Neutral Citation Number [2024] EWHC 1135 (SCCO)
Case No: T20217176
SC-2024-CRI-000028

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 13th May 2024

Before :

SENIOR COSTS JUDGE GORDON-SAKER

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R
- v -
PETER METCALF

Judgment on Appeal under Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

Appellant: Mr Peter Metcalf

Mr Joshua Munro (instructed by **Ward Hadaway LLP**) for Mr Metcalf
Ms Francesca Weisman for the **Lord Chancellor**

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

The appropriate additional payment, to which should be added the court fee of £100 paid on appeal, and assessed costs of £28,000 (plus any VAT payable), should accordingly be made to the Appellant.

SENIOR COSTS JUDGE GORDON-SAKER

1. This is an appeal by Mr Peter Metcalf against the decision of Ms Lucy Keats, a Case Manager in the Criminal Cases Unit of the Legal Aid Agency, not to allow the fees of a second junior counsel.

2. The case against Mr Metcalf arose out of the Hillsborough Stadium disaster in April 1989. Mr Metcalf, a solicitor, was instructed by the Municipal Mutual Insurance Company, the insurers of South Yorkshire Police, in relation to the independent inquiry conducted by Lord Justice Taylor and the civil proceedings brought against the police.

3. In June 2017 Mr Metcalf was charged with two counts of undertaking acts with the intention to pervert the course of justice. The first alleged that between April and August 1989 he had provided advice on the amendment of statements made by police officers which were to be provided to the investigating force, West Midlands Police. The second alleged that before July 1990 he had drafted an addendum statement and advice in respect of four police officers who gave statements in relation to the civil proceedings. Two senior police officers also faced charges. The prosecution case was that the three defendants had sought to minimise the blame that might be levelled against the police by altering the accounts of the officers present at the stadium.

4. Following an initial appearance in Warrington magistrates' court in August 2017, the case was sent to Preston Crown Court. There were substantial hearings as to change of venue, because of potential juror bias, abuse of process, on the basis that the prosecution was oppressive and that a fair trial would not be possible (heard over 8 days), the need for expert evidence (heard over 2 days), disclosure, fitness to plead and joinder with other proceedings.

5. The trial commenced in Manchester in April 2021. After 24 days, William Davis J (as he then was) concluded that there was no case to answer. Mr Metcalf was acquitted and an order was made that his costs should be paid out of central funds.

6. Mr Metcalf had instructed Ward Hadaway to represent him and they instructed a team of 3 counsel: Mr Jonathan Goldberg KC, Mr Timothy Kendal and Mr Senghin Kong. As one would expect, Mr Goldberg cross examined the main prosecution witnesses and Mr Kendal and Mr Kong cross-examined the investigating officers from the Independent Police Complaints Commission (since replaced by the Independent Office for Police Conduct).

7. Mr Metcalf claimed costs of £4,095,725. On determination £1,014,214 was allowed, which was increased on redetermination by £199,455.

8. Mr Metcalf's appeal was originally in respect of the fees of leading and junior counsel and the experts' fees. All of the issues raised, apart from the fees of Mr Kong, were resolved before the hearing.

9. In respect of Mr Kong's fees, £709,317 was claimed (11,259 hours at £63 per hour). Mr Kong's time had been billed to the client at £100 per hour and it would appear that all of his time, including his attendance at trial, was charged at that rate. There are no brief fees or refreshers. The Determining Officer concluded that instructing two juniors was not reasonable and disallowed Mr Kong's fees in principle. However, she accepted that some of the work done by him had been reasonable and, on redetermination, indicated that she would approve payment for work in relation to considering and scheduling the IPCC disclosure and unused and drafting the chronologies. However she needed further details of how much of Mr Kong's time

had been spent on that. I understand that, subsequently, 1,000 hours at £29 per hour was allowed for this work.

10. This was expressly not allowed as the fees of a second junior, but rather as work that had to be done by somebody. The issues on the appeal therefore are whether it was reasonable to incur the costs of instructing Mr Kong as second junior counsel and, if so, whether the fees claimed are reasonable.

11. In the same way that concessions had been made in relation to the hourly rates charged by the other counsel, on appeal, Mr Metcalf now seeks a rate of £50 rather than £100 as charged by Mr Kong or £63 as originally claimed. He also now contends for an allowance of 7,500 hours, rather than the 11,259 hours claimed.

12. Regulation 7 of the Costs in Criminal Cases (General) Regulations 1986 provides that:

> (1) The appropriate authority shall consider the claim and any further particulars, information or documents submitted by the applicant … and shall allow costs in respect of –
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> (a) such work as appears to it to have been actually and reasonably done; and
>
> (b) such disbursements as appear to it to have been actually and reasonably incurred.
>
> (2) In calculating costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity and difficulty of the work and the time involved.
>
> (3) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.
>
> …..
>
> (5) Subject to paragraph (6), the appropriate authority shall allow such legal costs as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings.
>
> (6) … the appropriate authority shall calculate amounts payable out of central funds in respect of legal costs to the individual in accordance with the rates or scales or other provision made by the Lord Chancellor pursuant to paragraph (7), whether or not that results in the fixing of an amount that the appropriate authority considers reasonably sufficient or necessary to compensate the individual.

13. The rates and scales document published by the Lord Chancellor provides for basic fees for junior counsel of £545, refreshers of £178.75 and fees for written work of £58.25 per item. Paragraph 3.2(4) provides:

> (4) Where it appears, taking into account all the relevant circumstances of the case, that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with the table above would not provide reasonable remuneration for some or all of the work allowed, there may be allowed such amounts as appear to be reasonable remuneration for the relevant work.

14. It is not in issue that the exceptional circumstances of this case justify a departure from the prescribed rates.

15. The Determining Officer was not impressed with the civil decisions to which she was referred on redetermination in which the fees of three or more counsel had been allowed. She considered that the complex legal issues were a matter for the experts and the abuse of process and admissibility arguments were not unusual. The size of the prosecution counsel team was only "of limited weight" and the fact that the co-defendants were represented by two counsel was more relevant.

16. On behalf of Mr Metcalf, Mr Munro pointed to the size of the case. The Hillsborough criminal investigations as a whole had been described by the CPS as "the largest in English criminal history", involving more than 350 prosecution lawyers and staff, and costing the Crown, at the time that Mr Metcalf was charged, over £98m. There were over 1.6m pages of documentary evidence. Mr Metcalf's team was limited to 5 lawyers: one solicitor, one paralegal and the three counsel.

17. The work undertaken by Mr Kong is summarised in paragraph 79 of Mr Munro's skeleton argument and bears repetition here:

> "a) Reviewing all the served evidence, Operation Resolve disclosure and the Goldring Inquests Archive;
>
> b) Preparing the first draft, and often subsequent drafts, of almost all of the written submissions and substantial correspondence (some of which are highlighted below);
>
> c) Researching the authorities referred to in each skeleton argument which usually involved novel and/or difficult issues of law;
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> d) Attending all of the conferences and hearings in the case, and liaising closely with the solicitor and paralegal and the other counsel in relation to the division of work;
>
> e) Preparing the skeleton argument on venue which involved important arguments on the risk to a fair trial of possible juror bias;

f) Preparing the application to dismiss and stay, which amounted to 175 pages of submissions. Preparing bundles of evidence based on detailed trawls of the voluminous evidence and disclosure that had by then been served;

g) Preparing bundles of authorities;

h) Reviewing a vast amount of press reportage spanning nearly 3 decades in preparation for the application to stay the prosecution as an abuse on the basis of adverse publicity;

i) Distilling the case for the purposes of taking instructions from Mr Metcalf, and preparing his proof of evidence (which was necessarily very long) and supporting bundle of documents;

j) Preparing a list of issues in the case (akin to a defence statement, which was not required as the case began before the CPIA 1996 came into force);

k) Preparing the skeleton argument on the admissibility of the Stuart-Smith Scrutiny report, which involved novel and difficult legal issues;

l) Considering the prosecution expert's report from Gregory Treverton-Jones KC and preparing the documents necessary to brief the experts Sir Robert Francis KC, Geoffrey Williams KC and Patricia Robertson KC – this involved both distilling the relevant facts in a fair way but also researching and setting out the authorities relevant to the difficult issues of professional conduct which lay at the heart of the case;

m) Preparing the skeleton arguments in relation to re-opening the admissibility of the Stuart-Smith Scrutiny following the prosecution decision to obtain expert evidence, whether as a matter of law there was a duty of candour, and whether the prosecution expert should be permitted to give evidence that there existed such a duty – again these arguments involved novel and difficult legal issues;

n) Preparing skeleton arguments in relation to the admissibility of expert evidence from the prosecution and the defence experts, not only as to the general principles applicable to the professional conduct of solicitors in 1989 / 1990, but also their application to the facts of the case;

o) Preparing numerous summaries of the evidence for each of the key topics and the key witnesses in the case, with supporting bundles, to assist in the preparation of cross-examination and speeches by Jonathan Goldberg QC and Tim Kendal;

> p) Preparing the defence schedules setting out the relevant evidence drawn from the served case, the disclosure and the Goldring Inquests Archive which were put before the jury in hard copy, together with the supporting documents which were uploaded to the jury's iPads;
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> q) Cross-examining the IOPC officers to present the defence schedules and other documentary evidence helpful to Mr Metcalf's case;
>
> r) Preparing the skeleton argument in support of the submission of no case to answer."

18. In the alternative, if the court is minded to restrict Mr Kong's time to the work identified and allowed by the Determining Officer, Mr Munro contended that work took about 6,000 hours. The chronologies drafted by Mr Kong ran to thousands of pages. The disclosure schedules contained over 100,000 items with over 1 million pages of material.

19. Mr Kong's fee notes appear to run from August 2017 to May 2021. He has produced detailed worklogs recording the date, work done and time spent, often with 11 or more hours recorded per day. Following the hearing of this appeal, and at my request, I was provided with a bundle of over 4,600 pages being examples of the chronologies, schedules, skeleton arguments and submissions prepared by Mr Kong.

20. On behalf of the Lord Chancellor, Ms Weisman submitted that the starting point is that the payment out of central funds should be *reasonably sufficient* to compensate the defendant for expenses properly incurred in the proceedings. It was appropriate for the Determining Officer to assess the reasonableness of instructing a third counsel from that overarching perspective.

21. The Lord Chancellor's rates and scales document acknowledges that a useful starting point is the rates payable under legal aid. It would not make sense, submitted Ms Weisman, to apply that comparison only to litigators. By the same reasoning, the regulations relating to the instruction of more than one counsel in legal aid cases are relevant. Further Mr Metcalf's legal team had already been remunerated for a greater breadth of work than that undertaken for his co-defendants. The Determining Officer had taken into account the particular need for Mr Metcalf's team to consider the paperwork from the earlier inquiries. In addition, Mr Metcalf had the benefit of three leading counsel giving expert evidence on the duties of lawyers.

22. The correct starting point, it seems to me, is that, in assessing costs out of central funds under s.16 of the Prosecution of Offences Act 1985, the test is whether the defendant was reasonable in instructing the counsel which he did: *R. v Dudley Magistrates Court Ex p. Power City Stores Ltd* (1990) 154 J.P. 654. That other counsel or more junior counsel or fewer counsel could have conducted the case is not the test. In approaching the correct test the Determining Officer should look at the size, weight, complexity and all of the circumstances of the case.

23. The instruction of three counsel in criminal cases is, in my experience, rare and there is little guidance. The Taxing Officers' Notes for Guidance, issued by my predecessor

in 2002, refer to three counsel only in the context of legal aid, it being noted that three counsel will be authorised only in cases prosecuted by the Serious Fraud Office. That does make the comparison with the co-defendants, relied on by the Determining Officer, less helpful as they were legally aided and so could not instruct more than two counsel.

24. That cases prosecuted by the SFO might justify the instruction of three counsel is perhaps relevant. In those cases, as in this, there will be a huge amount of documentation and that, in my experience, is usually the reason for instructing more than two counsel.

25. Clearly this was a heavy case with a huge amount of documentary evidence arising out of or created for the several judicial inquiries which had occurred since the disaster. The work of considering, sifting, prioritising, and scheduling those documents and preparing chronologies would have to be done by Mr Metcalf's legal team. That team, by comparison with his co-defendants' teams, had fewer solicitors and more counsel. Mr Munro explained that this was the same counsel team who had represented Marine A. He submitted that it was reasonable for Mr Metcalf to opt for that counsel package and a smaller solicitor team.

26. An inescapable conclusion is that it was necessary for somebody to do at least some of the work done by Mr Kong. That was accepted by the Determining Officer. Was it reasonable for it to be done by counsel rather than by a paralegal? Mr Kong was called in 2008 and so was about 10 years' call at the time. It would certainly be reasonable for a defendant to assume that Mr Kong would be capable of doing the work more quickly, more accurately and with less recourse to his supervisors than a paralegal.

27. In my judgment it was reasonable to instruct three counsel in this case, the third counsel being primarily responsible for reviewing, analysing and scheduling the disclosure. While it is not possible for me to conduct a detailed audit of Mr Kong's worklogs, the work identified by the Determining Officer as necessary must have taken up the majority of his time. Having done that work, his familiarity with the documents would be indispensable at trial and enable him to conduct the cross-examination of some of the witnesses.

28. However, the work done on skeleton arguments etc, would not, in my view, justify the instruction of three counsel. That is work which would generally be done by those principally presenting the case at trial, in this size of case a leader and one junior. Accordingly I would allow the fees of a second junior counsel for reading the disclosure, preparing the schedules and chronologies arising from that, ancillary work such as attending conferences and attending trial.

29. Is the sum of £375,000 (7,500 x £50) now claimed reasonable? I have no hesitation in concluding that the hourly rate of £50 is reasonable. The rate of £29 allowed is the trainee rate in the Lord Chancellor's rates and scales document. Having decided that it was reasonable to instruct a third counsel of Mr Kong's call, it follows that the trainee rate would not be appropriate. There is no preparation rate for counsel. The solicitors' rate of £45 would be more appropriate for counsel (other than a pupil). Neither a pupil nor a trainee could produce the documents generated by Mr Kong. The rates and scales document permits the recovery of higher rates in exceptional circumstances. It

seems to me that the amount of disclosure in this case made it exceptional. £50 is well within the band of reasonableness.

30. The time is more difficult, in part because of the way in which it has been charged. A second junior would usually charge by way of a conventional brief fee and refreshers, rather than by the hour, although charging by the hour would be appropriate for reviewing disclosure, etc. It would be somewhat artificial to pick out the work which probably fell within the brief and more sensible to take into account that a reasonable brief fee is likely to be less than the aggregate of the number of hours spent in preparation and attendance charged at an hourly rate.

31. It would also be right to take into account that the burden of responsibility on a second junior is less. That is, to some extent tempered by the hourly rate and the fact that Mr Kong undertook some of the cross-examination.

32. Taking all of that into account and taking a broad brush approach, the total fees of £375,000 do appear to be too much to be reasonable. In my judgment 5,000 hours, which would be equivalent to about 100 weeks, would be reasonable. That would give a fee for Mr Kong of £250,000 as against the £29,000 allowed for the notional paralegal.

33. The appeal succeeds to that extent.

34. Mr Metcalf's costs of the appeal are claimed in the sum of £55,608. I should bear in mind that the appeal was originally much wider and that an additional payment of about £930,000 was agreed about 3 weeks before the hearing. Nevertheless the costs claimed are still too high to be reasonable.

35. The hourly rates claimed are reasonable. The partner's rate is just above the guideline hourly rate, but the rates for the other fee earners are within them. Despite the sums originally in issue, I think that the amount of time spent on documents is too high to be reasonable as are counsel's fees. The attendance at the hearing of a second fee earner, in addition to counsel and the partner, is also unreasonable. I would allow a total of £33,600 (including value added tax) as being reasonable.