SENIOR COURTS
COSTS OFFICE

SCCO Ref: 154/17, 155/17 and 177/17

Dated: 8 January 2018

ON APPEAL FROM REDETERMINATION

REGINA v DAUGINTIS

LINCOLN CROWN COURT

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T 20167519

LEGAL AID AGENCY CASE

DATE OF REASONS: 16 August 2017

DATE OF NOTICE OF APPEAL: 18 September 2017

APPLICANT: Counsel

REGINA v CVETKOVAS

LINCOLN CROWN COURT

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20167159

LEGAL AID AGENCY CASE

DATE OF REASONS: 24 August 2017

DATE OF NOTICE OF APPEAL: 20 September 2017

APPLICANT: Counsel

REGINA v LIUMAS

LINCOLN CROWN COURT

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20167159

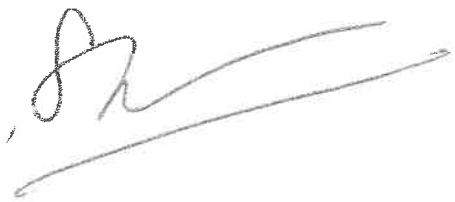
LEGAL AID AGENCY CASE

DATE OF REASONS: 16 November 2017

DATE OF NOTICE OF APPEAL: 28 November 2017

APPLICANT: Counsel

These appeals have been dismissed



COSTS JUDGE
SIMON BROWN

REASONS FOR DECISION

1. The issue arising in these appeals is whether the Determining Officer was correct in her decision as to the the extent to which certain served electronic evidence should count for the purposes of determining the Pages of Prosecution Evidence ('PPE') in an assessment of the fees due under the Graduated Fee Scheme. As is well known, and explained in more detailed in the decision of Holroyde J 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 Criminal Legal Aid (Remuneration) Regulations 2013, and the length of the trial. Since the same point arises in respect of all three appeals it is agreed that all the appeals should be heard together.

2. The Appellants represented three defendants in criminal proceedings before the Lincoln Crown Court. The Defendants were charged with a conspiracy to import and to supply Class A drugs. The Defendants pleaded guilty to the offence of importing the drugs, and were found guilty after a jury trial of conspiracy to supply.

3. Mr. McCarthy, counsel, appears on his own behalf in respect of one of the appeals and on both of the other Appellants. Mr. Rimer, an employed lawyer, appears on behalf of the Legal Aid Authority (the LAA).

4. As part of the police investigation, the police obtained raw telephone data from the Defendants' mobile telephone companies which showed the call data for a period covering the conspiracy period. The information obtained was provided to the defence in both Portable Document Format (PDF) and Excel format. There is no dispute that the telephone data was served as evidence in the case. The principal issue that arises in this appeal is whether the Determining Officer's decision was correct to assess the PPE only on the basis of the PDF versions of the data rather than the page count which would be indicated on application of the 'Print Preview' function of the spreadsheets in the Excel versions, or indeed by adding together the indicated page count in respect of the material provided in both formats.

5. As I understand it graduated fees have been allowed to the Appellants on the basis of PPE of 5574 pages, of which 2910 derived from the electronic material and 2664 were physical (paper) pages. In this appeal, a PPE allowance of over 10,000 is sought in respect of all three appeals.

6. I was also asked to make a further allowance for a special preparation fee under paragraphs 17 (1) (b) of Schedule 1 of the 2013 Regulations on the grounds that the page count, on the Appellants' cases, would exceed 10,000.

7. Paragraph 17 (1) (c) of Schedule 1 of the 2013 Regulations provides that where a documentary exhibit is served in electronic format but did not exist in

paper the appropriate officer, where satisfied that it is reasonable to do so, allow a fee for work done where the material has not been counted as part of the PPE. Mr. McCarthy however made it clear that no such fee would be claimed in these appeals if I were to accept that the Determining Officer was correct only to count the pages of PDF material as PPE.

8. 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."*

9. Guidance as to these provisions has been given by Holroyde J in *SVS*. He said as follows:

> *"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. The Crown Court Fee Guidance which was updated in March 2017 prior to the decision in *SVS* and 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' 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.*"

10. 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, eg 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.*"

11. In *Lord Chancellor v Edward Hayes* LLP [2017] EWHC 138 (QB) Nicola Davies J noted that the prosecution relied on a schedule of text messages which were at the core of the Crown's case. She said, at para 20:

> *"Given the importance of the evidence it is unsurprising that the defence refused to agree to admission of the extracted data until it was able to examine all the data on the download. This was the defence application to the trial judge which he granted. The request was not only reasonable, it enabled the Defendant's legal team to properly fulfil its duty to the Defendant. It enabled the Defendant's legal representatives to satisfy themselves of the veracity of the extracted data and to place the same in context having examined and considered the surrounding and/or underlying data. It also enabled the Defendant's legal team to extract any communications which they deemed to be relevant. Given the importance of the extracted material to the Crown's case and resultant duty upon the Defendant's team to satisfy itself of the veracity and context of the same, I am satisfied that this was additional evidence which should have been accompanied by a Notice in the prescribed form."*

10. This passage is cited in *SVS* by Holroyde J, who went on to say:

> "44. *I respectfully agree with those general observations as to the duties of the defence when asked to agree a schedule or some proposed agreed facts. The agreement of schedules and/or agreed facts, which reduce a mass of evidence and exhibits to a much more convenient and efficient form, is central to the proper progression of very many criminal trials. But it is important to bear in mind that the role of the defence lawyer is often not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include: it often extends also to checking the surrounding material to ensure that the schedule does not omit anything which should properly be included in order to present a fair summary of the totality of the evidence and exhibits which are being summarised. It may therefore often be necessary to review what has been omitted before being able to agree to the accuracy of that which has been included.*
>
> *45. It is, of course, also important to bear in mind that the prosecution are not obliged to call every witness who may have some admissible evidence to give about the facts of a case, and that the prosecution are obliged to follow the provisions of the CPIA in relation to disclosure of unused material. The distinction between evidence and exhibits which are served, and unused material which is disclosed, is a crucial one.*
>
> *46. I make those general observations because it seems to me that difficulty has arisen in the present case because both the CPS and the determining officer assumed that only the evidence and exhibits on which the prosecution rely can ever be "served", and that "served" evidence is necessarily identical to the evidence and exhibits on which*

the prosecution rely. Sometimes that will be so; but it is in my judgment a mistake to think that it will always be so. It is frequently the case that the prosecution evidence and exhibits include material which cannot realistically be said to be "relied upon" by the prosecution, for example because it is an irrelevant part of a statement or exhibit which also contains relevant material, or because it is a part of the material which is inconsistent with the way the prosecution case is put but is necessarily included in order to be fair to the defence. In the present case, as I have indicated, the prosecution exhibited the complete downloads of data relating to seven of the ten seized phones: it seems unlikely that they "relied on" every piece of those data.

47. It will, of course, sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material. But it seems to me that such situations will not arise very often, because even in the example I have given, fairness may demand that the whole of the data be served, for example in order to enable the defence to see what other use the Defendant was making of his phone around the times of calls which are important to the prosecution case. The key point, as it seems to me, is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be necessary for all of the data from that source to be exhibited so that the parts on which the prosecution rely can fairly be seen in their proper context.

48. This means, of course, that decisions as to the service of evidence and exhibits, and therefore as to the inclusion of material in the PPE, will be case-specific. In so far as Haddon-Cave J in Furniss may have suggested a blanket approach (which I am not sure he did) I must respectfully disagree with him. But I agree with him that it will very often be the case that, where the prosecution rely on part of the data in relation to a mobile phone, and seek agreement of either those data or a summary of them, fairness will demand that all of the data be exhibited so that the full picture is available to all parties".

11. The issue arising in *SVS* and in *Edward Hayes* was whether electronic material in that case should be regarded as "served" for the purposes of the provisions not the issue that arises here. Nevertheless in his decision Holroyde J also cited 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. 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. 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]*

12. As is well known Excel is a spreadsheet which is designed to be read and used electronically. Pressing the 'Print Preview' function will divide up the spreadsheet across rows and columns which will not necessarily reflect the manner in which the information should be read. As I understand the indicative page count which would appear on using the Print Preview' function may also vary according to the settings for the file or page formattingand the use of this function may produce a different page counts depending on the version of Excel used by the viewer.

13. PDF, by contrast, is a file format used to present documents which are to be read in a manner independent of the application software, hardware, and operating systems. It is formatted in a way which permits the information to be read and then printed in page format so that the printed page will reflect the page as it appears on the screen.

14. It is common ground that the material served in this case, save for one exception, was identical in both formats. I understand from what I was told in the hearing (which reinforced my own understanding) that not infrequently electronic evidence is served by the prosecution in both formats. Mr. Rimer says that the PDF form is for printing but that the information is also provided in Excel format in order to assist the representatives as it can be more easily manipulated and analysed in this format: it is easier, for instance, to locate all calls received from one particular telephone by using the 'find' function.

15. I do not accept, as the Appellants contend, that the Determining Officer was required to count the material in both formats for the purposes of determining the PPE. In considering whether to allow material to count as PPE the Determining Officer has a discretion which is to be exercised *"taking into account the nature of the document and any other relevant circumstances".* In my judgement, the fact that the material in this was duplicated (save for the exception I deal with below) seems to me to be a relevant consideration. Further it seems to me clear that in this case the material plainly did not require separate consideration in both formats and to count the same material twice would give rise to a fee which would be disproportionate to the work reasonably required.

16. In *R v El Treki* (SCCO Ref 431/2000) Costs Judge Rogers held that where the same material is served in different formats only one version should be included in the page count (in that case a handwritten and typed version of the same statement). Moreover that payment should be made on the basis of one, but not both, electronic formats was conceded in the *SVS* case (paragraphs 32(vi) and 52) and in *R v O'Rourke* (ref 10/17). Mr McCarthy relies on the decision in *R v McCarthy* (ref 36/17) which he says is the opposite effect but it it is not clear to me that that the material in excel and pdf form in that case was necessarily identical or that it did not require separate consideration.

17. As to the exception referred to above, this concerned a file called 'Louth' where pdf page count was 77 pages and the indicative page count in respect of the Excel format was said by the Appellants to amount to 8829 (the LAA version of Excel appears to have indicated a page count of 4837 on application of the 'Print Preview' function). I was shown this file in the course of the appeal hearing and understand that there was a substantial amount of additional background technical material in the Excel version but not the PDF version; the spreadsheet was said by the Determining Officer to contain 256 columns of technical date which on application of the 'Print Preview' function were distributed amongst various different pages, many of the cells being blank. I do not however consider, applying the relevant guidance, that this additional background technical material required any consideration of the sort that would justify its inclusion as PPE. It would have been readily apparent that it was not evidence relied upon the prosecution and the Determining Officer was correct to determine that compensation for work done considering this material and work done in respect of other duplicated material was by way of special preparation fee. However, as indicated above, no claim was made by Mr. McCarthy for a special preparation fee in respect of this material.

18. As to whether the material should be considered PDF or Excel format for PPE purposes, the Appellants contend that is open to them to choose to determine which format is appropriate. However, as I have indicated above, the relevant provisions give the Determining Officer a discretion to determine which material is to be include for the purpose of assessing the PPE having regard to *"the nature of the document and any other relevant circumstances".* Where material is served in two electronic forms, one for ease of manipulation and analysis but the other more representative of the material if set out in printed page format, that seems to me to be a highly relevant consideration for determining the extent to which the material should count for PPE purposes.

19. The difficulties with applying the 'Print Preview' function in Excel in respect of the material in this case was readily apparent: it might divide up the columns or rows such that one column or row appears in one page and one in another; and the material would or may be distorted and incomprehensible if it were printed out. It also tended to produce a potentially significant number of empty pages. These matters were demonstrated to me by Mr. Rimer with reference to one particular file (the 'Louth' file).

20. In his written submissions Mr. Rimer gave further examples of these difficulties. In particular he said that the call data relating to Mr Daugintis' phone comprised 6 pages in PDF but that same information would generate 36 pages in Excel, using the 'Print Preview' function. A printed version of this material from Excel would, he says, be unusable or unintelligible because only two columns of information are shown on each page and on pages 31-36 on the Print Preview for the Excel version are two narrow columns of figures. In respect of a file relating to another of Mr Daugintis' telephones the PDF document is 120 pages; the Excel version generated applying 'Print Preview' is 265 pages of which pages 213 -261 consist of three or so columns which, he says, state "N/A 1200 ON NET" in, as he puts it, various repetitions; the final pages are simply two columns of numbers. It was not necessary for these two examples to be demonstrated in the course of the appeal hearing because the substance of what Mr. Rimer said was not in dispute.

21. These examples demonstrate however how the page count indicated by a Print Preview may (subject to the specify settings on the file in question) indicate a very different page count from that indicated by the PDF format and, further, how the former approach might not properly reflect the actual time required to consider the data; indeed the information divided up in page form may, as the Determining Officer found, bear little of nor resemblance to the information as it appeared in spreadsheet form on the screen. Mr. McCarthy appeared to recognise at least part of the problem with using the pages indicated by a Print Preview of an Excel spreadsheet because he accepted that the blank pages should not count for PPE purposes (whilst maintaining that any page indicated by a Print Preview which contained any material at all would count).

22. The Determining Officer followed the guidance in *R v Jalibaghodelezhi*, which, as I understand it, was cited with approval by Holroyde J in *SVS*. In my judgment she was correct to do so.

23. It seems to me that in this case the Determining Officer was also correct to take the page count on the PDF format as a more accurate approximation of pages of paper evidence and an accurate and reliable indication of the degree of consideration which would have been required if the relevant material had been served on paper.

24. In contrast, as the Determining Officer found, the page count indicated by a Print Preview of an Excel spreadsheet appears to produce an artificial figure not properly reflective of the underlying material or the work reasonably required to consider it. Moreover the method of ascertaining the page count from the Print Preview seems to me unreliable as it is dependent on the settings on the file in question and the version of Excel on which it is viewed. Further, it seems to me, as a matter of generality, that the effect of considering the page count in the way contended for by the Appellants would also, as the Determining Officer has found, be to include material which has little or no bearing on the case, including personal or technical data which could in any event be the basis of a claim for special preparation fee.

25. There is no dispute that (save for the background technical material in the 'Louth' file that I have referred to) the material in question required careful consideration. This was a case of conspiracy where the prosecution relied upon the communications which are evidenced by the electronic material. But that does not of itself address the question which I am required to consider. Nor was it apparent to me that there was any basis for concluding that the decision of the Determining Officer would disrupt the economic balance which is said to underlie the scheme; as the Officer found in this case the effect of taking the Appellants' approach would be to produce a fee disproportionate to the work reasonably require.

26. The Determining Officer found that the proper method of remunerating the advocates for the time spent considering and manipulating the Excel spreadsheet was by a way of a special preparation fee, a fee which is based on actual time reasonably spent. But, as I have indicated above, the Appellants did not seek to make any such claim.

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