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

Delivered: 15/03/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPEAL OF A DECISION OF THE TAXING MASTER
UNDER ARTICLE 15(3) OF THE LEGAL AID FOR CROWN COURT
PROCEEDINGS (COSTS) RULES (NORTHERN IRELAND) 2005 AND IN THE
MATTER OF THE QUEEN v ALAN NURSE

BETWEEN:

ARTHUR HARVEY and CIARAN HARVEY

Appellants;

and

THE TAXING MASTER

Respondent.

STEPHENS J

[1] This is an appeal by Mr Arthur Harvey QC and Mr Ciaran Harvey in relation to the assessment of their remuneration in the criminal case of *The Queen v Alan Nurse*. The appellants were instructed on behalf of the defendant in that case. Mr Arthur Harvey marked a brief fee of £35,000 and Mr Ciaran Harvey marked a brief fee of £17,500 being half of senior counsel's brief fee. The fees which have been allowed to date amount to £5,250 for senior counsel and £2,625 for junior. Those fees have been calculated in accordance with the Table of Guilty Plea Fees for Counsel in Schedule 1 Part 3 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the "2005 Rules") with a 40% uplift on the basis of exceptionality in accordance with Rule 11 paragraphs (5) and (6) of the 2005 Rules.

[2] The appellants appealed to the Taxing Master and by a decision dated 6 January 2012 Deputy Master Wells dismissed the appeal. Not content with that the appeal now comes before me.

[3] It is the contention of the appellants that the circumstances of the case were wholly exceptional under Rule 11(8) of the 2005 Rules and that there ought to be a further uplift as this court considers reasonable. The appellants were litigants in person. The respondent did not appear to contest the appeal before the Deputy Taxing Master. They did not appear on this appeal. Mr Cullen, the Principal Legal Officer, Public Legal Services Division, Access to Justice Directorate, Department of Justice, attended in court at short notice holding a watching brief. He also provided assistance to the court in relation to questions that arose during the appeal and I am grateful to him for that assistance.

[4] I heard argument this morning and give this judgment this afternoon.

Statutory Framework

[5] Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 deals with remuneration of solicitors and counsel. Article 37 paragraph (2) deals specifically with such fees before the Crown Court. It provides that in making Rules and in determining the amount of remuneration regard should be had amongst the matters which are relevant to:

- “(a) the time and skill which work of the description to which the rules relate requires;
- (b) the number and general level of competence of persons undertaking work of that description;
- (c) the cost to public funds of any provision made by the rules; and
- (d) the need to secure value for money,”

These provisions are in contrast to proceedings before a court other than a Crown Court. In respect of such proceedings regard shall be had to the principle of allowing fair remuneration according to the work reasonably undertaken and properly done (for which see Article 37 paragraph (1)).

[6] It can be seen by contrasting Article 37(1) and Article 37(2) that there is a value for money criteria in Article 37(2)(d) and a public criteria in Article 37(2)(c). In respect of the value for money criteria, among the matters which are relevant, is the need to secure value for money. Does this mean that the remuneration should be less than reasonable? I do not consider that to be so. It is an injunction to make sure that the costs are not unreasonable, that is not unreasonable in amount and not unreasonably incurred. In arriving at that interpretation I have not had the benefit of any authority being opened to me nor have I been able to examine any of Hansard’s debates, however, I do not perceive that it was the intention of the

legislature to require remuneration to be assessed on an unreasonable basis by inserting a value for money criteria.

[7] In respect of the public criteria in Article 37(2)(c), among the matters which are relevant, is the cost to the public funds of any provision made by the Rules. Counsel and solicitors are under a professional obligation not to mark unreasonable fees and any breach of that obligation is professional misconduct. The Professional Conduct Committee has an obligation to maintain professional standards and that obligation must include monitoring professional standards in respect of remuneration. The professional obligation only to mark reasonable fees applies regardless of the identity of the client or the source of the funds. I consider that the public requirement is a requirement to have regard to the wider public interest. That money spent on legal aid is money not available to other services such as education and health. It emphasises that there is a need for proportion, however, again, I do not consider it to be an injunction to impose less than reasonable remuneration. If that was the intention of the legislature then clear words would have been needed.

[8] The relevant amendments to Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 were made on 8 March 2005. The 2005 Rules under Article 37(2) were made on 9 March 2005. A general obligation in determining costs is contained in Rule 4 at paragraph (2) which provides:

“In determining costs, the Commission shall, subject to and in accordance with these Rules -

- (a) take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and
- (b) allow a reasonable amount in respect of all work reasonably undertaken and properly done.”

[9] The determination of advocate fees depends in the first instance on the grids contained in Schedule 1 to the 2005 Rules. Schedule 1 paragraph (5) provides for indictable offences to fall within various classes listed in the Table of Offences. If an accused is charged with a number of offences then the offence that determines the class is at the selection of counsel (see Part 5 paragraph (20) sub-paragraph (1) of Schedule 1 to the 2005 Rules). The Table of Offences in Schedule 3 to the 2005 Rules sets out the classes. Class G includes certain offences if the value involved exceeds £30,000. The offences in Class G range from theft through, for instance, abstraction of electricity, false accounting, forgery to fraudulent evasion of duty. This case falls within Class G as the accused was charged with theft of monies of some £650,000. He also faced multiple counts including forgery and false accounting.

[10] The statutory framework continues in that Rule 11(4) of the 2005 Rules provides:

“Where an advocate considers that, owing to the exceptional circumstances of the case (or part of the case which is the subject-matter of the application), the amount payable by way of fees in accordance with paragraphs (2) and (3) would not provide reasonable remuneration for some or all of the work involved, he may apply to the Commission for a Certificate of Exceptionality and the Commission may, in its discretion, grant such application in accordance with paragraph (5).”

Rule 11(5) provides:

“(5) When considering an application for a Certificate of Exceptionality, the Commission shall have regard, among the matters which are relevant, to –

- (a) whether the issues involved were significantly more complex than other cases involving the same offence or Class of Offence;
- (b) whether the volume of evidence (including any un-used evidentiary material) was significantly greater than that in other cases involving the same offence or Class of Offence;
- (c) any novel issues of law which were involved in the case; and
- (d) any new precedents established in the case, “

It can be seen that the reference sample or comparator against which the particular case is to be assessed is either:

- (a) other cases involving the same offence; or
- (b) class of offence.

In this case the comparators could be either theft, forgery and false accounting, the offences with which the accused was charged, or the class of offence, that is Class G. Class G ranges from what is and perhaps always would be relatively straightforward, namely the abstraction of electricity to what are relatively straightforward but which can be very complex cases, namely theft.

[11] There is a significant range of difference between a case involving straightforward theft where an item valued in excess of £30,000 is stolen to a case involving a complex accounting exercise ranging through the books of account involved in white collar crime. It is equally apparent that at both ends of the spectrum one can envisage different degrees of complexity. In some white collar crimes the audit trails may be simple and in others the audit trail may involve the books not only of one company but many companies and those companies may be in more than one jurisdiction and each company may be subject to different laws and regulations in those different countries. It is important to bear in mind that the accounts at issue in this case related to a single entity, that is a solicitor's practice in one jurisdiction, that is Northern Ireland, subject to the same legal and regulatory framework.

[12] I return to the statutory framework. Rule 11(8) provides:

“If the Commission is satisfied that the circumstances of the case were wholly exceptional, it may allow an uplift up to the maximum amount specified in paragraph (7) and refer the application under paragraph (4) to the taxing master who may allow such further uplift as he considers to be reasonable.”

It can be seen that the test is that of being wholly exceptional. That is a matter of fact and degree. It is not to be interpreted so restrictively that no case ever falls within the ambit of being wholly exceptional. In order to be wholly exceptional the case does not have to have every exceptional feature present of all those exceptional features of which one can perceive. If the case is wholly exceptional then it *may* fall outside the grid because the Taxing Master, and on this appeal I, may allow such further uplift as he or I consider to be reasonable. I emphasise the word “may” which provides discretion.

[13] Finally, in relation to the statutory framework I would observe that under the new provisions for the Crown Court the concepts of exceptional and wholly exceptional are removed. Those new provisions are to be found in the Legal Aid for Crown Court Proceedings (Costs) Amendment Rules (Northern Ireland) 2011. The scale in those Rules are applicable to all cases on a swings and roundabout basis. On that scale Mr Arthur Harvey's fees for this case would have been £18,900 and for Mr Ciaran Harvey it would have been £9,450.

Factual Background

[14] The charges against Mr Nurse related to a solicitors' practice. The facts in relation to the offences are comprehensively set out in the sentencing judgment of Mr Justice Hart delivered on 22 January 2010 under reference HAR7717. I gratefully adopt that factual description and incorporate it into this judgment. I have also

considered a medical report which sets out some of the background in respect of Mr Nurse and his wider circumstances.

[15] The offending behavior covered a 5 year period from 1997 to 2001 inclusive. The matters came to light in 2001. There was a Law Society investigation which together with disciplinary proceedings continued until 2007. The Law Society engaged Goldblatt McGuigan Accountants whose investigations cost £90,000. That gives an indication of complexity. Goldblatt McGuigan were not instructed to and did not analyze how much money had been stolen by Mr Nurse as opposed to being illegally moved around his various client accounts. Ninety-three different client accounts were involved. The police were informed. Mr Nurse was interviewed. There are 500 pages of interview notes which are replete with elaborate explanations - all of which have to be understood and analysed. The lack of an initial investigation as to the amount stolen meant that when these charges were brought against Mr Nurse years later there had to be an analysis of documents which were now historic to arrive at a conclusion. Some documents were missing. The financial affairs of Mr Nurse were complex and this was of his own making either intentionally or, negligently, but this did not relieve counsel of the obligation to master those complicated affairs in order to give proper professional advice.

Exceptional Features

[16] The features which were submitted and which I consider to be exceptional are:

- (a) The number of separate counts which were involved, namely 14;
- (b) The amount involved in the charge of theft. Category G applies to offences where the value is in excess of £30,000. The amount here was initially some £650,000. The significance can be seen in the likely sentence to be imposed on a contest. Sums between £17,500 and £100,000 merit a 2-3 year sentence of imprisonment. Sums from £100,000 to £250,000 merit a 3-4 year sentence of imprisonment. Sums from £250,000 to £1m merit a 5-9 year sentence. The likely sentence was at most 3 times more severe than for a case in which the amount was £30,000.
- (c) The voluminous documents. There were in total some 8 lever arch files containing an estimated 4,000 to 5,000 documents. In relation to some cases involving voluminous documents it is a matter very quickly of identifying the relevant from the completely irrelevant. In this area of litigation the documents require careful analysis and cross-referencing. There is not the capacity to ignore large volumes of documents.
- (d) The number of hours of work involved. Neither counsel kept a record of the hours spent and they have estimated that senior counsel spent

250 hours and junior 360 hours. These are estimates and with deference to counsel I treat the totals with caution, though having considered the papers I have no hesitation in accepting that the number of hours required were exceptional in comparison to other theft cases. If there is to be a reference to a significant number of hours in future cases so as to allow an arithmetic calculation then those hours should be recorded hours. I have no doubt that a considerable number of hours were involved and those hours could well be 250 and 360. However, bearing in mind the public dimension and the need to secure value for money I do not propose to approach this case on an arithmetic basis multiplying the hours by a rate. I do, as I have stated, find that the number of hours required for the work in this case were exceptional.

- (e) The period of time. The period of time that it took this case to be investigated by the police and for charges to be brought is another aspect of exceptionality. The lapse of time makes investigation more difficult. The period of time that it took others, namely a significant number of years, to come to a conclusion demonstrates complexity found on the part of others.
- (f) The judicial reference to complexity by Mr Justice Hart in his sentencing remarks. The trial judge makes it clear on a number of occasions in his sentencing remarks that he considered this case to be a complex case.
- (g) There is further support for the case being complex on the basis of the amount of investigation that was required by the accountants for the Law Society, Goldblatt McGuigan, and also the amount of investigation that was required on behalf of the defendant by the accountants, Harbinson Mulholland.
- (h) The degree of skill and expertise required by counsel. I consider this case required experienced counsel. It required experienced counsel because of the volume of documents, the complexity of the factual issues, the personal difficulties in the accused's background that required consideration so that the will of the accused was not overborne by counsel.
- (i) The subject-matter of this case is different from a theft where a single item is stolen. This was a case involving an analysis of complex accounting matters, wholly separate from a simple theft case.
- (j) The number of strands to the methods employed by Mr Nurse in his criminal activities all of which had to be understood and analysed.

Unexceptional Features

[17] The defendant made it clear at an early stage that he admitted the offences of false accounting, however, the most serious charges related to theft and forgery and in this respect there were elaborate explanations, all of which required detailed analysis before decisions could be made that would properly reflect the guilt of the client. I also consider it to be an unexceptional feature that the legal principles to be applied were straightforward. This is not a case involving novel principles of law or precedents being set.

Conclusion

[18] I have considered the exceptional features individually and cumulatively and conclude that they are of sufficient degree to bring this case into a wholly exceptional category.

[19] In relation to the amount of remuneration I reject the contention that I should apply an hourly rate to arrive at a brief fee for senior counsel of £35,000. I reject this approach for the reasons I have already set out. I bear in mind a comparison with equivalent fees in relation to civil litigation involving thefts which require detailed analysis of company accounts. I do that in a general way because an exact comparison is not appropriate. I note that the Government has set as an appropriate fee now, some 2 years later, under the Legal Aid for Crown Court Proceedings (Costs) Amendment Rules (Northern Ireland) 2011 - a fee of £18,900 for senior counsel and that fee will be payable even if there were no exceptional or wholly exceptional circumstances. I settle senior counsel's fee at £22,500 and junior counsel at £11,250.