



Neutral Citation No. [2022] EWHC 1785 (SCCO)

Case No: T20200236

SCCO Reference: SC-2021-CRI-000147

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 7th July 2022

Before:

COSTS JUDGE WHALAN

REGINA

v

SPENCE

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

Appellant: Lam & Meerabux Solicitors

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

The appropriate additional payment, to which should be added the sum of £1000.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

Costs Judge Whalan

Introduction

1. Lamb & Meerabux Solicitor ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of its Litigator's Graduated Fee Scheme ('LGFS') claim. The issue on appeal is whether the total PPE count should be 9756, as claimed, or 3798, as allowed.

Background

2. The Appellants represented Mr Philip Spence ('the Defendant') who appeared with a number of co-defendants at Woolwich Crown Court on an indictment alleging money laundering arising from a drug supply operation. He was convicted following trial.
3. The prosecution relied on electronic datum downloaded from mobile phones recovered from the defendants. This digital material was uploaded by the CPS to the Digital Case System ('the CDCS system'). The relevant datum appears at J(g), (h) and (i) [MAE7]. It seems to be common ground between the parties that the page count recorded by the CDCS totals 9756. It is also common ground that all the digital datum is considered relevant to the PPE count. The limited but important issue on this appeal is whether the Determining Officer should in these circumstances simply accept the CDCS count, or whether he/she was entitled to reduce the count having identified pages which are apparently 'blank' or 'duplicates'.

The Regulations

4. 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 subparagraphs (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

5. Authoritative guidance was given in PPE cases by Mr Justices Holroyde in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB). The parties refer specifically to para. 50(i) to (xi).

The submissions

6. The Respondents’ case is set out in Written Reasons dated 26th October 2021 and in Submissions drafted by Mr Jonathan Orde, a Barrister employed at the Government Legal Department, dated 27th April and 5th May 2022. The Appellants’ case is set out in Grounds of Appeal appended to the Appellants’ Notice and in Submissions drafted by Mr Martin McCarthy, Counsel, dated 22nd November 2021 and 3rd May 2022. Mr Orde and Mr McCarthy attended the oral hearing on 24th April 2022. The parties’ second written submissions were filed (with the permission of the court) after the hearing.

My analysis and conclusions

7. The Respondent, in summary, submits that it is incumbent on the Determining Officer, when exercising the discretion at para. 1(5) of Schedule 2 to the 2013 Regulations, to identify and exclude from the PPE count pages which are blank or which appear to duplicate other pages in the relevant datum. As such, the issue is not so much relevance, but whether blank or duplicate pages properly exist as a 'page of prosecution evidence'. Mr Orde refers to various cases (para. 20-27 of his first written submission), but essentially reliance is placed on the guidance at para. 50(ix) of Lord Chancellor v. SVS (ibid), where Holroyde J emphasised the importance of the Determining Officer's discretionary consideration as "*an important and valuable control mechanism which ensures that public funds are not expended inappropriately*". Mr Orde's analysis suggests that file J(i) contains about 2,279 blank pages. This corresponds to a smaller reduction than was applied by the DO. With regard to 'duplicate' pages, Mr Orde submits that solicitors should only be paid for reviewing electronic evidence as PPE once.
8. The Appellants, in summary, submit that where relevance is conceded, the Determining Officer should accept and endorse the page count recorded formally by the prosecution on the CDCS system. Mr McCarthy refers to the decision of Costs Judge Rowley in R v. Jankis [2020] SC-2020-CRI-000107. The relevant part of his determination is set out at paras. 20-23:

20. The issue is whether it is appropriate for the determining officer to reduce the PDF by the number of blank pages that he found. It is not a course of action that, it seems to me, is one that should be widely adopted. The repeated phrase that the calculation of the graduated fee is meant to be mechanistic does not militate towards individual PDFs being scrutinised page by page. I can understand why the determining officer took that approach in this case having decided that the PDF had been created from an Excel spreadsheet which is known for producing blank pages. But it seems to me an approach that could only be adopted in extremis.

21. Mr McCarthy challenged the appropriateness of the determining officer's approach given that it was impossible for solicitors to challenge which pages had been disallowed in the absence of any information. I think there is a good deal of force in Mr McCarthy's point albeit that it is not which, as a matter of practicality, will be difficult to deal with in any proportionate fashion.

22. Ultimately, I have concluded that I should not take the PDF as my starting point, although the determining officer had little choice but to use that

document. It is a document (whoever created it) which would appear to be unsatisfactory for the purpose of calculating PPE. The difficulty in challenging the subsequent manipulation of that document by the determining officer only highlights that this is not satisfactory.

23. I prefer to take the view that the document on the DCS is the one which ought to be contemplated, at least in this case. The move towards evidence being produced on the DCS is clear and if there is a reliable page count on that platform, it seems to me to be inevitable that that is the one on which reliance will be placed in due course. Whilst there are practical difficulties in the determining officer not being able to see the document, for the purpose of this case alone, I am prepared to accept Mr McCarthy's information of the page count on the DCS that it contains few if any blank pages as would be expected from the print preview to Excel document.

CJ Rowley went on to “stress that this is a decision made on the specific facts of this case” (24).

9. Mr McCarthy also relies on my decision in R v. Dafallah [2020] SC-2020-CRI-000044. In that case, where the relevant datum comprised an Excel schedule uploaded to the Digital Case System, recording thereby a formal page count. Recognising, inevitably, that not every one of the pages counted might necessarily include substantive to relevant datum, I concluded (at para. 13) that:

It seems to me, however, that when exercising the formal (often quite technical) requirements of the LGFS, the only fair and equitable way of reaching a total PPE count – and in this regard the inclusion of an exhibit of undoubted general relevance – is to adopt the count recorded in the DCS.

10. Mr Orde, for the Respondent, submits that this reason is incorrect, “because if applied generally it would have the effect of trumping the determining officer’s statutory duty under para 1(5) to assess electronic evidence”.
11. Turning to the question of duplicate pages, Mr McCarthy relies on my decision in R v. Everett & Others [2019] SC-2019-CRI-000038. In that case, I concluded that any duplication was only apparent after “*relatively detailed analysis*” of the datum, I concluded (at para. 14) that “*it is only fair to concede this analysis in the PPE count (i.e. the number recorded on the DCS system), notwithstanding the fact (albeit with hindsight) of some considerable duplication*”.
12. The discretionary power of the DO to include to exclude datum from the PPE count at para. 1(5) of Schedule 2 is, as Holroyde J stated, an important and valuable control

mechanism which ensures that public funds are not expended inappropriately. This function, it seems to me, is carried out properly by a (sometimes broad) consideration of the substantive relevance and importance of the electronic datum to the prosecution's case. I do not see that this function extends to an (often ad hoc) assessment of whether a page is technically 'blank' or constitutes a 'duplicate' of another page. Varied use of the Excel and/or PDF format, in circumstances where material is often converted from the former to the latter, does not lend itself easily to an accurate assessment of blank pages. The process is never "blindingly obvious", as was submitted by the Respondent's advocate in R v. Everett (ibid), and it almost invariably produces contradictory conclusions, notwithstanding the amount of time and effort expended on the process. This is illustrated vividly in this case, where Mr Orde's calculations differ markedly from those of the Determining Officer. As such, the issue is whether, when substantive relevance is conceded, the PPE count should be based on the total recorded formally by the prosecution in the CDS system, or whether it should be subject to further reduction on the basis of an analysis of blank and/or duplicate pages, a process which seems to me to be invariably inconsistent and subject to variation or dispute, notwithstanding the time expended on the process. It is quite clear to me as the court has found consistently in Jankis, Dafallah and Everett (ibid), that the preferable course is for the PPE count to rely on the total recorded in the CDCS system. The prosecution ultimately control the upload of digital datum to this system and can edit out any pages, blank, duplicate or otherwise, if they consider it reasonable and proportionate to do so. The DO still performs the core function, the important safeguard of assessment by reference to relevance and substantive importance to the prosecution case, so the function of para. 1(5) is in no way compromised by this approach. Again, however, where substantive relevance is either conceded or assessed by this criteria, so that all digital datum is considered relevant for inclusion in the PPE count, there should not be a further deduction for what the DO considers to be either 'blank' or 'duplicate' pages. To entertain this process would be to invite repeated streams of inconsistency and dispute in cases assessed under the LGFS. It is in no way unreasonable or unjust to adopt the formal page count in the CDCS system for the purposes of counting the PPE in LGFS claims.

13. This appeal is allowed and I direct that the Appellants' LGFS claim should be paid by reference to 9756 PPE.

Costs

14. The Appellants' appeal has succeeded and I award costs of £1000 (+ VAT) in addition to the £100 paid to lodge the appeal.

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