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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 24/09/2018

IN THE COURT OF JUDICATURE OF NORTHERN IRELAND

TAXING OFFICE

THE LEGAL AID FOR CROWN COURT PROCEEDINGS (COSTS) RULES
(NORTHERN IRELAND) 2005, AS AMENDED

Before Master McGivern

Notice of Decision and Reasons

Between:

Flynn & McGettrick as representative
for the defendants noted below

Appellant

and

Legal Services Agency NI

Agency

Defendant	Certificate Nos. Taxing Ref No.
Thomas Andrew Bates	CC/14/11/20255 T/CC/17/00055
Gary Samuel Bates	CC/174/11/20254 T/CC/17/00056

1. The appellant lodged appeals under Rule 14 of the 2005 Rules in both cases mentioned above against decisions of the Legal Services Agency ("the Agency") dated 1 August 2017 in relation to the calculation of fees pursuant to Rule 13 of the Rules. I heard the appeal on 2 October 2017. Mr Shields BL, Mr Blaney and Mr Morgan appeared. The delay in delivering this decision is regretted.

2. Both cases involve the Agency's calculation of the fee payable due to the number of Pages of Prosecution Evidence (PPE) and the decision to reduce the costs on the second defendant to twenty per cent.

3. The case relates to an environmental prosecution by the NI Environment Agency ("NIEA"). The defendants are brothers who were for

more than 25 years directors of Ace Bates Skip Hire Ltd. The company was also a defendant in the proceedings.

4. The defendants were charged with 15 offences of alleged unlawful waste disposal and evasion of landfill taxes. They were returned for trial in August 2014 and the case was listed for case management before Mr Justice Weir (as he then was). The judge expressed a view from the beginning that counsel on each side should strive to resolve the issues in early course, if possible. As a consequence of negotiations between prosecution and defence counsel the defendants were arraigned on 9 January 2015 and pleaded guilty to four offences in satisfaction of the indictments. These pleas were accepted on an agreed written basis of plea. It was agreed between the parties that the defendants would not be sentenced until conclusion of proceedings which the prosecution had brought under the Proceeds of Crime Act 2003 ('POCA').

5. It was recognised that culpability would depend on the outcome of issues which fell to be determined in that aspect of the proceedings.

6. When the prosecutor's statement in the POCA proceedings was served it was revealed that the sum sought under the Confiscation Order was in excess of £18,000,000.00. The sum originally canvassed was in the region of £3,000,000.00

7. A number of experts were engaged by each side. Joint meetings of experts took place but they were unable to reach agreement. Central to their considerations was the amount and categorisation of waste deposited on the defendants' site and on neighbouring land. An important indicator of the categorisation and amount of waste deposited was contained in Waste Transfer Notices (WTNs). There were 86 WTNs included in the prosecution papers. Those WTNs contained details of the volume, nature and destination of the waste.

8. Before the matter came to confiscation hearing and sentencing, the defence enquired with the PPS/NIEA if there were any other WTNs held by NIEA. As a result of this enquiry, the NIEA found a box containing 9608 WTNs which had been stored away and forgotten about. The statement of James McKervey, an officer in NIEA, states:

"The waste transfer notes were not disclosed due to an administrative oversight in that I had not looked at them in the intervening time period and forgot that they were in the possession of the department when producing the disclosure schedule. When reminded about these notes I retrieved those that I knew were stored in F2. I photocopied all available waste transfer notes and forwarded these on to both defence and prosecution."

9. These WTNs had not been included with the other WTNs which had been served in the Prosecution evidence. Nor were the documents ever referred to in any disclosure schedule.

10. At a court review on 11 December 2015, the court was informed that the WTNs had not been served when they should have been because they had been 'lost'. The court directed that the WTNs be copied with all speed. The WTNs were then copied, 2 per page and served within the week. The WTNs ultimately proved to be instrumental in having the case resolved by agreement without the need for a contested hearing.

11. At the hearing of this appeal both solicitors and counsel emphasised the mammoth task they had to undertake in examining all the WTNs. They spent days going through the documents to get a sense of the material which was then available. The material was examined on a number of occasions by the representatives. Detailed examination and categorisation of the documents was done by the legal representatives; it was not simply handed over to the experts.

12. Both cases were considered by a Criminal Redetermination Panel of the Agency on 19 July 2017. The decision of the panel was to uphold the original Agency decision and as such no further fees were payable. No reasons were given by the Agency for the Panel's decision in its letters of 1 August in both cases.

13. Statutory Framework:

Rule 2 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 provides:-

““PPE Range” means the number of pages of prosecution evidence, and for this purpose the number of pages of prosecution evidence includes all -

- (a) witness statements,
- (b) documentary and pictorial exhibits,
- (c) records of interviews with the assisted person, and
- (d) records of interviews with other defendants,

served on the court:”

14. The issue in these cases is that the WTNs were never copied for the court, they were only provided to prosecution and defence. This did not happen apparently because of the volume of notes to be copied. At the time the representatives were advised that NIEA had spent 2 days using all photocopiers available, just to copy notes for the prosecution and defence. If the matters required a hearing, the WTNs would have had to be copied for the court. The agreement reached as a result of the work carried out by the representatives obviated the necessity for a hearing.

15. It is clear, in my judgment, that the material which was initially lost by NIEA was integral to the prosecution case and required the defence teams to review and examine it in detail for the purposes of properly preparing the

defence cases. The crucial nature of the material to a trial does not, in my view, seem to be in any dispute.

16. The issue is then simply whether the absence of formal service should affect its inclusion in the PPE.

17. In my consideration of the respective appeals I have regard not only to the PPE but also to the work done by the appellants in relation to the disputed documents.

18. I have regard to the general provision contained in rule 4(2) of the 2005 Rules as amended which applies equally to my determination of these appeal under rule 14. Rule 4(2) provides:-

“4. – (1) Costs in respect of work done under a criminal aid certificate to which these Rules apply shall be determined by the Commission in accordance with these Rules and having regard to such directions and guidance as may be issued by the Lord Chancellor.

(2) In determining costs, the Commission shall, subject to and in accordance with these Rules –

(a) take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and

(b) allow a reasonable amount in respect of all work reasonably undertaken and properly done.”

19. I consider that in the circumstances of the cases the work done by the appellants in relation to examination of the second tranche of WTNs was reasonably undertaken and properly done within the meaning of the general provision contained in rule 4(2)(b) together with, in respect of the appellant solicitors, the provision in rule 8(1) and in respect of the appellant counsel, the provision in rule 11(1).

20. I am satisfied that this time consuming, difficult and complex work was reasonably necessary and properly done by each of the appellants. Accordingly for the purposes of remuneration the PPE count should be 6464 as opposed to 1660.

21. Part 5 paragraph 20(2) provides:-

“20.-(2)(a) the representative shall select one case (“the principal case”), which shall be treated for the purposes of costs in accordance with the previous paragraphs of this Schedule;

(b) in respect of the main hearing in each of the other cases the representative shall be paid a fixed fee of twenty per cent of-

(i) the Basic Trial Fee, Guilty Plea Fee or Trial Preparation Fee as applicable, for the principal case, where that is the case falling with paragraph 1, or

(ii) the fixed fee for the principal case, where that is a case falling within paragraph 2.

“representative” is defined in rule 2 as meaning “a solicitor or counsel”.

22. Both defendants were represented by Flynn & McGettrick Solicitors however they both had separate solicitors and counsel. As the defendants were not represented by the same representative paragraph 20(2) does not apply and accordingly there should be no reduction.

IT IS ORDERED that the appeals be allowed.

Dated 24th September 2018

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Master McGivern