



IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION

Case No: 990674

Royal Courts of Justice,  
Strand, London WC2A 2LL

Date: 30th July 1999

Before:  
THE HON. MRS. JUSTICE HALLETT DBE

BETWEEN:

SMITH GRAHAM, Solicitors  
(Regina v Carr)

Plaintiff

- and -

THE LORD CHANCELLOR'S DEPARTMENT

Defendant

Mr. Christopher HARDING (instructed by Messrs Smith Graham for the Plaintiff).

Mr. Nicholas HILLIARD (representing The Lord Chancellor's Department – the Defendant)

Judgement: Approved by the court for handing down

SMITH

This is an appeal from the determination by Master Pollard under the Legal Aid in Criminal and Care Proceedings Costs Regulations 1989. The Master certified the following point as a point of principle of general importance:

“When a solicitor acting under a legal aid certificate instructs an enquiry agent to carry out an item of preparation on his behalf and the solicitor pays the enquiry agent’s account as claimed, can the solicitor claim that item of work as if it were preparation carried out by a member of his firm?”

Messrs. Smith and Graham represented a local councillor charged with offences of deception in relation to his claims for expenses. They obtained prior authorisation to spend up to a £320.00 instructing an agent to attend at the council offices with the accused and examine the expense claim forms. They instructed a Mr William Fryer an enquiry agent whom they had used before. He sent them a bill for £243.93. They then claimed for his services at an enhanced hourly rate of £90.00 as a grade B fee earner under Regulation 6. The determining officer took no issue with the reasonableness of the work done and the time spent but allowed only the sum actually paid to Mr Fryer as a disbursement under Regulation 7.

The determining officer rejected the argument that as Mr Fryer was frequently instructed by the firm to do different kinds of work for them, he should be regarded in this instance as a fee earner. On appeal the Master adopted the same approach as the determining officer and dismissed that part of the appeal.

Regulation 2 of the Costs Regulations defines a fee earner as a “solicitor, legal executive or any clerk who regularly does work for which it is appropriate to make a direct charge to the client.”

Regulation 6 authorises the payment of solicitors fees “done by fee earners” in a number of categories including:

“taking instructions, interviewing witnesses, ascertaining the prosecution case, ... preparing and perusing documents.....conferences... views ..etc.”

Smith and Graham argue that this was an item of work that was reasonably done by a fee earner and that for the purposes of the regulations Mr Fryer was a Grade B fee earner and that they are entitled, therefore, to claim at the appropriate rates. They claim an enhanced rate on the basis that the whole case merited an enhanced rate. No attempt was made before me to justify this particular piece of work as exceptional.

Mr Hilliard on behalf of the Lord Chancellor’s Department argues that the costs of instructing Mr Fryer should be treated as a disbursement. He makes three principal submissions:

1. Mr Fryer was an independent contractor and, therefore, not to be regarded as a fee earner within the definition section. He was not employed in either

a full time or part time capacity by the appellant firm. In strict legal terms he should not be regarded as an agent of the solicitors.

2. Insufficient information has been provided as to the nature of his skill and experience and the work he normally does.
3. Insufficient information has been provided as to the nature of the work done in this case.

I have been informed that Mr Fryer is a retired police officer and "litigation enquiry agent" and that he was instructed to attend at the Borough Council offices with the accused to conduct an examination of expense claim forms. Mr Harding on behalf of the appellant firm concedes that he is not in a position to provide me with the detailed information I should like to assess the work actually done. I am reminded, however, that the determining officer and the taxing master accepted that the work was reasonably done. Plainly, he regularly undertakes a variety of work for the appellant firm and some of the work he does is claimed as a disbursement.

The issue for me to decide is whether in this particular case, someone in the position of Mr Fryer instructed to do this particular kind of work may properly be regarded as a fee earner within the terms of regulation 6. I have been helpfully referred to a number of authorities which establish that whether someone is to be regarded as a fee earner is a very much a question of fact to be determined in each individual case.

On the facts of this case, despite the limited nature of the information before me, I am satisfied that the nature of the work Mr Fryer was instructed to do here was work which it was appropriate for a fee earner to do. I doubt that anyone would have considered it inappropriate in a case such as this for the solicitor in charge of the case or someone similar to have carried out the work himself and to make a direct charge to the client. The fact that Mr Fryer was not actually employed by the solicitors either as a full-time or part time employee does not in my judgement exclude him from the definition of fee earner.

No such restriction is imposed by the regulations themselves and I note that in the guidance to determining officers in 1996, full-time employees, part time employees and "persons engaged by solicitors as agents" are said to be included. I am not persuaded that the use of the word "agent" in that guidance was intended to mean a full fiduciary relationship of agent and principal as argued by Mr Hilliard. It means someone not actually employed by the firm but instructed to carry out work on their behalf.

Whatever the nature of an "agent's" contractual or legal relationship with the solicitors' firm, for the appropriate test of fee earner one must return to the regulations themselves: a fee earner includes "a clerk who regularly does work for which it is appropriate to make a direct charge to the client." As was said by the Chief Taxing Master in the case of Pullum (TCS1) the use of the term "clerk" is very well known in the legal profession. Many of us are familiar with the use of "outdoor clerks"

instructed to attend upon counsel at court. As I understand it, it is accepted that such work would count as fee earning work.

Having considered Mr Fryer's background and the services he offers, I have no doubt that Mr Fryer comes within the definition of someone who may be instructed to do fee earning work. Attending at Council offices to examine important documents with the lay client is clearly "fee earning work".

I am satisfied, therefore, that in the circumstances of this case Mr Fryer does come within the definition of "fee earner" within the regulations.

I turn to the level of fee which should be allowed. No information has been put before me to justify his grading as B. The onus is upon the appellant firm to justify such a grading. Without that information, he must be classified as a Grade C. Similarly no information has been provided to me to justify an enhanced rate for the work that he did. The fact that the appellant firm instructed an agent to carry out this work, in the absence of any explanation, leads one to assume that although important it was not exceptional. I am satisfied, therefore, that it would be inappropriate to allow his fees at an enhanced rate.

The appellant firm will, therefore, be allowed the sum of £133.87.

The question posed by the Master cannot be answered with a simple yes or no. The answer must be: it depends on the circumstances of the case.