Neutral Citation No.[2022] EWHC 2845 (SCCO)

Case No: T20167850

SCCO Reference: SC-2020-CRI-000188 (170/17)

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE
(from the Crown Court at Birmingham)

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

Date: 09/11/2022

Before:

COSTS JUDGE JAMES

IN THE MATTER OF AN APPEAL FROM REDETERMINATION PURSUANT TO REGULATION 10 OF THE COSTS IN CRIMINAL CASES (GENERAL) REGULATIONS 1986:

R (ARGYN KHASSENOV) V KULICH AND KULICH

Mr Strickland and Mr Morris (instructed by Thomas Legal Costs Limited) for the Appellant
Mr Rimer (instructed by The Legal Aid Agency) for the Respondent

Hearing dates: 1 and 7 April 2021

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Approved Judgment

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JENNIFER JAMES
COSTS JUDGE

REASONS FOR DECISION

1. The Written Reasons in this matter were dated as long ago as 9 November 2018 and the date of the Notice of Appeal was 29 November 2018. In fact, I handed down a written Judgment in this matter in July of 2019 but sometime thereafter certain consequential issues arose. I heard those matters (remotely, via BT MeetMe) as long ago as 1 and 7 April 2021 and sincerely apologise to the parties for the subsequent lengthy delay in producing this decision, which was partly to do with the pandemic; the parties clearly deserved the certainty of a ruling before this.

2. I heard from Mr Tom Morris (Counsel for the Appellant; his input on the first hearing was limited as there was insufficient time to address the matter upon which he had been briefed) and Mr Edward Strickland (Costs Lawyer for the Appellant, who made submissions before me at the first hearing). The Legal Aid Agency ('LAA') was represented throughout by Mr Michael Rimer, who was at the relevant time an employed Barrister with the LAA. References below are to the page numbers in the hearing bundle lodged for this matter.

3. This is an appeal by Mr Khassenov, a Private Prosecutor in relation to the assessment of his costs under a prosecution costs order, made on 30 May 2019 under s.17 of the Prosecution of Offences Act 1985. On 25 April 2019, £209,197.51 was claimed in relation to confiscation proceedings under the Proceeds of Crime Act 2002. In total, the Determining Officer assessed the claim at £122,896.261 (excluding VAT). In her written reasons dated 24 April 2020, the Determining Officer gave an explanation as to why areas of the claim had been reduced on assessment (although, as will be seen below, I agree with the Appellant that the Determining Officer gave insufficient detail in her written reasons).

4. There is no need to recite in detail the background to this case (brief information appears below); in 2019 I dealt with an appeal against the assessment of costs in the underlying proceedings and the full background facts are at paras 5-11 of *Khassenov v. Kulich* (SCCO ref 170/17 31 July 2019).

First Hearing 1 April 2021 – Mr Strickland on Disclosure Platform issues

5. On 1 April 2021 Mr Strickland referred me to a Bundle on CE-file which was the same bundle as had been uploaded for the main hearing in this matter, back in 2019. Although I handed Judgment down after that hearing, the parties were unable to agree all of the ramifications of that Judgment and hence the need for a further, short hearing to take place.

6. Mr Rimer and Mr Strickland attended in person on the Appeal hearing in 2019 along with representatives of the firm of Edwards Marshall McMahon, Solicitors for the Appellant. The Appellant had brought a successful private prosecution after being the victim of a complex multinational fraud in respect of which the Police/CPS refused to prosecute.

7. Dealing with the outstanding issues, Mr Strickland addressed the question of costs regarding the disclosure platform. He stated that, whilst I had allowed the Appellant's Costs; there were other points, of which the Appellant won some and lost others. The original Appeal hearing had addressed what the disclosure platform was for and my 2019 Judgment dealt with that issue; the Appellant had appealed the disallowance of some of the time spent, as well as the costs of setting up the disclosure platform.

8. Per Mr Strickland, the upshot was that the Appellant succeeded on the disclosure platform aspect but that when he sought payment, the payment received did not accord with what was due following that win. The LAA paid an increase in hourly rates as awarded by this Court, but despite the fact that the Appellant won on the disclosure platform issue, the LAA paid the relevant disbursement but not the time spent/work done.

9. Regarding the time sought, Mr Strickland asserted that the Appellant was not asking for all of it; for example, the Appellant knew he would not recover training on the disclosure platform, but he believed that he was entitled to (and had only sought) time working on the disclosure platform once it was up and running. In Mr Strickland's submission, if one follows the Application, the Appeal and the Submissions, under 'time spent' it is clear (following my original Judgment) that the Appellant succeeded on that issue. My original Judgment does not say that the Appellant won the disbursement but not the time spent/work done on this platform.

10. Per Mr Rimer, my decision was in favour on the overhead cost of the disclosure platform, but not the time spent uploading the data. The Appellant claimed 3,249 hours uploading and scanning; 2,800-odd hours were allowed, but it was not (per the LAA) correct to state that the remaining 393.2 hours must be included. Instead, the 2,800-odd hours allowed already, were enough and there was no need to add in another 393.2 hours. This had been discussed via email between the parties; Mr Rimer directed my attention to the Bundle accordingly and I have read it.

11. Mr Strickland asked whether Mr Rimer could point to a decision of the Determining Officer which allows 2,800 hours as 'enough', which is not something Mr Strickland or his clients had seen, and nor was this (2,800 hours is 'enough') what the LAA had said on Appeal. This was a very large private prosecution, and if the LAA now referred to the 2,800 hours as 'enough', if that was not an argument made on Appeal, then it was not reasonable to raise it now. He reiterated that the Appeal was not based on 100% of all the work on disclosure; the LAA had treated the issue as being that work done on the disclosure platform was irrecoverable and 'as night follows day' if it was not allowed as a disbursement, the time would go as well. That being the case, should not the reverse (if it WAS allowed as a disbursement) be true too?

12. Mr Strickland added that his clients were not simply scanning documents into the platform. A Judgment has already been given on this matter, and it contained two pages on the Application for redetermination, and 1 paragraph on the disbursement. The Appellant did NOT appeal all reductions, just those predicated on a misunderstanding, which is why the parties went to such lengths to discuss it in email correspondence. Per the Appellant, in those circumstances it is not right now to say that the Determining Officer thought 'enough' had already been allowed; that was not said at the material time, and as such it was not what the redetermination addressed.

13. In the original Judgment in this matter, from July 2019, the following points were noted:

Decision on Disclosure Platform

88. It appears that, in referring to the disclosure platform enabling the Solicitors to do their job, the Respondent has conflated the definition of an overhead and the definition of a disbursement. Whether or not VAT is chargeable upon disbursements depends upon whether the goods or services in question were supplied to the Solicitor to enable him to render his service to the client (HM Revenue and Customs Notice 700). Travelling and hotel expenses are not classed as disbursements, and VAT is therefore chargeable upon them. Court fees and oath fees are payments relating to goods or services supplied to the client and hence are disbursements and do not attract VAT. However, both would generally be chargeable to the client and not classed as overheads so that enabling the Solicitors to do their job, is not determinative.

89. The hourly rate charged by Solicitors is designed to cover their costs, office overheads and a profit element. Where an item is included within office overheads it should not be charged separately to a client on top of the hourly rate; this includes administration costs, telephone calls and faxes (as to the actual fee charged by the line provider rather than the unit charge for the time spent on the call or fax in question). Postage and couriers are overheads as is copying unless it is unusually heavy for the kind of case in question. Travelling expenses to a local Court (less than 10 miles away) are likewise treated as overheads. However, where the expenses are unusually heavy, and not deemed to be part of the firm's expected overheads when calculating their hourly rates, they are usually recoverable as an extra expense.

90. *So, the question (of whether this is an overhead) is not whether this enabled the Solicitors to do their job, but whether it was an unusually heavy expense. That is secondary to the main question, in this Appeal, of whether it was reasonable to purchase (or lease) the software for this case. I note that Ms Gammon asserts it was the first time she had ever used the software, but I also note that Mr Strickland asserted that disclosure platforms are now deployed in almost every prosecution of this nature (including by the SFO). Be that as it may, at the time it was used for this case it was clearly unusual and, in my view, reasonable. Given the scope of the fraud as to its value and its worldwide nature, using software in this manner to save time and therefore costs, was reasonable.* ***The Respondent did not challenge any aspect of the disclosure platform other than that of saying it was an overhead; I do not believe it was an overhead, and I believe that it was reasonable, therefore both the platform and the training, are allowed.*** [my emphasis]

Decision on Disclosure Platform – revisited

14. Deducting from the amount of preparation time claimed in the bill (4,147 hours) the amount allowed by the Determining Officer (3,566 hours) gives an amount disallowed of 581 hours. The difference between the 3,249 hours spent on the disclosure platform and the 2,855.8 hours allowed for that aspect, is 393.2 hours. That means that just under 68% of the total 581 hours disallowed on redetermination, was due to the disclosure platform. Putting it another way, the 2,855.8 hours allowed for the disclosure platform represents just over 80% of the total time allowed on redetermination (in 2018), at 3,566 hours.

15. Per the above text in bold type, I referred to the only point specifically raised by the Determining Officer in my original Judgment back in 2019. In the redetermination of 18 October 2018, the Determining Officer stated simply that the digital disclosure platform was, *"…equipment brought in to enable the solicitors to do their job, and as such I consider it to be an overhead."* Later in the Written Reasons, there is a second reference to disclosure platform which simply states, *"This has been dealt with above and is refused."*

16. The Appellant had made two separate challenges to the disclosure platform reductions, to the time spent on the disclosure platform and to the disclosure platform itself. The 'overhead' answer was given to both of those challenges, but the Written Reasons of 9 November 2018 contain more detail, as follows:

    "Digital Disclosure Platform (time spent). This is equipment that Solicitors bring in to enable them to do the job. I view this as a classical definition of overhead costs. The maintenance of such a system is included in the overall running costs which, again, are overheads. The uploading and scanning of documents onto the system is an administrative task, and not necessarily fee earner work, but given the amount of information involved I allowed a considerable amount of time on the documents. Out of 3249 hours claimed (items 864-896 in the bill) 2855.8 hours were allowed, including, where claimed, time for uploading and reviewing documents on the platform. I do not consider training on the disclosure platform for TE (claimed twice), PH, RB, FG or any other fee earner to be chargeable, as staff training cannot be considered as something chargeable to the client and should not be expected to be recoverable from public funds."

17. That detail was known to the Appellant and was aired at the Appeal in 2019, when the Appellant's position (as I understood it) was that both the platform, and the training in how to use it, were bespoke and would be of little if any use in any future case; such a case would (if it warranted a disclosure platform at all) require a bespoke platform for the case at hand, and bespoke training upon it.

18. It is clear (and must have been clear to the Appellant) that a significant proportion (more than 80%) of the time spent/work done on the disclosure platform had been allowed as at the redetermination on 18 October 2018: given a total claim of 4,147 hours of which 3,249 were spent on the disclosure platform, any allowance over 898 hours (the difference between these two figures) must have included the disclosure platform. Notwithstanding the 'overhead' point made on redetermination, the 'training' reason for the reduction of just under 20% was clearly stated in the written reasons as long ago as 9 November 2018 and had to do with this being work which, in the Determining Officer's view, was not chargeable to the Appellant and should not be recovered from public funds either.

19. The test being applied is one of allowing compensation that is *"reasonably sufficient."* Mr Strickland's argument that, had the question of 'enough' been raised on the first Appeal hearing, the Appellant could have answered it and I would have ruled upon it, seems to me to be wrong. The wording is different, but in deciding that it was reasonably sufficient, the Determining Officer decided that it was 'enough'. She explained her reasoning in November 2018, the Appellant understood her reasoning and was able to argue the point before me at the hearing in 2019.

20. However, the point is that having heard this point in 2019 I decided the issues around the disclosure platform in the Appellant's favour, both as to the purchase cost and as to the time spent/work done. Had the disclosure platform been one that could be used for a multitude of clients I would not have allowed the purchase cost as against this one client/public funds. By analogy, if the bespoke training would not benefit other clients either, it was properly chargeable to this client/public funds.

21. This was an extension of the 'overhead' point; the Determining Officer took the view that this platform, and the knowledge of how to use it, would benefit Edwards Marshall McMahon's clients down through the years (hence making it an overhead of the firm to be ameliorated across many clients' matters). Mr Strickland persuaded me, back in 2019, that neither was the case and therefore, on the question of how my 2019 Judgment should be interpreted, the answer is that it should be interpreted as Mr Strickland has argued. The Appellant won, back in 2019, on both the cost and time reductions applicable to the disclosure platform, both of which are recoverable and should now be paid.

Second Hearing 7 April 2021 – Mr Morris on *Singh* Discount (*R v Supreme Court Taxing Office ex parte John Singh & Co* [1997] 1 Costs LR 49)

22. The LAA's concern in this case (it asserts) is that the Appellant's Solicitor's claims for costs are disproportionately high, and not only in the case before me but across other cases, a theme that has (per Mr Rimer) been picked up in various other judicial decisions in other cases where the same Solicitors had been instructed. In *D Ltd v. A and others* [2017] EWCA Crim 1604 the matter concerned an application for costs to be paid by the Defendants; £415,000 was claimed for a 2-day hearing and after this sum was described as "eye-watering" the Solicitor's costs were assessed at £61,905 (ex VAT); disbursements at £47,007.36 and counsel's fees at £13,983.90 (see page 5, para under the heading 'quantum'). Even if all of those sums attracted VAT at 20%, that would be less than half of the sum claimed. Also on page 5, the court noted, *"Obviously there was a complex bundling and preparation process involved in the appeal; but, with respect, extensive input of Solicitors was not required".*

23. In the case of *Blinkhorn v. Camillieri* (SCCO AGS/57/19 28 August 2019), the same Solicitor's claim for costs of the appeal were described as "quite extraordinary" by the Senior Costs Judge. A claim for £14,930 plus VAT was reduced to £5,000 (see para 65). Finally, in the 2019 Costs Judge appeal before me in this case, the costs of the appeal were sought in the sum of around £12,000 and these were reduced to £6,500 (see front page of the Court's 2019 decision).

24. Per the LAA, these are just three examples of the Appellant's Solicitors' costs having been considered unreasonably high and having been reduced by half, if not more; it was asserted that the Determining Officer had similar concerns in regard to the claim that was submitted in this case.

25. The LAA's brief submissions addressing the three Grounds of Appeal advanced referred the Court to the Determining Officer's original determination including a schedule of the Solicitors' time spent/work done. Mr Rimer asserted that the Determining Officer had carefully considered every line of work claimed. At the end of the schedule, the Determining Officer had then briefly noted how she had applied the *Singh* discount. "300 hours reasonable when compared to other POCA cases of similar or higher value (*O'Leary, O'Reilly*)."

26. The Determining Officer considered that 100 hours at the higher hourly rate of £300 (Grade A) and 200 hours at the lower hourly rate of £150 (Grade C) was appropriate; her written reasons (which I have read) are relied upon by the LAA in support of the assessment decision; the LAA submits that weight should be given to the Determining Officer's considerable experience of assessing large claims in similar cases.

27. The LAA gave examples of discrepancies between what was claimed in the schedule and what appears in the attendance notes for the same work and although that was not greatly stressed in the parties' submissions before me, I find it significant that the Determining Officer found relatively few contemporaneous attendance notes (the times recorded in the work log being often the only evidence). Where there are attendance notes, per the LAA, they are often for substantially lower times than the work log records. Other reductions were made in respect of administrative work, legal research and so forth; again, whilst these issues were not greatly stressed in the parties' submissions before me, I find it significant that the Determining Officer found that there was a great deal of time spent/work done on these.

28. However, where I find the Determining Officer's remarks less helpful, is that she does not appear to have given the middle figure; I have the preparation time as drawn, and the preparation time after application of the *Singh* discount, but I cannot find the time after deduction of overcharged time, legal research, administration and so on. As such, candidly it is difficult to state what the *Singh* discount actually was; it clearly was not the difference between the starting figure and the end figure as, according to the Determining Officer's comments, a substantial proportion of that reduction was due to other factors.

29. The Appellant argued that the *Singh* discount has been incorrectly applied; the Determining Officer undertook a "line by line" determination of the bill, then stood back and applied a *Singh* discount, reducing the preparation time from 734.3 hours to 300 hours. Of the hours claimed, 160 hours were claimed at A grade, 12 hours at B grade, 482 hours at C grade and 80 hours at D grade. (there is no dispute as to hourly rates). Of the 300 hours allowed, 100 were allowed at A grade, 200 at C grade, with the Determining Officer considering that the Grade B and Grade D work had not materially progressed the case.

30. The Appellant's case, in overview, was that the LAA's determination and redetermination of the profit cost element of his prosecution costs contained errors, as a result of which he has not been awarded an amount sufficient to compensate him for expenses which he properly incurred in the proceedings, and accordingly invited this court to redetermine the amount awarded in respect of his profit costs.

Two-stage approach

31. The Appellant invited the court to approach this appeal in two stages. The first was to consider whether the LAA's approach to the redetermination was incorrect in principle and (if so) to consider what amount would be sufficient to compensate him for expenses which he properly incurred. Per the Appellant, it was anticipated that this hearing may best be used to address the first of those issues, which turns on questions of law. Subject to the court's findings on that point of principle, suitable directions for the redetermination might then be given.

32. The Appellant's costs in relation to the confiscation proceedings were claimed at £209,197.51. At the end of the proceedings, the judge noted that the amount to be taxed then stood at £183,801.37. By the date of the initial determination, the claim consisted of £126,860 in respect of Solicitors' costs (being 734.3 hours of preparation), £16,176 in respect of counsel's fees and £66,161.51 in respect of disbursements.

33. On an initial determination, the Criminal Costs Unit awarded him £79,976.87 (around 35% of those costs) [17]. That sum was paid on 30th September 2019. The number of hours allowed for the Appellant's Solicitors was reduced to 300. The determination consists largely of handwritten manuscript notes written by the Determining Officer. On one page, headed *"O'Reilly"* [17], the Officer has noted the details of another POCA case, in which an order was made in October 2017. The note reads as follows:

£1.9m benefit. Involved international properties
Spanned several years 2011 – 2017
Over 70,000 transactions.
170 hours col + 50 hours sols.
Approx 220 hrs in total.
Similar in size and time scale, if anything O'Reilly is more substantial, but given the non-compliance of the def in Khassenov, extra time was taken to bring POCA to conclusion.
Applying "Singh" principle to this present case, I intend to allow Solicitors:
100 hrs @ A £300
200 hrs @ C £150
£60,000
To include attendance @ hearings.'

34. The reference to *"O'Reilly"* was to a private prosecution brought by the Football Association Premier League and the Federation Against Copyright Theft against Messrs. O'Leary and O'Reilly for creating, operating and maintaining a major pan-European illicit Internet Protocol Television System. That case is referred to below; per the LAA it was an apt comparator to this case, but per the Appellant it was significantly less complicated and therefore by using that case as a benchmark, the LAA has undervalued this one.

35. Another note by the Determining Officer headed *"??Singh"* [23], states: *'Other POCA in this category are submitted at C200hrs. In drawing comparison this POCA is way in excess. The sum in issue is not huge in this case and in comparison to many recently taxed POCAs...'*

36. On 1st November 2019, the Appellant asked for a redetermination, and made further detailed submissions in support of his request (the "Redetermination Submissions") The Appellant's costs were redetermined and the Appellant notified of this by a letter dated 18th February 2020. His recovery was increased to around 58%, largely consisting of a greater allowance in respect of forensic accountancy fees However, there was no upward adjustment of the Solicitors' costs. The redetermination stated as follows:

'I am content that the "Singh" principle has been properly applied here and that 300 hours preparation is a reasonable amount of time to allow for you to prepare these proceedings, especially now that the additional time has been allowed for the forensic accountant. I have recently been made aware (on 17.2.20) that the defence Solicitors have claimed in the region of 380 hours to prepare this case; a reasonable figure considering they were not involved in the substantive proceedings and joined these proceedings somewhat late in the day. I mention this only as a matter of transparency, it has no reflection on what I allowed in my determination.'

37. A request was made for written reasons, which were provided in a letter dated 24th April 2020. The Determining Officer noted that:

    (i) 734 hours were claimed by Solicitors, with the majority of the work having been done by Ms Fani Gamon (482 hours at Grade C rate of £150 per hour) and by Tamlyn Edmonds and David Jugnarain (160 hours at Grade A rate of £300 per hour);

    (ii) There were 945 entries in the Solicitor's schedule of work done.

    The written reasons stated as follows:

    'I have determined, since inception, many hundreds of defence POCA claims, ranging vastly in size, value and complexity, and in more recent years, private prosecution POCA claims. On determination, I looked at cases of a similar nature and size, of which there are few, but the Football Association Premiere League (FAPL) private prosecution cases, which I have recently determined, are a relatively close comparison,

involving complex fraud as the substantive offence and a complicated financial investigation resulting in a final, often agreed, benefit figure, as in this case. FAPL cases are run by a very experienced team of 3, which results in a very cost- effective service to the prosecutor; the consultant Solicitor charges well below the published guideline hourly rates. (I record this for transparency, the hourly rates charged are not in issue here.) These cases involve thousands of transactions, are paper heavy and require detailed forensic investigation of the defendant's finances to identify hidden assets, tainted gifts and foreign property. POCA proceedings in FAPL -v- O'Leary and O'Reilly included a total of 240 hours of preparation, attendance and travel spanning 10 months. This figure includes counsel's preparation.

After my initial audit "line by line" and considering all the relevant factors of the case, I decided the best approach was to step back and look at the case as a whole. ***I considered the number of hours after the audit phase still to be disproportionate to the nature of these proceedings****, and I therefore made a "Singh" adjustment allowing 300 hours of preparation for the POCA work, which I considered to be reasonable, based on my experience, knowledge of the substantive proceedings and cases of a similar nature, and also taking into account that these Solicitors did not perform the forensic investigation of the defendants finances, which was done by experts claiming over 500 hours.*

The figure allowed for Solicitor's preparation did not include any work done by counsel. It comprised 100 hours split between 2 A grade Solicitors, TE and DJ, and 200 hours by FG. The input from all 11 other fee earners does not, in my view, materially progress the case for the prosecution, as this work is of an administrative or secretarial nature or general case maintenance.

I contend that it is a legitimate exercise to make a basic comparison with the level of costs that would be incurred by other prosecutors. I accept that it is not a simple comparison, and that there are particularities to be considered.

I am content that the "Singh" principle has been properly applied here and that 300 hours preparation is a reasonable amount of time to allow for the Solicitors to prepare these proceedings, especially when one considers the additional time that has been allowed for the forensic accountant.

I have recently been made aware (on 17.2.20) that the defence Solicitors have claimed in the region of 380 hours to prepare this case; a reasonable figure considering they were not involved in the substantive proceedings and joined these proceedings somewhat late in the day. Defence counsel was allowed a fixed fee based on the papers. As the defendant had the benefit of legal aid, these fees are not of comparable use and I mention this only as a matter of transparency, it has no reflection on what I allowed in my determination.'

The emphasis added is mine; clearly there <u>was</u> a calculation of the number of hours after the audit phase (after deduction of overcharged time, legal research, administration and so on) prior to application of the *Singh* discount, but I do not know the number of hours arrived at. I could be dealing with a *Singh* discount of substantial or of modest proportions; I simply do not know.

This appeal:

38. The Appellant contends that there are three errors contained in the LAA's approach, as a result of which the Appellant's award falls short of the amount reasonably sufficient to compensate him for the expenses which he properly incurred in bringing the Defendant to justice. Those errors are stated to be:

(1) the LAA has not applied the *"Singh"* reduction correctly;
(2) the circumstances of the Football Association Premier League cases (O'Reilly) are not comparable with those in the present case so that the LAA was wrong to rely on that comparison; and
(3) the LAA wrongly disallowed a number of items.

The Appellant therefore seeks a redetermination of his costs by this Court.

Legal Framework:

39. Section 17 of the 1985 Act provides as follows (emphasis supplied by Appellant):

(1) Subject to subsections (2) and (2A) below, the court may –
(a) In any proceedings in respect of an indictable offence; and
(b) In any proceedings before a Divisional Court of the Queen's Bench Division or the Supreme Court in respect of a summary offence;
order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him the proceedings(...)

40. The relevant principles were considered in detail by Mr Justice Lane in *Fuseon Ltd v Senior Courts Costs Office and Another* [2020] Costs L.R. 251. He summarised the principle derived from *R v Supreme Court Taxing Office ex parte John Singh & Co* [1997] 1 Costs LR 49, upon which the LAA relied heavily in its determinations, in the following way (emphasis added by the Appellant):

[41] ...the judgments of the Court of Appeal approved the following approach of the Determining Officer [Mr Pearson]*:*

'Before moving to my specific reasons, it may assist if I outline my approach to the assessment of the Solicitors' claim in this case. The claim for preparation was percentaged in a total of 414 items, each one indicating the date, activity undertaken, grade of fee earner and time taken. Nearly all of these were supported by an attendance note, some attaching a copy of the document prepared at the attendance.

This is, of course, the correct way to present the claim, and the bill and supporting papers were clearly prepared in a neat and orderly way. However, upon examination of the bill and papers, I formed the view that the time spent was excessive, a view which I based on my experience of assessment of other Solicitors' claim in large cases as well as what appeared to be consistently high claims for most of the activities undertaken and given the work produced.

This said, for several categories of work, I did not feel able to point to any particular attendance as being rather unreasonable in length or unreasonably held, and I accepted that something was gained from nearly all the attendances. However, as well as examining each individual item, I felt it reasonable for me to step back and look at the totality of the time claimed in relation to each type of activity and consider if, taken as a whole, the time claimed for that activity was reasonable.

To assist my task, I therefore classified the activities undertaken into a total of 15 categories as listed in annex 1 to these reasons. This lays out a category number, class of activity, the total claimed and the total allowed after redetermination. A note then indicates if my allowance for the activity based on a global figure of all the items classed in the relevant activity or whether I have made separate and specific allowances on the claim, my 'total allowed' figure on the chart being simply the allowance for each item totalled up.'

41. Henry LJ in *Singh* held: *'The second point taken is this: whether the Determining Officer and taxing master could take an overall view and reduce the hours for each individual class of work over the board in the way that they did. The task to be performed in this taxation is preserving the balance between reasonable remuneration of the legal profession for work done on legal aid and protecting the fund against making an open-ended commitment to pay for more hours work than the task reasonably required. The judge dealt with it in this way at page 16:*

"... the notice of appeal ... essentially challenged the Determining Officer's right to stand back from the individual items in the bill and determine that the aggregate produced from those individual items, although not capable of being impugned as separate items, nonetheless produced a result which established that the time claimed was unreasonable. It seems to me that that must be one of the necessary functions of the

Determining Officer, once he has carried out what might be called the audit exercise in relation to the individual items on the bill.

The Determining Officer in the first instance, and the Taxing Master on appeal, should exercise great care to ensure that the sum payable on a determination such as the one in question is kept within reasonable bounds, whilst accepting that particular clients may pose particular problems.

It is perhaps well to remember the comment of Russell LJ in Re Eastwood (deceased) [1974] 3 All ER 603 at page 608 [Costs LR (Core Vol) 50 at 53] where he said that the field of taxation albeit in that case an inter partes taxation, was one where: 'Justice is in any event rough justice, in the sense of being compounded of much sensible approximation.'

I can see nothing to recommend an approach to taxation in this field which merely requires some justification of each item of the claim, followed by an aggregation, without a sensible assessment of the consequence of aggregation in the light of the overall complexities of the case, and above all the experience of the Determining Officer and Taxing Master."

I agree with that passage entirely. How else can the unreasonable claim be controlled? That is, the judge found, a point of principle but it is not a point of principle as to which there is any dispute… The proper use of the Legal Aid Fund requires that the efficient are rewarded for the economies of time in and out of court which their efficiency produces. It also requires that the inefficient are not over-compensated by being given an open cheque to take as long as they like. Reasonable economy and dispatch must be required while making proper allowance for matters such as a difficult client and the dangers of hindsight in the unpredictable field of litigation. On these questions, in long trials the view of the trial judge is likely to be of value and I, for my part, would encourage taxing masters to frequently consult him or her under regulation 15(11) when dealing with a long legally aided criminal trial."

42. In relation to the *Singh* discount, Lane J's analysis was as follows:

'So far as the Singh discount is concerned, the claimant does not contend that it has no part to play in any assessment of costs incurred by a private prosecutor who is seeking recovery from central funds. There was, however, some disagreement between Mr Cohen and Mr Boyle as to whether the Master's decision had been "arbitrary", in that there had been no attempt to apply the discount by reference to particular classes or categories of costs incurred.

I agree with Mr Cohen that there is a lack of clarity in the Master's decision on this issue even if one assumes, as Mr Boyle submitted, that the Master was, in effect, not departing from the categorisation exercise that had been employed by the Determining Officer. I do not consider that Singh was concerned with classes or categories merely because the Regulations then in force demanded that attention be focused on these issues. The importance placed on them bites deeper.

I agree with Mr Cohen that, as a general matter, if the Singh discount is to be applied in a way that is comprehensible to those affected by it, the exercise needs to be undertaken. Support for this is to be found in the recent case of West v Stockport NHS Foundation Trust & Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220.'

43. In *Demouilpied* the Court indicated as follows under the heading 'The Right Approach to Costs Assessment':

> *87. We are anxious not to restrict judges or force them, when assessing a bill of costs, to follow inflexible or overly complex rules. One of the matters, however, which is apparent from the many cases cited to us, and from the submissions of counsel on the hearing of these appeals, is that there is an absence of consistency in the way in which costs bills are assessed. Taking the various points made above and drawing them together, we give the following guidance on an appropriate approach.*

88. First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

89. At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.

90. The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.

91. At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.

92. The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.

93. Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double counting.

44. In relation to the quantum of recoverable costs, Lane J referred to *R (The Law Society of England and Wales) v The Lord Chancellor* [2010] EWHC 1406 (Admin), where it was held that compensation was *"reasonably sufficient"* if it was *"such amount as is reasonably incurred for work properly undertaken".*

Ground One: *"Singh"* reduction not applied properly:

45. Per the Appellant, there are two errors in the LAA's approach, the first being failure to carry out the categorisation exercise. The starting point is that, as Mr Justice Lane put it in *Fuseon*, if the *Singh* discount is to be applied in a way that is comprehensible to those affected by it, the exercise of categorisation must be undertaken in order for such a determination not to be arbitrary. Per the Appellant, it is plain that this exercise was not undertaken by the LAA, either on determination or redetermination and accordingly, the LAA has fallen into error.

46. The Appellant in the Redetermination Submissions identified the following categories or classes of work undertaken:

(i) responding to applications by the defence to extend the timetable;
(ii) liaising with third parties in relation to the potential re-possession of the defendant's property;
(iii) undertaking disclosure;
(iv) drafting and submitting applications for witness summonses;
(v) liaising with experts;

(vi) considering and responding to defence material (witness statement, s.16 statement and expert report);
(vii) work on skeleton arguments;
(viii) responding to applications to vary restraint order by third parties;
(ix) preparing for confiscation trial in March and in May; and
(x) applying to vary the restraint order.

47. The LAA failed to adopt this categorisation, stand back from the total hours claimed for each category and assess whether, globally, the claim was reasonable. Nor did the LAA carry out any categorisation exercise of its own. Instead, it simply looked at the total number of hours spent by the Appellant's Solicitors on all of the work they undertook for *"preparation for the POCA work"* and decided whether that overall figure was reasonable: *"after my initial audit "line by line" and considering all the relevant factors of the case, I decided the best approach was to step back and look at the case as a whole".*

48. Per the Appellant, that approach did not amount to a proper application of the *Singh* discount and did not result in reductions in the Appellant's claim being made in a way that is comprehensible to the Appellant. In that sense, the LAA's approach was arbitrary.

49. The LAA submitted that the Determining Officer applied the *Singh* discount correctly. Referring to *R v. Supreme Court Taxing Office Ex Parte Singh* [1997] 1 Costs LR 49, specifically page 56 of that decision which set out the task of the Determining Officer, it is clear from the judgment that the task can be done by grouping items together and then stepping back and reducing the hours for each individual class of work, or by assessing the Solicitor's work on a line by line basis and then stepping back to look at the overall amount and then using the Determining Officer's experience to reduce that to a more reasonable amount.

50. The Determining Officer's right to stand back from the individual items in the bill and consider the aggregate produced from those individual items *"must be one of the necessary functions of the Determining Officer, once he has carried out what might be called the audit exercise in relation to the individual items on the bill"* (*Singh* p56).

51. The Appellant's approach would (asserts the LAA) be to take categorisation to too granular a level for the Determining Officer to then be able to consider the "overall validity of the claim" per headnote (2) of *Singh.* The Solicitor's work itself is class of work in the claim that the Determining Officer is entitled to step back and consider the total that was claimed after considering each line of work in the schedule.

52. The LAA objected to the inclusion in the bundle of the colour coded worklogs at pages 197-253 in the Bundle, which they categorised as an ex post facto way of undermining the Determining Officer's application of the *Singh* discount which (per the LAA) could have been put to her when a redetermination and latterly written reasons were sought. The Appellant's Solicitors appeared to be asserting an overly technical application of the *Singh* discount, which itself is intended to be a simple exercise to be carried out by a Determining Officer after they have carried out a line-by-line assessment.

53. Whether the reduction is applied to individual categories of work, or to the entire category of work undertaken by the Solicitor, it should make no difference to the overall assessment amount. If the Appellant is asserting that the *Singh* discount, if applied to various classes of work, would result in a higher overall figure for their costs, then that would appear to be a misunderstanding of the *Singh* discount.

54. As to *O'Reilly,* the LAA submitted that the Determining Officer was entitled to look at similar cases in order to determine what a reasonable amount of time in this case would be. *Singh* concerned claims from the Legal Aid scheme but the LAA submitted that exactly the same principles apply here for payments that are made out of public (Central) funds and added that if this court is satisfied that the Determining Officer applied the *Singh* discount correctly, then it should be reluctant to substitute a slightly different *Singh* discount.

55. This is (per the LAA) an appeal hearing of a hybrid sort where the Costs Judge has all the same powers as a Determining Officer. It is not necessarily an appeal *de novo* and it would be perfectly permissible for this Court to adopt the reasoning of the Determining Officer if the court considers she undertook the task correctly. For the reasons below, I do not consider that she undertook the task correctly.

Decision on how *Singh* discount has been applied (Part 1):

56. As stated above at paragraph 24, by reference to the Determining Officer's written reasons and the annotated claim from the Appellant's Solicitors, I have the preparation time as drawn, and the time allowed after application of the *Singh* discount, but I cannot find the time after deduction of overcharged time, legal research, administration and so on prior to application thereof (what the Determining Officer refers to as *'the number of hours after the audit phase'*). I am grateful to Mr Strickland, Mr Morris and Mr Rimer for checking and confirming this for me, which they did very promptly upon my asking them to do so, last week.

57. That means that I cannot even tell for sure how much of the reduction (of well over 50%) to the claim for preparation time, is based upon *Singh* and how much was in fact deducted during the audit phase. I have the Determining Officer's comment upon the non-progressive nature of work done by the Grade B and Grade D fee earners, and that would account for a reduction from 734.3 hours to 642.3 hours, but the reduction here is to 300 hours. The proportion of Grade A time allowed, is higher (at 100 hours out of 160, or 62.5%) than that of Grade C time (at 200 hours out of 482, or 41.5%) but there, as far as I can tell, the detail ends.

58. I agree with the Court in *Demouilpied* that, prior to applying (in this case) the *Singh* discount, taking a step back and assessing the reasonableness of the costs in a more global way, one must first have (at the conclusion of the line-by-line exercise) a total figure, to which a further discount may be applied if appropriate. Here, I do not have that total figure, and in my view that is a fatal flaw in the way that the *Singh* discount has been applied. I cannot judge what the *Singh* discount is (I did try to calculate it, but not only are there hundreds of hours, there are hundreds of items with manuscript notes from the Determining Officer to try to decipher). This prevents me from forming a view and must have prevented the Appellant from taking advice upon the discount applied with a view to accepting or as the case may be, challenging it: in plain terms neither the Appellant, nor I, know how much *Singh* discount has been applied.

59. As to whether the Determining Officer would have been entitled to make a global reduction, rather than a reduction by reference to different categories, in my view the Judgment of the Court in *Singh,* when read with later authorities such as *Fuseon* and *Demouilpied,* does not allow such an approach. On page 56, Henry LJ refers to the second point taken, whether the Determining Officer and Taxing Master could take an overall view and reduce the hours for each individual class of work over the board in the way that they did, and the Court's answer is that they could do so in exercising the necessary care to ensure that the sum payable on determination, is kept within reasonable bounds.

60. Whilst the Court in *Singh* was not asked, and (it seems to me) has not ruled upon, whether a global reduction could, as a matter of principle, be made, what is very clear from *Fuseon* and *Demouilpied* above, is that the *Singh* reduction cannot be arbitrary, but must be reasoned and explained in sufficient detail for the Appellant to understand and take advice upon it.

61. In this case, both because of the global nature of the reduction and because of the lack of clarity around how much of the time was reduced during the audit phase and how much was reduced following *Singh,* that simply has not happened. On the facts in this case, the lack of any or any adequate detail upon how the figure of 300 hours was reached, is determinative of the issue in the Appellant's favour, i.e., that, as a matter of law, the *Singh* reduction has not been properly applied in this case.

62. The Appellant has suggested that (subject to the court's findings on the question of whether the *Singh* discount was properly applied) suitable directions for the redetermination might then be given; I would agree with that suggestion and will in due course ask the parties to endeavour to agree directions. However, prior to that I this matter should be remitted to the Determining Officer to explain how much was reduced during the

audit phase and how much by operation of the *Singh* reduction. Upon receipt of this information, I will ask the parties for agreed directions if possible (or, if not, for each side's proposed directions, upon which I will rule and make an Order setting the timetable and listing the next and hopefully final hearing as well).

Ground One part two: *"Singh"* discount was based on other POCA cases rather than full consideration of this particular case:

63. Per the Appellant, the second error in the LAA's approach compounded the first. Although the LAA states that its decision was based on *"knowledge of the substantive proceedings"* and that it has considered *"all the relevant factors of the case"*, the written reasons contain absolutely no analysis of the relationship between the "nature, importance, complexity and difficulty of the work involved", and the work actually done, as required by regulation 7(2). Instead, the LAA's view on the quantum of the Appellant's costs was informed by reference to other POCA cases. The LAA's approach to the determination was to:

(i) carry out a line-by-line audit to identify particular items which should be disallowed;
(ii) identify the *O'Reilly* case as "a relatively close comparison";
(iii) identify the number of hours of preparation attendance and travel involved over ten months in those proceedings;
(iv) consider whether the remaining sums claimed in these proceedings seemed reasonable by reference to the *O'Reilly* case and other unspecified POCA cases; and
(v) make a reduction in the number of hours allowed in this case to a number closer to the 240 hours claimed in *O'Reilly* or other unspecified *"cases of a similar nature"*, amounting to a reduction from 734 hours of Solicitors' time to just 300 hours (i.e., just 41% of the time claimed).

64. It was respectfully submitted (by the Appellant) that this approach was not one which it was open to the Determining Officer to take. The Regulations require the LAA to allow costs *"reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings"*. A reasonable amount for costs properly incurred could only be determined by reference to the nature, importance, complexity and difficulty of the work done and time involved in <u>these</u> proceedings, and not by reference to other proceedings.

Decision on how *Singh* discount has been applied (Part 2):

65. The above is merely a precis of the Appellant's submissions; as stated above, without any or any adequate detail, I do not know how much the *Singh* discount is. If the reductions leading to the number of hours after the audit phase were substantial, the *Singh* discount itself may have been something of a red herring. If the LAA asserts that the Appellant's files did not justify the times claimed, due to lacking contemporaneous evidence/file notes, including contemporaneous evidence and file notes that did not match the times in the work log and so forth, that may be a serious matter but it has <u>nothing</u> to do with *Singh.* If the LAA asserts that the time spent/work done on this case, when viewed accurately after deductions during the audit phase, was not exceptionally high by comparison to other cases such as *O'Reilly* then that may be a fair statement, or it may not: it is simply impossible to tell at this time. The Appellant infers that the *Singh* reduction alone, is responsible for the reduction to 300 hours but per the Determining Officer's own comments, there was an audit phase prior to the application of that reduction. In due course, directions should cover this issue as well.

Ground two: improper comparison with O'Reilly

66. The Appellant contends that, in any event, the comparison with *O'Reilly* was not a proper one to make. That is because the nature, importance, complexity and difficulty of the work and the time involved in *O'Reilly* was very different from the present case. The Appellant's Solicitors were required to undertake a significant amount more work, principally because they did not, as in *O'Reilly*, have the support of any public agencies and because the conduct of the Defendant was different. The LAA asserts that the comparison was apt, and

that, to the extent that this case was more complicated, a higher allowance was made (300 hours instead of 240 in *O'Reilly*).

Decision on Ground 2

67. The situation in regard to Ground 2 is the same as at paragraph 66 above; without knowing how much the *Singh* discount is (as opposed to the total amount reduced, which includes reductions during the audit phase to give the number of hours after the audit phase) it is impossible to say whether it has been applied properly. As to whether *O'Reilly* was an apt comparator, given the different situation regarding support from public agencies in that case as opposed to this, it may be that it was not. However, this must await determination at a future hearing and the Directions for that hearing should cover Ground 2 as well.

Ground three: items wrongly disallowed

68. The LAA disallowed numerous items of work as set out below; the Appellant submitted that many of those items were improperly/wrongly disallowed:

Legal research,
Internal meetings,
Internal emails,
Calls and meetings with counsel and prosecutor,
Typing up attendance notes,
Routine emails and
Preparing bundles

Per the Appellant, these were not, as a matter of principle, outside the scope of items "properly incurred". Whether the costs of those items were reasonable in amount is a separate question, but it was submitted that the LAA was wrong to disallow those costs in principle, with this a further reason why the amount awarded is insufficient.

69. The LAA relied upon the written reasons to rebut this point which clearly explain which items of work fell into the administrative category. The types of work that the Determining Officer disallowed were:

Phone calls to Court to enquire who deals with restraint orders,
Calls to the Land Registry to find out if the Solicitors had an account,
Internal emails,
"Miscellaneous",
Calls and meetings with COLP for general advice,
Producing time sheets for costs lawyer review,
Researching the law,
Forwarding incoming emails on to senior fee earners,
Multiple fee earners on calls and meetings with counsel and the prosecutor,
Producing scanned copies of records and statements,
Scanning and filing financial records,
Incoming routine emails and letters,
Typing up attendance notes,
"Sorting out" bundles i.e., arranging for them to be photocopied and printing extra copies,
Arranging travel and accommodation,
Emailing the NTT[sic – National Taxing Team/LAA I assume] to enquire who the Determining Officer would be. (written reasons page 5).

70. Other deficiencies in the claim were also said to have led to the Solicitor's costs being reduced on assessment. Per the LAA, the court would be entitled to form the view that the Appellant's Solicitors appear to be seeking to maximise their claim from Central Funds, rather than claiming a reasonable and proportionate

sum in relation to the work undertaken in the underlying proceedings. Put another way, if the Appellant instructed his Solicitors to undertake and charge him for every item of work claimed on the schedule, he cannot then complain that he has not been awarded a sum which is reasonably sufficient to compensate him in the proceedings if the sum awarded has been properly reduced by applying the *Singh* discount on the grounds that the claim put forward was disproportionately high.

71. For the Appellant, it was submitted that the LAA's determinations cannot stand and that the Appellant's costs should be redetermined by this court, to award the Appellant costs which are reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings, taking into account all the relevant circumstances of the case, including the nature, importance, complexity and difficulty of the work and time involved. For the reasons set out above, the Appellant submitted that that amount was greater than that awarded by the LAA.

Court's Decision

72. This is almost impossible to address without the breakdown between the reductions during the audit phase (the number of hours after the audit phase) and the *Singh* reduction; if I do not know how much was disallowed during the audit phase how can I say whether or not it was reasonable?

73. However, some factors which the LAA says gave rise to the number of hours deducted during the audit phase, are factors which the LAA would have been within bounds to disallow. For example, if the Appellant's files did not justify the times claimed, due to lacking contemporaneous evidence/file notes or to including contemporaneous evidence and file notes that did not match the times in the work log and so forth, that would appear to me to fall within the Determining Officer's discretion.

74. Nor would I have any issue with the Determining Officer disallowing Grade A and/or Grade C time (if any) on matters such as calling the Land Registry to see if the firm had an account, typing up attendance notes, arranging travel and accommodation, non-legal work on Bundles et cetera. Most of the items in the list at paragraph 69 above seem to be non-chargeable. There is nothing improper about ringing the LAA to find out who the Determining Officer is, but is that work that requires a professional fee earner's input? If it is secretarial/clerk work, to claim it against Central Funds at fee earner rates would not in my view meet the test in *R (The Law Society of England and Wales) v The Lord Chancellor* [2010] EWHC 1406 (Admin), where it was held that compensation was *"reasonably sufficient"* if it was *"such amount as is reasonably incurred for work properly undertaken".*

75. The Determining Officer considered that the Grade B and Grade D work had not materially progressed the case and disallowed all of their time; it is unclear whether that was because they were engaged in matters such as phone calls to Court to enquire who deals with restraint orders, calls and meetings with COLP for general advice, producing time sheets for costs lawyer review, researching the law and scanning financial records and statements. If that was why their time was disallowed, those reductions would make sense but were the reductions to Grade A and Grade C times for similar reasons, or were they the ones (allegedly) keeping inadequate records of their time spent/work done?

76. It is again currently impossible to tell, not only what has been disallowed, but why; hopefully, more detail on the reductions during the audit phase, will enable the Court to reach a decision upon them as well as upon the application of the *Singh* discount. Only then can the Court take a view upon whether those reductions were reasonable and whether the amount produced thereby represents an amount reasonably sufficient to compensate the Appellant for the expenses which he properly incurred in this prosecution. The Directions should allow for more detail accordingly.

Costs

77. I am not in a position to rule on costs as yet. On the one hand, it is clear that there was a fatal flaw in the way that the *Singh* discount was applied by the LAA. However, it is unclear whether the Appellant's challenge to the amount allowed (as opposed to the way in which that amount was reached) will prevail. More clarity is needed before a final decision can be made accordingly.