



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
 2 CRIMINAL DIVISION

3 LEGAL AID NO. LACR 423/ 2019

4
 5 IN THE MATTER OF THE LEGAL AID LAW 2015
 6 AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE TAXING
 7 OFFICER PURSUANT TO SECTION 29 OF THE LEGAL AID LAW 2015
 8 AND IN THE MATTER OF AN APPEAL OF THE DECISION OF THE DIRECTOR OF
 9 LEGAL AID PURSUANT TO SECTION 38 OF THE LEGAL AID LAW 2015

10

11 BETWEEN

12 KODY DAVID ZANDER

Appellant/Applicant

13 -v-

14 THE DIRECTOR OF LEGAL AID

First Respondent

15 and

16 THE HONOURABLE CLERK OF COURT

Second Respondent

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 22 **Appearances:**

Mr. Charles Miskin Q.C. and Mr. Alex
 Davies of McGrath Tonner for the
 Appellant/Applicant

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Ms. Heather Walker of the Attorney
 General's Chambers for the
 Respondents

28 **Before:**

Hon. Justice Cheryll Richards Q.C.

29 **Heard:**

24th March 2020

30 **Draft Judgment:**

9th April 2020

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HEADNOTE

*Legal Aid Law 2015 – Sections 24 and 38 - Complex case,
reasonableness of decision of the Director of Legal Aid, Section 29 -
Appeal against taxation of bills.*

JUDGMENT

1. This is an appeal by Counsel for the Appellant/Applicant Kody David Zander (hereinafter “the Appellant”) for re- taxation of three bills of costs¹ pursuant to s.29 of the *Legal Aid Law* 2015 together with an appeal against a refusal of reconsideration pursuant to s.38 of the said Law. This judgment is primarily in relation to the latter matter which seeks reconsideration of the Director’s decision to refuse payment to Lead Counsel at a rate above the standard legal aid rate.

2. The background to the matter is as follows. On the 25th October 2019, Junior Counsel who is a listed attorney² wrote to the Legal Aid Office foreshadowing an application to be made on behalf of the Appellant who was then still endeavouring to secure private funding. The letter indicated that the Appellant had been recently added as the fifth defendant to Indictment Nos. 81, 82, 83, 84 and 92 of 2019 and that the trial was due to commence in the Grand Court on the 18th November 2019.

¹ Fee Notes 31563 and 31643 for Junior Counsel and Fee Note dated 27th December 2019 for Lead Counsel.
² Section 2 and 7 of the Legal Aid Law, 2015

1 3. By application made on the 6th November 2019, the Appellant applied for the grant of legal
2 aid in respect of criminal proceedings on the said indictment. The application was made on
3 the basis that although he had initially self-funded, the closure of his business following
4 arrest, interview and charge for offences of money laundering had left him without a source
5 of income. The letter from Junior Counsel which accompanied the application sought
6 approval for the appointment of leading Counsel, gave a rough estimate of the work required
7 for trial preparation and provided further details to the Director as follows:

- 8 i) Counsel's firm had been instructed by the Appellant as at the 20th June 2019.
9 ii) The firm had represented the Appellant over the course of five interviews
10 between 20th June and 31st August 2019.
11 iii) The Appellant was formally charged on the 6th September 2019.

12 It was also stated therein that:



"The Department of Legal Aid will be aware of the nature of the litigation. It is of a complex nature ... the papers are voluminous, running to thousands of pages of evidence and thousands more of unused material. There may yet be more material that will be inspected, subject to any applications for disclosure of material. The case against Mr. Zander is fundamentally different to that against the other defendants. His alleged role involved the re-packaging of gold within the Cayman Islands after arrival in a private jet piloted by the other defendants with the remaining two as passengers."

22 4. On the 8th November 2019, Counsel advised the Director of Legal Aid that an overseas Lead
23 Counsel had been identified. This was followed by further correspondence on the 13th
24 November 2019 advising of the urgent need for a response given the proximity of the trial

1 date. On the 13th November 2019, the Office replied seeking information as to the details of
2 previous invoices during the self –funding period and the source of funds.

3
4 5. On the 14th November 2019, the Appellant was granted a legal aid certificate for Junior
5 Counsel only, effective as at the date of his application and with an initial cap of \$20,000.00,
6 together with an undertaking to confirm additional funding once approval was given by the
7 Court Administrator. His application for the grant of legal aid for leading Counsel was
8 refused. In explaining this refusal, the Director stated that it was accepted that the
9 Appellant’s case is “slightly different” from the other defendants but that, upon review of
10 the facts, the matter did not appear to be complicated and should be well within the
11 capabilities of Junior Counsel. The Director expressed the additional view that Counsel may
12 benefit from the initial arguments made in the case by the other defendants as the issues were
13 significantly common to all regarding the interpretation /comparison of the laws.

14
15 6. On the 14th November 2019, Counsel applied for re-consideration of this decision. The
16 application made reference to the difference between the Appellant’s case and that of the co-
17 defendants and stated that the relevant documents relating to his case are voluminous and
18 the issues are separate.

19
20 7. On the 15th November 2019, the application for re-consideration of the refusal of legal aid
21 for leading Counsel was refused. The Director again stated her belief that the case of the
22 Appellant was not complex in nature and was within Junior Counsel’s capabilities.



1 8. On the 19th November 2019, by Order of the Court, the appeal against the refusal to grant a
2 certificate was allowed. The Court set aside the Director's refusal of the application to extend
3 the Appellants' certificate to cover leading Counsel. The appeal in relation to the back-dating
4 of the certificate was adjourned generally.

5
6 9. The Court's findings on the appeal included that the Crown's case against the Appellant was
7 materially different from the case against the other co-defendants and that the Director's
8 finding that his case was only slightly different from that of the others was unreasonable.

9
10 10. On the 20th November 2019, The Director issued a legal aid certificate in respect of the
11 Appellant with an effective date of 19th November 2019. It was, *inter alia*, in the following
12 terms:

13
14 *"The terms of engagement for the Lead Counsel is at the standard hourly legal aid*
15 *rate - \$160.00(KYD) and capped initially at \$20,000.00....*
16 *This sum (\$20K) will be reviewed and increased once the overall review of the*
17 *matter is completed with the Administrator who must approve all funding over*
18 *\$20K."*
19

20 11. Disbursements were allowed additional to fees, to include airline travel, accommodation and
21 car rental costs as well as immigration and standard disbursement fees.

22
23 12. In the interim, foreign Queens Counsel who had been initially approached was no longer
24 available. Lead Counsel who is now on record was approached. He had previously been
25 involved in the matter, having represented another defendant at the long form preliminary



1 inquiry in which he had taken the lead role in making submissions on the point as to the
2 construction of the Proceeds of Crime Law.

3
4 13. The trial was due to commence on the 25th November 2019, having been postponed from the
5 18th November 2019 at the request of Junior Counsel for the Appellant and then to the 2nd
6 December 2019 at the request of newly appointed Lead Counsel. The trial began on the 3rd
7 December 2019.

8
9 14. By letter dated the 5th December 2019, Junior Counsel sought an amendment to the
10 certificate. The application was made pursuant to s.24 (4) of the Law for an uplift in the
11 hourly rate for leading Counsel from the standard rate of CI\$160.00 to \$250.00 per hour.
12 The application was made on the basis that, as the preparatory work progressed, it became
13 apparent that the complexity of the case in respect of the Appellant was greater than first
14 envisaged. It was explained that his case involved very large amounts of business
15 documentation and that there was a large amount of paperwork among the unused material
16 which had to be analysed. Counsel relied on eight specific items in support as follows:

- 17 i) Large amounts of late documentary disclosure made by the Crown.
18 ii) Detailed analysis of historic precious metal transactions.
19 iii) Disclosure application to be made re documents and computers seized from
20 the Appellant's premises.
21 iv) Greater amount of work compared to other defendants because of business
22 documentation.



1 v) Change of circumstances brought about by the Prosecution's opening note
2 which clarified the specific documents to be referenced against the
3 Appellant.

4 vi) Refusal by the Crown to provide in a timely fashion, a copy of seized
5 material which hampered preparation of the defence case.

6 vii) A pending public interest immunity application which may raise further
7 issues of law.

8 viii) The reliance by the Crown on the complexity of documentation as equating
9 to a deliberate act of deceit by the Appellant.

10


11 15. Counsel also stated that the difference in documentary volume in the case against the
12 Appellant compared to the case for the other defendants and the extra work required within
13 a short time frame justified an increase in the standard hourly rates paid to leading counsel
14 and that :

15 *"In order to reflect the necessary analysis of a very large number of*
16 *documents, dealing with complex transactions between multiple companies in*
17 *numerous jurisdictions ... both leading and junior counsel have had to work*
18 *far beyond the expected thresholds in legal aid cases. Leading counsel's great*
19 *experience in the field of proceeds of crime law has been instrumental in the*
20 *analysis of the case legally and factually."*
21

22 16. A request was also made for an increase in the \$20,000.00 cap on the certificate and an
23 increase in the daily cap of 10 hours on the basis that further preparatory work required to
24 be carried out in addition to full days in Court. Confirmation was also sought that the case is

1 deemed complex pursuant to s.24(2) of the *Legal Aid Law* and that the 10-hour daily limit
2 would not apply, being unsuitable in the circumstances of the case.

3
4 17. On the 12th December 2019, Lead Counsel wrote to the Director, attaching his work log up
5 to that date and a note for taxation in which he stated *inter alia* that:-

6  *“These matters (together with the issue of law-see below) justify, I respectfully*
7 *submit, the description of this case as serious “fraud” and may be reasonably and*
8 *properly described as “complex” as that term is used in the Legal Aid Law. Given*
9 *all the circumstances the proper instruction of a senior foreign QC (over 20 years*
10 *in that rank with recognised lengthy experience in financial crime and proceeds of*
11 *crime law) in turn justifies a modest enhancement of the hourly rate.”*

12
13
14 18. On the 12th December 2019, the Director responded to Lead Counsel advising that a decision
15 had been made that as the trial was due to break on or about the 19th December 2019, all
16 billing would be dealt with at that time. It was recommended that the work log be updated
17 as at that date before submission to the Taxing Officer.

18
19 19. On the said date, the Director also responded to the 5th December 2019 letter from Junior
20 Counsel with an assurance that the cap on fees for Counsel would be increased and stated as
21 follows:-

22 *“We were recently advised that the trial may take longer than originally expected*
23 *and that caused some pause in our deliberations. We undertake that Counsel (and*
24 *Lead Counsel) will be fairly compensated **at the standard rate** for the reasonable*
25 *work undertaken in this matter. We seek that you continue to diligently keep track of*
26 *the times at court and preparation etc. and outline the same in your bill of costs.*

27
28 *However, taking into account the issues, hearing dates etc., seem to be varying*
29 *constantly, we propose to take an overall review of the matter after the first part of*



1 *the trial is completed on the 20th December 2019.*" (Emphasis as contained in
2 correspondence.)
3

4 20. On the 18th December 2019, Lead Counsel submitted an updated bill and a note for taxation
5 purposes which at paragraph 14 indicated his understanding that there would be a complete
6 review of the case at that stage and reiterated his submission that the circumstances justified
7 a modest enhancement of the hourly rate. Counsel also noted that the matter involved an
8 important point of law which required extensive further research in addition to that done for
9 the purpose of the preliminary inquiry.
10

11 21. By letter dated 20th December 2019, Counsel advised the Director of the reason for certain
12 printing costs incurred, of the total page count of printed materials consisting of Crown and
13 Defence documents (15,551 pages) and of the fact that the case had been deemed complex
14 by the Court for the purpose of s.16 of the Judicature Law (2017 Revision) which had led to
15 the selection of a twelve rather than seven member jury.
16

17 22. On the 4th February 2020, taxation certificates were issued in respect of the three bills
18 submitted by both Counsel for the period up to 27th December 2019.
19

20 23. By letter dated 4th February 2019, Counsel sought re-consideration of these taxation
21 certificates pursuant to s.37 of the Law. Counsel also sought reconsideration of the decision
22 not to increase the hourly rate for Lead Counsel as had been initially requested in the 5th
23 December 2019 letter.

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24. On the 13th February 2020, the request for reconsideration of the rate for Lead Counsel was refused with the Director referencing the “numerous correspondence” on the matter and stating that the request to revisit/amend the legal aid rate to \$250.00 per hour instead of \$160.00 was deemed to be unacceptable and unreasonable. The Director also referenced the 12th December 2019 response which indicated fair compensation at the standard rate and stated that:



“ Mr. ... QC subsequently submitted his bill of costs on the 19th December 2019 and quoted the standard rate in his bill of costs (last page). We see this as acceptance of the standard rate provided. The bill of costs was subsequently taxed on the 31st January 2020.

The legal aid rate of \$160.00 per hour is deemed fair and reasonable for this matter having regard to all the circumstances. The negotiations of a rate or fixed contract for complex matters should be dealt with in advance of the engagement and certainly not at this stage. The Legal Aid Department has not contemplated or budgeted for such a request and the same is deemed improper at this stage.”

The Legal Provisions

25. Section 38 of the Legal Aid Law 2015 provides that an applicant or an assisted person may appeal to a judge in chambers where:

- (a) he is refused a legal aid certificate;
- (b) legal aid is varied, suspended or withdrawn;
- (c) the Director makes an order under section 30 (1) or a direction under section 30 (2); or
- (d) the Director refuses an application for an exemption under section 31.

1 26. The appointment of foreign counsel as in this case is governed by s.21 (3) and (4) of the
2 Legal Aid Law 2015 which provide as follows:

- 3 (3) *The Director shall not approve the engagement of foreign counsel to*
4 *conduct any legal aid case unless such case is a complex one and it is not*
5 *possible to assign the services of a generally admitted attorney-at-law*
6 *because -*
7 (a) *every reasonable effort has been made to obtain the services of a*
8 *listed attorney-at-law for the assisted person; and*
9 (b) *there is no generally admitted attorney-at-law on the Islands who is*
10 *willing and able to advise or represent that person.*
11
12 (4) *For the purposes of this section, "foreign counsel" means an attorney-at-*
13 *law of a Commonwealth jurisdiction who is engaged from outside of the*
14 *Islands to undertake legal aid services in the Islands pursuant to this Law.*
15

16
17 27. Section 24 of the Law provides for the contracting of legal services in complex cases and is
18 in the following terms:

- 19 (1) *The Director may procure, by contract, legal aid services on behalf of*
20 *assisted persons in certain criminal cases which he determines, in*
21 *accordance with subsection (2), to be complex legal aid cases.*
22
23
24 (2) *In determining whether a matter is a complex legal aid case the Director*
25 *shall take into account whether the case satisfies at least three of the*
26 *following criteria -*
27 (a) *the commission of the offence to which the case relates is likely to*
28 *give rise to national publicity and widespread public concern;*
29 (b) *a successful defence to the charges requires highly specialist*
30 *knowledge;*
31 (c) *the elements of the offence are of a technical nature and a successful*
32 *defence requires an attorney-at-law with the relevant technical*
33 *legal knowledge;*
34 (d) *the elements of the offence involve an international dimension;*
35 (e) *a successful defence against the charges requires a combination of*
36 *legal, accountant, investigative and other expert skills;*
37 (f) *the charges are based on allegations of terrorism;*



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- (g) *the offence attracts a sentence exceeding ten years;*
- (h) *the offence is of a violent or sexual nature involving multiple victims; or*
- (i) *the offence involves complex financial or legal transactions or records.*

(3) *The fees and costs attached to the proceedings in complex legal aid cases shall be paid in accordance with the terms of the legal aid contract negotiated between the listed attorney and the Court Administrator and granted under this section.*

(4) *The Director, with the approval of the Court Administrator, may, on receiving a written request from the attorney-at-law assigned under the contract indicating the reasons, allow for an upward adjustment in the agreed fees and costs if, during the conduct of the criminal or civil proceedings, there is a material change of circumstances which is likely to prejudice the quality of the legal aid representation and which makes it unreasonable to enforce the terms of the original legal aid contract.*



(5) *An attorney-at-law in a complex legal aid case shall, at such intervals as may be specified in the contract, provide the Director with such written evidence as the Director may reasonably require in order to permit the Director to ensure that the estimates of time and costs under the legal aid contract are being met.*

(6) *Sections 25, 26 and 27 do not apply to complex legal aid cases.*

THE SUBMISSIONS

28. The principal submissions of Counsel on behalf of the Appellant include that the case is a complex one such that the provisions of s.21(3) and s.24 (2) of the Law are engaged. Further that the original rate which was imposed was not negotiated and in any event there is provision for upward adjustment.

1 29. In reply Counsel on behalf of the Respondents makes principal submissions as follows:

- 2 i) Section 38 of the Law provides for a right of appeal in specific circumstances.
3 There is no right of appeal in respect of an application for a rate adjustment.
4 Even if there were, the Court's powers are limited to remitting the matter for
5 reconsideration by the Director.
- 6 ii) There is no statutory requirement imposed on the Director to procure services
7 on behalf of assisted persons by way of a contract. This method is discretionary.
8 Thus it is open to the Director even in cases falling within s.24 (2) of the Law
9 to issue a legal aid certificate outlining the terms by which assistance is to be
10 provided. Alternatively it is for an Applicant to seek to negotiate terms.
- 11 iii) It was reasonable for the Director to have assumed that the certificate issued on
12 the 20th November 2019 had been accepted by both Counsel.
- 13 iv) The Director properly treated the representations subsequently made as a request
14 for reconsideration.
- 15 v) The quantity or volume of work involved in a case may be dealt with by the
16 Director in a number of ways.
- 17 vi) There had been no material change in circumstances.
- 18 vii) The Director acted reasonably in all the circumstances.



20 **SECTION 38 OF THE LAW**

21 30. Counsel for the Respondents submitted that this is not an appeal which the Court can
22 entertain, that the grounds under s.38 of the Law and in other areas of the Law are specific

1 and there is no possibility of an appeal on the level of the hourly rate. In addition to appeals
2 in respect of the refusal or variation of a certificate, s.38 provides for appeals with respect to
3 charges against land recovered and refusals of exemptions of property under s.31 of the Law.
4 Under s.29, there is a specific provision for appeals against taxation of a bill of costs. Counsel
5 notes that this is not an application to be considered in terms of denial of justice.

6
7
8 31. Junior Counsel for the Appellant submitted that the matter involves a refusal of a legal aid
9 certificate following an application for a variation of a certificate such that the direct appeal
10 provisions apply. On a plain reading of the wording of the Law, this is doubtful. The refusal
11 of the certificate for Lead Counsel had been appealed to the Grand Court in November 2019
12 and the certificate issued on the 20th November 2019 was not varied by the Director neither
13 was it suspended or withdrawn. This is really not much more than an argument as to the
14 reasonableness of terms and the Respondent is likely correct that the better approach would
15 have been for the Appellant to proceed by way of judicial review proceedings. I can however
16 see that a refusal of requested terms could in certain circumstances be tantamount to a refusal
17 of a certificate and that interest of justice considerations would apply. I propose that s.38 be
18 given a broad construction and to consider this matter by way of this route.

19
20 32. Lead Counsel for the Appellant indicated acceptance of the submissions of the Respondents
21 that at best, even by way of appeal, the argument on this case is akin to that in the said
22 proceedings and is to be determined on the basis of the principles set out in the case of



1 *Associated Provincial Pictures House Ltd. v. Wednesbury Corporation*³. Thus it is accepted
2 that this Court ought not to impose or suggest an hourly rate, such being a matter for the
3 discretion of the Director. It is submitted that in line with the said principles, it would be
4 appropriate to remit the matter to the Director with expressed views as to how it should be
5 approached.

6
7 33. In a recent legal aid appeal case⁴, I expressed the view that the Law does not contemplate
8 that matters such as rates for the accommodation of foreign Counsel should be subject to
9 appeal outside of the taxation process. It is my view that such matters are within the
10 discretion and judgment of the Director and that the Court should be hesitant to interfere in
11 such matters by allowing the invocation of the appeal process by some circuitous route. I
12 recognise that there may be an extreme and rare case, where a decision on such a matter
13 might be tantamount to a refusal of a legal aid certificate such that there is impact on the
14 interests of justice - but that this is not likely to be the case in the usual course.

15
16 34. With respect to the instant case, s.24 of the Law provides that the procurement of legal aid
17 services in complex legal aid cases is a matter for the Director. By s.7(5) of the Law, the
18 Director is subject to the direction of the Court Administrator and is required by s.8 (1) to
19 seek authorisation for any expenditure in excess of twenty thousand dollars. Section 24(3)
20 is clear that fees are payable following negotiation of a contract between the listed attorney
21 and the Court Administrator and as granted under that section.

22

³ 1948 1 KB 223

⁴ *R. v. Juan Gonzales Infante*- 30th December 2019



1 35. In my view the Law, structured as it is, does not contemplate that the Court in the normal
2 course is to hear appeals and *determine a rate*, if there is a disagreement between the Director
3 and a listed attorney as to the level of fees offered and the level of fees sought. These are
4 matters for the discretion of the Director and the give and take of negotiations with both sides
5 acting reasonably and in good faith.

6
7 36. I accept the submissions of Counsel for the Respondents and Lead Counsel for the Appellant
8 that in so far as the Court may seek to opine on this matter, any such opinion is to be limited
9 to observations on the reasonableness of the decisions of the Director.

10

11 **COMPLEXITY OF THE CASE**

12 **Submissions of the Appellant**



13 37. With respect to s.24 (1) of the Law, Lead Counsel for the Appellant submitted that the matter
14 was complex in accordance with seven of the nine criteria, set out in s.24 (2). The only two
15 which did not apply were (f) and (h). By s. 24(6), the ten-hour-a-day cap does not apply to
16 complex legal aid services. Counsel submitted further, that by virtue of s.21 of the Law, it
17 follows that a decision must have been made that this case is complex for the purpose of the
18 Legal Aid Regulations.

19

20 38. Counsel for the Respondents did not seek to argue otherwise, but urged that in responding
21 to the complexity of the case, the Director could reasonably respond in alternative ways.

22

1 39. I accept that the case was complex as defined by s.24(2) for almost all the reasons set out
2 therein. The case involved offences of a technical nature, with complex financial records and
3 had an international dimension. It was likely to give rise to national publicity, and required
4 the assistance of defence counsel with specialised knowledge as to money laundering
5 offences which attract sentences exceeding ten years. The point of Law to be argued was
6 also a factor which added to its complexity. It was therefore incumbent on the Director to
7 treat with the matter in accordance with the provisions in that section.

8
9 40. Lead Counsel for the Appellant submitted that the terms which were imposed in the instant
10 case were without negotiation and that the circumstances did change. He argued that if there
11 is a contract, in relation to this matter, the terms are in the certificate imposed. There could
12 have been very little consideration of the complexity of the matter. The Director could not
13 have known any more about the case than she did. Counsel referred to s.24(4) which provides
14 that if there is a material change in circumstances which is likely to prejudice the quality of
15 the legal aid representation and which make it unreasonable to enforce the terms of the
16 original legal aid contract, an upward adjustment in the agreed fees may be approved by the
17 Director. He urged that in circumstances where there was no negotiation, no contract was
18 entered into and terms were imposed by the Director, that such terms are susceptible to
19 enhancement.

20
21 41. In support of his argument, Counsel noted that the trial had been initially slated to last five
22 weeks and, instead, lasted some thirteen weeks and involved one very important point of
23 law. The point was a highly complex one involving extensive research in the



1 Commonwealth, the United Kingdom, the United States of America and the Cayman Islands.

2 This being a novel point, the research was original and the position rendered clearly different
3 from other cases. It is said that the Director may not have appreciated all these matters at the
4 time of her decisions and that she fell into error by the 12th December 2019 when matters
5 were outlined to her or at least prior to reconsideration of the matter in February 2020.

6
7 42. Junior Counsel for the Appellant submitted that a material change in circumstances must re-
8 open the ability to renegotiate the terms. Lead Counsel said that this was not a matter which
9 could have been renegotiated by Junior Counsel, that given the short time between 20th
10 November and the 4th December, 2019 and the ongoing preparations for the case, the 5th
11 December 2019 was the first opportunity to raise the issue of an uplift to the rate after seeing
12 the case papers.



13
14 **Submissions of the Respondents**

15 43. Counsel on behalf of the Respondents submitted in reply that the central issue is whether the
16 initial decision to award the certificate to Lead Counsel at the standard rate and the
17 subsequent decision to maintain the certificate at that rate was reasonable in all the
18 circumstances. Counsel submitted that it was within the range of reasonable responses
19 considering that one effect of a finding of complexity would be to increase the billable hours.
20 It does not follow that a finding of complexity would necessarily lead to a grant at more than
21 the standard rate. In the absence of an attempt to negotiate it was reasonable for the Director
22 to set the rate at the standard of \$160.00 per hour. Additionally, from her perspective this

1 rate had been accepted. The first that she knew that it was not was on the 5th December 2019
2 after the trial had begun.

3
4 44. Counsel also submitted that the onus was on the Appellant to detail the reasons for the
5 request for an uplift. The 5th December 2019 letter referred mainly to volume of work. It is
6 difficult to find therein reference to specific complexities. The point as to difference with the
7 case against the co-defendants had already been ruled on by the Grand Court and the Director
8 would have thus been aware of this. In response to this 5th December letter, the Director
9 offered reassurances that the overall cap would be reviewed at the Christmas Break. At the
10 time that the Director made her decision on the 12th December 2019, no points had been
11 submitted in relation to the complexity of the novel point.

12
13 45. Counsel argued that quantity of work is not the same as the complexity of the work and can
14 properly be dealt with by looking at the overall cap. The Law is silent as to how volume is
15 to be addressed. Claims for more than 10 hours per day were in fact allowed in respect of
16 the bills which had been submitted in December 2019 and taxed in January 2020.

17
18 46. Counsel also stated that Counsel for the Appellant would have known from the outset that
19 this was a document-heavy case as evidenced by the letter of the 6th November 2019 and that
20 the point as to the construction of the Proceeds of Crime Law had already been developed
21 for the purpose of submissions in the Summary Court on the preliminary inquiry, there was
22 nothing new and no material change.

23



1 47. The certificate of refusal of reconsideration records all the matters to which the Director had
2 regard. At this point Director had all the information and submissions made up to the 13th
3 February 2020. A final determination was made that the request would be dealt with by way
4 of an increase in the overall cap.

5 **Discussion**

6 48. Both sides referred to the judgment of the Grand Court in the case of *R. v. Watson*⁵. Junior
7 Counsel for the Appellant drew the Court's attention to the similarities between the instant
8 case and that of *R. v. Watson* with respect to issues of complexity. He asked that the Court
9 note the time scale for preparation in that case (May to October), in comparison to the
10 extreme urgency in this case which required case preparation to be undertaken within a short
11 time frame in order to be ready for the start of the trial.

12
13 49. In the case of *R. v. Watson* the Court considered an appeal against the refusal of the Director
14 to extend the limit of a grant of legal aid from \$15,000.00 and to extend the certificate to
15 allow for his representation by Queens Counsel in respect of an appeal after trial.

16
17 50. The Court concluded that the matter was complex within the meaning of s.24 (2) (b) (c) and
18 (i) and also accepted that novel or difficult questions of law are a contributory factor of
19 complexity. The Court stated:

20 *"However the classification of the case as complex does not necessarily mean that the*
21 *applicant's request for open-ended additional funding and the appointment of Queens*
22 *Counsel must be met. Section 24 (1) simply authorizes the Director to procure legal aid*

⁵ LACR0194/2016 - 16th June 2017



1 *services by contract for complex cases leaving the issue of the seniority or expertise of*
2 *the lawyer to the evaluative judgment of the Director.”*
3

4 51. The Court determined that the matter should be referred back to the Director in keeping with
5 s.24 but that special directions should be given. These included:

6 *“The process will thus involve the negotiation of a reasonable sum, having regard to the*
7 *complexity of the case, to be engaged by contract entered into with ... as the instructing*
8 *attorney on behalf of herself and the Queen’s Counsel to be engaged. In the course of*
9 *those negotiations, the Director will of course have regard to the cap imposed by section*
10 *8 (1) but, with the prior written approval of the Court Administrator and Clerk of Court,*
11 *may well also have regard to the legal fees allowed in prior complex cases, including*
12 *the fact that under section 23 (1) of the Law, the rates have been increased from \$135*
13 *to \$160 per hour. The preference for local leading counsel expressed in section 21 (3)*
14 *of the Law, should also be observed.”*
15

16 52. In the instant case, no negotiation occurred. Very likely this was due to the pressure of time
17 on both sides. The Appellant had delayed applying for legal aid, while he endeavored to
18 make arrangements to secure private funding. On the 20th November 2019, the day following
19 the Grand Court appeal hearing, the commencement of the trial was imminent. The Director
20 issued a certificate to both Counsel promptly and in undoubted good faith. This was a matter
21 with which she would have been familiar from the stage of the preliminary inquiry, from
22 previous grants to other Counsel representing the four co- defendants and from the details
23 provided to her by Counsel on behalf of the Appellant in the letter of application of 6th
24 November 2019.

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26 53. The parties on this appeal point to the absence of a contract. It is accepted that there was no
27 formal contract drawn up between the Director and Counsel. There was however the issue
28 of the certificate detailing the terms of engagement as set out above.



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2 54. The issue of this certificate was followed by the apparent acceptance of its terms by the
3 commencement of work in representing the Appellant. The start of the trial was postponed
4 in order to allow for further preparation time.

5

6 55. Where there are matters involving the appointment of foreign counsel in respect of a complex
7 case as defined by s.24, the Director may wish to consider whether by extension of the
8 guidance provided by the Court in the case of *R. v. Watson* there should be another
9 documentary step in the process to record the nature of the complexity identified, and to
10 reflect the negotiation process by documenting the rate offered in respect of the case and
11 obtaining the response of foreign Counsel to that rate before a certificate is issued.

12

13 56. In the absence of such a step, one possible approach could be for this matter to be remitted
14 to the Director for negotiation and agreement as to a reasonable sum. This does not appear
15 to be appropriate in a case where as the 5th December 2019 letter makes clear, as at the 20th
16 November 2019, Counsel had neither sought nor intended to enter into negotiations on the
17 matter. Counsel's letter indicates that it was upon the progression of the preparation of the
18 case including receipt of large bundles of additional evidence that "*it became apparent that*
19 *the complexity of the case is greater than first envisaged.*"

20

21 57. Was there a material change in circumstances after the 20th November 2019 such that s.24
22 (4) of the Law is engaged? In my view, this is the question at the heart of the matter. Counsel
23 for the Respondents argued that s.24 (4) is not engaged where there is no formal written



1 contract as envisaged by the section. It is difficult to accept this submission. It does not take
2 account of the factual position and the terms of engagement which had apparently been
3 accepted, however informal that acceptance may have been. The issue for the Director's
4 consideration was whether following the grant at the standard rate and the acceptance
5 thereof, there had been a material change in circumstances which allowed for an uplift.

6
7 58. I have taken note of the wording of the response provided by the Director by e-mail of the
8 12th November 2019 and the wording of the certificate on reconsideration in February 2020,
9 which are both referenced above. I do have some concern as to whether the Director applied
10 the appropriate test under s.24(4). Aspects of the latter response appear to focus on the failure
11 to negotiate in advance of the engagement and the apparent acceptance of the standard rate
12 following the 12th December 2019 response. Counsel had in fact enclosed a note dated 18th
13 December 2019 together with the bill which indicated that an uplift was still being sought.
14 Additionally as the Law does allow for an uplift to be requested in certain circumstances, the
15 stage at which the request was made cannot be deemed improper as stated in the Director's
16 February response.

17
18 59. I note however that in the first paragraph of the reconsideration response, the Director stated
19 as follows:

20 *"Further to the review of counsel's correspondence dated 4th February 2020, the*
21 *other numerous correspondence on this matter relating to costs/other issues and*
22 *taking into account this matter as a whole, the request to revisit/amend the legal rate*
23 *to \$250.00 per hour (instead of \$160.00) is deemed unacceptable/unreasonable."*
24



1 60. While the Director may not have used the words “material change in circumstances”, the
2 Director was in effect asking whether, given all that I now know about this matter in February
3 2020, should the rate be revisited or amended? Her conclusion was that it should not.

4

5 61. Was the Director’s refusal to grant an uplift in fees reasonable?

6

7 62. In order to consider this question I have examined as carefully as I can the circumstances as
8 set out in the material produced before and after 20th November 2019. I have set out some
9 of the points raised in detail below.

10

11 **Before 20th November 2019**

12

13 Preliminary Inquiry -

Point of construction on Proceeds of Crime Law.

14

15 6th November 2019 letter-

Complex nature of litigation. Papers voluminous, running to thousands of pages of evidence and thousands more of unused material, may yet be more material that will be inspected subject to any applications for disclosure of material.

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14th November 2019 letter –

Case against Defendant completely different from other defendants, Crown are putting the case on the basis that he masterminded the shipping operation with companies in Curacao and Panama. The relevant documents relating to his case are voluminous and the issues are separate.

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Application to be made in relation to material evidence from the business of which only the Defendant has material knowledge.

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19th November 2019-

Court Ruling -Case for the Defendant materially different from that against the other four co-defendants. Lead Counsel to be appointed.

20th November 2019-

Certificate for the engagement of foreign lead Counsel granted.

After 20th November 2019

5th December 2019 letter-

Complexity of case is greater than first envisaged. Case against Defendant involves very large amounts of business documentation seized by the Police.

Statements and exhibits bundles served by the prosecution already run to over 4,800, however many more pages are to be analysed by the defence in unused material upon receipt.

Exceptional effort has been expended in preparation of the case, beyond that expected at the commencement of the case, and more is yet to come, upon receipt of the Defendant's unused seized business documentation and laptop computers.

The case involves matters of considerable national publicity and public concern, multiple international jurisdictions and customs regulations, sentence of ten years or more, requires specific expertise.

Business records and methods involved in the material transactions are of great importance and must be robustly analysed by reference to the business practice of the Defendant and the industry at large.

A bundle of defence material will have to be prepared in addition to those already served by the Crown in order to conduct the case for the Defendant.



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The material served by the Crown requires exploration of the business practice of the Defendant including all previous transactions in forensic detail.

Consideration of material is essential as the Crown alleges that he deviated from his usual business practice.

Extent to which Crown rely on this became apparent upon receipt of draft Opening Note of Crown on 28th November 2019.

Following the grant of legal aid on this case, the necessary rate and volume of work to proceed towards a trial timetable has been exceptional, the other parties have had many weeks to prepare fundamentally simpler cases than that of the Defendant who has had only a short time with the assistance of leading counsel.



Given the difference in documentary volume compared to the case of the other defendants, the extra work required and extremely short time with which to prepare matters.

Necessary analysis of a very large number of documents, dealing with complex transactions between multiple companies in numerous jurisdictions.

Note of 12th December 2019-

Prosecution case is that the Defendant played a pivotal role in the development of the scheme from its origins in late 2018. It is more like a serious fraud case examining a course of conduct over several months and dependent on inferences to be drawn from his actions and the extensive documents.

Documentary case both for and against him consists of a minute examination of air transportation and customs documents with a mass of emails of which access has only been obtained in the last two days. It requires the reader to master the details of (a) national and international air



travel freight (to understand whether or not his conduct was out of the ordinary) and (b) the business of buying and selling, importing and exporting unrefined gold. It also requires expertise in the international gold markets and the effects of sanctions levied by the USA and other countries.

Point of construction on Proceeds of Crime Law.

Note of 18th December 2019-

Search of unused and used material and obtained further materials from the defendant for the purpose of compiling two extensive defence bundles containing documents that are being given witness by witness to the jury.

Point of construction on Proceeds of Crime Law.

Letter of 20th December 2019 -

The specific page count of the various bundles served by the Crown - 7,647 pages, Bundles produced on behalf of Defendant 304 pages.

63. Section 24(3) requires in my view, a change of some substance or significance. The above tabulation indicates that there was much similarity in the representations made both before and after November 2019 albeit that more detail was subsequently provided. Prior to the 20th November 2019, the circumstances were that this case involved a point of law on the construction of legislation, that it was a document heavy case in respect of the Appellant and that there were more documents to come. Indeed this fact was included as part of the basis for the application for leading Counsel. Prior to the 20th November 2019, the circumstances were that the case against the Appellant would center on his role in the shipments and would involve business documents in relation to his company. Prior to the 20th November 2019, the circumstances of the case against the Appellant involved the gold trade with an international

1 dimension. I cannot see that any of these could amount to a change in circumstances after
2 the 20th November 2019, much less a material change in circumstances.

3
4 64. I would have expected that the opening note provided by the Crown would have narrowed
5 the focus on which documents might be relevant, rather than serve to increase the burden of
6 documentary search. Similarly I would not have expected that a public interest immunity
7 application, given the limited nature of the *inter partes* aspect of such an hearing and the
8 well-known guiding principles would have imposed a significant burden on experienced
9 advocates such as to amount to a material change in circumstances.

10
11 65. The main differences between the two periods appears to be the shortened preparation time
12 before the start of the trial and the extent of the volume of documentation. The increase in
13 volume of documentation cannot be said to have been outside the realm of anticipation.
14 Indeed it was foreshadowed in the 6th November 2019 letter.

15
16 66. As to the shortened preparation time, the start date of the trial was known. The certificate
17 was accepted with knowledge that there would be *limited preparation time in a document*
18 *heavy case*, given the start date for the trial and the pressure for this to be maintained, because
19 of the circumstances of the co-defendants, two of whom were in custody and all of whom
20 are foreign nationals.

21
22 67. While I do have some sympathy for the position of Counsel for the Appellant, accepting as
23 I do their submissions as to the hard work which had to be and was undertaken in a very





1 short space of time, I find it difficult to conclude that the circumstances relied on as
2 constituting material change, to wit, *limited preparation time in a document heavy case* can
3 be so characterised.

4
5 68. Section 24 also requires that the material change be one which is likely to prejudice the
6 quality of the legal aid representation and which makes it unreasonable to enforce the terms
7 of the original legal aid contact. There is no issue raised as to whether there was likely to be
8 any prejudice to the quality of the legal aid representation.

9
10 69. I have considered the second aspect by posing the following question. Even if I am wrong
11 as to whether or not there had been a material change in circumstances, would it be
12 unreasonable to enforce the terms of the original legal aid contract where the contract was
13 not capped at the usual \$20,000.00 and the 10-hour daily claim limit did not apply? The
14 effect of the absence of caps means that Counsel would be able to claim for extended and
15 additional hours worked in dealing with the volume of documentary material. Enforcement
16 cannot be said to be unreasonable in such circumstances.

17
18 70. Having considered all the submissions made and on examining all the circumstances as best
19 as I am able, in my view, it would not have been unreasonable for a conclusion to be reached
20 that there was no material change in circumstances. It follows that I cannot conclude that the
21 Director's refusal to grant an uplift in the fee is unreasonable.

22
23 71. Finally, even if it is accepted that, despite the early representations made, the documents
24 were more extensive than initially thought or that the review and preparatory time needed

1 was much greater than initially contemplated or that the constraints as to the time for
2 preparation were also greater than anticipated, it cannot be said that the response of the
3 Director that such matters could properly be addressed on an overall time basis and by an
4 increase in the cap of \$20,000.00 and did not necessarily require an adjustment in the fee
5 was an unreasonable one. In this regard I accept the submissions of Counsel for the
6 Respondents. This is not a matter which requires to be remitted to the Director for re-
7 consideration of the decisions made.

8
9 72. The Director has already given the written assurance that both Counsel will be fairly and
10 adequately compensated and that the caps will not apply. I anticipate that the Director and
11 Taxing Officer within their discretion and within the margins of reasonableness, will ensure
12 that there is fair compensation for the volume of work undertaken.



13
14 **TAXATION OF BILLS**

15 73. The second aspect of this appeal is as to taxation of the bills referenced above. Section 29 of
16 the Law provides:-

- 17 (1) *If an attorney-at-law is dissatisfied with the amount allowed to him on*
18 *taxation under section 28 he may apply, within seven days of the issue of the*
19 *certificate of legal aid taxation, for his bill of costs to be re-taxed by a Judge.*
20 (2) *If an assisted person who is required to pay a contribution of at least three*
21 *quarters of the cost of his representation, is dissatisfied with the amount*
22 *allowed to his attorney-at-law on taxation under section 28 he may apply*
23 *within seven days of the date upon which the certificate of legal aid taxation*
24 *is served on him, for his attorney-at-law's bill of costs to be re-taxed by a*
25 *judge.*
26 (3) *Subsection (2) does apply to an assisted person who has been convicted of*
27 *an offence and ordered to pay a contribution towards the cost of his*
28 *representation pursuant to section 19.*

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- (4) *If the Financial Secretary is dissatisfied with the amount allowed on any taxation under section 28, he may apply within seven days of the date upon which the certificate of legal aid taxation is presented to him for payment, for the attorney-at-law's bill of costs to be re-taxed by a Judge.*
- (5) *When an application is made for a bill of costs to be re-taxed, the certificate of legal aid taxation issued by the Clerk of the Court shall be revoked automatically and shall not be payable by the Government.*
- (6) *An application for re-taxation of a bill of costs shall be in writing and shall specify those items of the bill about which the applicant is dissatisfied.*
- (7) *The judge shall re-tax the entire bill of costs, without regard to the decision of the Clerk of the Court.*
- (8) *The judge may require the attorney-at-law to produce the whole or part of his files relating to the proceeding or any part thereof.*
- (9) *Having conducted an initial review of the bill of costs, the Judge shall invite the attorney-at-law, the assisted person or the Financial Secretary or his representative, to attend before him in Chambers for the purpose of addressing him upon those items of the bill of costs about which the applicant is dissatisfied and any other items about which the Judge is not satisfied.*
- (10) *When re-taxing a bill of costs the Judge shall act in an administrative capacity and his certificate of legal aid taxation shall be final and conclusive.*

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74. I am required by the Law to apply my own judgment to these bills. I have considered the detailed submissions made by all parties, both written and oral. Junior Counsel does not challenge some disallowances made by the Taxing Officer, and agrees that in light of the prior directions to Attorneys given by the Second Respondent by Notice dated 20th August 2018, certain items of work are not recoverable on taxation in legal aid matters. He explained that the billing which is automatically issued by his firm should have recorded "not billable" against such items. Some hours were disallowed in December 2019 which should have been claimed in November 2019. He explained that these had been inadvertently omitted from the November billing.

1 75. The legal aid certificate did not authorize claims for travel time or work done in relation to
2 the legal aid appeal. By Regulation 21(3) of the *Legal Aid Regulations*, the Second
3 Respondent is authorised to disallow claims for unauthorised items. Lead Counsel explained
4 that given the imminent start date of the trial, he had been seeking to use every available
5 hour to prepare, including preparing while *en route* to the Cayman Islands.

6
7 76. Having reviewed each individual item disallowed in tandem with the representations made,
8 with respect to the claim of Junior Counsel by way of Fee Note 31563, I consider that an
9 increase of 3.5 billable hours is appropriate as having been reasonably and properly incurred.
10 In respect of Fee Note 31643, I consider that an increase of 9.6 billable hours is appropriate
11 as having been reasonably and properly incurred.

12
13 77. With respect to the Fee Note of Lead Counsel filed 27th December 2019, having considered
14 each individual item disallowed and the representations made, I consider that an increase of
15 15 billable hours is appropriate as having been reasonably and properly incurred.

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18 **Dated this the 21st day of April 2020**

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20 **Honourable Justice Cheryll Richards Q.C.**
21 **Judge of the Grand Court**