SENIOR COURTS
COSTS OFFICE

SCCO Ref: 204/18

Dated: 29 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v BECKFORD

CROWN COURT AT WINCHESTER

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007 / REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20170180

LEGAL AID AGENCY CASE

DATE OF REASONS: 27 September 2018

DATE OF NOTICE OF APPEAL: 18 October 2018

APPELLANT: Ronald Fletcher Baker LLP

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

The appropriate additional payment, to which should be added the Appellant's summarily assessed costs in the sum of £3,000 inclusive of VAT and the £100 paid on appeal, should accordingly be made to the Appellant.

MASTER NAGALINGAM
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Ronald Fletcher Baker LLP, ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Authority ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of its Litigators' Graduated Fee ('LGF') claim.

2. The Appellants submitted a claim for 9,997 PPE, which included 9,854 pages of electronic exhibits identified as CE/JB/01/JWG/01 and CE/JB/02. The Respondent, following a first redetermination, allowed 1,554 PPE, comprising 146 paper pages of statements and exhibits, and 1,408 pages of the electronic exhibits. Ostensibly, therefore, 8,443 pages remain in dispute and comprise the issue in this appeal. In fact, for reasons outlined below, the issues and arguments relevant to the outstanding dispute have since narrowed.

Background

3. The Appellants represented Mr Joshua Beckford ('the Defendant') who was charged on an indictment alleging 2 counts of possessing a controlled drug of Class A and 2 counts of possessing a controlled drug of Class A with intent. He was tried at Winchester Crown Court from 5th to 7th February 2018. He was found guilty.

4. The Prosecution asserted that the Defendant had engaged in the sale and supply of drugs, aided by the use of a 'burner' phone, ownership of which the Defendant denied. The electronic exhibits CE/JB/01/JWG/01 and CE/JB/02 comprised data downloaded from the 'burner' phone and the Defendant's personal mobile smartphone. Along with ANPR evidence, the data on the two phones were analysed to establish if any links existed. The Prosecution used the telephone data and the message data alongside ANPR data to create schedules and charts with they stated showed the Defendant arranging sales of drugs and then driving to an agreed location in order to conduct the transaction.

5. On 28 January 2019, the Respondent conducted a review of exhibits CE/JB/01/JWG/01 and CE/JB/02 in light of the appeal submissions and allowed a revised count of 6,589 pages of PPE, comprising 146 pages of paper evidence and 6,443 pages of electronic evidence. This comprised the core communications data downloaded from both mobile phones and included contacts, call logs, SMS messages and chat messages. Of the material excluded from the page count it is the 2,997 pages claimed as PPE for images downloaded from the Defendant's personal smartphone which is now the only subject matter of this appeal.

The Regulations

6. The Representation Order is dated 3 July 2017 and so the applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations').

7. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> *"1. Interpretation*
>
> *...*
>
> *(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 in account the nature of the document and any other relevant circumstances".

8. Paragraph 20 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

"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, 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 in each case using the rates specified in the table following paragraph 27.

(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."

Authorities

9. Authoritative guidance was given in *Lord Chancellor v. SVS Solicitors* [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at paragraph 50) these principles:

> *"(i) The starting point is that only served 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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the 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."*

10. The Appellants have also cited the judgment of Nicola Davies J. in *Lord Chancellor v. Edwards Hayes LLP* [2017] EWHC 138 (QB) and *R v Ali* [2017] 4 Costs LO 533.

11. The Respondent has cited *R v Sana* [2014] 6 Costs LR 1143 and *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB).

The submissions

12. The Respondent's case is set out in the Written Reasons dated 27 September 2018 and in written submissions drafted by Mr Michael Rimer and dated 28 January 2019. The Appellants' submissions are set out in the Grounds of Appeal and an Appellants' Skeleton Argument dated 25 January 2019, prepared by Counsel Mr Wells. Mr Raphael Steele, a solicitor at the Appellants, has also filed and served a "Solicitor's Note – Request for Crown Court Redetermination" alongside a note from the Defendant's trial counsel. Mr Wells and Mr Rimer both attended and made oral submissions at the hearing on 29 January 2019.

13. There is no dispute that the image data extracted from the Defendant's personal smartphone is included in the served evidence. There is no dispute that the Appellants should not receive some form of remuneration for considering that image data. The Appellants submit that remuneration should be in the form of

PPE whereas the Respondent submits the proper method of remuneration is special preparation.

The revised appeal

14. By the time of the hearing on 29 January 2019 it had become clear that the issues in dispute had narrowed. First, the Respondent conceded that the appeal should be allowed to the extent that the PPE be increased by an additional 5,035 pages of electronic evidence. Second, the Appellants argued only for the additional inclusion of the entirety of images on the Defendant's personal smartphone, on the basis of a further 2,997 pages of PPE.

My analysis and conclusions

Agreed matters

15. The Respondent, as noted, concedes that an additional 5,035 pages should be added to the PPE. To this extent, therefore, the appeal should be allowed.

Inclusion of images

16. The Appellants argue that those pages of exhibit CE/JB/02 which comprised images taken from the Defendant's personal smartphone should be included in the PPE. This is rejected by the Respondent.

17. Mr Rimer, on behalf of the Respondent, was at a disadvantage in that prior to today's hearing he had been unable to download the images saved on exhibit CE/JB/02 so as to analyse the same. Notwithstanding that disadvantage, Mr Rimer is correct to observe (as per paragraph 26 of his skeleton argument) that "the majority of the images on his [the Defendant's] 'personal' phone were just that: the usual social and personal images that one would expect to find on a modern smartphone e.g. selfies, photos of friends/family, internet jokes and memes and various icons and logos". Mr Rimer reaffirmed this position when, during the course of the hearing, the Appellant's representatives were able to show Mr Rimer the relevant image data on a laptop computer.

18. There are no concerns as to duplication, but rather the importance of the content to the defence and the basis upon which any analysis of that content ought to be remunerated.

19. The Respondent argues that these pages should not be included in the PPE by reference to paragraph 1(5) of Schedule 2 to the 2013 Regulations, as "*it is unclear from the submissions provided how the data on the remaining pages of the reports were directly relevant to the case. It is therefore considered more appropriate for the remaining pages to remunerated as special preparation on a time taken basis*". The Determining Officer accordingly exercised her discretion to exclude the images from the Defendant's personal smartphone from the page count, taking into account the nature of the document(s) and any other relevant circumstances. Not only is this an essential part of the process set out in the 2013 Regulations but, as Holyroyde J. noted at paragraph 50(ix) of *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB), it "*is an important and valuable control mechanism which ensures that public funds are not expended inappropriately*".

20. The Appellants submit that the images should be included in the PPE because "*incriminating images of the drug phone had been found by the prosecution, so all other images had to be analysed for context. This was central to the case as one picture on the personal phone displayed the dirty phone itself*". Mr Wells clarified that the references to the "drug phone" and "dirty phone" both related to the 'burner phone' colloquially referred to above.

21. The Appellants submit that the case was about the link between an iphone (which the Defendant accepted was his personal smartphone) and a 'burner' phone, which the Defendant denied ownership of. Those submissions are amplified in a note from the Appellant's Solicitor which states:

"*Paragraph 20 of counsel's note explains the relevance of these pages. The Prosecution had relied on incriminating images on the phone which appeared to show a picture of the second phone that formed the basis of the case. The other images also had [to] be examined to understand what use the defendant made of the photo gallery on his mobile phone and whether there was anything*

within the photos that might support his explanation for having that image on his phone. Further details can be found in paragraph 20."

Paragraph 20 of the Defendant's counsel's note states:

"*The photo section of the download was relied upon by the Crown because of an incriminating photograph on the phone of what appeared to be the screen of the burner phone or one like it showing the words "NHS_NoReply". The other images had to also be examined to try to understand what use Mr Beckford made of the photo gallery on his mobile phone and whether there was anything within the photos that might support his explanation for having that image on his phone.*"

22. I am satisfied, having considered the parties' written and oral submissions carefully, that the Respondent was correct, on the facts of this case, to exclude the images on the Defendant's personal smartphone from the PPE count, when taking account of the nature of the documents and any other relevant circumstances. The counts of possession had been admitted by the Defendant and so it was the counts of intent which the Appellants were tasked with defending. The CPS were satisfied that a single image of the 'burner' phone on the Defendant's personal smartphone was sufficient and either did not look for further incriminating evidence or did not find any. The CPS relied on that single image only, alongside the other evidence outlined above. It is difficult to envisage what other images the defence could have located which would amount to a defence to intent, or indeed in mitigation. The Defendant was already in the position of having to explain the presence of the 'burner' phone image on his personal smartphone, and the fact that the Defendant's personal smartphone number was saved in the 'burner' phone under "Me". I cannot comprehend how the absence or otherwise of further incriminating images could help to explain the 'burner' phone image or storage of the Defendant's smartphone number on the 'burner' phone under "Me". Indeed I observe that the Defendant sought to explain away the reference to "Me" as being a shortened version of "Menace", which the Defendant submitted was a nickname he was sometimes known by.

23. Notwithstanding those conclusions I concur with the Respondent's stance at paragraph 30 of Mr Rimer's written submissions that a review of the images on the Defendant's personal smartphone was reasonable when taking into account all of the relevant circumstances of the case.

Conclusions

24. I find and direct that: (i) the initial page count be increased from 1,554 to 6,589; (ii) the claim for 2,997 PPE in the form of images from exhibit CE/JB/02 (the Defendant's personal smartphone) be remitted to the Determining Officer with a direction that the claim be reviewed by reference to paragraph 20 of Schedule 2 of The Criminal Legal Aid (Remuneration) Regulations 2013 to calculate the amount of a special preparation fee for consideration of those images.

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