Neutral Citation No. [2023] EWHC 2197 (SCCO)

Case No: T20210426

SCCO Reference: SC-2023-CRI-000027

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30/8/23

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Roberts
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

KLARKS LAW LIMITED

Appellant

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been successful for the reasons set out below. I allow a further 59 pages of PPE in addition to those allowed by the Determining Officer and costs of £300.

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. At the hearing on 17 August 2023 the Appellant was represented by Mr Prior, counsel for the Appellant, and the Legal Aid Agency ('the LAA') were represented by Mr. Orde, an employed barrister.

3. The Appellant is a litigator (for the purpose of the scheme) who represented the defendant, Liam Roberts under a Representation Order issued in 2021, in proceedings before the Leicester Crown Court. The Defendant was charged possessing a Class B drug (cannabis) with intent to supply. The principal issue arising, as I understand it, was whether the Defendant was purchasing cannabis for onward supply. The Appellant was paid a cracked trial fee.

4. The PPE was assessed as 2,697 pages by the Determining Officer (of which 2,603 was in respect of electronic evidence). On appeal, 4,321 PPE is claimed. As part of the investigation into this allegation the Defendant's telephone was seized and the contents downloaded into a report in PDF format. It was uploaded in whole to the Digital Case System (DCS). No attempt was made to extract material from it. The Determining Officer considered that the other sections of the report were too peripheral to the case to merit inclusion within the PPE but allowed call logs, chats, contacts, emails and instant messages.

5. Prior to the hearing the LAA conceded a further 52 pages. A small number of further pages were conceded in the course of the hearing in part following clarification sought by Mr. Orde in his written submissions dated 31 July 2023.

The Legal Framework

6. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all —*
> *(a) witness statements.*
> *(b) documentary and pictorial exhibits.*
> *(c) records of interviews with the assisted person; and*
> *(d) records of interviews with other Defendants,*

which form part of the served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which —

(a) has been served by the prosecution in electronic form.
and
(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

7. As Holroyde J (as he then was) made clear in *SVS*, material which is, as he put it, only disclosed as unused material cannot be PPE. However, it is clear from the judgment that 'service' for the purposes of the regulations may be informal. 'Served' means served as part of the evidence and exhibits in the case and evidence may be served even though the prosecution does not specifically rely on every part of it.

8. It is clear however from the terms of Regulation 1(5) and the guidance set out above that it is not of itself enough for the material to count as PPE that it be 'served'. When dealing with the issue as to whether served material should count as PPE, Holroyde J, said this:

> *"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.*
>
> *If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".*

9. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

10. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e., those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*

"*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' <u>such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant</u>*." [my underlining]

11. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

"*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.

Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g., it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement.

Raw phone data where the case is a conspiracy, and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact.

12. In his decision Holroyde J, as he then was, also cited, with approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi* [2014] 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. <u>It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper.</u> So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining].

13. Even if material is not appropriately to be regarded as PPE, then it may be remunerated by a special preparation fee provided for in paragraph 20 Schedule 2 of the 2013 Regulations. A Special Preparation Fee is based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence other than that allowed as PPE (see too, *R v Sana* [2016] 6 Cost LR 1143).

Application to the facts in this case

14. Turning then to the different sections of the material in the download report which were the subject of the appeal. Log-entries, Bookmarks, Web history and Notes were conceded as part of the 52 page concession made in this appeal. As to the remaining matters, applying the approach that is set out above, my allowances are as follows:

- Summary Information. I think on balance, that summary information should be paid as PPE if only because it indicated that some material has been deleted. I accept that it would have to be looked at closely. Whilst reserving the position in other cases, but taking a pragmatic approach in this case, I allow these 3 pages.

- Calendar. These were all pre-loaded (including for instance Boxing Day Bank Holiday etc). I do not allow these as I do not think they required close consideration necessary for them to be regarded as PPE.

- Locations- in particular wi-fi locations. I understand that location was an issue in the case and the relevant evidence was not relied upon as part of the paper PPE. This was again not contested in the event, following the clarification sought by Mr. Orde. I allow 2 pages for this.

- Passwords. This section was not pursued and is not allowed. It did not in the event appear to have sufficient relevance.

- User Accounts – this was said to be relevant as showing that the Defendant only was using the phone, but as I understand it, there was no suggestion otherwise, so no more than a cursory review would have been required. Accordingly, I do not allow this material.

- Wifi networks. It is said that in this case consideration had to be given as to whether the Defendant was in a particular hotspot/network location to which the material in this location related. No separate material was served as PPE in respect of this point and I allow the 2 further pages in this section following clarification.

- Timeline. This is by far the most important element of the claim. It shows the dates and times of various activities and even details of messages. However the material, as Mr Prior accepted, essentially duplicates material that has been allowed elsewhere. It is a consolidation of material found in other sections placed in a chronological order For the reasons I gave in *R v Baptiste* SCCO Ref 189/18 the material in this section essentially duplicates material elsewhere. Mr Prior told me that as result of material on an old phone being picked up by the Defendant's new phone, particular care had to be taken to taken in considering the chronology. The essential point remains that the material could be viewed in both sections- even if in some instances it may be convenient to look at this in the Timeline. For the reasons I gave in *Baptiste* I do not think it is appropriate to make any allowance for this material here. To make an allowance for duplicative material as PPE would, to my mind, substantially distort the operation of the scheme.

15. I have borne in mind that this material was uploaded to the DCS which may not be the usual way that such material should be served. It may well reflect a failure to undertake the task of extracting relevant material, which might be the more usual way material such as this is dealt wit, but I do not think it means a wholly different approach is required. It is to be emphasised that I do accept that the material needed to be considered; it is just means that the material did not require the same level of scrutiny as material which is to be regarded as PPE. I quite accept that the material needed to be considered and checked generally but I think a special preparation fee would be appropriate for this and I will leave it to the parties to agree a timetable for an application for such a fee. along with the option of submitting a claim for special preparation for the remaining material served electronically.

16. The appeal has been successful, to the extent that I have allowed, on my calculations, an additional 59 pages the bulk of which was conceded in the appeal proceedings before the hearing. The success however is very modest particular against the additional pages claimed and as to the substantial element of the Timeline has been unsuccessful. This needs to be reflected in the costs order and I allow £300 only as a contribution the costs claimed.

COSTS JUDGE BROWN