Neutral Citation No. [2024] EWHC 1321 (SCCO)

Case No: T20190346

SCCO Reference: SC-2024-CRI-000033

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 June 2024

Before:

COSTS JUDGE ROWLEY

R (ENVIRONMENT AGENCY)
v
BOWDEN

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

Appellant: Gregory Johnson (Counsel)

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

The appropriate additional payment, to which should be added the sum of £750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Gregory Johnson of counsel against the decision of the determining officer to calculate the advocate's graduated fee based on band 16.3 for the purposes of the Criminal Legal Aid (Remuneration) Regulations 2013.

2. Counsel was instructed on behalf of Jade Bowden who, together with a number of other family members, was said to be involved in a scheme which contravened the Environmental Protection Act 1990 and secondary legislation to it. In respect of Jade Bowden specifically, she was charged with contravening Regulations 12(1), 38(1)(a) and 41(1) of the Environmental Permitting (England and Wales) Regulations 2010. The particulars of offence were described as follows:

> "Between the 1st March 2014 and 12th January 2015, Jumbo Waste and Metals Ltd contravened regulation 12 of the Environmental Permitting (England and Wales) Regulations 2010 by operating a regulated facility at Bonnie Braes farm, Bignall End outside the terms of authorisation of an environmental permit and this offence was committed with the consent or connivance or was attributable to the neglect of Jade Bowden, being a director of the said company."

3. Equivalent offences were charged against other members of the Bowden family. Several companies and their directors were charged with depositing controlled waste on land contrary to the Environmental Protection Act 1990 in the absence of any environmental permit in force authorising those deposits.

4. The centrepiece of the scheme, according to Mr Johnson, who appeared on his own behalf at the hearing of his appeal, was encapsulated in the first count on the indictment which concerned the operating of a regulated facility on Bonnie Braes Farm without the authorisation of an environmental permit and the defendants charged with that offence were Jumbo Waste and Metals Ltd, Raymond Bowden, Julie Bowden and Stefan Paraszko.

5. The prosecution's opening note describes the illegal depositing of waste on a massive scale at Bonnie Braes Farm. The "colossal quantity of waste" dumped on the farm, including asbestos, had changed the landscape forever according to the prosecution. In addition to that environmental degradation, a crucial gas distribution pipeline passed underneath the farm and the written permission of the National Grid was required before anything could be deposited either directly on top of it or nearby. No such permission was sought and the vast quantities of waste deposited on top of the pipeline risked its failure. At paragraph 4 of the opening note, the reason for operating the illegal waste operation is described as follows:

> "Who was responsible for operating the illegal waste operation at Bonnie Braes Farm? Well I can tell you that one man – Stefan Paraszko – has already pleaded guilty to his involvement in the enterprise. However, the prosecution say he was a "front man" behind whom the real beneficiaries of this enterprise sought to hide. The prosecution alleged say this was various members of the Bowden Family who – it is alleged – were

> instrumental in both operating and benefiting from the illegal enterprise via their company Jumbo Waste and Metals Ltd. The prosecution allege that Ray Bowden was the real directing force behind this illegal enterprise, though he was careful to place other members of his family in ostensible control of Jumbo Waste and Metals Limited during a large portion of the time of the illegal deposits.
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> The prosecution suggest that Ray Bowden was ably assisted by his wife Julie Bowden who – for most of the indictment period – was director and majority shareholder of Jumbo Waste and Metals Ltd. In the period between May 2012 and 12th January 2015, the only other director of the company was Ray and Julie Bowden's daughter Jade Bowden. She then resigned as a director – along with her mother Julie Bowden – to be replaced as directors by her father Ray Bowden and by her brother James Bowden. All four Bowdens are alleged to have been complicit in the illegal activities at Bonnie Braes Farm.
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> Why would the Bowdens wish to involve themselves in running a site where waste would be illegally deposited? The prosecution say that during this trial you will see an obvious financial motive to their involvement. During the indictment period, the prosecution say that Jumbo Waste and Metals Ltd was paid over £750,000 from hauliers willing to deposit waste illegally at Bonnie Braes rather than pay the additional costs that would have been associated with transporting it to a legal site."

6. The prosecution's opening note goes on to cite TW Frizzell (Haulage and Plant Hire) Ltd as being the company which most frequently illegally deposited waste at Bonnie Braes Farm. The directors of that company were also defendants at the trial. The company denied that payments of more than £519,000 paid to Jumbo Waste and Metals Ltd were made for being allowed to deposit waste at the site. TW Frizzell said that the payments related to vehicle sales and the purchase of crushed concrete from Jumbo Waste.

7. The proceedings began on 28 August 2019 in the North Staffordshire Magistrates Court. The trial eventually took place at the Crown Court at Stoke-on-Trent on 7 September 2023 and lasted for 37 days. During the proceedings counsel applied for an interim fee. The claim form described the offences as falling within class K and an interim payment was made.

8. The claim for an interim payment referred to the litigators for Jade Bowden and some of the co-defendants having been paid based on a class K categorisation. That description relied upon the Table of Offences in the 2013 Regulations which no longer applied to advocates since the introduction in 2018 of a separate document entitled "Banding of Offences in the Advocates Graduated Fee Scheme." A revised version (version 1.2) came into force in December 2018 and it is that document which applies in this case.

9. As I understand it, although it is not material in my view, the interim fee was actually paid based on the determining officer categorising the offence using the advocates' banding document rather than the Table of Offences in the 2013 Regulations which only applied to litigators by that point. Counsel relied upon the categorisation in the interim fee application as demonstrating that a previous determining officer had considered the case to be akin to a fraud claim rather than a regulatory crime.

10. Whilst that may be so, it seems to me that in the circumstances of the pandemic and the fact that litigators were entitled to claim a class K categorisation, which relates to fraud, the decision to make an interim payment based on any particular banding is not of any great weight in my view.

11. Although the Banding of Offences altered in 2018 in respect of advocates, the general approach to classification of offences did not vary from the arrangements set out in the 2013 Regulations. A comparison of the offences on the indictment would be made against the Table of Offences and if there was a direct match then that would be the categorisation appropriate to calculate the graduated fee. If however, the offence was not specifically set out in the Table of Offences, then it would fall into the miscellaneous category by default.

12. The litigator or advocate could request that the determining officer reclassify the offence so that it more closely aligned to a different category and the determining officer could agree to do so. Alternatively, the determining officer could conclude that a different category was more appropriate than the one proposed by the litigator or advocate. Or they could simply leave the offence in the miscellaneous category for the purposes of calculating the appropriate fee. That general approach still applies albeit that, for advocates, the Banding of Offences document inevitably contains some offences which are not in the original table given the effluxion of time.

13. Sometimes, as occurred here, there can be a difference in the treatment between litigators and advocates under the graduated fee schemes. For litigators, the choice for categorisation of the offences was between either fraud offences of varying values (F, G or K) or strict liability offences (H) which appeared to be relatively minor. In the case of the Environment Agency v Flanagan, Tones and Abraham in 2014, Costs Judge Andrew Gordon-Saker decided that the fraudulent offences were the better comparison. The appellants in that case (both litigators and advocates) relied upon the prosecution opening which stated that:

> "…at its heart, the Prosecution say that really this case is about fraud, fraud on the public whereby unlawful waste was dumped (with potential environmental consequences) avoiding the necessary costs incurred by lawful disposal and no tax paid."

14. Counsel in this appeal relied upon the Flanagan decision as being on all fours with this case. Even from the brief extract from the prosecution's note in Flanagan, it can be seen that there are very obvious similarities. As far as litigators are concerned, Flanagan would put to bed any suggestion that this case should be categorised as anything other than band K (not least because the value of the fraud in this case was put at more than £10 million which was considerably more than the value of the fraud in Flanagan and which in itself comfortably exceeded the threshold required to be a class K offence.)

15. However, the advent of the banding document means that the determining officer now has an alternative classification of offence to consider in respect of advocates' fees. The determining officer put it this way in her written reasons:

> "The AGFS Banding Document referred to in the Remuneration Regulations places offences in one of 17 main bands, some of which have several sub-bands. In accordance with Regulations, whilst any indictable offence which is not already categorised with an Offence Band will fall into Band 17.1 by default, the advocate has the right to request reclassification of the offence.
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> …
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> When considering a request for re-banding of the offence, and taking into account the elements of the offence charged and the true nature of the case (as required by the decision of Costs Judge Leonard in the Lahooty case), the determining officer considered that the offence did not easily fit in to any of the following offence bands [1-5,7-15].
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> The determining officer was left with Band 6 – Dishonesty (consisting of Bands 6.1 – over £10m or over 20,000 pages; 6.2 – over £1m or over 10,000 pages; 6.3 – over £100,000; 6.4 – under £100,000; 6.5 – under £30,000); Band 16 – Regulatory Offences (consisting of Bands 16.1 - Health and Safety or environmental cases involving one or more fatalities or defined by the HSE or EA as a "major incident"; Band 16.2 - Health and Safety or environmental cases not falling within Band 1 but involving: Serious and permanent personal injury/disability and/or widespread destruction of property (other than that owned or occupied by the defendant); Extensive pollution/irreparable damage to the environment; Toxic gas release (e.g. carbon monoxide, chlorine gas); Cases involving incidents governed by mining/railways/aviation legislation; Band 16.3 – All other offences (unless standard)) and Band 17 – Standard Cases.
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> The determining officer considered that, given the wording of the various Band 16 sub Bandings, and particularly Band 16.3, that any Environmental Regulatory Offences not listed as falling in Band 17 (Standard Cases) could not be determined to Band 17.1.
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> The determining officer also considered that, given the presence of a Banding category specifically for Regulatory offences, especially one featuring some extremely serious Health & Safety and Environmental Offences, Banding the offence in this case into Band 6 would not be appropriate…

> The determining officer considered that the instant offence could be re-banded into one of the Band 16 Offence Bands. The determining officer then considered whether the offence should be classified within Band 16.1 or 16.2. The Band 16.1 option was immediately discounted as this was not an offence involving fatalities or a major incident. Band 16.2 was also discounted as there was no serious injury; destruction of property, release of toxic gas, etc.
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> Within Band 16.3 are the Environmental Offences of carrying on a process without authority, failing to comply with requirements in connection with the suspension of a licence, carrying out prescribed processes save in accordance with appropriate Regulations, etc. The determining officer considers that the instant offence is comparable with such offences and should be banded within Band 16.3.
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> In determining that the appropriate offence band for the instant offence is Band 16.3, the determining officer is saying that, taking into account the elements of the offence charged and the true nature of the case, the most appropriate offence Band for this offence is Band 16.3."

16. The determining officer refers to the decision of Costs Judge Leonard in R v Lahooty in 2016 rather than to the case of Flanagan. Costs Judge Leonard referred to Flanagan in his decision and similarly concluded that the determining officer in the relevant case had not had regard to the true nature of the particular offence (and which was also a complex fraud worth at least hundreds of thousands of pounds.)

17. It seems to me that the decision before the determining officer in this case was rather more nuanced than in the earlier decisions in Flanagan and Lahooty. The introduction of the Banding of Offences document has given the determining officer a wider range of potentially comparable offences to consider.

18. The prosecution was brought by the Environment Agency and the opening paragraph of the prosecution's opening describes the environmental damage done to the farm by the massive amount of waste that had been deposited. From the documentation I have received, the scale of this waste is described as being estimated at least 69,000 tonnes and possibly up to 200,000 tonnes and which has increased the height of the land by 6 or 7 metres in places. The exemption obtained by Mr Paraszko enabled just 1,000 tonnes of waste soil and stones to be deposited without needing a permit and no permit was ever sought.

19. The prosecution's sentencing note sets out the environmental harm at length. It expressly refers to the "Environmental Offences Sentencing Guidelines" when discussing harm and culpability and the various starting points for sentencing.

20. Given this information, it seems to me that the determining officer was justified in looking at band 16 as being the obvious comparator for the offences which the defendants faced. The reasoning by the determining officer demonstrates a precising

of the contents of the Banding of Offences at band 16 and I agree with the determining officer that bands 16.1 and 16.2 do not fit the circumstances of this case.

21. That only leaves band 16.3 which is the catchall "all other offences". Whilst it cannot be said that so broad a description does not potentially capture this case, it seems to me that it does not represent a good fit. By any measure, the unlawful depositing of waste materials was carried out on a significant scale. The profit made by the main target of the prosecution – Jumbo Waste – was estimated to be more than £10 million. That level of endeavour in a fraud case would take the categorisation to the top of that band. It does not seem to me that such a large scale crime easily fits within a catchall banding such as 16.3.

22. The determining officer excludes the higher bands of band 16 and in so doing demonstrates an appreciation of the underlying nature of this case. She dismissed the relevance of the interim payment fee having been calculated based on band 6.2 as being a result of the pandemic and the fact that any issue could be resolved in the final determination. As I have said above, I agree with that approach.

23. But there is little in the otherwise comprehensive reasoning to explain why placing this case into band 6 regarding dishonesty offences is not appropriate. The only reason, as far as I can see, is that there are regulatory offences in band 16 which, on the face of them, seem more appropriate. Whilst that would be an entirely logical approach if one of the specific bands in band 16 fitted this case, that is not, in my view, the outcome of the determining officer's decision. The specific bands are (rightly) discounted as being inappropriate and therefore the case, by default, is said to fall most appropriately into the catchall band 16.3. The determining officer has looked at Table B which sets out four environmental offences under the Environmental Protection Act 1990 and, as set out above, considers that the offence with which Jade Bowden charged was comparable with those offences.

24. It is here that I am afraid that I depart from the determining officer's conclusions. The EPA offences are, in my view, little more than the strict liability offences discounted by the cost judges in Flanagan and other cases referred to in that decision such as Lahooty. The offences are, in my judgment, very different from Regulation 41(1) of the 2010 Regulations with which the defendant was charged here.

25. Regulation 41(1) relates to the "consent or connivance" or "neglect" on the part of the defendant as a director of Jumbo Waste. In order to make that prosecution succeed, not only did the depositing of unlawful waste have to be demonstrated, which was probably the easiest part of the prosecution, but also the financial arrangements between the various members of the Bowden family to demonstrate acts that could be described as consent, connivance or neglect.

26. As Mr Johnson said at the appeal hearing, it would not take 37 days to demonstrate that unlawful waste had been deposited on the site. The time was taken in dealing with the financial trail and which resulted in him cross-examining Ray Bowden's accountant at some considerable length. The fruit of that cross examination appears to be reflected in the prosecution's sentencing note where reference is made to invoices which had been tampered with so as to hide the true destination of the payment to Jumbo Waste rather than the "front" company owned by Mr Paraszko.

27. Before the trial, Mr Johnson applied for prior authority to incur expenses in order to be able to appear in Stoke-on-Trent and that authority was granted. Mr Johnson's expertise in both regulatory and fraud matters was given as the reason for seeking that authority. In my view this neatly demonstrates the dual aspect of these proceedings. Whilst they are clearly cloaked in environmental issues, the pursuit of Jumbo Waste and members of the Bowden family through these proceedings and subsequent Proceeds of Crime Act proceedings, clearly shows an attempt to seek redress from the financial gains made by the defendants.

28. Therefore, whilst I have some sympathy with the determining officer's approach in this case, it does not seem to me that, ultimately, the "true nature" of these proceedings are reflected in band 16 but rather that the category should have been band 6 since the heart of the proceedings was the prosecution of a fraudulent endeavour. As I have already set out, the threshold for establishing entitlement to band 6.1 has been achieved and indeed was made clear in the prosecution's own documents.

29. Accordingly, this appeal succeeds and I direct the determining officer to recalculate the graduated fee based on a 6.1 banding.