



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 222/18

Dated: 15 May 2019

**ON APPEAL FROM REDETERMINATION
REGINA v GREENING**

WOOD GREEN CROWN COURT

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

CASE NO: T2017177237

LEGAL AID AGENCY CASE

DATE OF REASONS:

8 OCTOBER 2018

DATE OF NOTICE OF APPEAL: 30 OCTOBER 2018

APPLICANTS:		
ELLIOTT STERN	SOLICITORS	

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

The appropriate additional payment, to which should be added the £100 paid by each Appellant on appeal and the additional sum of £500 (exclusive of VAT) for costs, should accordingly be made to the Appellant.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 (as applicable before 1 April 2018) under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations.
2. Graduated fees are calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"), subject to an overall "cap" of 10,000 pages. The issue on appeal is the appropriate PPE count.
3. The appeal addressed by this judgment is brought by Elliott Stern, solicitors for Nicholas Greening ("the Defendant").
4. Paragraphs 1, (2)-(5) of Schedule 2 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."

5. The Appellant seeks remuneration on the basis of a PPE count of 6,101 pages. The actual volume of evidence served, says the Appellant, came to over 56,000 pages but the Appellant seeks only 4960 pages. That represents the agreed count for downloaded telephone handset data in Excel format, along with 549 paper pages, four pages of Instagram, and 588 pages of Twitter, all already allowed.
6. The telephone data was also served in PDF format, the agreed page count for that being 2,385 pages. There is no material difference in the content of the PDF and Excel versions: they represent different ways of presenting the same information downloaded from the handset. The PDF version presents as if it were on paper and the Excel version is more suitable for finding and managing data. The Appellant does not seek to include both the PDF version and the Excel version within the PPE count, accepting that that would be duplicative.
7. The Determining Officer allowed a PPE count of 3,187 pages, including 2,638 pages served electronically.

The Background

8. The Appellant represented the Defendant in proceedings before the Wood Green Crown Court. The Defendant faced 21 charges relating to rape and serious sexual assault against three young boys, and the making of distribution of indecent photographs of children. The charges covered on an indictment period from February 2013 February 2016.
9. The police seized a number of electronic devices belonging to the Defendant, including an iPhone, an iPhone watch, an Acer laptop, an Apple Mac laptop and an Apple iMac desktop computer. Several thousand indecent images and videos were recovered from the Apple Mac laptop, including images and videos of the complainants. The videos had been filmed on an old mobile telephone which was not recovered, and then backed up to the laptop. Other images were recovered from the desktop Computers. Schedules of the images recovered became part of the prosecution case.
10. The web history from the Apple Mac laptop and the Apple iMac desktop computers was analysed and revealed various searches for videos involving young boys. The web history from both devices was uploaded to the Digital Case System (DCS) as exhibits, together with emails from the desktop computer distributing the images. The download of the Defendant's telephone contained a number of what is app messages sent between the Defendant and one of the complainants, referred to in submissions as "SC", including messages in which the Defendant and SC exchanged images.
11. The Defendant claimed that he had been acting under duress and been physically as threatened and sexually assaulted by SC. He stated that the videos had been made at SC's request and that he had downloaded various images from the Internet and sent them to SC via an application called

Telegram. He claimed that the telephone download would contain evidence of threatening messages sent to him by SC.

12. The Defendant was convicted of the charges against him.

The Appellant's Submissions

13. Other matters having been agreed, this appeal now concerns only the appropriate page count for the downloaded data from the Defendant's mobile telephone. The Appellant that the page count should be based upon the Excel version. The Respondent contends that the page count should be based upon the PDF version.
14. The Appellant submits that on receipt of material relied upon by the prosecution and presented in electronic format, it is under a duty to carefully examine and analyse each file on disc. In the instant case, Miss Carly Debins, the solicitor with conduct of the case, did so. Mr Evans examined the various files contained on disc, in particular the "raw handset data" Excel file, comprising 4960 pages, and the extraction report PDF file of 2385 pages.
15. The key work is done on the Excel version, given that format's suitability for finding and managing data. It follows, says the Appellant, that the PPE count should be based upon Excel pages rather than PDF. The Respondent refers in that respect to the judgment of Master James in *R v O' Rourke* (SCCO 10/17, 34/17 and 47/17, 17 October 2017) and in particular her conclusion at paragraphs 32-33 that the relevant evidence in that particular case was of crucial importance. She also concluded (paragraph 40) the PDF-based PPE count allowed by the determining officer did not reflect the work that the defence team had to put into that case.
16. The Appellant argues that the telephone data was of pivotal importance to the case. It allowed the Crown to secure the Defendant's conviction. PPE is quantified by reference to page count, not volume of data. The Appellant argues that one should, accordingly, count the pages by reference to the format in which the crucial work was done. Because data can be presented in so many different ways, Excel can be a difficult format for the purposes of identifying an appropriate page count but in this particular case there is no dispute as to the appropriate figure.

The LAA's Submissions

17. Mr Rimer for the Lord Chancellor concedes that the full PDF extraction report (2,385 pages) should be allowed, along with the additional 1,141 pages not in dispute.
18. Mr Rimer submits that in fact the telephone download data was not of pivotal importance. The pivotal evidence was the image and video evidence from the Apple Mac laptop. The rest was secondary. It is not clear that the PDF and Excel documents considered in *O'Rourke* had, as here, the same content.

19. In any case, where evidence is provided in multiple electronic formats such as PDF and Excel, it is reasonable for the determining Officer to conclude that the format that most closely approximate page paper evidence should be used to calculate the graduated fee. Usually, that will be the PDF version.
20. The fact that evidence in Excel format is designed to be viewed electronically and to be manipulated and analysed from through the application of various tools and filters renders it unsuitable as a basis for a page count. Too much depends upon how the format is used.
21. In contrast, material served in PDF format is designed to be “read” on a page basis, similar to documentary exhibits served in paper format. It can be printed and considered in detail, in which case the printed page will reflect the pages appears to the viewer on screen. It follows that evidence served in PDF format will ordinarily require the same degree of consideration as paper evidence.
22. As Master Gordon-Saker said at paragraph 11 of his judgment in *R v Jalibaghodelezi* [2014] 4 Costs LR 781, as referred to by Holroyde J in *Lord Chancellor v SVS*:

“... It seems to me 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...”

Conclusions

23. It is understood that a defence advocate or litigator, undertaking the necessary checking and cross-referencing of telephone data, is not expected to work from the data in PDF format. On the contrary, defence teams will normally work with telephone and billing data in Excel format. They have to do so, to search and manage the data in the way they are expected to do.
24. The question however is not whether PDF or Excel is the best format in which to work. The question is whether PDF or Excel gives the most realistic and representative page count. In that context, one must keep in mind that the calculation of fees by reference to a PPE count dates from a time when all evidence was served on paper and that the 2013 Regulations, like their predecessors, are designed to make similar provision for documents served electronically.
25. The PDF format is designed to mimic presentation on paper. Excel is not, and can offer different page counts depending upon the way in which the information in that format is managed, used or presented. 50 pages of legible data on paper will, if reproduced in PDF format, remain 50 pages of legible data with much the same appearance. In Excel format, depending on how the same data is managed or presented, the page count could run into hundreds.
26. For those reasons, I have concluded in previous appeals that one should include in the PPE count data in PDF format and exclude from the PPE count

any duplication of the same data in other formats such as Excel. I refer here, for example, to *R v Muiyoro* (SCCO 70/18, 1 November 2018) *R v Simpson* (SCCO 44/18, 26 November 2018), and *R v Khadir* (SCCO 85/18, 10 January 2019)..

27. That approach is consistent with conclusions previously drawn by Master Brown in *R v Daugintis & Ors* (SCCO 154/17, 155/17 & 177/17, 8 January 2018) and *R v Ladic* (SCCO 73/17, 28 February 2018), and Master Rowley in *R v Simpson* SCCO 148/17, 16 April 2018 and *R v Zamir Ahmed* (SCCO 145/18, 21 January 2019).
28. Master James came to a different conclusion in *O'Rourke*, but it is not clear that the facts of that case were the same. Generally I would say that the Importance of the evidence is a consideration in deciding whether to include it within the PPE count. It does not assist in deciding the appropriate format upon which to base that count.
29. Second, the PPE count is part of a formula which calculates a graduated fee by reference to matters such as the category of offence, length of trial and volume of relevant evidence. It is not based upon a measure of the amount of work actually undertaken, nor on its urgency, nor on its quality. As a result an advocate or litigator may receive the same remuneration for a greater or lesser amount of work, undertaken with a greater or lesser degree of urgency, to greater or lesser effect. That is how the formula works. Schedule 2 has "special preparation" revisions at paragraph 20 to address circumstances in which payment by reference to the formula may not be enough.
30. For those reasons my conclusion is that the PPE count should in this case be 3,526 pages. The appeal succeeds to that extent.

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