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Case No: T20197237

SCCO Reference: SC-2022-CRI-000140

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date:19 December 2023

Before:

COSTS JUDGE ROWLEY

R
v
Mohammed Ikhlaq

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

Appellant: Harewood Law (Solicitors)

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

The appropriate additional payment, to which should be added the sum of £250 (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 Harewood Law solicitors against the decision of the determining officer to calculate the litigator's fee under the Criminal Legal Aid (Remuneration) Regulations 2013 using 4,680 pages of prosecution evidence ("PPE") rather than the 10,000 pages claimed.

2. The solicitors were instructed by Mohammed Ikhlaq who, together with 11 others, was prosecuted for money laundering out of the running of a business called "Wesellallcars.com". Second hand vehicles were supposedly traded under this brand, but it was essentially a front for the laundering of cash and various illegal activities concerning motor vehicles.

3. Mr Chaudhury, who appeared on behalf of the solicitors at the hearing of this appeal, described Ikhlaq as being the legitimate face of an illegitimate business which concerned up to 15 people in a conspiracy to launder money. More than £1million went through the business. The prosecution said that no cars were being bought and sold but simply cash arising from drugs.

4. In support of the prosecution, Detective Inspector Little produced a witness statement concerning the telephone download obtained from a white and silver iPhone said to belong to Ikhlaq. DI Little's witness statement states that he prepared a telephone report which he produced as JEL1-161118 which is also referred to as CH/1. He produced this exhibit on 16 November 2018.

5. By 25 May 2022 the defendant's counsel, Edward Lucas, felt the need to advise his instructing solicitor in writing regarding the evidence. The trial was due to a start in a month's time with a time estimate of 4/5 weeks. Mr Lucas described the evidence as both extensive and voluminous. In particular, he stated:

> "I am concerned that we have not had access [to] or have been able to forensically examine the mobile phone data for the Defendant as relied upon by the Crown at exhibit CH/1."

6. He went on to advise seeking LAA authority to incur the cost of an expert to analyse the exhibit "and present it in a readable and comprehensible format." The appellant solicitors obtained authority to instruct an expert and consequently engaged Tower Forensics to produce a report. The description in their invoice is "Mobile phone extraction and report for the case of R v Ikhlaq" and the invoice is dated 18 July 2022. There is an earlier invoice, dated 10 May 2022 which is said to be for "R v Ikhlaq mobile device extraction into PDF."

7. The wording of both of these invoices causes some difficulty when compared with the other documents. Counsel's first advice refers to the trial starting on 27 June 2022 but that date must have been put back given that his second advice, dated 14 July 2022, refers to the trial being listed for "this coming Monday" which I believe would make it 18 July. It appears that the LAA approved the request on 15 July and Tower Forensics turned round the report more or less immediately. That chronology fits together with the submissions of Mr Chaudhury that the report was obtained after all of the work in reviewing the exhibit had already been undertaken. He said that the original version of

the download was in UFED (Universal Forensic Extraction Device) which, despite the word universal, appears to be a proprietary format for use with Cellbrite reports.

8. That version of events does not entirely tally with the first Tower Forensics invoice which is dated prior to either of counsel's written advice and, on the face of it, indicates that a PDF version of the download was already available for use. Why there would be any need for a second extraction in addition to any form of report is not clear. The only explanation based on counsel's advice may lie in his request to have "the data in a format that we can navigate to the chats/messages/images in the same way the prosecution will." The remainder of counsel's advice goes to specific elements of the case on which counsel wished to have the expert's input.

9. The determining officer was provided with a PDF version of the extraction report and it is based on that document that some of the pages have been allowed as PPE and others have not. Mr Chaudhury did not accept that this was an appropriate approach where he and his colleagues used a different format to consider the download rather than via a PDF version which he told me was not available at that time.

10. It seems clear from the entries between Mr Chaudhury and the determining officer during the reconsideration process that the UFED version provided by the prosecution was used by the solicitors to deal with this case. That was a deliberate choice for ease of use. It appears to be an enhanced version of the approach sometimes seen where Excel spreadsheet versions of downloads are used in preference to the PDF versions which may have been provided at the same time.

11. There have been numerous costs judge decisions which have determined that the PDF version of the download is the more appropriate format to use for the purposes of calculating the PPE. It is intended to replicate the paper page and therefore, even if another format is more user friendly in terms of working on the case, it is the PDF version which is preferred for calculating the PPE.

12. I have dealt with some appeals where the litigator has been required to use an Excel version to support the PPE claim as well as conduct the case because no PDF version was provided by the prosecution. Attempts to turn those spreadsheets into PDFs purely for PPE calculation at the end of the case have not always proved successful because the PDF captures the blank pages which are seen when using Excel print preview.

13. In the appellant's notice, Mr Chaudhury described the determining officer's approach of using the PDF version as being flawed since that was only produced for the trial and was not the format used by the solicitors. Furthermore, there was some suggestion that the version seen by the determining officer (and provided to me) was only a partial version in that it showed the breakdown of the contents but did not actually provide the 14,000 or so pages.

14. In order to seek to overcome this issue, Mr Chaudhury provided me with a USB stick on which was a copy of the UFED version and an executable file in order to be able to read it. Part of the reason for the delay in producing this decision has been my attempt to download the relevant program and see the UFED version. But that has not proved to be possible, notwithstanding the assistance of IT staff in HMCTS. I understand from an email received from Mr Orde, who appeared at the hearing on behalf of the LAA, that he was able to download the UFED version but was not able to view the contents.

15. This outcome is regrettable in that I wished to be sure that I could examine all of Mr Chaudhury's submissions to their conclusion, but, ultimately, I have decided that they cannot alter the standard position. I do not see that it is likely that using the UFED version would be more time consuming than using a PDF version, as otherwise, practitioners would not use it. Indeed, the Cellbrite format is one that we commonly see on appeals. On this basis, I do not see that the solicitors were prejudiced in the running of the case in being required to use the UFED format. The PDF version was created during that period from the original material. As such, there is no suggestion that it would have been any differently formatted if it had been provided by the prosecution at the outset. Therefore, it is the version that would normally be preferred for the purposes of calculating the PPE and I do not think that the determining officer's decision to use it in this way was flawed in principle.

16. Mr Orde described the appeal as consisting of the formatting issue – which I have dealt with above – and the relevance issue. In respect of relevance, Mr Chaudhury criticised the limitation of the areas of the PDF allowed by the determining officer. The written reasons record that the number of pages runs to 13,749 which suggests that the determining officer was aware of the extent of the PDF version even if he was not able to view all of it. Those reasons set out the contents of CH/1 by category and whether each category has been allowed. The categories allowed follow what seems to be the usual approach of allowing messages and other communications claimed in full. Categories such as cell towers, journeys, installed applications and searched items are also allowed. However, nothing is allowed for categories described as "technical metadata" such as the device information as well as "configurations" (which amounts to more than half the pages (1662 to 9128)). The time line has been disallowed as being duplicative of information set out on other pages already. A proportion of the images (5%, amounting to 223 pages) has been allowed.

17. The written reasons describe allowing "all communications, web and location data within the PPE" based on the solicitors' submissions about the relevance of the telephone data and the nature of the offence. A contrast is drawn with the relevance of the technical metadata.

18. In respect of the images, the determining officer records the solicitors' argument about relevance as being the need to check the photos for various other people who could potentially have been co-defendants. The determining officer then indicates that he had reviewed the images (which suggests he did, in fact, have the full PDF) and describes the majority as being selfies, or photos of friends/family, animals, children or public figures / memes etc.

19. There is then what appears to be something of a standard paragraph regarding relevance before the determining officer concludes that "on the basis that images showing the defendant with others were potentially relevant I consider it appropriate to include a proportion of the images within the PPE. Taking all the circumstances into account I consider 5% of the pages from this section to be reasonable." Reference is then made to the case of R v Sereika (2018) SCCO Ref 168/13 where this approach was first utilised by the Senior Costs Judge, Andrew Gordon-Saker.

20. Mr Chaudhury's note to the determining officer records the pages as being over 100,000 based on the UFED format. His argument was that all served evidence should be counted and the note traces the history of PPE from before R v Furniss up to the Lord

Chancellor v SVS. There is no need for me to deal with that history in any detail. It is settled law that litigators need to look at everything that is served upon them and that some documentation provided by the prosecution may be deemed served on the basis of its importance, even if it is not formally served. But it is equally clear that, in relation to electronic PPE, the regulations require the determining officer to impose a threshold of importance so that it can be properly described as requiring the same concentration by the litigator as paper PPE would do. If the electronic PPE does not reach that threshold, then a claim for special preparation could be made for the time spent reviewing that served documentation.

21. The delineation of the areas of the PDF by the determining officer divides the elements that he thinks were sufficiently important e.g., the messages and web searches, from those which were not i.e. the technical metadata. This is not just a perfectly proper approach, but a requirement under the 2013 Regulations, as was made clear in SVS.

22. In this case there was a considerable amount of paper PPE. In addition to that was the download of exhibit CH/1 which is described in the note to the determining officer as follows:

> "…photos, messages, calls, WhatsApp messages. This data was used in exhibit JEL 1 which used the surveillance, audio/video recordings, call data, messages, photos, online banking, WhatsApp messages, all of this data was connected and showed the movement of persons, money and connections were exhibited by the prosecution to show how the OCG moved money."

23. There are similar comments throughout the note. I have set it out because, it seems to me, that it confirms the determining officer's allowance of the various messaging applications and interactions with the web, as well as some photos, related to the core elements of the prosecution case.

24. The audio and video footage has been disallowed as technical metadata. It was in fact decided many years ago that moving images did not count as photos or as PPE and the same has been held of audio transmissions. As such, those pages could not be allowed. Mr Chaudhury told me that he had cross referred audio transcripts with bank transfers. I would assume that the transcripts, as opposed to the recordings, would have been included within the paper PPE following transcription.

25. In my view, with the exception of the images section, the determining officer's exercise of his discretion to allow parts of the download as amounting to PPE given their relevance, but not others, cannot be faulted.

26. As far as the images are concerned, the determining officer's reliance on Sereika was challenged by Mr Chaudhury as being distinguishable given the number of pages involved. Mr Chaudhury described Sereika as being a "small" case in comparison, but it is not clear to me that the approach, as described by the Senior Costs Judge, is predicated on the size of the number of images at stake. The crux of his decision on this point is contained in the following three paragraphs:

> "In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors would have wished to look for photographs indicating that use. On the other hand it is unlikely that the vast majority of those photographs would have been relevant to that task. It would seem unlikely that the solicitors would have looked in detail at each of the 20,608 images served on disc. Most would have required a glance or less.
>
> In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However much of the evidence on the phone would not require consideration.
>
> It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in *In re Eastwood* 1974 3 WLR 454 at 458. But that is the nature of the assessment of costs."

27. Having considered the examples of images referred to by the solicitors, the Senior Costs Judge came to the conclusion that it was appropriate in that case to allow no more than a thousand pages of images which was approximately 5% of the total. From that case appears to have grown a practice on the part of determining officers of allowing 5% where some of the images appear to be relevant but others are not. I am yet to see a case where a determining officer concludes that any other percentage than 5% is appropriate. That practice, allied to the seemingly standard paragraph in the written reasons as to why the percentage approach endorsed by costs judges in cases such as Sereika was appropriate, and together with my view that, in this case, the images were used for more than is recorded by the determining officer (association with possible co-defendants), leads me to conclude that the figure of 5% of the images is not appropriate in this case.

28. In his submissions, Mr Chaudhury told me that, as in Sereika, it was the defendant's case that Ikhlaq's phone was used by others. The most striking example of this was that transactions continued on the phone whilst Ikhlaq was recovering in hospital having been stabbed in the back.

29. I was told that photos of cars would be sent to Ikhlaq's phone to demonstrate what car was allegedly being bought or sold in case the bank rang to check the authenticity of the transaction. Those photos were not deleted, unlike the messages, and so could be proved by the images on the phone. Photos taken and used whilst Ikhlaq was in hospital were also obviously relevant. It was also Ikhlaq's case that cars were purchased legitimately and that photos of at least some of the cars supported this argument. Ikhlaq

was involved in a further scheme involving the purchase of rental properties with legitimate money. Photos of properties – as well as internet searches – were demonstrated by the contents of the phone. Furthermore, the question of whether Ikhlaq had a criminal lifestyle was evidenced by the images on the phone.

30. I note that none of these categories of photos are described in the list given by the determining officer and, given his recording of the purpose of the images reviewed, I have concluded that the importance of the images to various strands of the defence case has been underplayed.

31. The images are recorded as running from page 9192 to 13649. Doing the best I can with the submissions made by Mr Chaudhury; the information provided by the determining officer and the PDF report filed as part of the appeal papers, I consider that around 30% of the images ought to be allowed as being sufficiently important to merit categorisation as PPE. Taking into account the paper PPE and other elements of the electronic evidence allowed, I direct the determining officer to recalculate appropriate graduated fee using a figure of 6,000 pages rather than the 4,680 pages previously allowed.

32. To this extent therefore the appeal succeeds and the solicitors are entitled to their costs of the appeal.