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Case No: T20217160

SCCO Reference: SC-2024-CRI-000002

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 17 July 2024

Before:

COSTS JUDGE LEONARD

R
v
LASTOWSKI

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

Appellant: **(Yates Ardern Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal concerns a claim for payment under Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 19 December 2021, so the 2013 Regulations apply as in force on that date.

2. Defence litigators such as the Appellant will be paid for their work by reference to the Graduated Fee provisions of Schedule 2. The Graduated Fee due is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"). The PPE count is subject to a cap, which for present purposes is 10,000 pages, but it is open to litigators, in addition to the Graduated fee calculated by reference to the PPE count, to claim an additional payment for "special preparation".

3. The definition of "pages of prosecution evidence" ("PPE") is to be found at paragraph 1, subparagraphs (2)-(5) of Schedule 2:

> (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."

4. The special preparation provisions are to be found at paragraph 20 of Schedule 2:

> "**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; or

(b) … where the number of pages of prosecution evidence, as so defined, exceeds 10,000,

and the appropriate officer considers it reasonable to make a payment in excess of the fee payable under Part 2.

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2.

(3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—

(a) where sub-paragraph (1)(a) applies, to view the prosecution evidence; and

(b) where sub-paragraph (1)(b) applies, to read the excess pages,

and in each case using the rates specified...

(4) A litigator claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.

(5) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case."

The Background

5. The Appellant represented Roman Lastowski ("the Defendant") in the Crown Court at Preston. The case against the Defendant was that he was one of multiple defendants alleged to have conspired to produce cannabis on a very large scale in cannabis farms in the Lancashire area. As I understand it, he was the sixteenth of thirty-three defendants named on the indictment. Many of the defendants were from eastern Europe and resided not far from each other.

6. According to the Appellant, the Defendant was alleged to have played a significant role in the conspiracy, having been trusted by those who played a leading role to identify properties suitable for use as cannabis farms. His case was that he played no part in the conspiracy and knew only one of his co-defendants in a social context, as evidenced by the exchange of mobile phone message as pictures on areas on common interest such as motorcycles.

7. The papers filed in support of the appeal include this advice from counsel on digital evidence:

> "We have received approximately 28000 pages of electronic data which is principally phone data served to support the phone evidence and sequence of events charts relied on by the prosecution.
>
> As Mr Lastowski denies involvement in a conspiracy, please ensure you check the data is checked so we can agree the accuracy of all the relevant entries in the sequence of events and admissions. The court will expect this to be done in time for the trial.
>
> In addition, please check for our client's communication pattern with others as well as call patterns of other defendants of interest, particularly if there is any contact by any of the accused with one Patryk Rozowsk, who our client alleges converted the property without his knowledge.
>
> Our attributed numbers are 1079, 2196 and 7617. Please check for attribution and assess call patterns - in particular communication with any particular co accused or suspect, including Rozowsk. Also check for contact IDs in the respective phones, check for accuracy and analyse call patterns of Tomas Vaisvila (63721) and his communication with co-defendants. This man takes out tenancy at 48 Berriedale Road with my clients assistance. His house was converted into a cannabis factory. Prosecution say client helped to convert the property and was a principal facilitator."

The Determination

8. Following the trial, a claim was submitted by the Appellant for 613.45 hours' special preparation at Grade A, the highest level of seniority, for the consideration of 25,000 PPE in excess of 10,000. The claim was supported by a work log, which has been filed in support of the appeal.

9. In her detailed written reasons for allowing 320 hours at Grade B, a more junior level, the Legal Aid Agency's Determining Officer included a summary of the way in which she had gone about assessing the claim:

> "On determination I allowed a total of 200 hours and reduced 413.45 hours. This is because the evidence had been served in electronic PDF format and was therefore in my view capable of being filtered and searched digitally. Upon inspection, the electronic evidence also appeared to contain duplication, a significant amount of blank cells and columns and material which, in my view, could have been perused much more quickly due to its nature. The grade of the fee earner was A and to consider all the electronic evidence at grade A was not reasonable as supported by a number of cost judge decisions.
>
> On redetermination, I allowed a further 10 hours for the consideration of the remaining material not considered PPE as I accept that fee earner must consider all material whether it is relevant or not. I also reallocated 40 hours from grade C to B following representations regarding fee earner grade.
>
> On additional payment, I authorised a total of 320 hours at grade B. I was

> unable to authorise all work at grade A and the full amount of 613.45 hours due to reasons set below. I did however accept the previous redetermination was unreasonable and I accept that PDF documents are not as easy to filter as excel documents and taking this into consideration I allowed a further 110 hours taking my final assessment to 320 hours being authorised at grade B."

10. The Determining Officer also put some emphasis upon her conclusion that much of the electronic data was irrelevant, not being not data specifically relied upon by the Prosecution, data by reference to which that relied on could only be understood properly, or data which could have provided support to the Defendant's defence: examples being technical and metadata incorporated in mobile phone downloads. Whilst she accepted that the Appellant had a duty to consider all the evidence, she did not consider it reasonable to claim a large amount of time for perusing data which was plainly irrelevant, and which did not require a similar degree of consideration as a page of evidence served in paper format.

11. The Determining Officer allowed 10 hours for considering such material, on the basis that it could be gone through quickly. She also considered that the Defendant had played a minor role in the conspiracy. The Appellant takes issue with this, but I understand her to have meant that the Defendant's involvement in the conspiracy had been limited, rather than that his role had been unimportant.

The Appeal

12. The Appellant (which has mooted a claim for 475 hours, but only as a compromise) maintains the claim for 613.45 hours' special preparation at Grade A, on these grounds.

13. The Appellant argues that there is a duty to consider every page of the prosecution papers, whether they are irrelevant or not. It would be incompetent of any Fee Earner not to consider the full case papers and it is only once they have been considered that the Fee Earner can confirm whether evidence is relevant or not. The fact remains that it must be considered.

14. During the trial the Crown had to concede that there was nothing in the phone data linking the Defendant to his co-defendants. Ultimately it was accepted that the Defendant was linked only to two addresses, at one of which he resided, and that although he had access to and some dealings with the second property, at which cannabis was cultivated, he was not part of the wider conspiracy.

15. The Prosecution's Sequence of Events suggested that the Defendant was key to those above him and although the Defendant reluctantly accepts that "key searches" might have reduced the time spent in consideration of the data, other key numbers which did not form part of the Prosecution case needed to be considered in accordance with the Defendant's instructions. The work was undertaken by a solicitor of 20 years' experience who had established a working relationship with the Defendant, whose English was limited.

16. Nor does the Appellant accept that any of the data considered does not qualify as PPE,

because it was exhibited evidence confirmed in a notional PPE count.

Conclusions

17. I need to start by addressing the proper basis for calculating the PPE count. It is wrong for the Appellant to contend that electronic evidence included within a nominal PPE count at the time of service, which would these days typically be recorded on the Crown Court's Digital Case System ("DCS"), must be included within the PPE count for the purposes of payment under the 2013 Regulations. That is directly contrary to the guidance of Holroyde J (as he was then) in *Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB)* and of Cotter J in *The Lord Chancellor v Lam & Meerbux Solicitors* [2023] EWHC 1186 (KB).

18. As the rules to which I have referred make it clear, served electronic evidence is only included within the PPE count for the purposes of payment under Schedule 2 if the Determining Officer considers that it is appropriate to do so.

19. The key criterion for inclusion is, as Holroyde J explained in *Lord Chancellor v SVS Solicitors*, whether the evidence was of central importance to the trial (and not merely helpful or even important to the defence). For that reason, for example, documents containing telephone numbers searched for on the instructions of the Defendant, rather than relied upon by the Prosecution, would not necessarily merit inclusion within the PPE count. Nor is it open to the Appellant to rely upon its duty to consider the totality of the evidence. That is true of every case. It is not a criterion for inclusion within the PPE count.

20. I am unable to accept that it is only possible to judge the relevance of electronic evidence after it has been reviewed. That is an argument that has been repeatedly rejected by Costs Judges. Electronic evidence is typically replete with data that can be seen at a glance to be of little or no evidential value.

21. I also find it difficult to understand how the Appellant has formulated its claim for a PPE count of 25,000 over the limit of 10,000 pages. An attendance note included with the papers filed by the Appellant refers a total of "over 25,000" pages served, not a total of 25,000 pages over the PPE limit. The best evidence I have as to the correct number of pages is the advice from counsel quoted above, which refers to a total of approximately 28,000 pages.

22. Subject to the amount of served "paper" PPE (in other words PPE falling within paragraph 1, subparagraph (4), rather than subparagraph (5), of Schedule 2), that indicates a count of approximately 18,000 pages over the PPE limit, rather than 25,000 pages. Nor have I been able to clarify this by reference to a figure for served "paper" PPE. The Appellant's special preparation claim form includes a box for specifying the amount of paper PPE included within the graduated fee paid to the Appellant, but it has been left blank. It seems highly unlikely, however, that the served paper PPE could have come to 10,000 pages.

23. Because I do not accept that all of the electronic evidence qualifies as PPE, and

because the total number of pages of electronic evidence does not exceed about 28,000, I cannot be satisfied that the Appellant received 25,000 pages of electronic PPE above the 10,000 page limit.

24. I bear in mind however that the provisions to which I have referred allow a special preparation claim to be made for reviewing electronic evidence even if it does not qualify for inclusion within the PPE count (although, as the Determining Officer said, it would probably require less consideration than evidence that does qualify).

25. This takes me to whether (a) the 613.45 hours' special preparation claimed by the Appellant for reviewing the electronic evidence was reasonable, and (b) whether it can be justified at the Grade A level sought by the Appellant.

26. The answer to (b) is, plainly, no. Whatever the relationship between the Appellant's Grade A fee earner and the Defendant, straightforward data cross-checks are suitable for delegation to a more junior fee earner. If anything, the Determining Officer has been generous in assessing the entire special preparation claim (as allowed) at grade B.

27. As for (a), it is evident from the Appellant's own submissions, and from the worklog provided support of the claim, that the Grade A fee earner's review of the electronic evidence was undertaken manually. No electronic searching or filtering methods were used. So, for example, the worklog contains multiple entries of in the region of six hours going through pages of electronic evidence looking for data linking the Defendant to his co-Defendants, and finding nothing.

28. I have (after some delay caused by filing difficulties) received from the Appellant a copy of the served electronic evidence. The great majority of it is in PDF format, with some spreadsheets in addition. All of it lends itself to fast electronic searching methods. Much of the PDF data is broken up into small reports rather than large ones, but widely available and inexpensive PDF software offers facilities for undertaking a search for a given word or number throughout multiple documents. Such searches can be completed in minutes rather than hours, and the user can attend to other matters whilst awaiting the results.

29. For that reason, I have concluded that the methodology employed by the Appellant in reviewing the electronic evidence was highly inefficient. It was not necessary to spend so much time going through the evidence manually, page by page. Using common electronic search methods could have reduced the review time to a fraction of what has been claimed.

30. In all the circumstances I am quite unable to accept that the necessary work could not have been undertaken within the 320 hours (about eight working weeks) allowed by the Determining Officer.

31. For those reasons, this appeal is dismissed.