rates for preparatory work at the maximum of 100%. The Determining Officer allowed 30%. On this appeal, the Appellant again seeks an enhancement of 100%.

Submissions

9. The Appellant says that the Defence team worked expeditiously in order to try to resolve the POCA proceedings as early as possible and without the need for a contested hearing. Settlement offers were made to the CPS in correspondence. The first was made on 24th March 2020, approximately three weeks after the Crown's section 16 Statement had been served. The Prosecution replied on 5 May 2020 rejecting the offer and requesting a full reply to the section 16 statement.
10. During this period the country went into lockdown as a result of the Covid-19 pandemic, causing significant problems in trying to secure video links at HMP Maidstone where the Defendant was detained, with a view to obtaining instructions. Two visits were unexpectedly cancelled by the prison, as priority was given to the Courts. This meant that a number of applications, all unopposed by the CPS, were made to the court to vary the Confiscation timetable. The Defendant's section 17 statement was prepared via correspondence and telephone consultations with the Defendant.
11. A further offer was made to the CPS on 17 June 2020 and rejected on 26 June 2020. A supplementary section 16 Statement was served on 28 August 2020 which asserted that the Defendant had hidden assets. The Crown's case was that as he had played an important role in a profitable trade in contraband over a period of many years, it was not credible that he had no assets in the UK or overseas beyond his car.

12. During a hearing on 28 September 2020 before HHJ Barde, the Prosecution informed the court that there was outstanding banking evidence to be served in relation to the Defendant. That evidence was served on 20 October 2020 and duly considered.
13. The issues in dispute were the apportionment of benefit; a tainted gift (an Audi A6); and, perhaps most significantly, the hidden assets allegation. On 29 December 2020 the Crown abandoned the hidden assets allegation and agreed to a small reduction in the benefit figure. The case was listed on 12 February 2021 before HHJ Bartie QC when the agreed confiscation order was made.
14. Because the Appellant did not have conduct of the case during the trial, it was necessary for the Appellant to conduct a review of the relevant prosecution witness statements and exhibits in order to apply appropriate expertise to the proper preparation of the Defendant's case. Irrelevant evidence was not considered so, for example, 852 pages of evidence were considered on 8 October 2019 but only 6.5 hours claimed, as some of the exhibits within those documents were not relevant to the POCA proceedings.
15. In summary, the Appellant says that this was not a standard POCA case. It involved a protracted financial investigation spanning some 8 years. The served evidence contained voluminous financial evidence, from banking evidence to handwritten financial ledgers pertaining to the numerous shops and warehouses.
16. The Defendant was described by the Prosecution and sentenced on the basis of having had an operational role in the organisation, so his involvement spread across various businesses. The case was conducted with exceptional skill in order to bring about the successful conclusion in this matter, avoiding the hidden assets finding.

The Determining Officer's View

17. In coming to his decision the Determining Officer considered the provisions of paragraph 29 of Schedule 2 (as set out above) and the 'relevant factors' set out at paragraph 1-11 of the Taxing Officers 'Notes for Guidance :
 “(a) the importance of the case, including its importance to each defendant in terms of its consequences to his livelihood, standing or reputation even where his liberty may not be at stake;
 (b) the complexity of the matter;
 (c) the skill, labour, specialised knowledge and responsibility involved;
 (d) the number of documents prepared or perused with due regard to difficulty or length;
 (e) the time expended; and,
 (f) all other relevant circumstances... ”
18. Bearing those criteria in mind, the Determining Officer accepted that this was not an unimportant or an easy case, and that it had been competently dealt with.
19. In terms of complexity, the case was not in his view near the top range of POCA cases dealt with in the Crown Court. The Defendant was said to be near the top of the criminal organisation, the investigation spanned 8 years and involved much financial material and there was an allegation of hidden assets, but those aspects, even

cumulatively, did not in his view make the matter exceptionally complex. Whilst the Appellant was not instructed in the substantive proceedings, that is also not exceptional in confiscation cases, and preparation time had been allowed in full, taking that and other matters into account.

20. The question, in the Determining Officer's view, was accordingly whether there was anything exceptional about the way the case was dealt with by the Appellant. An enhancement of 30% was merited under paragraph 29(2)(a) of Schedule 2 to reflect the fact that the Appellant was able to get an offer accepted by the Crown and bring the proceedings to an end without the need for a full hearing.

Conclusions

21. In his written reasons the Determining Officer referred to *R v Backhouse* [1997] Costs LR 445, but for the reasons I gave in *R v Hinchcliffe* (SCCO SC-2019-CRI-000109, 16 March 2020), I do not think that that *R v Backhouse* has much bearing on a claim under the 2013 Regulations.
22. More to the point, I think, are the observations of Master Gordon-Saker in *Re v Wharton* (SCCO 90/14, 14 September 2014):

In the days of ex post facto fees “exceptional” was taken to mean exceptional by comparison with the “generality of criminal cases” and should be given its ordinary and natural meaning of “unnatural and out of the ordinary”: *R v Legal Aid Board ex p R M Broudie & Co...*

As I have said before, if enhancement is paid on straightforward cases, the truly exceptional case will be underpaid...”

23. The citation for *R. v Legal Aid Board Ex p. RM Broudie & Co* is, incidentally, [1994] C.O.D. 435; (1994) 138 S.J.L.B. 94.
24. I respectfully agree with Master Gordon-Saker's observations, and with the further observations of Master Rowley at paragraph 16 of his judgment in *R v Smith-Ajala* (SCCO 2/17, 10 November 2017), as referred to by the Determining Officer. That case involved the foreign exchange market and foreign exchange controls in Nigeria, and Judge Rowley upheld a determining officer's decision to allow an enhancement of 50%:

"It seems to me to be entirely sensible for the Agency to grade the level of exceptionality in cases so as to reward the most complex cases at a higher level than those which are less so. To that extent this follows the spirit of the comments of Master Gordon-Saker in *R v Wharton*."
25. In reaching his decision, the Determining Officer drew on his experience of over 30 years of determining criminal costs appeals, and I would agree with his conclusion.
26. I did consider whether I might make some allowance for complexity, given the lengthy period over which the unlawful operations continued the Defendant's central role and the volume of evidence, or whether I might attach less importance to the Crown's abandonment of its hidden assets case, given that major concessions by the

Prosecution are not unusual in confiscation cases and that I am unable to link the concession in any meaningful way to the Appellant's claim to have exercised exceptional skill.

27. Fine points of approach aside, however, the point is that I agree with the Determining Officer's overall conclusion. In my view he appropriately exercised his judgment to allow an enhancement of 30% which was, as he put it himself, reasonable and proportionate in the circumstances.
28. For those reasons, this appeal does not succeed.