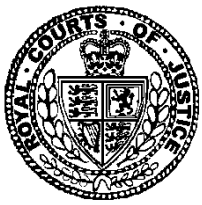

Neutral Citation No. [2025] EWHC 374 (SCCO)

Case No: 50EL0080123

SCCO Reference: SC-2024-CRI-000101

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21st February 2025

Before:

COSTS JUDGE WHALAN

R
v
STEVEN JARROLD

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

Appellants: Parlby Somerville Ltd

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

The appropriate additional payment, to which should be added the £100 paid on appeal, plus costs of £250 (+any VAT payable) should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Parlby Somerville Ltd ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS').

2. The Appellants challenge the Respondent's decision to reduce the number of pages of prosecution evidence ('PPE') in the claim. The Appellants submitted a claim for 2684 PPE. The Determining Officer allowed 201 PPE, comprising 16 pages of statements, 86 exhibits, 36 transcripts and 63 pages of electronic evidence. Pursuant to this appeal, the Respondent has allowed another 173 pages of electronic evidence, making a total of 374 PPE. 2310 PPE remain in dispute.

Background

3. The Appellants represented Mr Steven Jarrold ('the Defendant'), who was charged at Plymouth Crown Court on an indictment alleging two counts of sexual assault. The alleged offences occurred on 26th June 2022. The Defendant pleaded not guilty at the pre-trial preparation hearing but changed his pleas to guilty on the first day of the trial.

4. The prosecution case turned in part on text messages sent by the Defendant to the complainant after the alleged assault, in which he appeared to accept that the assault had occurred and apologised. There was a possibility – mentioned in a text message from the Defendant – that he had taken a photograph of the complainant on his phone either during or shortly after the alleged assaults. No such image was found on the Defendant's phone and it was suggested that this had been deleted. The Determining Officer, in assessing the relevance of the electronic datum to the PPE count, allowed 63 pages of messages, but nothing for photographs or images. The Respondent, having reconsidered the position in the light of this appeal, concedes that images have some relevance to the PPE count, and the LAA allowed accordingly an additional 123 pages, representing 10% of the total.

The Regulations

5. The Representation Order is dated 1st August 2023 and so the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply, as amended.

6. 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*.

Case Guidance

7. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50):

> *(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.

8. I am referred additional to the decisions in R v. Jalibaghodelezhi [2014] 4 Costs CLR 781, R v. King [2019] SCCO Ref: 170/19, R v. Barrass [2020] SC-2020-CRI-000083, R v. Carter [2020] SC-2020-CRI-000100, R v. Gyanfi [2022] EWHC 2550 (SCCO), R v. Lawrence [2022] EWHC 3355, and Lord Chancellor v. Lan and Meerbux Solicitors [2023] EWHC 1186.

The submissions

9. The Respondent's case is set out in Written Reasons dated (incorrectly) 29th January 2025 and in Written Submissions drafted by Ms Alice Walker, Government Legal Department, dated 9th January 2025. The Appellants' case is set out in Grounds of Appeal and in Written Submissions dated 13th January 20225. Mr Somerville, solicitor, attended and made oral submissions for the Appellant at the hearing on 31st January 2025. No appearance was made by the Respondent.

My analysis and conclusions

10. The Respondent, in summary, relies on the proposition that most of the images/photographs on the Defendant's phone could be reasonably excluded from the PPE count, as most are clearly identifiable as being irrelevant. The prosecution evidence was neither downloaded nor relied on any image taken from the Defendant's phone. The only reference to images was the suggestion in a text that the Defendant had taken a photograph of the complainant after the assault, which image had been deleted subsequently. Accordingly, while acknowledging that the Appellant must reasonably pay some attention to this part of the electronic datum, a 10% allocation was reasonable.

11. The Appellants, in summary, submits that the prosecution relied impliedly on a reference to a prejudicial photograph and that this obliged them reasonably to look through and consider the entirety of the images/photo file. The Respondent, submits Mr Somerville, effectively concedes the inclusion of images as a relevant category of

PPE by virtue of the 10% allocation. The 10% allocation is an arbitrary concession and the calculation is unexplained in the Respondent's written submissions.

12. At the oral hearing, Mr Somerville made additional reference to the question of video evidence, which comprises 365 pages of electronic datum (pp 2082-2447). The complainant had apparently alluded to the fact that the Defendant had made a video during the assaults in her own Achieving Best Evidence ('ABE') video statement. This reference was edited out of the transcript of her ABE and the prosecution never relied on any form of video evidence. Nonetheless, submits Mr Somerville, it was necessary and reasonable for the Appellants to consider the Defendant's video file.

13. I am satisfied that the Respondent's 10% concession in respect of the image files is reasonable and correct. A reference was made to a potential, prejudicial photograph in the Defendant's text messages, and so images formed reasonably a relevant part of the PPE count. Nonetheless, no such image actually existed (in either used or unused material), and the prosecution relied on no photographic evidence. The % allowance is well established as a part of the "important and valuable control mechanism" cited by Holroyde J at paragraph 50(ix) of Lord Chancellor v. SVS Solicitors (ibid). On the facts of this case, it seems to me that a 10% allowance is well within the parameters of a reasonable allocation.

14. The Appellant referred to video evidence at the oral hearing and it may well be that this element was not previously emphasised before the DO or the LAA. Given the complainant's initial reference to a video, I am satisfied that this datum also forms part of the relevant PPE. Again, no video existed, and there is no direct citation or indirect reference to this type of evidence in the prosecution case. Nonetheless, it was reasonable, it seems to me, for the Appellants to consider this datum as a potential source of compromising evidence. Although the % approach could arguably apply to video evidence, this is, in my judgement, a more difficult and artificial proposition. In any event, on the facts of this case, I would allow the video evidence as a whole in the PPE count.

15. Accordingly, for the reasons outlined above, the appeal is allowed to the extent and I direct that the Appellants' LGFS claim should be recalculated by reference to 739 (365 + 374) PPE.

Costs

16. The Appellants have been successful (in part) by reference to the Respondent's concession and my finding after the oral hearing. The £100 paid on lodging the appeal should be returned, plus additional costs of £250 (+ any VAT payable).

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