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Case No: T20190555

SCCO Reference: SC-2023-CRI-000115

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 1 July 2024

Before:

COSTS JUDGE LEONARD

R
v
RIMON ALI

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

Appellant: **Hussain Solicitors**

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2. The Representation Order was made on 6 July 2019 and the 2013 Regulations apply as in effect on that date.

2. The graduated fee due to the Appellant is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"). The issue on this appeal is the appropriate PPE count.

3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, subsections (2)-(5), which explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 committal or served Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

The Background

4. The Appellant represented Rimon Ali ("the Defendant") in proceedings before the Crown Court at Birmingham. The Defendant was arrested while in the passenger seat of a car which contained cocaine, cannabis and drug dealing paraphernalia. He was charged with possession with intent to supply Class A and Class B drugs, to which he entered a plea of not guilty. His case was listed for trial on 17 December 2019 but was adjourned, and the case did not conclude until 7 June 2023, when the Defendant entered a plea to a lesser offence.

5. In the course of preparation for trial, the Defendant submitted a defence case statement in which he asserted that he knew nothing of the contents of the vehicle and disputed that he was involved with Class A drugs. He maintained that he was a consumer of cannabis, and nothing more. Expert reports served by both Prosecution and Defence addressed the interpretation of messages on his telephone, the question being whether they demonstrated that he was a consumer or a supplier of drugs. An addendum to his Case Statement set out example messages taken from his handset which supported his case. Ultimately, the Crown accepted a plea to a lesser charge concerning cannabis, which was consistent with the Defendant's case.

The Appellant's Claim

6. The Appellant submitted a claim to payment based upon 2,556 pages of PPE, including electronic PPE ("EPPE"). The claim for non-electronic PPE was consistent with the LAA report from the Crown Court's Digital Case System ("DCS") which showed a total of 145 pages of witness statements, exhibits, and streamlined forensic reports.

7. The claim for EPPE included contacts, SMS, call logs and chats (as is typical in such cases) but also searched items, web bookmarks, web history, locations and wireless records. The stated grounds were that drug dealers and users often search the internet and that evidence had to be considered to ascertain whether or not such activity was consistent with selling or using. Locations, wireless and journeys were also, the Appellant argued, relevant to ascertain exactly when the Defendant entered the vehicle, cross-referencing with other phone material to demonstrate that his presence in the vehicle was not pre-arranged but a chance encounter. Notes could also be useful as they may record drug debts, as appeared to be the case here.

8. The Determining Officer allowed 122 pages of non-electronic PPE for reasons which, not being referred to in his Written Reasons, are unclear.

9. As for EPPE, the Determining Officer allowed contacts, SMS, call logs and chats but no other categories of data. This produced a page count of 1,326 as against the Appellant's 2,556. The LAA has, on reviewing the evidence for the purposes of this appeal, increased the figure to 1,446.

10. The Appellant does not accept that offer, and takes issue both with the exclusion by the Determining Officer of categories of data which, the Appellant says, are of central importance in this case, and with the methodology used by the Determining Officer to derive a page count, which is considered below.

11. I should mention that Mr McCarthy KC, for the Appellant, added MMS messages to the categories to be included within the PPE, on the basis that the Determining Officer had incorrectly identified the relevant data as "technical metadata". When, however, I checked the single relevant entry on the spreadsheets with which I been supplied by the Appellant, it did indeed appear to comprise technical metadata, with no apparent evidential value.

Authorities on the Inclusion of Electronic Data Within the PPE

12. By virtue of paragraph 1(5) of Schedule 2 to the 2013 Regulations, served electronic evidence which has never existed in paper form may be excluded from the PPE count if the Determining Officer considers that appropriate.

13. In *Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB)* Holroyde J (as he then was) gave guidance as to how that discretion should be exercised. At paragraph 50(viii) of his judgment he identified the key criterion: whether the evidence was of central importance to the trial (and not merely helpful or even important to the defence).

14. At paragraph 50(vii) Holroyde J explained that where the prosecution seeks to rely on only part of the electronic data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data.

15. Holroyde J also mentioned the observations of Costs Judge Gordon-Saker in *R v Jalibaghodelehzi [*2014] 4 Costs L 781, in which (referring to similar provisions in the Criminal Defence Service (Funding) Order 2007) the Costs Judge said, 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. 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…"

16. In *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB) Mrs Justice Nicola Davies DBE (as she then was) concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the underlying data from which the prosecution had extracted samples upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. The underlying data should accordingly (although never formally served) be included within the PPE count.

17. I *Hayes* indicates that where key prosecution evidence is extracted from a particular category of electronic data, one would generally expect all of the electronic evidence in that category (in *Hayes*, messaging data) to be included within the PPE count.

18. Every case will however (as Holroyde J observed in *Lord Chancellor v SVS*) turn on its own facts. Where, for example, mobile phone downloads contain large numbers of images, only a small proportion of which are relevant, Cost Judges have, in decisions such as *R v Sereika* (SCCO 168/13, 12 December 2018), taken the pragmatic approach, of allowing an appropriate percentage of the full body of image data. That approach was approved by Cotter J in *The Lord Chancellor v Lam & Meerbux Solicitors* [2023] EWHC 1186 (KB), an appeal from a Costs Judge to which I shall make further reference.

Conclusions on the Categories of Data to be Included in the PPE Count

19. The categories of data that qualify as PPE may vary depending on the facts of the case. I am not entirely convinced by all of the Appellant's submissions in relation to searched items, web bookmarks, web history, locations and wireless records, some of which seem to me to focus upon their potential usefulness to the defence rather than their central importance to the case.

20. The Appellant has, however, included in the papers filed for the purposes of this appeal a Prosecution exhibit which incorporates selected extracts from web history, web log entries, instant messages and notes. Given that the Prosecution relied upon extracts from such data, then on *Hayes* principles it seems to me that all such data should be included within the PPE count (there is no basis in this particular case for adopting a percentage approach).

Deriving a Page Count from a Spreadsheet

21. EPPE downloaded from mobile phones may be supplied by the Prosecution in a variety of formats, most commonly spreadsheets and PDF documents. Specialist software is often used to generate reports in both spreadsheet and PDF format, organising the downloaded data into categories such as images or texts. The spreadsheet version, which will show each category of data on a separate "worksheet", is better suited to searching, data manipulation and extraction. The PDF version (to which I shall refer as a "purpose-made PDF report") mimics a conventional paper document, each category of data typically being reproduced in efficient and compact fashion on numbered A4 pages. This renders relatively straightforward the identification of a page count for those categories of data that qualify as PPE.

22. It is more difficult to identify a reliable page count for a spreadsheet, which is designed for use on screen rather than on paper. The only way that I know of to count A4 "pages" from a spreadsheet is to generate a print preview, showing what would be produced if each worksheet were printed off. Print previews tend to incorporate many blank pages and pages containing only small pieces of data, which in isolation are meaningless. It will offer a total page count for the presentation of the data in this scattered and inefficient fashion. Even then the exact count may depend upon whether "portrait" or "landscape" format is chosen for printing.

23. For those reasons, and because historically, before the service of large volumes for EPPE became commonplace, the PPE count was based on paper evidence (see again *R v Jalibaghodelehzi*) Costs Judges have rejected attempts to derive a page count from a spreadsheet print preview when a purpose-made PDF report is available.

24. In *Lam & Meerbux*, prosecution evidence had been served in PDF format, not as a purpose-made PDF report but by uploading a PDF copy of a spreadsheet's print preview (replete with blank pages and pages containing only isolated snippets of data) to the DCS.

25. Cotter J rejected the Costs Judge's approach of adopting the automatic page count on the DCS. He preferred a relatively broad-brush count based upon the elimination of blank pages, and those of minimal value. At paragraph 62 of his judgment, he said this:

> "In my judgment… when conducting any assessment of electronic material there is nothing wrong, if it necessary and appropriate, with a rough and ready analysis; a "sensible approximation". It is an entirely proper approach to consider the content of a documentary or pictorial exhibit and conclude that only a proportion of the pages should count as PPE. The perfect must not be the enemy of the good in this regard. Disagreement between parties as to whether there are 1,000 or 1,500 blank or data free pages in a 3,000 page exhibit may result in a broadbrush assessment, but the potential for disagreement, could not justify the conclusion that all 3,000 pages should be seen as PPE."

26. At paragraph 67 of his judgment he warned against an over-pedantic approach

> "… remuneration for detailed consideration of pages which could require no consideration is axiomatically overpayment. However, in any broadbrush assessment proportionality may play a part and in an appropriate case, a determining officer or Costs Judge may take the view that the assessment of the number of blank pages is not worth the candle. The odd blank page within a large body of electronic material is unlikely to be identified as a matter requiring to be addressed."

27. Mr McCarthy referred me not only to *Lam & Meerbux* but also to some Costs Judge decisions which predate that case. In *R v Jankys* (SC-2020-CRI-000107, 22 September 2020) Costs Judge Rowley suggested that the practice of removing blank sheets from PDF copies of spreadsheets, for the purposes of calculating a PPE count, should only be adopted in extremis.

28. In *R v Campbell* (SC-2020-CRI-000254, SC-2021-CRI-000001, 22 October 2021) Costs Judge Rowley warned against an overzealous approach in removing blank columns for the purposes of calculating a page count for data produced in spreadsheet format, because even in PDF format (which mimics presentation on paper) not every page is full of text in any event.

Deriving a PPE Count in This Case

29. In this case, my understanding is that there is no purpose-made PDF report. Because however the data has been made available in electronic spreadsheet format, the Determining Officer has been able to adopt an alternative to the "broad brush" exercise approved in *Lam & Meerbux*. He has removed blank columns in the worksheets containing the relevant data and taken the PPE count from a print preview of what was left.

30. Mr McCarthy accepts, of course, that *R v Jankys* and *R v Campbell* must be reconsidered in the light of the judgment of Cotter J in *Lam & Meerbux*. Blank pages in a worksheet print preview may, in the light of Cotter J's guidance, be eliminated from the PPE count as a matter of course. In fact the Appellant's proposed page count is derived after eliminating completely blank pages (but nothing else) from the print preview of each relevant worksheet.

31. Mr McCarthy's argument is that the Determining Officer has adopted too rigid an approach. He reminds me of *R v Wadsworth & Hooper* (SC-2021 -CRI-000024, 11 February 2022), in which I rejected an attempt to reduce a PDF page count by reference to blank columns in each page.

Conclusions on the Determining Officer's Methodology

32. In *R v Wadsworth & Hooper*, my observation concerning the relevance of blank columns turned upon the fact that the EPPE had been provided in a purpose-made PDF report. Such a report, as I have observed, presents the relevant data just as if it were on paper, so that one A4 page of PDF is the equivalent of one A4 sheet of paper. In that context, the fact that a given PDF page or pages may contain some empty space does not seem to me to have any relevance. The same would be the case on paper, and one would not cut up paper pages to reduce the PPE count.

33. Quite different considerations apply in relation to spreadsheets. For the reasons I have given, the relationship between the volume of data to be considered and the print preview page count is a tenuous one. As Cotter J found in *Lam & Meerbux*, a PDF version of an unedited print preview is for practical purposes unworkable, good only for generating an inflated page count. The Defendant's approach is not, in fact, wholly in line with *Lam & Meerbux*, in which Cotter J approved not only the exclusion of blank pages but also of those containing odd pieces of unusable data.

34. In order to compare the Appellant's proposed approach with that of the Determining Officer I repeated the exercise undertaken by the Determining Officer and considered the result. On the whole, I found it a sensible and realistic approach to deriving a PPE count from the Appellant's spreadsheets. I say that for these reasons.

35. I found that the elimination of empty columns, followed by a print preview, brought the spreadsheet data into a less scattered and more workable format. For example, a small amount of contact data on one handset fitted neatly into a half page, rather than the four pages contended for by the Appellant. In effect, I was undertaking the exercise that I would undertake (including the choice of "portrait" or "landscape" format, whichever appeared to be more efficient) should I wish to print out the data and review it on paper.

36. The exercise did not strike me as data manipulation so much as pulling the data together to achieve the "sensible approximation" approved by Cotter J. In the example I have given, the Determining Officer rightly counted the half page of contact data as one full page. He did not attempt artificially to compress the data further, for example by moving data from one worksheet to another. That would be exactly the sort of data manipulation against which Costs Judge Rowley warned in *R v Campbell*: the electronic equivalent of cutting up paper pages.

37. The removal of blank columns from a spreadsheet still does not achieve the compact efficiency of a purpose-made PDF report. For example, the one line of MMS metadata to which I have referred above produces a two-page print preview in landscape format, even after blank columns are removed. That is, however, a consequence of the format in which the data was served.

Conclusion on the Correct PPE Count

38. In the absence of any explanation for the Determining Officer's reduction of the non-electronic PPE, down to 122 from the DCS figure of 145, I should stay with the figure recorded on the DCS.

39. As for the EPPE, adopting the same methodology as the Determining Officer and taking into account those categories of data excluded by him and allowed by me, my EPPE count comes to 1,878. Most of my figures for given categories of data are consistent with those of the Determining Officer. Some are higher, perhaps because he appears to have overlooked a small number of columns which did contain some data (completely blank spreadsheet columns can quickly be identified by using a filter, rather than scrutinising the entire column).

40. This gives a total PPE count of 2,023. The appeal succeeds to that extent.

Costs

41. The Appellant has claimed costs of £1,500 for this appeal. Because that figure seems to me to be on the high side, because this appeal has been only partially successful and because I regard the Appellant's approach to the calculation of the PPE count to be inconsistent with *Lam & Meerbux*, I have awarded half that figure.