SENIOR COURTS
COSTS OFFICE

SCCO Ref: 84/18

Dated: 17th September 2018

**ON APPEAL FROM REDETERMINATION**

**REGINA v FREMPONG**

CROWN COURT AT KINGSTON

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20167443

LEGAL AID AGENCY CASE

DATE OF REASONS: 16th April 2018

DATE OF NOTICE OF APPEAL: 2nd May 2018

APPLICANT: McMillan Williams Solicitors

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, should accordingly be made to the Applicant.

**MARK WHALAN**
**COSTS JUDGE**

## REASONS FOR DECISION

### Introduction

1. McMillan Williams, ('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 Litigator Graduated Fees ('LGF') claim.

2. The Appellants submitted a claim for 2467 PPE, which including 2252 pages of an electronic exhibit identified as PSC/2. The Respondent allowed 794 PPE, comprising 143 paper pages of statements and exhibits, and 621 pages of the electronic exhibit. Ostensibly, therefore, 1631 pages of PSC/2 remain in dispute and comprise the issue in this appeal. In fact, for reasons outlined in detail below, both parties now raise different issues and arguments relevant to the outstanding dispute.

### Background

3. The Appellants represented Mr Dennis Frempong ('the Defendant') who was charged on an indictment alleging a single count of rape. He was tried at Kingston-upon-Thames Crown Court from 19th - 23rd June 2017. He was acquitted.

4. The prosecution asserted that the Defendant had raped the complainant whilst she was unconscious through alcohol. The Defendant argued that the sexual contact was consensual and initiated by the complainant, who was not too intoxicated to consent. The electronic exhibit PSC/2 comprised datum downloaded from the mobile phones of the Defendant and the complainant. It was served by the CPS on 4th July 2017 until a Notice of Further Evidence. The fact of "service" is not in issue or dispute.

5. In the LGF claim the Respondent allowed 621 pages of exhibit PSC/2 as PPE. This comprised the core communications datum downloaded from the phones and included contacts, call logs, SMS messages and Chat Messages. The

material excluded from the page count comprised, inter alia, images, audio files, videos, installed applications, technical datum and web history.

The Regulations

6. The Representation Order is dated 30th November 2016 and so the applicable regulation is 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*".

## Authorities

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

9. The Appellants have also cited the judgment of Nicola Davies J. in Lord Chancellor v. Edwards Hayes LLP [2017] EWHC 138 (QB).

## The submissions

10. The Respondent's case is set out in the Written Reasons dated 16th April 2018 and in written Submissions drafted by Mr Michael Rimer and dated 1st August 2018. These Submissions exhibited a five page tabulated analysis of PSC/2 which was updated by Mr Rimer on 30th August 2018. The Appellants' submissions are set out in the Grounds of Appeal and an Appellants' Skeleton Argument dated 1st May 2018. Mr Christopher Maynard, a solicitor at the Appellants, filed and served a further Appellants' Response to the Respondent on 20th August 2018. Mr Maynard and Mr Rimer both attended and made oral submissions at the hearing on 31st August 2018.

## The appeal

11. The parties, as noted, disputed the inclusion of 1631 pages of electronic exhibit PSC/2. The Appellants argued that all the disputed pages should be included in the PPE while the Respondent determined that they should be all excluded.

## The revised appeal

12. It became clear at the hearing on 31st August 2018 that the issues in dispute had changed and that the Appellants had, in the words of Mr Maynard, "moved the goalposts fundamentally". First, the Respondent conceded that the appeal should be allowed to the extent that the PPE be increased by an additional 3 pages of PSC/2. Second, the Appellants conceded they no longer argued for the inclusion of the entirety of PSC/2, but only those pages comprising images. Third, and more significantly, the Appellants now purport to challenge the validity of the original page count undertaken by the CPS and adopted by the Respondent. Whereas, therefore, this count (which was adopted by the Appellants in its LGF claim and Notice of Appeal) comprised 2467 pages, it now argues that the total page count for PSC/2 should be 4186-5055, depending on whether images are excluded or included.

## My analysis and conclusions

### Agreed matters

13. The Respondent, as noted, concedes that an additional 3 pages should be added to the PPE. The count of 3 is certain whatever method is adopted for counting the pages. To this small extent, therefore, the appeal should be allowed.

### Inclusion of images?

14. The Appellants argue that those pages of PSC/2 which comprised images should be included in the PPE. This is rejected by the Respondent.

15. Mr Rimer has conducted an analysis of the images and has outlined a broad categorisation that is agreed essentially by the Appellants. Thus the images on PSC/2 comprise:

> "*i. Images downloaded from the internet: photos of sports personalities and other celebrities; images taken from news sites, logos from various websites e.g. Sky Sports News.*

*ii. Personal images: images of friends and family; photos taken of special occasions; holiday photos.*

*iii. Screen shots of social media sites e.g. "The sports bible" on Instagram; football scores; Facebook profiles.*

*iv. General social content: jokes, memes etc.*

*v. Misc images: photographs of personal documents; photos of cars, furniture etc.*

*vi. Cartoon images.*

*vii. Explicit images.*"

Mr Rimer records that all the images "*are duplicated at least once if not more*".

16. The Respondent argues that these pages should not be included in the PPE by reference to para. 1(5) of Schedule 2 to the 2013 Regulations, as the "*images appear to be wholly unrelated to the underlying criminal case*". The Determining Officer accordingly exercised her discretion correctly to exclude this material from the page count and taking 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 para. 50(ix) of Lord Chancellor v. SVS Solicitors (ibid), it "*is an important and valuable control mechanism which ensures that public funds are not expended inappropriately*".

17. The Appellants submit that the images should be included in the PPE as the issue in the alleged rape was the question of consent. Thus, argues Mr Maynard, if the images downloaded from the parties' phones had included pictures of the Defendant and complainant together, in either a sexual pose or otherwise, this could have been relevant to the existence (or otherwise) of consent. Mr Maynard accepts that the vast majority of the images would be, on any interpretation of the evidence, irrelevant to this issue. Nonetheless, the manner in which the images were collectively downloaded, stored and served, so that they are not grouped in the categories identified by Mr Rimer but all

jumbled together, meant that the defence had effectively to look through and check every image.

18. 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 from the PPE. I am not satisfied, in other words, that these pages should be included, when taking account of the nature of the documents and any other relevant circumstances. It seems to me that the issue at trial was not simply the question of consent, but whether, at the specific time of the alleged offence, the complainant's ability to consent was vitiated (or not) by intoxication. It seems unlikely to me that any images recorded on the parties' phones could have comprised any real probative or evidential effect. Given, additionally, that the vast majority of the images would, as the Appellants concede, be necessarily irrelevant to the case, it is not, in my conclusion, appropriate to include the images in the PPE.

Methodology: the accuracy of the page count?

19. Exhibit PSC/2 comprised an XRY image of the material downloaded from the parties' phones. It is common ground that in order to produce a formal page count for the Regulations, this image must be exported into a different format, specifically Excel or PDF. The material was presented in Excel format which produced for PSC/2 a page count (initially agreed by both sides) of 2252.

20. Mr Maynard states that the Appellants tried initially to convert the XRY datum to a PDF version. Unfortunately, possibly due to an error in the software, this proved to be impossible. It is assumed that the prosecution may also have tried to create a PDF format and experienced similar difficulties. Either way, the CPS produced an Excel version, with a page count that was agreed by the Appellants, in default of an alternative. After lodging the Notice of Appeal, the Appellants obtained additional IT support, which enabled the creation of a PDF version. This led invariably to a higher page count, as the Excel spreadsheet format reduces invariably the actual, accurate page count. Mr Maynard gives some examples of this at para. 6 of his revised Appellants' Response dated 20th August 2018:

"*In respect of the "messages – chat" tab from Excel, this calculates (as) 683 pages in the print preview function. The XRY data, when formed into a pdf, amounts to 3081 pages. The "messages – SMS" tab from Excel calculates 98 pages; the corresponding XRY download is 593 pages. The "calls" tab within Excel amounts to 60 pages; in the XRY download the figure if 382 pages. Finally, the "contacts – contacts" tab within Excel is 40 pages; whereas the XRY download is 130 pages*"

21. Mr Rimer, for the Respondent, replies as follows:

"*The Respondent would ordinarily accept that payment should be made on the basis of PDF reports, over Excel. However, in this case the original XRY data has not been supplied and it is unclear how the PDF reports have been generated.*"

Mr Rimer, in other words, concedes that the PDF format is generally preferable to Excel, as the former may produce a more accurate page count to the latter. His point is that the parties in this case have operated (during the trial as well as the appeal) on the basis of an Excel page count. This may, as noted, have resulted from the fact that both sides experienced technical difficulties when converting the XRY datum on the disc into a PDF format. No notice of the Appellants' revised submission was given until 20th August 2018, meaning that the Determining Officer has had no reasonable opportunity to carry out her own analysis, or at least check the methodology and accuracy of the Appellants' PDF count. It would be quite wrong, in these circumstances, to allow the appeal on this ground.

22. It is tolerably clear that both the Appellants and Respondent prefer generally a PDF page count to that produced from an Excel format. This is because the former generally produces a more accurate (and very often larger) page count, a fact acknowledged by Mr Rimer. I find, therefore, that as a general point of principle, that where it is necessary to produce a page count from an electronic exhibit for the purpose of counting accurately the PPE in the AGF (or, indeed, the litigator's graduated fee) scheme, the count should be based on a PDF and not an Excel format. In this case, both sides agreed an Excel page count, and

the alternative PDF formulation was not advanced by the Appellants until a very late stage, namely about ten days before the oral hearing. Clearly the Respondent has been prejudiced by the late amendment to the Appellants' submissions, as the Determining Officer has had no reasonable opportunity to consider the issues. It seems to me, in fact, that both sides may well have been prejudiced by the manner in which the prosecution compiled the PSC/2 electronic exhibit, with difficulties experienced in translating the XRY datum into a PDF file. Given my finding of principle, it would be wrong to simply dismiss this aspect of the Appellants' appeal. Equally, given the prejudice to the Respondent arising from the late change in the Appellants' submission, it would be wrong to allow the appeal by imposing a revised page count for those parts of PSC/2 that stand to be included in the PPE. The correct course, in my conclusion, is to remit this aspect of the claim and appeal to the Determining Officer for further consideration.

## Conclusions

23. I find and direct that: (i) the initial page count be increased by 3; (ii) the datum on PSC/2 to be included in the PPE is limited to those categories of material allowed initially by the Respondent and specified in the written reasons; and (iii) the overall PPE, which would be 797 (i.e. 794 + 3 conceded in the appeal), be remitted to the Determining Officer with a direction that it be reviewed by reference to a PDF and not an Excel format page count.

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