SENIOR COURTS
COSTS OFFICE

Ref: SC-2019-CRI-000138

Dated: 19 January 2021

APPEAL FROM REDETERMINATION

REGINA v FALANGA AND NGESA

THE CROWN COURT AT **HARROW**

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

CASE NO: T20190152

LEGAL AID AGENCY CASE

DATE OF REASONS: 13.11.19 and 01.02.20

DATE OF RECEIPT OF NOTICE OF APPEAL: 07.12.19

APPELLANTS: Leslie Frank Solicitors

This appeal is unsuccessful for the reasons set out below.

JENNIFER JAMES
COSTS JUDGE

REASONS FOR DECISION

1. The substantive issue arising in this appeal is as to the number of pages of Prosecution evidence ('PPE') for the purposes of the Graduated Fee claim submitted by the Appellants. The Appeal was lodged over a year ago and the Legal Aid Agency ('LAA') submitted its supplementary Written Reasons on CE-File in January 2020. I apologise for the length of time taken to produce this Judgment; notwithstanding the Covid-19 pandemic, and notwithstanding the failure of this Appeal, both sides deserved certainty upon costs, by way of a decision, much faster than was the case here.

2. This criminal costs appeal is to be determined on the papers. The amount in dispute in the Appeal is now relatively small. The initial claim was for 877 pages of which the LAA allowed 624 as to 411 paper pages (40 Statements, 363 Exhibits and 8 streamlined Forensic Reports) and 213 electronic pages from four handset download reports.

3. Hence the Appeal originally challenged the disallowance of 253 pages comprising 228 electronic pages (the remainder of the download reports) and the remaining paper pages (coversheets). The figure for these is given as 28 and 29 but 253 minus 228 equals 25 pages so there appears to be some arithmetical confusion.

4. In its Written Reasons the LAA explained its position and explained the basis on which a concession had been made which, it said, had substantially narrowed the issues (by allowing a further 73 pages from the handset download reports, giving a new total for the electronic pages in dispute, of 180 pages as to 155 pages of phone downloads and what again appears to be 25 pages of coversheets).

5. The Determining Officer decided not include the disputed pages in the PPE count on the basis that they were either coversheets or contained meta data of no evidential value, and the Written Reasons uphold that principle but allow a further 73 pages on a second count of the pages in the downloads. It does not appear to be a change of position on the principle of disallowing meta data and coversheets, but is an acceptance that the Determining Officer had disallowed too many pages.

6. The issue in this appeal is solely whether the remaining 180 pages should count towards the PPE for the Appellant's Graduated Fee claim. The amount at stake is not insignificant; the 253 PPE originally in dispute, are said to be worth £3,508.40 or something like £13.87 per page (so roughly £2,496.10 at stake for the remaining 180 disputed pages).

Background

7. Little background information has been provided and given the narrow scope of the Appeal none has been necessary; it is noted that there was a 5-day Trial for a classification "B" offence and that the Appellant firm acted for two Defendants.

The Regulations and Case Law

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. There is no dispute between the LAA and the Appellants, that the disputed material is to be treated as served under the scheme, but it is clear from the terms of Regulation 1 (5) that it is not of itself enough for the material to count as PPE that it be served. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045n(QB) (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

10. In his judgment Holroyde J (as he then was) when dealing with the issue as to whether served material should count as PPE, said this:

"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".

11. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, 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*."

12. 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, e.g. 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."

13. In his decision Holroyde J also cited, with apparent approval, 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]

The PPE claim:

14. Since reviewing this Appeal, the LAA has made a further concession of an additional 73 pages in relation to the 4 handset reports. A brief breakdown of what was originally allowed, what has now been allowed and what remains in dispute was set out in a table in the Written Reasons. Essentially, the only pages left in dispute were the 155 electronic pages of meta data at the end of each of the four reports which (per the LAA) related to the XRY extraction process and contained no data relating to the underlying case, and the 25 paper pages of cover sheets.

    Report 46 contains 135 pages, of which 110 have now been allowed.
    Report 47 contains 108 pages, of which 57 have now been allowed.
    Report 48 contains 70 pages, of which 42 have now been allowed.
    Report 49 contains 128 pages, of which 77 have now been allowed.

15. No concessions were made in respect of the 25 paper pages which remain claimed for cover sheets from the Digital Case System and no allowance was made for the four sections on each report which (per the LAA) related only to the meta data of the XRY extraction report.

16. Hence, across the 4 Reports, the total number of pages is 441 (all claimed) and the total now allowed is 286 (an increase on the 213 originally allowed by the Determining Officer) leaving a balance unpaid as meta data, at 155 pages. An example of the XRY meta data in each of the reports, as cited by the LAA in the Written Reasons, is this:

    XRY System/Log Index 9
    Module MAIN
    Status Success
    Time 02/06/2019 12:30:37
    Message I1 Resp = [MTK2N103.10.02.11.p1]
    XRY System/Log Index 10
    Module MAIN
    Status Success
    Time 02/06/2019 12:30:37
    Message Device found on MSAB Generic Communications Port (COM5)
    [COM5].

17. The Appellant asserts that the four telephone reports were created in paper form and were turned into electronic documents; per the LAA this is simply incorrect. A mobile phone download extraction is an electronic process and so it cannot sensibly be said that these were originally paper documents. As they are electronic documents, the Determining Officer is entitled to apply discretion by taking in to account the nature of the document and any other relevant circumstances when deciding whether some or all should be included in the PPE count. Including all of the report contents but not the 155 pages of meta data was (says the LAA) a reasonable exercise of discretion.

18. The LAA maintains its dispute in relation to the 25 cover pages, which (it says) were correctly excluded from the page count on the basis that they do not fall into the definition of PPE under paragraph 1(2). They are not:

"*(a)witness statements;*
(b)documentary and pictorial exhibits;
(c)records of interviews with the assisted person; and
(d)records of interviews with other defendants,".

19. Per the LAA, cover sheets serve the same purpose as an NAE, (which itself is never included in the page count for PPE). It is unclear on what basis the learned Judge in the *Ridwan* case concluded that coversheets were part of the PPE but (per the LAA) that decision is not binding on other costs judges and it seems clear as a matter of law that cover sheets simply cannot be included in the page count.

20. I have not been able to find a reference to a case of *Ridwan* in the Appellant's papers; in the original Written Reasons there is a reference to the decision in the case of *Ridwan* being decided upon its own facts so that this case would appear to have been distinguished by the LAA of its own volition, rather than being cited by the Appellant firm.

21. The Appellant has argued that the (download) reports should have been allowed in full as they constituted properly served PPE and therefore *"…are allowable per se."* This argument was apparently based on the decision of Master Rowley in *R v Mooney* SCCO ref 99/18. However, it seems to me that the facts of that case are distinguishable from those that apply here; the number of images necessary to reach the 10,000 'cap' in *Mooney* was a few, whereas here the Appellants would (in relying upon *Mooney*) be asking the LAA to allow in excess of 155 extra, irrelevant, pages in their own right (and not – it appears - to reach a specific 'cap' as in *Mooney*).

22. In any event, by reference to the case of *R v Muckhtar Khan* SCCO ref 2/18, in which the Court refused to certify such a point of principle of general importance for the purposes of an appeal, I do not accept that there is any such principle.

23. The £100 issue fee has (per the LAA) already been refunded to the Appellant because they have been partially successful in this Appeal, achieving a further 73 PPE.

Decision

24. Whether electronically served material should be included within the PPE depends upon its substance, relevance, importance, and context. The fact that the Defence were required to read subfolders which transpire to have included 25 paper pages of coversheets and 155 electronic pages of meta data, does not detract from the reasonableness of the Determining Officer's exercise of discretion to exclude those pages from PPE.

25. I do not accept the Appellant firm's assertion that the download Reports were, *"…paper documents (albeit served electronically)…"* Telephone downloads are electronic (and are designed so that they can be very quickly searched on screen e.g. by reference to relevant contact names and numbers, or by reference to relevant dates). In particular, for the reasons above referred-to, in my view the learned Judge's decision in *Mooney* is not applicable to, and does not assist the Appellant firm in, this case.

26. I also do not accept the Appellant firm's proposition that cover sheets are recoverable. In my view cover sheets are not recoverable as a matter of principle; they are routinely disallowed, and the Appellant firm has not produced any cogent argument as to why the Determining Officer should have allowed them in this case. If another costs judge has allowed them on the facts in another case, that is a separate issue; nothing I have seen persuades me that they should be recoverable here.

27. In my considered opinion the allowance now made for the electronic and paper PPE at 697 pages (the 624 allowed by the Determining Officer plus the 73 additional pages subsequently conceded by the LAA) is reasonable and should not be further increased. I therefore allow no increase to the assessed figure and no costs for the Appeal over and above the £100 Court Fee, which the LAA asserts has already been returned to the Appellant firm (and which must be returned if this has not yet happened).

TO:	Leslie Frank Solicitors DX 46458 KENTISH TOWN	COPIES TO:	Carmel Curran LAA DX10035 Nottingham