SENIOR COURTS
COSTS OFFICE

SCCO Ref: 66/17

Dated: 14 August 2017

ON APPEAL FROM REDETERMINATION

REGINA v YATES

GRIMSBY CROWN COURT

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

CASE NO: T20167149

LEGAL AID AGENCY CASE

DATE OF REASONS: 14 March 2017

DATE OF NOTICE OF APPEAL: 7 April 2017

APPLICANT: ABR 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 £600 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns a claim for payment for analysing evidence served by the prosecution upon the Appellant solicitors. The Relevant Representation Order was made on 22 December 2015 so the claim for payment, and this appeal, is governed by the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. Payment is made under the 2013 regulations by reference to the number of Pages of Prosecution Evidence ("PPE"), subject to an overall "cap" of 10,000 pages.

2. The Appellant claims payment for the maximum 10,000 pages of PPE. Payment for 302 pages has been allowed by the Determining Officer. The Appellant appeals that decision, maintaining the claim for 10,000 PPE.

3. Paragraph 1 of Schedule 2 to the 2013 Regulations explains 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 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 committal or 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."

4. Paragraph 20 of Schedule 2 makes provision for payment on a different basis for documents which are not considered by the Determining Officer to be appropriate for inclusion within the PPE:

> 20.— Fees for special preparation
>
> (1) This paragraph applies in any case on indictment in the Crown Court—
>
> (a) where a documentary or pictorial exhibit is served by the prosecution in electronic form
> and—
>
> (i) the exhibit has never existed in paper form; and
>
> (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence...
>
> (2) Where this paragraph applies, a special preparation fee may be paid...
>
> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable..."

Background

5. The Appellant represented Carl Yates ("the Defendant"). The Defendant was charged, in common with 8 other co-defendants, with conspiracy to supply controlled Class A drugs. The Defendant pleaded guilty at a Plea and Case Management Hearing 25 May 2016.

6. On 8 June 2016 the Crown served upon the Appellant, under cover of a Notice of Additional Evidence, a disc reference MPT/2393/300316/02. The disc contained 13,596 pages of telephone records and data extracted from the Defendant's telephone and his co-defendants' telephones. That is the basis upon which the claim for 10,000 PPE is made.

7. The Determining Officer refused the claim on the basis that disc MPT/2393/300316/02 was not served upon the Appellant but only upon a co-defendant. Mr Rimer, for the LAA, in submissions made in writing (and copied to the Appellant) on 6 June 2017 (two days before the hearing of this appeal) accepted that that is not correct. Accordingly, he says, the remaining issue is the extent to which it is appropriate to include the content of the disc, falling as it does within paragraph 1(2)(5) of Schedule 2, within the PPE count.

8. Mr Rimer refers to a breakdown of the contents of disc MPT/2393/300316/02, which indicates that of the total 13,596 pages, 271 comprised records from the Defendant's phone. He accepts that these 271 pages should be added to the PPE count, making the total 578 pages.

9. He submits, however, that the remaining material on disc is insufficiently central to the case against the Defendant to justify its inclusion in the PPE count. Instead, he suggests, the LAA should (and before me he confirmed, without reservation, that it will) entertain a late claim for special preparation for some 17.6 hours' work undertaken by the Appellant between 17 and 22 August 2016 on considering the co-defendants' phone data and cross-referencing it to that of their client.

10. Mr Rode, for the Appellant firm, does not agree. He refers to *R v Debenham* (SCCO reference 10/12, Master Gordon-Saker, 16 May 2012), which established (and this is not, I think, in issue) that that PPE can be served after a guilty plea.

11. Mr Rode emphasises the importance of the exercise undertaken between 17 and 22 August 2016. The Defendant was accused of playing a leading role in the conspiracy and had been advised, on the evidence, to plead guilty. The focus now was upon considering the basis of a plea and whether it would be appropriate to arrange a Newton hearing to address it. Following a careful and thorough review of the evidence on disc MPT/2393/300316/02, Mr Rode concluded that it would not be in his client's interests to do so because it was unlikely that the Defendant could establish a case any better than that already contended for by the Crown. This advice was given to the Defendant, who accepted it.

12. In reaching that conclusion, says Mr Rode, the evidence extracted from the telephones of the co-defendants was just as important as the evidence from the Defendant's own phone. This was a conspiracy case. To understand the Defendant's role, it was necessary to understand the roles played by the others involved. That included analysis of calls between the various defendants, between them and the third parties and establishing any links back to the Defendant, so as to put the actions of the Defendant in its proper context.

13. Mr Rode points out that in giving the advice it did, the Appellant was fulfilling its duty to the Defendant and ensuring that he obtained full credit for an early plea. Had the Appellant take a different approach, it could have claimed a cracked trial fee and its claim for PPE would not have been open to challenge on the basis that a guilty plea had been entered.

14. Mr Rimer submits that his suggested approach represents a fair outcome. He does not accept that evidence of the phone activity of co-defendants can have the same central importance, in the case against the Defendant, as evidence of the Defendant's phone activity. He also argues that in considering what, for the purposes of deciding whether material should be treated as PPE under paragraph 1(2)(5) of Schedule 2 to the 2013 regulations, there is a real distinction to be drawn between evidence analysed with a view to defending a charge of conspiracy in a trial that might continue for weeks, and evidence analysed in order to reach a conclusion about the basis of a plea in anticipation of a short hearing.

15. It is, he suggests, appropriate to remunerate Mr Rode's analysis of the co-defendants' telephone records at the rate appropriate to special preparation, but not at the significantly higher rates appropriate to the analysis of evidence crucial to determining guilt.

Conclusion

16. *R v Debenham* addressed payment for PPE under the provisions of the Criminal Defence Service (Funding) Order 2007, which at the relevant time excluded electronic documents completely and which did not require a Determining Officer to exercise any degree of discretion. That decision is of no assistance to me in reaching a conclusion about the extent to which the Appellant should be paid, in this case, by reference to the provisions of paragraph 1(2)(5) of Schedule 2 to the 2013 Regulations.

17. As to the appropriate application of those provisions, I tend to agree with Mr Rimer. That is not because I accept that there is any distinction to be drawn in principle between the consideration of evidence before and after a guilty plea. That has some bearing, but in my view the discretion to be exercised by a Determining Officer must turn upon the facts of the case before him.

18. My starting point is rather that I accept that there is a real distinction, in the context of the case against the Defendant, to be drawn between the importance of (a) telephone evidence directly attributable to the Defendant, offering as it does an indication of his direct contact with his co-conspirators and so his degree of involvement in the conspiracy with which he has been charged, and (b) telephone evidence attributable to others, which at most will help put his actions in context. The former was central to establishing the role played by the Defendant in the conspiracy: the latter, in my view, was not. It was part of the background.

19. Bearing in mind the context in which the work was undertaken, the difficulty with the Appellant's case is that it attaches the same weight to analysis of co-defendants' telephone records, for the purposes of considering a basis of plea, as it does to an analysis of the Defendant's own telephone records for the purposes of determining guilt. In my view that would not be right.

20. For those reasons I conclude that Mr Rimer is right in saying that it is appropriate for the LAA now to entertain a special preparation claim for the work done by the Appellant on the telephone evidence of the co-defendants, rather than for me to allow it as PPE. I would add that (although I appreciate that his views would not bind a Determining Officer, and some adjustment may be appropriate to allow for the time spent on the evidence now accepted as PPE) Mr Rimer gave me the clear impression that he considered the number of hours claimed by the Appellant on its analysis of the evidence between 17 and 22 August 2016 to be reasonable.

21. For those reasons this appeal succeeds, but only to the extent effectively conceded by Mr Reimer before the hearing of this appeal began. In view of the concession made by the LAA on 6 June that hearing was avoidable. I have

accordingly restricted the costs recoverable by the successful Appellant to the issue fee of £100 and a total of £600 for preparation time.

TO: Mr R Rode
ADR Solicitors
DX14092
Leeds

COPIES TO: Helen Garton
Senior Caseworker
Legal Aid Agency
DX10035 Nottingham