SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2021-CRI-000034

20 July 2021

ON APPEAL FROM REDETERMINATION

REGINA v LIDDLE

CROWN COURT AT MANCHESTER (CROWN SQUARE)

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

CASE NO: T20197574

DATE OF REASONS: 3 MARCH 2021

DATE OF NOTICE OF APPEAL: 12 MARCH 2021

APPLICANT: SOLICITORS CLIFFORD JOHNSON

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 £1,250 (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 Clifford Johnson solicitors against the number of pages of prosecution evidence ("PPE") allowed by the determining officer when calculating payment to the solicitors under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Scott Liddle who faced one count of rape following a works outing on 25 May 2018 which he and the complainant, amongst others, had attended. They returned to the defendant's premises where, along with another colleague, they carried on drinking and the men took cocaine. The other colleague left and the complainant went to sleep on the defendant's bed. On the following morning, the defendant also went to his bed and sexual intercourse followed. The complainant said that this was without her consent and that in fact she was asleep when it began. The defendant said that the complainant had woken and given her consent. As the judge's legal direction to the jury set out, the issues for the jury were whether the complainant consented and if she did not, whether the defendant had reasonably believed that she had done so.

3. The prosecution served 254 pages of paper PPE together with a disc of electronic evidence amounting, according to the PDF version, to 11,835 pages. An Excel version of the evidence was also provided together with a folder containing images. The determining officer allowed 5,115 pages of the contents of the disc as electronic PPE and, on this appeal, the Legal Aid Agency have conceded a further 273 pages so that the electronic PPE figure is now 5,388 pages. The solicitors say that this is a case where 10,000 pages ought to be allowed so as to reach the maximum figure for the graduated fee calculation.

4. The items which the solicitors say ought to have been allowed in addition to the pages which have been allowed are the timeline (2,950 PPE), and data files (1,549 PPE). The determining officer disallowed the timeline on the basis that it was duplicative of other parts of the download. He allowed 10% of the images using the broad approach described originally in R v Sereika (168/18).

5. Jonathan Orde, a lawyer at the Agency, supported the determining officer's position on the appeal. In relation to the timeline, he relied upon the case of R v Baptiste which concluded that, whilst useful, it was a duplication of the information otherwise downloaded. In any event, said Mr Orde, the issues in the case concerned a 24-hour period and therefore a timeline going back to 2013 could not be sufficiently important to come within the threshold required for electronic PPE.

6. Mr Orde submitted that the data files, other than the images consisted of technical meta data which was not relevant. In respect of the images themselves, it was difficult to see how they could be relevant to the issue of consent. He queried whether images from the defendant's phone were an important part of the served evidence and he relied upon an email from the CPS

which suggested that the images would only be relevant to the defendant's case rather than the Crown's.

7. Colin Wells of counsel, who appeared on behalf of the solicitors, together with Daimian Mullarkey, the solicitor with conduct of this case, submitted that the defence needed to look at the defendant's background in order to deal with the question of consent and the only feasible way of doing that was to look at the images to see what they revealed. They both said that the prosecution's case was that when the defendant had been drinking or taking drugs (or both) his behaviour deteriorated and therefore would diminish the defendant's concern about ensuring that any sexual activity was consensual.

8. In relation to the timeline, a wider period than 25 – 26 May 2018 needed to be considered. For example, information concerning the taxi which was called by the defendant for the complainant could not be found simply by looking at the call data since an app had been used. I was shown correspondence with the CPS prior to the trial regarding the difficulty in locating corroborative information regarding the taxi which on both prosecution and defence cases definitely took place.

9. During the hearing, Mr Mullarkey told me that the hyperlinks contained in the PDF document were broken. Those hyperlinks were set out next to the thumbnail images so that, in theory, they could be used to view a larger version of the picture by simply clicking on the link. Having established that the links were broken however, Mr Mullarkey went directly to the images folder in order to consider the 14,000 or so images that were contained there. He did not use the Excel version which he said would simply have provided a further set of links to the images, but without the thumbnail pictures as a reference point.

10. It seems to me that Mr Mullarkey's description of how he viewed the images makes the dispute in the pre-hearing written documents as to whether the PDF or Excel version of the download should be used for calculating the PPE rather redundant. The weight of costs Judge decisions clearly favour the use of PDF formatting since it is specifically designed to mimic the use of paper pages. It is only in certain circumstances where the Excel version – which is known to be problematic in the number of pages it suggests need to be printed – might be preferred. In circumstances where the Excel version has not been used, it seems to me that there is no prospect of that version being preferred.

11. I do, however, accept Mr Mullarkey and Mr Wells' description of the nature of the enquiries that the defence team needed to undertake. They needed to consider the relationship between the defendant and complainant and his relationship with others in order to deal with the question of consent and in particular his reasonable belief about such consent. I do not accept Mr Orde's argument that what mattered was simply the events on the 25 – 26 May 2018.

12. In particular, it seems to me that the images on the defendant's phone would be crucial in considering these matters, especially since the prosecution had served the entire download. I have had the chance to consider the thumbnail images on the download. I agree with Mr Orde that they are not any more or

less legible than is usually seen. In my view, many if not most of the images would not need to be expanded in order to determine whether they were relevant. Having said this, the proportion of pictures which might be relevant in that they involved people other than celebrities or indeed emojis et cetera is higher than in other downloads that I have seen.

13. Mr Wells contended for an 80% figure of the total number of pages containing potentially relevant images rather than the 10% allowed by the determining officer. Having reviewed a proportion of the images, I would put this figure at 40%. However that figure it seems to be needs to be contemplated in the context of the solicitor having to find those images separately in the folder of images given that the hyperlinks were broken. Mr Mullarkey told me that the running order of the images did not tally with the PDF document and as such it seems to me that locating a proportion of the images would be rather more time-consuming than ought to have been the case.

14. The broad assessment involved in allowing a percentage of the images is, in my view, an assessment based on the relevance of those images and taking a proportion of the whole to reflect that relevance. In this particular case, it seems to me that the appropriate way to reflect the increased consideration of the download by having to go to the images folder to seek the corresponding image would be appropriately reflected by increasing the 40% figure to 50%. This means an allowance of 752 pages which is an increase of 601 pages from the amount previously allowed by the determining officer.

15. I have looked closely at the timeline in the knowledge that it is usually disallowed on the basis that it is simply an amalgamation of entries from elsewhere in the download. The timeline here indicates that a number of entries had been deleted which, it appeared most likely to mean that they had been deleted from the phone but had been retrieved by the person responsible for extracting information from it. Mr Mullarkey was firmly of the view that there was information there which could not be located elsewhere. Mr Orde countered by saying that the entries in other areas also showed that the entries had been deleted and as such the normal position of the timeline being an amalgamation of other parts still stood in this case.

16. I was told that the timings in this case were important in order to demonstrate how long the defendant and complainant were together on their own both before and after the disputed events had occurred. There was also mention of the need to be firm about the timings in order to consider the toxicology evidence.

17. Whilst I can see that the timings might well be important for the reasons given, I am not convinced that the timeline is sufficiently important in itself in this case to entitle the solicitors to claim it as PPE in addition to the other parts of the download which have been allowed. I agree with Mr Orde that the entries marked as deleted in the timeline also appear to be marked deleted elsewhere. Therefore whilst I do not take the view that the timeline can never be recovered – indeed I have allowed it on limited other occasions – I do not think that it is appropriate to include it in the PPE in this particular case.

18. Consequently the solicitors have been successful in part in this appeal and are entitled to costs in addition to the increased sum which will be payable once the graduated fee is recalculated. The sum I have allowed for the costs of the appeal is considerably less than has been claimed. This reflects the partial nature of the success and also the fact that the sums claimed seemed to me to be unreasonable in an appeal of this type, even allowing for extra consideration of the images section.

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