Neutral Citation No.[2023] EWHC 1689 (SCCO)

Case No: T20217075

SCCO Reference: SC-2022-CRI-000157

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

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

Date: 27th June 2023

**Before**:

**COSTS JUDGE WHALAN**

**R**
**v**
**CHRISTOPHER BROOKS**

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

Appellant: Faradays 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 Appellant.

COSTS JUDGE WHALAN

## Introduction

1. Faradays Solicitors ('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 Fees Scheme ('LGFS') claim. The issue on appeal is whether the total PPE count should be 7584, as claimed, or 3407, as allowed.

## Background

2. The Appellants represented Mr Christopher Brooks ('the Defendant') who was charged with co-defendants at Guildford Crown Court on an indictment alleging a single count of conspiracy to supply class A drugs.

3. The prosecution relied on electronic datum downloaded from several mobile phones recovered from the Defendant and his co-defendants. This datum was served by the CPS in numerous exhibits numbered 0018-0087. It was common ground that all the digital datum was served and considered relevant to the PPE count. The issue on appeal is the method by which the count should be undertaken, as while all pages served were in A4 format, the font utilised was between 1.5 and 6, meaning that the format was essentially that of A1-A3.

## Application for adjournment

4. This appeal was listed for hearing on 9th June 2023 by a Notice of Hearing issued on 13th December 2022. At 17:57 hours on 7th June 2023, the Respondent applied to adjourn the hearing, by an e-mail from Ms Margaret- Victoria Quarshie, a Lawyer with the Government Legal Department. The application was expressed as follows:

> Due to issues accessing the electronic evidence in this case on Galaxkey, we have only recently been able to download and view this material. The Appellant assisted by reuploading the evidence to the system so that we could review. After the material was downloaded, we initially received error messages when trying to view numerous Excel spreadsheets, and this issue has now been resolved.
>
> We are now in a position to complete a review of the case. However, at this stage there is not sufficient time to prepare and file submissions. We are also

aware that the Appellant will need time to consider our submissions ahead of the hearing.

We seek an adjournment to allow further time to complete the review of this matter, see whether issues can be narrowed and prepare submissions.

5. The Respondent's application for adjournment was opposed by the Appellants. The Appellants pointed out that the appeal had been in the court's list and their diary for over 6 months. The relevant digital files had been uploaded to Galaxkey timeously but had presumably fallen out subsequently through effluxion of time. The Appellants had sought to cooperate with the Respondent's belated request for access by re-uploading the files in both PDF and Excel format.

6. I refused the application to adjourn by e-mail sent to the parties on 8th June 2023. An application to adjourn made on the eve of an oral hearing which has been diarised for over 6 months requires necessarily persuasive circumstance and reasoning. My overwhelming impression is that the Respondent had not looked at the relevant issues until the last minute, when it discovered that the digital datum, which was available initially, was no longer accessible. It is not reasonable or appropriate for the court and the Appellants to be inconvenienced significantly by reason of the Respondent's failure to prepare their case adequately and in time. Given the pressure on listing at the SCCO, an adjournment would have involved a delay until December 2023 at the earliest, and probably sometime in 2024. I reviewed my decision to refuse the adjournment during the hearing on 9th June 2023, in the light of subsequent e-mails from Ms Quarshie and Mr Jonathan Orde, a Senior Lawyer at the MAJ, in which the Respondent expressed its "disappointment". I remained entirely satisfied that the application was adjourn was unjustified and it should be refused.

## The Regulations

7. Paragraph 1 of Schedule 2 to The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended in 2018, 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

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

9. I was referred also to the decision of Costs Judge Rowley in R v. Francis [2020] SC-2020-CRI-000004, which drew extensively on the decision of Costs Judge Leonard in R v. Zigaras [2018], SCCO Ref: 155/18.

The submissions

10. The Respondent's case is set out in Written Reasons dated 4th November 2022. The Appellants' case is set out in Grounds of Appeal, which exhibits an (undated) Note on

Appeal, and in an Addendum Note (undated). Mr Michaelides, Costs Draughtsman, attended and made oral submissions on behalf of the Appellants at the hearing on 9th June 2023.

My analysis and conclusions

11. The relevant electronic datum was served appropriately in A4 format, but with font sizes ranging from 1.5 to 6. As such, it is common ground that the page count as served should be adjusted upwards in order to produce an accurate PPE count. This process is described as 'upscaling' in cases like Francis and Zigaras (ibid). In Francis, CJ Rowley approved a formula of x8. His reasoning was set out para. 27 of the judgment:

> In my view, whatever size document has been created electronically, for the purposes of PPE, it ought to be treated as the equivalent number of A4 pages. Therefore, if the document is A1 size, each page represents eight A4 pages for the purposes of the PPE. I do not think there is any need to consider whether the information can be viewed with a lesser amount of magnification. There is no reason for the calculation to be subject to some ophthalmic measurement.

In Zigaras, where the datum had apparently been served in A3 format, the formula approved was x4. This case is slightly different, in that the pages were actually served in A4 format, but with contents displayed in an atypically small font, namely 1.5-6, meaning that while the pages were technically A4 size, the datum depicted was effectively produced as A1, 3 or otherwise. Hence – and this is common ground – the need for 'upscaling' with the PPE count.

12. Turning to the PPE count, it is agreed that it should comprise 171 pages of witness statements, 12 pages of 'SFR', and an additional count representing the digital datum in the electronic exhibits downloaded from the mobile phones. It seems clear that when undertaking this part of the exercise, the Respondent applied a broad upscaling formula of x2. This is set out on p.4 of the Written Reasons where it states: "When a further redetermination was carried out, the assessor who had considered the matter decided to allow double the number of pages… to make appropriate scaling allowances".

13. The Appellants, in contrast, adopted a more complicated methodology. Mr Michaelides explained that to reach an accurate page count, he converted the PDF into

an Excel format, before applying a number of interventions, such as adjusting the column width and height, changing the font size to 11 and excluding those pages which appeared blank, to reach a total count (including the uncontentious statements and SFR) of 7584.

14. It is clear to me that the Respondent's application of a x2 calculator was insufficient. An appropriate font size is 11, although many institutions now require a font size of 12. Thus, while a x2 formula would be appropriate for those pages in the served material where the font size was 6, a significant proportion of this material utilised a smaller font size., down to 1.5. Ordinarily, conversion from PDF format to Excel is of limited assistance when assessing a PPE count. Numerous cost appeals attest to the preference of a count based on a PDF format. However, in this particular case, I am satisfied that the Appellants approached the issue carefully and cautiously, utilising a notional font size of 11, while adjusting column height and width and discarding 'blank pages' from the count. In this case, therefore, while neither the approach of the Appellants nor the Respondent is perfect, I am satisfied that the Appellants' methodology is preferable to that of the Respondent and, moreover, that the Appellants have produced as accurate an account as is achievable in this case.

15. For these reasons, I allow the appeal and direct that this LFGS claim should be re-assessed by reference to a PPE count of 7584.

Costs

16. The Appellants should receive the £100 paid on lodging the appeal. No other claim for costs was made.

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