



Neutral Citation No. [2023] EWHC 1636 (SCCO)

Case No: T20217088

SCCO Reference: SC-2022-CRI-000066

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 27 June 2023

Before:

COSTS JUDGE LEONARD

R

v

MUNEMO

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

Appellant: Bhandal Law (Solicitors)

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors under the Litigators' Graduated Fee Scheme set out at Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The Representation Order was made on 15 June 2021 and the 2013 Regulations apply as in effect on that date.
2. The graduated fee due to the Appellant is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"), subject to an overall "cap" which is, for present purposes, 10,000 pages.

The Regulations

3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, (2)-(5) to the 2013 Regulations. Those paragraphs explain how, for payment purposes, the number of pages of PPE is to be calculated:

"(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..."

The Authorities

4. The parties have made reference to a number of judicial authorities and non-binding Costs Judge decisions. It may help to put this appeal in context if I refer at this stage to the authorities I believe to be most pertinent for present purposes.

5. PPE appeals concerning electronic evidence have tended to turn upon either or both of two issues. The first is whether evidence which an appellant wishes to include within the PPE count should properly be considered as “served” evidence, or as unused material. Served evidence is, broadly speaking (and subject to the guidance of Holroyde J referred to below) evidence upon which the Prosecution relies. Unused material must be disclosed by the Prosecution under the provisions of the Criminal Procedure and Investigations Act 1996 because it might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.
6. Served evidence may be included within the PPE count: unused material will not.
7. The judgment of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB)* established that although service by the Prosecution upon the Defence is a prerequisite for inclusion of evidence within the PPE count, formal service is not. Evidence which justifies inclusion within the PPE count may properly be treated as “served” even if, for example, it was simply be handed over on a disc in court.
8. Because of the way in which the issues arose and were argued in *Lord Chancellor v SVS Solicitors*, Holroyde J’s judgment did not distinguish between service of evidence (formal or informal) and the inclusion of that evidence within the PPE count. For the purposes of that particular case, served evidence and PPE were effectively treated as the same thing.
9. It must be borne in mind that, by virtue of paragraph 1(5) of Schedule 2 to the 2013 Regulations, served electronic evidence which has never existed in paper form may still be excluded from the PPE count if the Determining Officer considers that appropriate.
10. Holroyde J’s guidance is however still crucial in determining how that discretion should be exercised. At paragraph 50(viii) of his judgment he identified the key criterion: whether the evidence was of central importance to the trial (and not merely helpful or even important to the defence).
11. At paragraph 50(vii) Holroyde J explained that where the prosecution seeks to rely on only part of the electronic data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count. The resolution of such issues will 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.
12. This guidance built upon paragraph 47 of his judgment, in which Holroyde J observed (again, equating service with inclusion within the PPE count):

“It will of course sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material. But it seems to me that such situations will not arise very often, because even in the example I have given, fairness may demand that the whole of the data be served, for example in order to enable the defence to see what other use the defendant was making of his phone around the times of calls which are important to the prosecution case. The key point, as it seems to me, is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be necessary for all of the data from that source to be exhibited so that the parts on which the prosecution rely can fairly be seen in their proper context...”

13. Holroyde J also mentioned the observations of the Senior Costs Judge in *R v Jalibaghodelehzi* [2014] 4 Costs L 781, in which (referring to similar provisions in the Criminal Defence Service (Funding) Order 2007) the Costs Judge said, 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.”

14. Since *Lord Chancellor v SVS Solicitors* was decided, the exclusion from the PPE count of parts of the served electronic evidence has become more commonplace than Holroyde J may have had in mind. That is largely because telephone download reports are commonly served in both spreadsheet and PDF format. The PDF format mimics presentation on paper, lends itself readily to a page count and is usually conveniently and clearly divided into sections, many of which are self-evidently irrelevant and can properly be excluded from the PPE count.
15. In *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB) Mrs Justice Nicola Davies DBE (as she then was) concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the underlying data from which the prosecution had extracted samples upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. The underlying data should accordingly (although never formally served) be included within the PPE count.
16. *Hayes* in my view indicates that where key prosecution evidence is extracted from a particular category of electronic data, one would normally expect all of the electronic evidence in that category (in *Hayes*, messaging data) to be included within the PPE count.
17. There will however be exceptions. Where mobile phone downloads contain large numbers of images, only a small proportion of which are relevant, Cost Judges have, in decisions such as *R v Sereika* (SCCO 168/13, 12 December 2018), taken the pragmatic approach, of allowing an appropriate percentage of the full body of image data.
18. That approach was approved by Cotter J in *The Lord Chancellor v Lam & Meerbux Solicitors* [2023] EWHC 1186 (KB), in which he considered the difficulties of identifying an appropriate page count where evidence has been served in a spreadsheet format that does not readily lend itself to a process of quantification historically based upon counting the pages of paper documents.
19. In *Lam & Meerbux*, prosecution evidence had been served (surprisingly) by uploading to the Court's Digital Case Management System ("DCS") a PDF copy of a "print preview" version of an Excel spreadsheet. The print preview, as is common with spreadsheets, produced large quantities of blank pages, pages containing the Excel grid but no information, or just snippets of data which in isolation were meaningless.
20. Cotter J rejected the approach that had been adopted by the Costs Judge below, of simply adopting the DCS page count. He preferred a relatively broad-brush approach based upon the elimination of blank pages, or those of minimal value. At paragraph 62 of his judgment, he said this:

“In my judgment... when conducting any assessment of electronic material there is nothing wrong, if it necessary and appropriate, with a rough and ready analysis; a “sensible approximation”. It is an entirely proper approach to consider the content of a documentary or pictorial exhibit and conclude that only a proportion of the pages should count as PPE. The perfect must not be the enemy of the good in this regard. Disagreement between parties as to whether there are 1,000 or 1,500 blank or data free pages in a 3,000 page exhibit may result in a broadbrush assessment, but the potential for disagreement, could not justify the conclusion that all 3000 pages should be seen as PPE.”

21. At paragraph 67 of his judgment he warned against an over-pedantic approach to the removal of blank pages:

“... remuneration for detailed consideration of pages which could require no consideration is axiomatically overpayment. However, in any broadbrush assessment proportionality may play a part and in an appropriate case, a determining officer or Costs Judge may take the view that the assessment of the number of blank pages is not worth the candle. The odd blank page within a large body of electronic material is unlikely to be identified as a matter requiring to be addressed.”

The Background to This Case

22. The Appellant represented Raphael Munemo (“the Defendant”) in the Crown Court at Teesside.
23. Between the 1 January and 28 November 2018, five individuals were involved in a conspiracy to defraud credit companies and banks. The Defendant was one of them. The modus operandi of the group was to target premises in the North Yorkshire and Durham areas (13 targeted properties were identified in the Prosecution’s opening note, many of which were isolated); to intercept post to those addresses; to use it to steal the identities of the occupants; and to use the stolen identities to obtain credit from banks and credit companies.
24. Three of the group pleaded guilty to involvement in the conspiracy, leaving the Defendant and one co-defendant, Tendai Dlamini, between them facing an indictment containing three counts of fraud. The case went to trial between 7 February and 11 February 2022. The Defendant was convicted and sentenced on 14 February 2022.

The Appellant's Account of the Case

25. Mr Stephen Tettey, counsel for the Defendant at trial and for the Appellant on this appeal, has explained that very large numbers of commercial, residential and hospitality entities were targeted for credit in the course of the fraud. Despite the scale of the conspiracy and the involvement of other unidentified persons, there was very little CCTV footage to establish the guilt of the five defendants. Banking records were of limited evidential value for the purposes of establishing guilt, as the identities of the complainants had been stolen, and so on the face of it transactions appeared to be conducted by the account holder. Descriptions provided by any eye witnesses were generic, often from a distance, and inadequate effectively to identify any particular person
26. The Prosecution case, accordingly, relied heavily on telephone evidence to establish a number of essential primary facts proving guilt. Cell site evidence could place the phone attributed to a particular defendant in the vicinity of an offence. The billing records of various phones attributed to various defendants identified communications between the defendants; the timing of those communications; and postcodes or other information linking one or more defendants to one or more offences.
27. The Prosecution also relied upon call records which showed a number of defendants, including the Defendant, using phones attributed to them contacting commercial or hospitality entities and even, in the case of the Defendant, a Government department.
28. The majority of the handsets recovered were not registered to the five defendants who featured on the indictment. Several had proxy pseudonyms. The Prosecution needed to collate a range of sources of evidence to establish attribution.
29. The Prosecution presented to the jury extracts from the body of telephone data upon which the Prosecution wished to rely. This appears to have included, among many device downloads, mobile phone download reports ASM1, JCG/2 and JCG/3 (from phones attributed to defendant Gray Gwewo); AQ1, JCG/4, MS/2 and LG/3 (from phones attributed to defendant Zwoushe Zhanje); and SA2 and SA3 (from phones seized from defendant Tendai Dlamini).
30. At a Plea and Case Management Hearing (PCMH) on 10 December 2021, counsel for the Prosecution confirmed that the full body of telephone download reports had been disclosed as unused material through the Egress system. HHJ Singh found that the full reports constituted key evidence in the case and directed that it be served.
31. According to Mr Tettey, the Prosecution was, through the served evidence, able to present such a clear case as to who was alleged to be responsible for each of the various incidents that gave rise to the overall conspiracy, and which devices were utilised to facilitate those offences, that three of the five defendants pleaded guilty.

32. At the outset of the case the Prosecution had alleged that Gray Gwewo was the leader of the conspiracy. In the face of a complex fraud involving five known Defendants and several other persons who could not be identified or located, spread over several months and including many civilian complainants and multiple financial organisations, the Prosecution case inevitably evolved. By the start of the trial the position adopted by the Prosecution was that the Defendant was in fact the leader of the organised crime group, responsible for directing other Defendants and participating in the commission of some of the frauds, but at a greater distance than his lieutenants or those lower in the organisational structure. Again, telephone evidence was pivotal.
33. Download report JCG/3 in particular was a central item of evidence linking all of the Defendants to the conspiracy. It gave access to images of fraudulent financial documents created and completed in the course of the fraud operation; details of third parties; private financial information; various account details; information relating to persons whose identities had been stolen; a history of financial enquiries; and online research in relation to the extraction of data from mobile devices by police.

The PPE Claim

34. The Appellant submitted a claim for payment based upon a PPE count of the maximum 10,000 pages. The Determining Officer allowed a total PPE count of 4,520 pages, including 3,228 pages of electronic evidence. He limited the PPE count from the download reports to call, messaging and contact data.
35. The download reports in this case were for the most part served in spreadsheet form only. According to his written reasons the Determining Officer, in calculating the PPE count, removed blank pages and columns. That would seem to explain why his page count for those parts of the spreadsheet evidence allowed as PPE is much lower than that relied upon by the Appellant, referred to in prosecution documents and, presumably, recorded on the DCS.
36. It is the allowance made by the Determining Officer for telephone download reports that forms the subject matter of this appeal.

Submissions on behalf of the Appellant

37. Mr Tetley refers to the fact that the mobile phone downloads were served in spreadsheet rather than PDF format. Within the spreadsheets, individual web links had to be clicked upon to identify which image, financial institution or service they related to. This was a slow and laborious process and did not always work, though in some instances the metadata would indicate whether an image was likely to be relevant. The timing of the creation of web links was also relevant, and they had to be considered against witness statements from the complainants and from officers of the various financial services providers.

38. Spreadsheet JCG/3 has been provided to me to illustrate what the Appellant received by way of service. It is a large spreadsheet, and it says Mr Tettey the source from which a number of key items were extracted to form a crucial element of the successful Prosecution case against the Defendant. JCG/3 gives access to thousands of pages of images, but as Mr Tettey says it does not display or even preview them. It shows the source of each file (for example another device), the size of the file, the file path and other metadata.

Conclusions on the PPE Count

39. The Determining Officer, as I have observed, limited the PPE Count to call, chat, contact and location data from various devices. That is appropriate to many cases in which no other data can be said to be of central importance to the case.
40. It does not seem to me to be appropriate in this particular case, because the key evidence against the Defendant was not limited to such data but extended to items such as images and web links.
41. It also has to be borne in mind that the telephone download evidence was not served in the readily divisible and page-count friendly PDF format to which I have referred.
42. JCG/3 does distinguish between different categories of data in that it is divided into “worksheets” containing, for example, device information, audio files, camera images, other images etc.
43. Some of this, as in most cases, can quickly be dismissed as irrelevant. Much of it, due to the limitations of the format in which it has been presented, cannot, at least without further examination.
44. I have taken particular note of the “images” worksheet within JCG/3, which contains 3,902 lines of image data without (as Mr Tettey has explained) incorporating any of the images themselves, even as previews.
45. Each line of data incorporates a link to the relevant image which, it seems, no longer functions. Mr Tettey advises me that at the time of service, it was possible to use such links with any spreadsheet to access images, webpages etc, although the outcome of doing so tended to be uncertain. I have been unable to make any of the links work, but long after the conclusion of the case that is not surprising.
46. It may be that the Determining Officer has not made any allowance within the PPE for images because they are now inaccessible. I appreciate that it is for the Appellant to make a case for including electronic documentation within the PPE Count, but it is not the Appellant’s fault that the electronic documentation was served by the Prosecution in such a limited and unhelpful format. The Appellant is not now in a position to supply the images that had to be examined via spreadsheet JCG/3.

47. It seems to me evident that some additional allowance must be made within the PPE Count for image data, because, as attested to by Mr Tetley, a number of images offered direct evidence of fraudulent activity and as such were sufficiently important to the case against the Defendant to justify inclusion within the PPE count. I note from a disclosure management report included with the Appellant's papers that the Prosecution reviewed 3,352 images from mobile telephone JCG/3 alone and produced those considered by the Prosecution to be important (the number not being identified) in a separate "extraction report".
48. As for quantifying the PPE to be allowed for images, the *R v Sereika* percentage approach (which I and other Costs Judges have adopted, in cases such as *R v Gyamfi* [2022] EWHC 2550) is predicated on the understanding that it is possible for a defendant's legal representative to scroll quickly through large bodies of irrelevant image data such as emojis.
49. That cannot, to my mind, be appropriate where, as Mr Tetley has explained, the process of using links from the served exhibit to access image files was of necessity a slow and laborious process in which every link had to be checked. If there is any reliable method of filtering the images worksheet in JCG/3 that might have speeded up the search, I am unaware of it.
50. In those circumstances, it seems to me that on *Hayes* principles the entire body of spreadsheet entries giving access to image data should be included within the PPE Count.
51. This takes me to the method of counting pages. Spreadsheets do not readily lend themselves to a reliable page count, because they do not operate in the same way that paper documents do. Simply producing a "page count preview" can be highly misleading because many of the "pages" so produced (as in *Lam & Meerbux*) may be blank or may contain only meaningless scraps of data.
52. The Determining Officer's elimination of blank pages and columns to produce the PPE Count seems in principle to be in line with *Lam & Meerbux* but the precise methodology adopted is unclear and I have not been able to match all of his figures, which overall seem to me to be too low.
53. For example the Appellant has quantified the "chats" section of JCG/3 at 1,700 pages, which is reasonably accurate if no attempt is made to eliminate blanks. The Determining Officer, albeit allowing all "chats" within the PPE, has allowed 835 pages.
54. By deleting all completely blank columns before calling up a print preview, I have reduced the Appellant's 1700 pages to 1,127 pages in A4 "portrait" format, most or all of which, scrolling through, appear to contain substantial quantities of data. That is presumably because the blank columns have been eliminated from the spreadsheet to be printed. (The page count in "landscape" format is, incidentally, higher).
55. Similarly, my count for the "contacts" section is 472 pages, as opposed to the Determining Officer's 360 pages.

56. I have taken the same approach to the “images” section of JCG/3. Eliminating blank columns produces a page count of 4,848 pages, again without noticeable numbers of blank pages. Those pages needed to be worked through line by line, because the way in which the data was presented give the Appellant no choice. To revisit the observations of the Senior Costs Judge in *R v Jalibaghodelehzi*, the spreadsheet data did not only require a similar degree of consideration to evidence served on paper: it probably required more. Either links were used, or the supplied metadata was examined, to identify and understand the served evidence.
57. Before me, Ms Quarshie on behalf of the Lord Chancellor conceded an additional 1,206 pages of electronic evidence in the same categories as had been accepted by the Determining Officer, bringing the total PPE count accepted by the Lord Chancellor to 5,726.
58. If I were to substitute my own electronic page count for the Determining Officer’s, I would expect the count for the body of PPE now conceded by the Lord Chancellor to be significantly higher than 5,726 pages, but it is not necessary to do so (nor to consider the inclusion of additional data categories). Adding the “images” section of JG/3 alone brings the PPE count to over 10,000 pages.
59. For those reasons, this appeal succeeds.