



Neutral Citation No. [2023] EWHC 3123 (SCCO)

Case No: T20220112  
SCCO Ref: SC-2023-CRI-000020

IN THE HIGH COURT OF JUSTICE  
SENIOR COURTS COSTS OFFICE

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

Date: 28/11/2023

**Before :**

**COSTS JUDGE NAGALINGAM**

**Between:**

**R**

**-v-**

**Besard Gaxha**

**and**

**IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION**

**RBB Law Solicitors**

**Appellant**

**- and -**

**The Lord Chancellor**

**Respondent**

Hearing date: 10/11/2023

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**COSTS JUDGE NAGALINGAM**

## **Costs Judge Nagalingam:**

### **Background**

1. The Defendant in this matter was charged with the possession of controlled drugs and criminal property. The Defendant was found whilst he was exiting a ground floor bedroom of a property which had been forcibly entered by the police. The Defendant's room was searched and several vials of white powder along with multiple bags of empty vials were discovered. In addition was a large ball of white powder (suspected to be cocaine), various bundles of cash, weighing scales, a burner phone and generally materials typically associated with the supply of controlled drugs.
2. The Defendant was also found to be in possession of an unlocked iPhone which the police attributed to the Defendant and marked as exhibit RBK/2, the contents of which were downloaded and analysed. The crown's case was that exhibit RBK/2 was the Defendant's personal phone.
3. The Defendant was indicted on 3 counts as follows:

Count 1 – POSSESSING A CONTROLLED DRUG OF CLASS A WITH INTENT, contrary to section 5(3) of the Misuse of Drugs Act 1971. Namely, that on the 4<sup>th</sup> day of May 2022 the Defendant had in his possession a quantity of cocaine, a controlled drug of Class A with intent to supply it to another in contravention of section 4(1) of the Misuse of Drugs Act 1971.

Count 2 – POSSESSING CRIMINAL PROPERTY, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. Namely, that on the 4<sup>th</sup> day of May 2022 the Defendant possessed criminal property namely, £9,171.50 in cash knowing or suspecting it to represent in whole or part and whether directly or indirectly, the proceeds of criminal conduct.

Count 3 – POSSESSING A CONTROLLED DRUG OF CLASS B, contrary to section 5(2) of the Misuse of Drugs Act 1971. Namely, that on the 4<sup>th</sup> day of May 2022 the Defendant had in his possession a quantity of cannabis, a controlled drug of Class B, in contravention of section 5(1) of the Misuse of Drugs Act 1971.
4. A Newton hearing proceeded on 21 October 2022, the focus of which was the extent of the Defendant's role. The crown are said to have relied on exhibit RBK/2 in support of its case that the Defendant played a significant role in an operation to supply drugs, including the direction of others.
5. The Defendant's case was that whilst he was in the possession of the phone at the time of his arrest, the phone was not his but rather a phone which stayed at the property and was used by others. The Defendant denied in particular being the sender of incriminating messages, denied that the cash found at the property was his, and alleged a person he would only name as "G" was in overall charge.
6. The Defendant's basis of plea set out that he was a vulnerable person, who owed a debt and was being used by an unnamed person higher up the chain of command.

7. The litigator submitted a trial fee claim based on 10,000 pages of prosecution evidence (PPE). The claim was assessed and paid on the basis of 1,399 PPE. This was based on 48 pages of witness statements, 60 pages of exhibits, 8 pages of SFE and 1,283 pages of electronic evidence.
8. The claim for 10,000 PPE was based on the following breakdown of Exhibit RBK/2:
  - Security (55 pages)
  - Organizer (24 pages)
  - Locations (90 pages)
  - Files & Media (3,975 pages)
  - Health (8 pages)
  - General info, Network info, Event Log, Installed Apps (774 pages)
  - Contacts (34 pages)
  - Calls (143 pages)
  - Messages (926 pages)
  - Web (300 pages)
  - Duplicate report (6,262 pages)
9. The Determining Officer allowed locations (90 pages), contacts (34 pages), calls (143 pages) and messages (926 pages in full).
10. In relation to 'Files & Media' the Determining Officer allowed 5% of the pages relating to images only. There are 139 pages of images and so the allowance is 7 pages. In relation to 'Web' the allowance made is 83 pages.
11. At the start of the hearing before me, Ms Quarshie for the Respondent accepted the 55 pages for 'Security' such that they are also now allowed. In addition, Mr McCarthy for the Appellant conceded the pages of 'Duplicate report' (6,262 pages conceded).
12. The Appellant also withdrew their claims for 'Organizer' (24 pages) and 'Health' (8 pages).
13. At the conclusion of oral submissions, I invited the parties to declare any benefit in staying the handing down of judgment for 7 days to provide time for further negotiations. Both parties declared they considered there would be a benefit in taking such an approach.
14. In the intervening period, the Respondent increased their allowance for 'Web' by a further 22 pages, taking the allowance for that category of documents to 105 pages (out of 300 pages claimed). The Respondent's allowance for 'Files & Media' has been increased by 28 pages, taking the allowance for that category of documents to 35 pages (out of 3,975 claimed). Finally, the Respondent's allowance for 'General info, Network info, Event Log, Installed Apps' has been increased to 28 pages (out of 774 pages claimed).
15. The Respondent's total allowance now amounts to 1,532 PPE and the issues in dispute have been narrowed to:

- i) *Files & Media* – The Appellant seeks an allowance of up to 20% (equivalent to 795 pages). The Respondent contends for 35 pages.
- ii) *General info, Network info, Event Log, Installed Apps* – The Appellant seeks an allowance of up to 20% (equivalent to 155 pages). The Respondent contends for 28 pages.
- iii) *Web* – The Appellant contends for 300 pages (as claimed). The Respondent contends for 105 pages).

16. In the circumstances, this appeal has been successful to the extent of the concessions made by the Respondent, whom shall pay the Appellant’s costs of the appeal in any event. The extent to which any allowance beyond those concessions is permissible is discussed below.

### **Relevant Legislation**

17. The applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 (‘the 2013 Regulations’), and in particular paragraph 1 of Schedule 2 to the 2013 Regulations which 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”.

### **The Parties’ Submissions**

18. Mr McCarthy relies on a substantial 20 page written submissions document dated 27 September 2023 in addition to the documents served with the appeal notice, supplemented by his oral submissions today. Ms Quarshie relies on the Determining

Officer's written reasons, her 11 page written submissions dated 25 October 2023 and oral submissions made today.

19. Mr McCarthy submits this case was all about attribution of the mobile phone found in the Defendant's possession. He points out that the phone was unlocked, such that anyone could use it, and that the Defendant sought to attribute ownership to another person – albeit a person the Defendant was unwilling to name for fear of violent reprisals.
20. Analysis of the phone was therefore important in establishing to what extent ownership could be attributed to another or others, or alternatively to demonstrate minimal or innocent use of the phone by the Defendant.
21. The exercise Mr McCarthy described was thereafter focused on the three main areas of dispute, as outlined above. Mr McCarthy sought to explain how analysis of these sections set out to demonstrate examples of where data arose that might innocently link the phone to the Defendant, but how in other instances data seemed unlinked to the Defendant. Mr McCarthy submits it is the necessity of this approach which means these sections had to be analysed on a page by page basis.
22. With respect to '*Files & Media*', Mr McCarthy accepts that the application of a percentage approach is reasonable to arrive at a fair remuneration figure for PPE. However, he rejects the Respondent's assertion, as set out in Ms Quarshie's submissions, that a percentage be applied to the pages of images only and at no more than 5%.
23. Having said that however, the focus of Mr McCarthy's oral submissions thereafter was on pages 5 to 156 (of the 3,975 pages originally claimed for '*Files & Media*').
24. Pages 5 to 156 of this section of the report relate to '*Files & Media*', which are then sub-divided by pictures, audio, video and archives. The pictures section runs from pages 5 to 143.
25. Mr McCarthy then took me through several of the pages within this section (pages 5-156) to demonstrate why a page by page approach was necessary. Those examples included where specific addresses could be associated with specific images, where the date and timestamp of an image might be relevant to attribution, images of men who look similar to the Defendant, images of other men, and images of damaged vehicle.
26. Mr McCarthy also placed reliance on the data relating to videos which gave the address at which that particular media was created.
27. Given the defence of non-attribution, innocent or shared use, Mr McCarthy contends that the presence of addresses not associated with the Defendant, the presence of images of persons other than the Defendant or images of cars/objects not associated with the Defendant were of such potential importance and relevance that they bore close scrutiny.
28. Mr McCarthy submits that Ms Quashie's proposal of 5% is simply too low to remunerate the Appellant for this category of work given how important attribution was to sentencing.

29. With regard to ‘*General info, Network info, Event Log, Installed Apps*’, reliance is placed on a 774 page section of the report containing these categories of documents.
30. The Respondent originally contended for nil pages but has now allowed 28 pages. The Appellant seeks up to 155 pages, representing an allowance of 20% of the disputed pages.
31. Mr McCarthy outlined how the Defendant faced allegations of links to a number of limited companies and also a Citroen motorcar.
32. The analysis of the relevant pages showed, for example, when the phone had been Bluetooth connected to a Citroen motorcar. However, those same pages also demonstrated examples such as a link with a company called Masha Trading HK Ltd – for which the Defendant faced no alleged links with.
33. Other examples included references to named persons with which no connection to the criminality in question was apparent, nor any obvious connection with the Defendant at all. However, set against this was the risk posed by names of Albanian heritage, given the Defendant’s own background.
34. In further balancing the importance of these pages, examples such as addresses with which the Defendant was associated were to be balanced with references to an Irish phone number associated with the name “Nana”, which was not apparently connected to the Defendant.
35. The Appellant’s argument being that such analysis was necessary to establish ownership, the use of the phone by others, and innocent use only (if any) by the Defendant.
36. With respect to ‘Web Related Data’, the relevant section is 300 pages (excluding the title and contents pages). The Respondent has increased their allowance to 105 pages but the Appellant maintains a claim for the full 300 pages to be remunerated as PPE.
37. The 83 pages originally allowed by the Determining Officer represented the totality of the sub-section for “Web/Searches”. It is not obvious to me how the Respondent has come to allow a further 32 pages and I assume some form a broadbrush or percentage approach has been applied to come to that amount.
38. I was invited by Mr McCarthy to focus on a number of pages which ultimately all fell within the ambit of the sub-section for web history. This included searches about law, local courts, undercover policing, unmarked police cars, vintage and luxury watches, private number plates and prominent or well-known Albanian people.

### **Analysis and decision**

39. The fact that something might require a page by page analysis does not automatically lead to the conclusion that 100% of those pages should be remunerated as PPE.
40. With regard to ‘*Files & Media*’, the first issues which arise are what percentage ought to be applied and to what pages. The Respondent contend for 5% of 139 pages and the Appellant contends for 10-20% of 3,575 pages.

41. There are approximately 2-3 images per page, many of which are stock animated images which could quickly have been dismissed for relevance. Further, the data associated with those stock images contains nothing other than technical information relating to software.
42. It is pages 5-90 that largely contain images unique to the phone in question. However, I do also accept that outside of the pages of images are other pages with location stamps that were capable of being relevant to attribution.
43. I do not consider that a cogent argument has been made out to take the entire 3,575 page of this section of the report as a starting point. In my view, 152 pages of this section are properly capable of qualifying as PPE for remuneration purposes. The phone data goes to attribution but I'm not persuaded that the 'Files & Media' section can be described as being of such importance that 10-20% of all of the 3,975 pages should be paid as PPE
44. Whilst the balance of this section could be presented in the form of a claim for special preparation, I consider the balance of pages is capable of swift dismissal in terms of relevance.
45. In terms of importance, one must recall the Defendant was found in possession of drugs and associated paraphernalia, along with the means to cut and package the drugs, as well as large amounts of cash. In my view, the Respondent's increased allowance of 35 pages for this section of the report is appropriate and I endorse the same.
46. With respect to 'General info, Network info, Event Log, Installed Apps', the Respondent's revised allowance of 28 pages equates to just over 3.5%. There is no dispute that a percentage approach is appropriate. It is a question of what percentage ought to reasonably apply.
47. Again, taking into account the importance of attribution to sentencing in this matter, balanced against the sub-sections of this section, I consider an allowance of 10% to be appropriate and the allowance shall therefore be 77 pages.
48. Finally, with regard to 300 pages of web related data, it is not at all clear to me how cookies or bookmarks are relevant. However, I am persuaded to allow the pages of web history, which allow for an additional 88 pages over and above the Respondent's latest proposals.
49. The Respondent shall additionally pay the Appellant £1,000 in costs plus the court fee.

**COSTS JUDGE NAGALINGAM**