Neutral Citation No. [2023] EWHC 1694 (SCCO)

Case No: T20220013

SCCO Reference: SC-2023-CRI-000021

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22 June 2023

Before:

COSTS JUDGE LEONARD

R
v
EMEH

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

Appellant: **(Solicitors/Counsel)**

The appeal has been successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £500 (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 under the Litigators' Graduated Fee Scheme set out at Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The Representation Order was made on 11 November 2021 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"). PPE, broadly speaking, describes the evidence upon which the Prosecution relies, as distinct from "unused material", upon which the Prosecution does not rely but which it is obliged to disclose under the provisions of the Criminal Procedure and Investigations Act 1996 (broadly speaking, material that might undermine the Prosecution or assist the Defence).

3. PPE should be identified as such by formal service on the Defence by the Prosecution: unused material is simply disclosed.

4. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, (1)-(5) to the 2013 Regulations. Those paragraphs explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(1)…"unused material" means material disclosed pursuant to the prosecutors' obligations in Part 1 of the Criminal Procedure and Investigations Act 1996, but does not include—
>
> (a) witness statements;
> (b) documentary and pictorial exhibits;
> (c) records of interviews with the assisted person; and
> (d) records of interviews with other defendants.
>
> (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 served prosecution 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. I should mention that paragraph 20 of Schedule 2 makes provision for a "special preparation" payment for the perusal of electronic evidence that has not been included within the PPE count.

6. I should also mention that this appeal has not been opposed by the Lord Chancellor, on behalf of whom the Legal Aid Agency ("LAA") has taken a "neutral" position. This appears to be the outcome of administrative problems, as a result of which it would appear that the LAA has not considered the merits of the appeal.

The History

7. The Determining Officer's written reasons do not make extensive reference to the history of this case, and as the Lord Chancellor has made no submissions I am largely relying upon the Appellant for the following account, which (the appeal being unopposed) I accept.

8. The Appellant represented Anthony Emeh ("the Defendant") in the Crown Court at Kingston on Thames. The Defendant was one of three co-defendants charged with several counts of conspiracy to supply and export class A and class B drugs. Both his co-defendants pleaded guilty. The Defendant was acquitted.

9. The conspiracy involved a "dark net" marketing operation, payment being received in cryptocurrency. The evidence included test purchases, police surveillance, banking, and telephone evidence.

10. As the case neared trial, it became apparent to the Appellant that the Prosecution was not uploading its full case to the Digital Case System as formally served evidence. Despite calling certain evidence in court, relying on it and promising (through counsel in court) to upload it as served evidence, the Prosecution (through the Crown Prosecution Service) did not do so. It was either uploaded to the "unused" section of the Digital Case System, or handed over at Court.

11. The evidence in question included in the statement of DC Lisa Jackson dated 7 September 2022 (21 pages). In that statement, DC Jackson referred to the Defendant's gambling, and attached a summary of entries from his bank statements. The point was to demonstrate that the Defendant and his co-defendants had been laundering the proceeds of drug dealing through gambling organisations.

12. The underlying bank statements (392 pages) were treated by the Prosecution as unused material, although the Crown called live evidence from DC Jackson referring to those statements and submitted that they supported the case against the Defendant, who also give evidence in respect of them.

13. PC Matthew Smith was another prosecution witness who gave evidence at trial. His evidence was described as "analysis of phone material/association of Emeh with co-d's Observations on 15.06.21, 21.09.22, 23.09.21, 08.11.21" and was scheduled to last three hours. The evidence included location data and call evidence linking the Defendant with his co-defendants.

14. The Jury Bundle Index included summaries of that mobile phone evidence. The mobile phone evidence from which the summaries were extracted comprised 1037 pages, again treated by the Prosecution as "unused material".

15. The Appellant says that this 1450 pages of evidence should be included within the PPE count. The Determining Officer has rejected that and has allowed a PPE count of 1244 pages. The Determining Officer summarised his reasoning in this way:

> "As the material was disclosed as unused it would not be considered payable as PPE. Appendix D of the Crown Court Fee guidance states that PPE does not include any unused material. In order for material to be considered payable as PPE we would require confirmation that the material was served as used evidence by the prosecution and that it was relied upon in the prosecution's case against the defendant. What appears to have happened in this case is due to the material have little or no evidential value the prosecution did not served the material as used evidence and instead disclosed it as unused.
>
> It appears that any relevant financial and phone data was extracted and served as part of the exhibits bundle with the rest of the data not considered relevant and as such not served.
>
> The guidance states that where the status of material is uncertain, each defence team should ensure that they agree their position, and with the court/ CPS where possible, before claims are submitted to the LAA. It should not be possible for a document to be both PPE under the LGFS and unused under the AGFS.
>
> As such the material cannot be classed as unused and served PPE, it can only be considered as one or the other and as the Advocate has already claimed the material as unused a claim cannot be made for the material to be included as served PPE. A claim can be made for considering the unused material under the unused material hourly rate."

The Principles

16. PPE appeals concerning electronic evidence have tended to turn upon either or both of two issues. The first is whether evidence which the appellant wishes to include within the PPE count should properly be considered as "served" or as unused evidence. The second is whether served electronic evidence which has never existed in paper form, and which will accordingly only be included within the PPE count if the Determining Officer considers that appropriate, is of sufficient importance to the case against the relevant defendant to justify inclusion within the PPE count.
17. Authoritative guidance on both issues has been provided by two decisions of High Court Judges. The first is the judgment of Mrs Justice Nicola Davies DBE (as she then was) in *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB).

18. In *Hayes* the Prosecution had relied upon extracts from a large body of text messages on a mobile phone. The main body of data, from which the extracts had been taken, was not formally served, but handed over on disc. Davies J 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 the evidence 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.

19. Further, detailed guidance was offered by Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). In his judgment Holroyde J made it clear that formal service is not a prerequisite for inclusion within the PPE count. At paragraph 50 of his judgment he gave this guidance (I have added an emphasis to the most pertinent part of this guidance, for the purposes of this appeal):

> "… I set out the following summary of what are, in my judgment, the principles to be applied to issues such as have arisen in this case:
>
> **i)** The starting point is that only <u>served</u> evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.
>
> **ii)** In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.

iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispensed with the need for service of a notice of additional evidence before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary precondition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages would be excluded from the count of PPE merely because the notice had for some reason not reached the court.

vi) **In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.**

vii) Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore serve an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. 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. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

viii) **If – regrettably - the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Officer (or, on appeal, the Costs Judge) will have to determine it in the light of all the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) would be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE.** Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) would be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.

ix) 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.

x) 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.

xi) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply."

20. Holroyde J's guidance is summarised at paragraphs 61-63 of Appendix D to the LAA's Crown Court Fee Guidance, and the Determining Officer has referred to Appendix D. Nonetheless, in effectively treating the Prosecution's treatment of the 1,450 pages of evidence that is the subject of this appeal as "unused" as decisive, I believe that he has failed to follow Holroyde J's guidance and in doing so has fallen into error.
21. That is not just because I accept that the Prosecution agreed that that 1,450 pages of evidence should be served, but did not act upon its own agreement. The Determining Officer's error is evident from the fact that he has refused to include the witness statement of DC Jackson within the PPE count, notwithstanding that the regulations expressly require that it be included.

22. As for the bank statements and telephone data from which the summaries put to the jury were extracted, plainly the bank statements and the data were of central importance to the case against the Defendant. On *Hayes* principles, all of the evidence from which the Prosecution extracted their summaries must be included within the PPE count.

23. For those reasons, this appeal succeeds in full. The PPE count by reference to which the Appellant's graduate fee is calculated must be increased by 1,450 pages.