Neutral Citation No. [2023] EWHC 1693 (SCCO)

Case No: T20170362

SCCO Reference: SC-2022-CRI-000136

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 13 June 2023

Before:

COSTS JUDGE LEONARD

R
v
DILENARDO

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

Appellant: **Cohen Cramer (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 £650 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. From 29 August 2019, the Appellant represented Peter Adrian Dilenardo ("the Defendant") in confiscation proceedings under the Proceeds of Crime Act 2002. A settlement was agreed prior to the final hearing on 9 September 2022, when the court made an order recording a benefit figure of £1,197,552.23 and an available amount of £514,163.88, and providing for a default period of 5 years.

2. This appeal concerns payment for that work, which is governed by paragraphs 26 to 29 of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. Schedule 2 sets out the Graduated Fee scheme for payment of Litigators representing defendants who have the benefit of Legal Aid funding under a Representation Order. The relevant Representation Order was made on 26 November 2017, so the 2013 Regulations apply as in force on that date. These are the pertinent provisions.

3. Paragraph 26 of schedule 2 reads:

> **"26.— Fees for confiscation proceedings**
>
> (1) This paragraph applies to… proceedings under Part 2 of the Proceeds of Crime Act 2002…
>
> (2) Where this paragraph applies, the appropriate officer may allow work done in the following classes by a litigator—
>
> (a) preparation, including taking instructions, interviewing witnesses, ascertaining the prosecution case, preparing and perusing documents, dealing with letters and telephone calls, instructing an advocate and expert witnesses, conferences, consultations and work done in connection with advice on appeal;
>
> (b) attending at court where an advocate is instructed, including conferences with the advocate at court;
>
> (c) travelling and waiting; and
>
> (d) writing routine letters and dealing with routine telephone calls.
>
> (3) The appropriate officer must consider the claim, any further particulars, information or documents submitted by the litigator under regulation 5 and any other relevant information and must allow such work as appears to him to have been reasonably done in the proceedings…
>
> (5) The appropriate officer must allow fees in accordance with paragraphs 27 to 29 as appropriate to such of the following grades of fee earner as the appropriate officer considers reasonable—
>
> (a) senior solicitor;
>
> (b) solicitor, legal executive or fee earner of equivalent experience; or
>
> (c) trainee or fee earner of equivalent experience."

4. Regulation 2 of the 2013 Regulations defines these grades (generally referred to as A, B and C) in more detail:

> "… "senior solicitor" means a solicitor who, in the judgement of the appropriate officer, has the skill, knowledge and experience to deal with the most difficult and complex cases…
>
> "solicitor, legal executive or fee earner of equivalent experience" means a solicitor, Fellow of the Institute of Legal Executives or equivalent senior fee earner who, in the judgement of the appropriate officer, has good knowledge and experience of the conduct of criminal cases;
>
> "trainee solicitor or fee earner of equivalent experience" means a trainee solicitor or other fee earner who is not a Fellow of the Institute of Legal Executives, who, in the judgement of the appropriate officer, carries out the routine work on a case…"

5. The "appropriate officer", for present purposes, is the Legal Aid Agency ("LAA")'s Determining Officer, from whom, by reference to regulation 29 of the 2013 Regulations, appeal lies to a Costs Judge.

6. Paragraph 29 of Schedule 2 reads:

> **29.— Allowing fees at more than the prescribed rates**
>
> (1) Upon a determination the appropriate officer may, subject to the provisions of this paragraph, allow fees at more than the relevant prescribed rate specified in paragraph 27 for preparation, attendance at court where more than one representative is instructed, routine letters written and routine telephone calls...
>
> (2) The appropriate officer may allow fees at more than the prescribed rate where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that—
>
> (a) the work was done with exceptional competence, skill or expertise;
>
> (b) the work was done with exceptional despatch; or
>
> (c) the case involved exceptional complexity or other exceptional circumstances…
>
> (4) Where the appropriate officer considers that any item or class of work should be allowed at more than the prescribed rate, the appropriate officer must apply to that item or class of work a percentage enhancement in accordance with the following provisions of this paragraph.
>
> (5) In determining the percentage by which fees should be enhanced above the prescribed rate the appropriate officer must have regard to—
>
> (a) the degree of responsibility accepted by the fee earner;

(b) the care, speed and economy with which the case was prepared; and

(c) the novelty, weight and complexity of the case.

(6) The percentage above the relevant prescribed rate by which fees for work may be enhanced must not exceed 100%.

(7) The appropriate officer may have regard to the generality of proceedings to which these Regulations apply in determining what is exceptional within the meaning of this paragraph."

The Background

7. I will set out below the decisions of the Determining Officer which are taken to appeal, and my conclusions on each of them. Before I do so I should refer to the background to the case, which I take from the Determining Officer's written reasons for the decisions under appeal, provided in accordance with regulation 28(8) of the 2013 Regulations.

8. The Defendant was employed as an Independent Financial Advisor ("IFA"), authorised by the Sesame Bank Hall Group ("Sesame"). Sesame is a regulated financial network authorised by the Financial Conduct Authority. Harvest Associated Limited ("Harvest"), a firm under which the Defendant had been self-employed as a financial advisor since he joined on 12 March 2012, was also regulated by Sesame.

9. In about July 2013 Sesame became aware that the Defendant appeared to be charging his clients excessively for advice. There was also concern that he was "churning" his clients, a term which describes IFAs, in breach of industry rules, regularly "turning over" their existing book of business in order to generate commission for themselves and without benefit to their clients. Sesame decided to review the Defendant's business and investments on a full file basis from August 2013.

10. Inspection revealed irregular switches and repeated transfers of client investments, some without their knowledge. Sesame's investigators concluded that the Defendant's activity appeared to be aimed entirely at generating elevated commission payments for himself and that the charges made by the Defendant were far in excess of both general industry guidance and Sesame's own guidance.

11. As a result of those investigations, on 17 February 2014 the Defendant was suspended by Harvest and his IFA authority removed. He was invited to attend a meeting with the investigation team at Sesame to discuss the allegations of fraud and forgery, but he refused to attend. The Defendant resigned in March 2014 and continued to refuse requests to attend Sesame's offices.

12. Following the Defendant's suspension and resignation it was established by Sesame that a number of signatures on client authorisation documents had been forged. A total of 22 clients were initially identified as possible victims, of whom a number subsequently confirmed that signatures on documents relating to their investments, purporting to be theirs, were not genuine. As the investigation progressed the number of potential victims increased.

13. Ultimately the Defendant faced an indictment identifying these areas of offending.

Switching and or movement of client funds (overcharging): Counts 1 & 2

14. This involved the repeated movement of clients' investment funds in order to generate greater commissions. These movements took place between January 2010 and February 2014.

15. In numerous cases the Defendant's clients were moved from one provider to another, sometimes repeatedly, and within a relatively short period of time, with no clear incentive or gain for the clients. Some client portfolios had been repeatedly and unnecessarily restructured by the Defendant without their knowledge and agreement, in particular with a provider called "Skandia". Skandia's online system meant the Defendant could claim "switching fees" of up to 3% of the fund values without the knowledge of the relevant client. The Defendant moved funds into Skandia purely for the purpose of switching. A number of documents (Service and Payment agreements) supposedly signed by clients were analysed and found to have been doctored or to contain forged signatures.

Orion: Count 4

16. Between January 2014 and May 2015, when the Defendant was no longer authorised to give regulated financial advice, the Defendant encouraged clients to withdraw their funds from legitimate investment plans and to "reinvest" them in a new product over a five year period. This was not a genuine investment but an unsecured loan to the Defendant. The Defendant had informed his clients that his "investment product" would offer a 5% interest return over a fixed five-year term with underlying the funds returned in their entirety on expiry. Following a search of the Defendant's home on 7 August 2015, exhibit CHM1/070815 was seized. This was a lever arch folder that containing loan agreements in the names of twelve of the Defendant's clients and details of unsecured loans of varying amounts by his clients to a company called Orion Financial Limited. The Defendant was the sole director and sole shareholder of Orion Financial Limited and the sole signatory on its Santander bank account.

Sale of Client Books: Count 6 (Mr Palmer): Count 7 (Mr Ronander)

17. IFA Client Sales (UK) Limited ("IFACS") manages a website through which IFAs can sell their books of business and clients to other IFAs. On 19 February 2016 the Defendant contacted IFCAS, saying that he had a book of IFS business he wanted to sell following his retirement in 2015 (which in itself would have been a breach of a Restraint Order, referred to below). The Defendant stated in his marketing data that the sale price of his business was £80,000. Following the advertisement, a number of interested parties contacted the Defendant with a view to purchasing the client list. Mr Palmer and Mr Ronander paid the Defendant for his 'client bank' but despite repeated requests, promises and excuses for the delay from the Defendant, the information was never supplied. Both took civil action against the Defendant.

Restraint Order Breaches

18. On 13 August 2015 in the Leeds Crown Court Her Honour Judge Belcher made a Restraint Order against the Defendant prohibiting him from dealing with his assets save as authorised by the Crown Court. The Defendant was in contempt of court in respect of the Restraint Order on several occasions.

Case S20161025

19. On 2 December 2016 the Defendant admitted to being in contempt of Court by virtue of seven breaches of the Restraint Order by repeatedly opening and utilising bank accounts and transferring ownership of a restrained vehicle. He was sentenced to eight months' imprisonment suspended for two years and ordered to pay a fine of £1,600 with costs of £900 This suspended sentence expired on 2 December 2018.

Case S20190326

20. On 4 June 2019 at Leeds Crown Court the Defendant admitted further breaches of the Restraint Order in opening and utilising bank accounts in the UK and the USA without the Prosecution's knowledge. Some of the accounts had had money paid into them by his victims. The UK account had had a turnover of £12,510 and the United States accounts of $458,811.

21. The Defendant received a further custodial sentence of 1 year for these breaches.

Further Breaches

22. The Defendant also had a 'Blue Vault' safety deposit box in the USA, which he had had from 2 November 2017 and had concealed from the Prosecution. With the assistance of the USA authorities, this safety deposit box was opened on 13 August 2020 and was found to contain $175,200, €2155 and £200.

The Trial

23. On 30 May 2019, at the conclusion of a 36 day trial, the Defendant was found guilty. On 5 June 2019, he was sentenced to a total of 10 years and 3 months' imprisonment (a quite exceptional sentence for white collar crime) in relation to five counts of fraud, three fraud related counts, breach of a suspended sentence in case S20161025 and the committal for sentence of S20190366.

The Confiscation Proceedings

24. The Defendant's Representation Order had initially made on 26 November 2017 in favour of JMW Solicitors, who represented him throughout the substantive proceedings. Legal Aid for the confiscation proceedings that followed, was transferred to the Appellant on 29 August 2019.

25. The Defendant owned 38 properties, primarily in his sole name. Over the course of these proceedings, many of them were repossessed as "Buy to Let" mortgages had not been adequately serviced.

26. Within its initial section 16 statement, the Prosecution detailed nineteen bank accounts in the Defendant's sole name, and seventeen properties, eight of which were in in his sole name and nine in the joint names of the Defendant and his wife, Nicola and asserted a benefit figure of £2,335,424.96.

27. In a further section 16 statement dated 8 February 2021, the prosecution conceded an equity split of 50% to the Defendant and 50% to his wife in the jointly owned properties once mortgages were settled, and offered a revised benefit figure of £802,288.96, to be recalculated for a 5 day contested POCA hearing listed for 7 September 2021. The position of the Prosecution was that in the context of extent of the Defendant's deceit and wrongdoing, it would not be disproportionate if he had to pay confiscation for the full benefit, be fairly distributed to victims of the Defendant's offending, and to be declared bankrupt if he has nothing left to satisfy any County Court judgments. On 9 September, the prosecution and defence reached the agreement embodied in the court's order of 9 September 2022.

28. The Prosecution position throughout the confiscation proceedings was that nothing that Mr and Mrs Dilenardo said or did could be relied upon as being truthful (and that the conduct of the Defendant was consistently duplicitous.

29. Mr Goodwin of the Appellant firm has explained to the Determining Officer that that with every task, the Appellant had to be sure that the Defendant's instructions were true and not a falsehood before they could be acted upon, and that when the Defendant was sentenced, the sentencing reflected the effect that the Defendant's actions had upon his victims. The Defendant, as Mr Goodman put it, was not stealing £30,000 from a millionaire, but was stealing £30,000 from someone who only had £30,000. The Determining Officer accepted the opinion held by both the Prosecution and the Appellant of the Defendant's character and questionable veracity. I agree: the Defendant appears to have been quite incorrigible, and quite ruthless in his determined dishonesty. As the Trial Judge observed in sentencing remarks, when one line of dishonest dealing was closed to the Defendant, he simply moved to another.

30. I am not remotely surprised, in the circumstances of this case, that the Determining Officer was persuaded, in accordance with paragraph 29 of Schedule 2, to allow an enhancement of 100% on given categories of work carried out by the Appellant. Whether that enhancement should be extended to further items is one of the grounds of appeal to which I now turn.

Grounds of Appeal: Time Allowed for Consideration of Non-Trial Material from JMW solicitors

31. The Appellant, which had not been instructed by the Defendant in the underlying fraud proceedings, has claimed payment for 756 hours' work on the consideration of evidence from those proceedings. On the initial determination this was allotted 410 hours, with no enhancement, and redetermination at 570 hours, with a 100% enhancement.

Consideration of Non-Trial Material from JMW Solicitors: Written Reasons

32. In her written reasons the Determining Officer unreservedly accepted that the Appellant would have had no choice but to consider the papers received from JMW solicitors, so as to understand the wrongdoing of which the Defendant was convicted. She accepted that the documentation that evidenced that wrongdoing would be the foundation of the confiscation case against the Defendant.

33. The Determining Officer also appears to have accepted that it was necessary for the Appellant to embark upon an analysis of that evidence in order to identify accurately the benefit obtained from the offences of which he was convicted. She was not however persuaded that 756 hours was a reasonable time for the completion of this work. She noted that Riley Moss, forensic accountants instructed by the Defendant spent 774 hours (actually, I understand, 744 hours) on the case, which she said would have been of substantial assistance to the Appellant.

34. In her written reasons, the Determining Officer confirmed that she had considered in depth the documentation provided by the Appellant in support of this part of the claim for payment, along with the attendance notes provided. Both at the determination and redetermination stage she had had the benefit of access to a large amount of documentation submitted by the Appellant, including the documents considered by the various fee earners as part of their preparation in the confiscation proceedings, submitted in support of two hardship claims and in relation to the final claim. The Determining Officer went on to consider whether the total time claimed was reasonable and, where she found it not to be, considered what time would be reasonable to allow.

35. The Determining Officer described her approach as an "experience based" approach, and a reasonable basis on which to determine reasonable and allowable costs where the documentation provided was so vast that to consider each document would be out of proportion to the task in hand. Her allowance of 570 hours was, accordingly, a fairly broad-brush figure and not calculated down to the last page. The Determining Officer noted that the Graduated Fee payable to JMW solicitors in the substantive proceedings had been calculated by reference to a figure of 7,406 pages of prosecution evidence, and she took the view that the hours allowed by her to peruse that documentation were far in excess of what might normally be allowed for 7,406 pages.

36. The Determining Officer made reference to a number of costs decisions and authorities. These included *R v Pichodsky*, which would appear (I do not have a copy) to be a rather antique decision of a Taxing Master from 1987, cited by the Determining Officer in support of the proposition that a Determining Officer may disallow accurately recorded time if of the opinion that it is nonetheless excessive. That seems to me to be a statement of the obvious. Time may be recorded with pinpoint accuracy and still be unreasonable in amount.

37. The Determining Officer also referred to another non-binding decision, *R v Davis* (SCCO 334/09, 3 February 2010) in which Master Simons effectively followed *Singh*, referred to below.

38. More pertinent for present purposes seem to me to be the following authorities referred to by the Determining Officer.

39. In *R. v Supreme Court Taxing Office Ex p. John Singh & Co* [1997] 1 Costs L.R. 49, Henry LJ said:

> "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 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 the 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."

40. In *Miller Gardner (Solicitors) v The Lord Chancellor* [1997] 2 Costs L.R. 29 Carnwath J accepted that the application of the *Singh* approach necessarily involves an element of "feel", which it may not be possible to express very precisely (although it should not, importantly, be seen as purely arbitrary). It may be based upon experience, or on comparisons with the work done for other defendants in the same case.

41. In *Francis –v- Francis and Dickerson* [1955] 3 All E.R. 836 at 840, [1955] 3 W.L.R. 973 Sachs J considered the duties of legal advisers acting for a legally aided client, and the principles of reasonableness to be applied on assessing costs funded by legal aid. Sachs J that the primary duty of a solicitor in conducting a legally aided case is to the client, and that solicitors and counsel must approach the consideration of incurring reasonable expense to attain justice in an assisted case in the same way as if the lay client were a person whose means enabled them to fight that particular case in a reasonable manner. At 980 he said:

> "When considering whether or not an item in a bill is 'proper' the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interest of his lay client… the lay client… should be deemed a man of means adequate to bear the expense of the litigation out of his own pocket – and by, 'adequate' I mean neither 'barely adequate' nor 'super-abundant'".

42. In *Storer v Wright and Another* [1981] 2 W.L.R. 208 Lord Denning MR, at 212 F-G, said:

> "Seeing that there is no one to oppose, it seems to me that, on a legal aid taxation, it is the duty of the taxing officer to bear in mind the public interest. He should himself disallow any item which is unreasonable in amount or which is unreasonably incurred. In short, whenever it is too high, he must tax it down…"

Consideration of Non-Trial Material from JMW Solicitors: Submissions

43. The Appellant argues that the initial reduction to 410 hours, with disallowance of any enhancement, was arbitrary. The Appellant was entitled to be given reasons for the reduction, but none were given. The increase to 570 hours represented an acceptance that the original deduction was not reasonable but the remaining deduction from 756 hours to 570 hours is still, says the Appellant, entirely arbitrary.

44. There is says the Appellant no reason for disallowing any of this work and no justification for saying it was unreasonable for the Appellant to undertake any of this work.

45. The reduction from 756 claimed hours to the 570 allowed suggests that very experienced solicitors with a specialist department dealing with confiscation matters undertook 186 hours of unreasonable work. This would be a period of probably about five weeks' full-time work for a fee-earner undertaking this task.

46. There is says the Appellant no logic to the proposition that the fact that forensic accountants undertook 744 hours' work leads to the conclusion that the Appellant should have undertaken 186 fewer hours. The accountancy work did not duplicate the work undertaken by the Appellant.

47. In *Singh* the Taxing Master was able to assess the time claimed by John Singh & Co against the time claimed by co-Defendants' solicitors and so there were easily visible comparators, which is not the case here. It would not be appropriate to use an accountancy firm as a comparator.

48. In any event, the Determining Officer has said that the reduction in this case is not based on a comparison of costs claimed for a co-defendant but to her experience, referring to *Miller Gardner v Lord Chancellor* and "feel". The Determining Officer's "feel" led however to an initial reduction of 410 hours (with no enhancement). A shift from 410 hours allowed to 570, between the initial determination and the redetermination, indicates that an "experience-based feel" has not been applied.

49. As for *Pichodsky*, it is not alleged by the Determining Officer that the time spent by the Appellant was excessive. Even if it was, time has not been disallowed on the basis that it was excessive but on an experience-based approach that the overall time is not reasonable.

50. The applicability of *Francis v Francis and Dickerson* is challenged. This says the Appellant is an old test referring to a private client of means adequate personally to bear the expense of the litigation. A private client facing these confiscation proceedings, themselves following the criminal proceedings, would have to be in possession of "super-abundant" means to fund the work. There are very few people who could afford to pay reasonable fees for this type of case.

51. As for the Determining Officer's reference to the JMW solicitors' graduated fee in the substantive proceedings, that fee will have been assessed under a graduated fee scheme which is not based upon the number of hours spent. In any event, the Appellant says that it reviewed far in excess of 7,406 pages of documentation.

Consideration of Non-Trial Material from JMW Solicitors: Conclusions

52. I appreciate that the process of determination and redetermination has been frustrating for the Appellant. It seems to have taken a long time. It may have been difficult, for example, to understand why no enhancement at all was initially allowed on the important work of reviewing the material received from JMW Solicitors. I have some difficulty in understanding that myself.

53. The Appellant's submissions, nonetheless, do not seem to me to be entirely fair to the Determining Officer. It cannot be right on the one hand to criticise the Determining Officer for implicitly finding that the Appellant undertook 186 hours of unreasonable work whilst arguing on the other that she did not find the time spent by the Appellant on the consideration of the documents received from JMW solicitors to be excessive. Evidently she did.

54. Similarly, the Determining Officer did not suggest that the time spent on the documents by forensic accountants could be used as a comparator for the time spent by the Defendant. Her point, as I understand it, was that the involvement of forensic accountants might have reduced to some extent the burden upon the Appellant.

55. Nor did the Determining Officer draw any comparison between the Graduated Fee payable JMW solicitors and the fee payable to the Appellant. She noted only that the PPE count used in the calculation of that fee was 7,406, the implication (by reference to established authorities such as *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB)) being that that was the number of pages of evidence considered sufficiently important to the case against the Defendant to merit inclusion within the PPE count), and even then she did not limit the time recoverable by the Defendant to that she might have considered reasonable to consider that number of documents.

56. In my view the Determining Officer's stated methodology is not in itself open to criticism. Each of the authorities (as opposed to non-binding Costs Judge decisions) referred to by her is referred to in the Taxing Officers' Notes for Guidance, and as a Determining Officer she is expected to apply them on assessment.

57. Those authorities referred to various Legal Aid schemes and regulations, some civil rather than criminal, but the principles laid out by them remain relevant and binding in the context of the 2013 Regulations.

58. To my mind that includes *Francis v Francis and Dickerson.* The point of that decision was that those responsible for the assessment of publicly funded costs should not apply a more stringent approach to reasonable costs than they would apply to a privately funded case, and Sachs J offered as a benchmark for judging reasonableness a hypothetical private client of adequate, rather than super-abundant means. I am sure that the Appellant is right when saying that no person of merely adequate means would be able to fund the sort of criminal litigation involved here, but I would suggest that this requires only to a restatement of the principle to recognise that reasonableness must be judged by the means of a hypothetical private client who would, within reason, be able to fund such litigation, but who does not have limitless resources.

59. Had the Determining Officer attempted to apply a purported "experience-based" approach without regard to the evidence offered in support of the work done, then I would have agreed that her decision was entirely arbitrary. I have in the past (as has Costs Judge Rowley) had reason to point out that such an approach is wrong in principle, and that Determining Officers should not adopt it.

60. That does not, however, seem to be what the Determining Officer in this case has done. She has made it clear that (subject only to reasonable considerations of proportionality) that she gave careful consideration to that evidence before, in line with *Singh*, coming to the conclusion that that the aggregate of the individual items recorded by the Appellant nonetheless produced a result which established that the time claimed was unreasonable.

61. It is clear from *Miller Gardner* that the Determining Officer is entitled to base that conclusion upon experience, as opposed to a comparison of the costs of co-defendants. That is what she has done. Any *Singh* decision must of necessity be broad-brush. 186 hours may seem like a large reduction, but it represents less than 25% of the total, and reductions on that scale for time spent in documents are by no means unusual on assessment.

62. The Determining Officer's application of the *Singh* approach does not represent an evaluation of the competence or experience of the fee earners undertaking the work. I do not doubt, as the Appellant says, that the grasp of the underlying facts exhibited by the Appellant was recognised and openly praised in court. It does not, as the Appellant appears to submit, follow that every item of time claimed must be allowed. It must be borne in mind that in *Singh* the Court of Appeal recognised that the total time claimed for undertaking a given category of work may be in excess of what should be considered reasonable, even where the individual items claimed are not capable of being impugned as such.

63. The reality is that some fee earners work faster than others. A solicitor may (as appears to have been the case here) do a meticulous and excellent job but may still, in doing so, spend an amount of time which exceeds what will be recoverable as reasonable from an opponent, from the public purse or even from the client. Bearing that in mind, it is right for a Determining Officer to apply her experience, in line with *Singh* and *Miller Gardner*, to find that the aggregate total of the individual items recorded by the Appellant exceeds what it is reasonable for the Appellant to recover.

64. All that said, I do not find myself entirely in agreement with her conclusions, and I can understand the Appellant's perception of some aspects of the decision as arbitrary.

65. I start with the volume of documentation. I appreciate that the PPE count was 7,406, but that is not the volume of documentation the Appellant had to deal with. It would appear that the Appellant in fact received 11 boxes of lever arch files from JMW solicitors, all of which (as the Determining Officer has accepted) had to be reviewed and analysed. In the absence of a more precise count, assuming between three and four lever arch files to a box and up to about 550 pages per file, that could represent something between about 18,000 and about 24,000 pages. The PPE count suggests that not all of that documentation may have required in-depth analysis. Nonetheless, applying my own experience on a *Singh* basis, the Determining Officer's allowance of 570 hours seems to me to be on the low side for the inspection and analysis of such a large volume of paper.

66. I should make it clear that it does not follow from the fact that the Determining Officer was persuaded, following representations made by the Appellant on redetermination, to make a substantial adjustment to the hours allowed, that either of her decisions was arbitrary. It indicates that she was prepared to exercise her judgment and review her initial decision, based upon further information and argument from the Appellant. Redeterminations of that kind are very common. It cannot be right to criticise Determining Officers for revising their figures upwards on redetermination: that is the whole point of the procedure.

67. I do nonetheless have difficulty in understanding the basis of the original allowance of 410 hours, and I can understand the Appellant's perception that the amount of work that had to be undertaken has not fully been recognised even on redetermination.

68. I find the Appellant's work records to be quite meticulous, if rather full (and at times, apparently aimed at justifying the time taken rather than just explaining it). Notably the time is claimed precisely by reference to units of six minutes rather than the round figures I have seen on many lengthy work records. Collectively, they do appear to record a very big task, carefully undertaken.

69. A more precise page count would have been helpful. Absent that, and bearing in mind the PPE count, I have to take a reasonably cautious approach. Doing the best I can with the information available to me, I would revise the Determining Officer's *Singh* – based allowance to 625 hours. The appeal succeeds to that extent.

Grounds of Appeal: The Assessment of Angela Terenzini as a Grade C, rather than a Grade B, Fee Earner

70. Angela Terenzini, an employee of the Appellant who worked on this case, qualified as a solicitor in Australia in 2015, having (says the Appellant) worked exclusively in confiscation cases for over 2 years before she qualified. She continued working with the New South Wales equivalent of the CPS until August 2017. Ms Terenzini joined the Appellant firm in February 2018 as a trainee solicitor, being admitted as a solicitor in this jurisdiction on 21 December 2020. She worked solely on confiscation proceedings from 1 November 2018.

71. The Appellant points out, correctly, that Australia has a similar common-law framework to that of England and Wales and advises me that the LAA has in previous cases accepted Ms Terenzini as a Grade B Fee Earner. The Appellant has, accordingly, claimed for her work at Grade B from 1 November 2019, whereas the Determining Officer assessed her as a Grade C fee earner until 12 June 2020.

Conclusions: The Assessment of Angela Terenzini as a Grade C, rather than a Grade B, Fee Earner

72. The Determining Officer's conclusion seems to have been informed by the fact that Ms Terenzini's qualification as a solicitor in Australia does not in itself entitle her to practice as a solicitor here. That seems to me to be a rather technical point. The real question one of relevant experience. The legal system in New South Wales is similar to the legal system here. Ms Terenzini worked on criminal cases for two years before her Australian qualification in 2015. Her qualification was followed by about two further years' work in crime, and she would appear to have had another 20 months' criminal experience in this jurisdiction by 1 November 2019.

73. The Appellant's position is strengthened by the fact that much of Ms Terenzini's criminal experience seems to have focused on confiscation cases, though the regulations do not actually require such specific experience as a prerequisite for categorisation as Grade B. It seems to me that Ms Terenzini was, by 1 November 2019, in the position of an "equivalent senior fee earner" with "good knowledge and experience of the conduct of criminal cases" and should be assessed as a Grade B fee earner from that date. The appeal succeeds in that respect.

Grounds of Appeal: Work upon which no Enhancement Was Allowed

74. In her Written Reasons, the Determining Officer confirmed that she had allowed enhanced rates on "practically all" items of preparation but not on a number of individual items which according to the Appellant total 26.9 hours' work, and this which she characterises as "of an administrative or routine nature, such as researching ('Googling') postcodes and potential estate agents, completing authorities for the defendant to sign, and completing CRM4 and EX107 forms".

Conclusions: Work upon which no Enhancement Was Allowed

75. The Appellant argues that it is "a fundamental misconception to disallow enhancement on preparation and consideration but to allow it on other items". This does not seem to me to be what the Determining Officer has done. On the contrary, she has allowed enhancement on preparation and consideration, with the exception of certain items which she considered to be either routine or administrative in nature.

76. The Determining Officer's reasoning was based on the judgment of Master Gordon-Saker (now the Senior Costs Judge) in *R v Britton* (SCCO 311/09, 1 March 2010), when, on applying the enhancement provisions of The Criminal Defence Service (Funding) Order 2001, he observed (at paragraphs 9-11 of his judgment):

> "The 2001 Funding Order provides that:
>
> > Where the appropriate officer considers that any item or class of work should be allowed at more than the prescribed rate, he shall apply to *that item or class of work* a percentage enhancement … (emphasis added)…

> In my judgment it must follow that the Determining Officer may allow enhancement on some items or classes of work but not on others… Generally, it seems to me that enhancement will rarely be justified on work of an administrative nature, routine work or on travelling and waiting."

77. In my view the Determining Officer was right to adopt the approach advocated by the Senior Costs Judge in *R v Britton*. It is important to remember that he was applying the 2001 Order, not the 2013 Regulations, but the pertinent wording, for present purposes, is the same. It is not, as the Appellant argues, anomalous to allow enhancement on some items of preparation but not others, because the rules provide for the Determining Officer to do so.

78. The Determining Officer identified the items in question in Annex 8 to her Written Reasons. This document, relabelled Annex 9, is included in an index of the papers filed by the Appellant in support of the appeal, but I have not been able to find it in the electronic version, and I have not found a way of filtering the main bill to identify the relevant items. The print on the paper copy is too small to read.

79. I do have a list of ten of the relevant items included in the Grounds of Appeal, where the Appellant argues that enhancement should not have been disallowed on the basis of that the work was "administrative" whereas in fact it was fee earning work (this is not specifically stated in relation to a request for a transcript on 3 October 2019, but seems to be the underlying point).

80. The ten examples offered by the Appellant in the Grounds of Appeal are, as the Appellant says, not administrative in nature, but they are, with two exceptions, routine, comprising as they do tasks such as preparing requests for transcripts, completing forms of authority or completing requests for prior authority. The two exceptions are on 26 and 27 September 2019, on which date the Appellant took instructions from the Defendant in relation to his ownership of various properties and undertook further work verifying the ownership position. That seems to me to fall squarely within the general thrust of the complex and difficult investigatory work undertaken by the Appellant, and as such to merit enhancement.

81. Absent a better copy of Appendix 8, I cannot say whether I would disagree with the Determining Officer on any other items. The appeal succeeds in relation to the work carried out by the Appellant on 26 and 27 September 2019 in taking instructions upon, and investigating, the Defendant's property ownership. If the Appellant wishes to supply me with an electronic copy of Appendix 8, I can produce a short supplemental decision dealing with any items I have not already considered.

Grounds of Appeal: Time Spent on Hold, waiting for Santander Bank

82. On 5 August 2021, 1 hour's waiting is claimed by a Grade C fee earner for "Waiting at the telephone whilst put on hold to speak to Jane of Santander Bank". The Determining Officer allowed 30 minutes.

83. On 1 September 2021 3.2 hours' waiting is claimed at Grade C for waiting at telephone upon Santander Bank to request again further urgent information in relation to the Client's three bank accounts. The Appellant took the view that the information could be extremely important and so decided to wait on hold for over 2 hours on the afternoon call alone. The Determining Officer allowed 1.6 hours.

84. The Determining Officer accepted that it must have been frustrating to be left on hold for such long periods. However, when waiting within an office environment for an extensive period of time, it is a reasonable expectation that a fee earner would undertake other work whilst waiting. The telephone could have been put on hands free/speaker, which would enable the fee earner to perform other tasks, albeit of a mundane nature, such as reading and sending emails.

85. The Appellant refers to Santander's recorded message to the effect that "your call will be answered as soon as it can be" (or words to that effect). If the response is missed when it finally comes (which would easily be done if working on another matter) the process has to be started all over again. If someone at Santander speaks, the caller is on loudspeaker they cannot hear the caller, they hang up after a few seconds and again, the process has to start from the beginning.

86. I do not find this very persuasive. Everyone these days has experience of waiting on hold for lengthy periods of time, with the need for a quick response when an answer finally arrives. The quality of telephone loudspeakers these days is good, even on mobile phones, and I cannot believe that the use of a loudspeaker would normally give rise to any particular problem. It seems to me that the Determining Officer was right, and accordingly this part of the appeal fails.

Summary Of Conclusions

87. Of the 756 hours' work claimed for reviewing documents received from JMW solicitors, on the information I have, I can allow 625 hours. As the Determining Officer has already decided, that will be subject to an enhancement of 100%.

88. Angela Terenzini's work should be remunerated at Grade B from 1 November 2019, as claimed.

89. The Determining Officer's refusal to allow enhancement upon routine items of work was correct in principle. Having been unable to locate a workable copy of Appendix 8 to her written reasons, I have only been able to identify two items which the Determining Officer has classified as routine but I would classify as non-routine. These are taking instructions upon, and investigating, the Defendant's property holdings on 26 and 27 September 2019. If the Appellant wishes to supply me with an electronic copy of Appendix 8, I can give a short separate decision on whether there are any other such items.

90. The Determining Officer was right to reduce the recoverable waiting time incurred by the Appellant on 5 August and 1 September 2021.