SENIOR COURTS
COSTS OFFICE

Dated: 17 October 2017

SCCO Ref 10/17, 34/17 & 47/17

ON APPEAL FROM REDETERMINATION

REGINA v MICHAEL O'ROURKE AND ANOTHER

PORTSMOUTH CROWN COURT

CASE NO: T20167100

LEGAL AID AGENCY

DATE OF REASONS: 09 DECEMBER 2016 (LOUISA BAGLEY)
31 JANUARY 2017 (SOLICITORS)
21 FEBRUARY 2017 (MR MALCOLM QC)

DATE OF NOTICE OF APPEAL: 13 MARCH 2017 (RECEIVED)

APPLICANT: BERNARD CHILL & AXTELL
SOLICITORS
10 CARLTON CRESCENT
SOUTHAMPTON SO15 2EZ

MR ALASTAIR MALCOLM QC
DRYSTONE CHAMBERS
DX 332
LONDON

LOUISA BAGLEY (COUNSEL)
BERNARD CHILL & AXTELL
SOLICITORS
10 CARLTON CRESCENT
SOUTHAMPTON SO15 2EZ

The appeal has been successful for the reasons set out below. The appropriate additional payment, to which should be added the sum of £200 paid on appeal (2 fees at £100 each) plus £1,200.00 (costs including VAT) should accordingly be made to the Applicant.

JR JAMES
COSTS JUDGE

REASONS FOR DECISION

1. Bernard Chill and Axtell Solicitors ("BCA"), Miss Bagley (Counsel) and Mr Malcolm QC (Leading Counsel) Appeal against the Determination of the Determining Officers of the Legal Aid Agency ("LAA") Ms Elisabeth Cooper - Written Reasons dated 9 December 2016 re: Miss Bagley and 21 February 2017 re: Mr Malcolm QC and of Mr Jas Soar - Written Reasons dated 31 January 2017 re: BCA. The area in issue was pages of Prosecution evidence ("PPE") and as the issue is the same across all three Appeals they were heard together by me and are now dealt with in a single Decision.

2. The relevant legislation is the Criminal Legal Aid (Remuneration) Regulations 2013, as amended, paragraph 1(2) of Schedule 2, Part 1 of which gives the definition of PPE and the relevant guidance is the Crown Court Fee Guidance published August 2014, Appendix D of which gives the definition of PPE and what cannot be considered to be PPE. The relevant law is quoted below at paragraph 12.

3. Mr O'Rourke (representation granted 23 March 2016) was charged with attempted murder upon a victim aged 1 year or over, contrary to section 1(1) of the Criminal Attempts Act 1981 and causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. These charges arose out of an incident on 28 February 2016 when one Patrick Redmond was assaulted and named Mr O'Rourke and his co-Defendant, Kieron Cameron, as his attackers. A third Defendant, Nicola Smyth, was charged with Intimidation contrary to section 51(1) of the Criminal Justice and Public Order Act 1994.

4. The Defendants' case was that Mr Redmond had clearly been assaulted, but that it had been the work of a group of males from Liverpool who had been contracted to do Mr Redmond serious harm, that he was too afraid to say so, and that he had been threatened so as to make him blame Mr O'Rourke and Mr Cameron, who had formerly been Mr Redmond's friend. As well as stating that they had not committed the offences charged, Mr O'Rourke and Mr Cameron both asserted an alibi Defence, and proving where they were (and with whom) at certain times/dates, was crucial.

5. In their fee claims, BCA, Miss Bagley and Mr Malcolm QC included a claim based on 6,704 PPE, of which 883 were physical pages; payment for those physical pages is not in dispute. Nor is payment for evidence served electronically in dispute per se; the LAA accepts that the electronically served evidence was used and should be paid for in this case (see paragraph 12 below for the relevant extract from the **Criminal Legal Aid (Remuneration) Regulations 2013**).

6. Instead, the substance of this Appeal concerns 5,821 PPE served electronically, not because it was served in that way but because it was reduced by the LAA to 572 pages, on the basis that was the page count generated by displaying the evidence in a different format. The LAA assert that the evidence could be presented in PDF or Excel format, the latter being searchable electronically but generating a larger page count.

7. The LAA took the view that it is reasonable for the legal team to consider that evidence in the shorter (PDF) format and it paid for the smaller (just under one tenth) number of pages accordingly. There is no suggestion that the 572 pages constituted edited highlights or a condensed version, they contained the same evidence as the 5,821 pages, it is purely a question (per the LAA) of how the legal team ought reasonably to have considered that evidence.

8. The legal team, in contrast, asserted that they could not consider the evidence more quickly just because the size of the electronic exhibit could be decreased for the purpose of printing; there were 5,821 pages to consider and that is what should be paid for. Miss Bagley, who was Junior Counsel in this matter but is also employed at BCA, put together submissions; Mr Malcolm QC adopted those submissions and also gave some more insight into how the telephone evidence was used.

9. The Crown relied very heavily upon phone usage to present its case; the Crown produced a schedule that had to be considered against the raw data (PPE) and a fuller Schedule was then produced for the Defence, which was crucial to their case. Mr O'Rourke had two telephone numbers; it is said that Mr Cameron "had the use of" two telephone numbers and Nicola Smyth (their alibi but also charged with Witness Intimidation on the same indictment) had a telephone number so that there were five to cross-reference in a case where the Defendants' whereabouts (and with whom they could prove that they were at certain locations) at certain times, were key.

10. It is also said (by Mr Malcolm QC) that an added difficulty was that Mr O'Rourke is dyslexic and was at this time in custody; hence taking him through electronic schedules was not a straightforward task. Following the receipt of some further "unused" material during the Trial, Mr O'Rourke made certain admissions in addition.

11. The learned Judge who heard the matter (HHJ Sarah Munro QC) wrote an addendum to Counsel's Note, as follows (dated 24 August 2016):

"I agree with the above. The telephone evidence was vital for both sides and I can confirm that a vast amount of work was required by the lawyers to ensure that the Prosecution telephone schedule, their own complimentary schedule and new third party telephone evidence were all accurate and complete. The necessary work was all completed in a timely manner and unnecessary delay was, in the main, avoided."

12. Matters went to and fro between the LAA and the legal team; there were three sets of Written Reasons in December 2016, January and February 2016, by two different people (Ms Cooper and Mr Soar) as set out in paragraph 1 above. Common to all three, was that the PPE were reduced to 1,455 as to 833 physical pages plus 572 electronic pages.

13. Common to all three sets of Written Reasons was also the explanation for this, which can be summed up by reference to the following. The **2013 Crown Court Fee Guidance** cites the **Criminal Legal Aid (Remuneration) Regulations 2013** (in both Schedules 1 and 2). It is of course the Regulations which prevail and these state that, 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), going on to add:

"(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…

(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."* **[My emphasis]**

14. The LAA states that Parliament has reserved to the DO, the decision of whether electronically served exhibits should be treated as PPE. The LAA further went on to refer to a number of cases upon this issue, which it listed as follows:

R v Furniss	**Nottingham T2013653**	
R v Jalibaghodelehzi	*SCCO ref:*	
R v Napper	**SCCO ref: 160/14**	**Master Simons**
R v Chilton	**SCCO ref: 400/14**	**Master Simons**
R v Khandaker	*SCCO ref: 223/15 and 36/16*	
R v Jagelo	*SCCO ref: 96/15*	
R v Tunstall	**SCCO ref: 220/15**	**Master Simons**
R v Sibanda	**SCCO ref: 227/14**	
R v Sana	**SCCO ref: 248/14**	
R v El Treki	**SCCO ref: 431/00**	**Master Rogers**

15. The LAA refers specifically to the cases in **bold** type; those in *italic* script are listed but not cited, presumably on the basis that they are self-explanatory. The LAA maintains that current case law is authority for the proposition that the DO is entitled to look at the nature of the document and the relevant circumstances (R v Napper and see paragraph 16 below), that only material relevant to this Defendant should be included (R v Sana, R v Sibanda), that duplicates should not be paid for (R v El Treki) and that, cumulatively, case law entitles the DO to opt to allow the PDF files instead of the Excel files, the latter being very substantially larger but containing exactly the same information as the Excel files.

15. Neither side referred me to the decision of Holroyde J in ***Lord Chancellor v SVS Solicitors*** **[2017] EWHC 1045** (with Costs Judge Rowley as assessor), which talks

about how the scheme in the 2013 Regulations provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE, and the length of the trial.

16. Holroyde J specifically stated that:

"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".

Neither the LAA nor the legal team has sought to address me on the question of special preparation and I make no further comment upon it here accordingly.

17. Holroyde J also referred to the decision of Senior Costs Judge Gordon-Saker in ***R v Jalibaghodelezhi [2014] 4 Costs LR 781***. That decision concerned the Funding Order, which was in force at the material time and is in material respects similar to the 2013 Regulations. Master Gordon-Saker said as follows 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."*** **[My emphasis]**

18. The legal team (both Barristers and BCA) all accept the proposition that duplication should not be paid for, but request payment for the Excel in preference for the PDF files on the basis that those Excel files were served upon them, and that they had to go through those Excel files, and now wish to be paid accordingly.

19. In **R v Napper, SCCO ref (Costs) [2014] 5 Costs L.R. 947** Master Simons held that, when determining whether electronically-served documents should be included as PPE, the role of the appropriate officer under the Funding Order was much wider than simply to ascertain whether documents had ever existed in paper form, and that

he/she was positively required to take into account the nature of the document and all the relevant circumstances (including

"*whether the evidence is pivotal, whether the evidence underpins the understanding or admissibility of any other piece of evidence, and whether the volume of evidence disrupts the fair and predicted economic balance of the remuneration paid for a case in the light of the Legal Aid Agency's position statement that the statutory changes were not designed to disrupt the status quo*"; paragraph 29).

20. **R v Furniss T20137653 Nottingham Crown Court** and **R v Chilton SCCO ref 400/14** have both been departed from in subsequent cases such as **R v Manning and Others Manchester Crown Court 3 April 2015** (see below) so that the comments therein regarding PPE are not repeated here.

21. However, on 5 February 2015 the LAA published the guidance document **Claiming Electronic Evidence as Pages of Prosecution Evidence (PPE) – Supporting Evidence following the Costs Judge decision in R v Napper**. The guidance provides that, when determining claims for whether electronic evidence should be paid as PPE, "*the LAA considers that:*

(i) *Whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012 is a relevant circumstance under paragraph 1(5) of Schedules 1 and 2 to the Regulations that the determining officer will take into account. If the determining officer is able to conclude that the material would have been printed prior to 1 April 2012, it will be counted as PPE for both the litigator and advocate.*

(ii) *If the determining officer is unable to make that assessment, the determining officer will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done and by whom, and the extent to which the electronic evidence featured in the case against the defendant."*

22. In the first-instance judgment of **R v Manning & others**, HHJ Mansell QC emphasised the fact that the decision in **R v Furniss** is not binding on any Crown Court judge, and he pulled no punches in stating that the reasoning behind Mr Justice Haddon Cave's decision is *"flawed for a number of reasons"* (paragraph 9). The Learned Judge was firm in his stance that *"it is…no part of the function of a trial judge to dictate to the determining officer how fees in any given case should be calculated, or to dictate to the Crown Prosecution Service how to serve their evidence, provided that they serve it"* (paragraph 10(ii)).

23. In the recent case of **Lord Chancellor v Edward Hayes LLP and Nick Wrack [2017] EWHC 138 (QB)** Mrs Justice Nicola Davies with Master Whalan sitting as an Assessor, addressed the question of evidence on disc, and at paragraph 24 stated:

"Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the 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. I regard the stance taken by the appellant in respect of the surrounding material on this disc as unrealistic. It fails to properly understand still less appreciate the duty on those who represent defendants in criminal proceedings to examine evidence served upon them by the prosecution."

24. What was in this material that the legal team looked at so carefully? For that I needed to look at a number of sources, including the note produced by Mr Malcolm QC on the telephone evidence, the LAA's own note of which items they disallowed (and why) and the Crown's List of Exhibits.

25. Upon looking at those documents, there were many exhibits allowed as drawn, and many others that were reduced by only a few pages here and there. If the DO has gone through those exhibits with care and has found irrelevant material, I do not find that the legal team has provided any justification for reinstating such material and would not criticise that decision of the DO at this stage.

26. There were also a number of "unknown" exhibits, which were again reduced to a small extent. This was for such reasons as a 30-page file not opening (thus the legal team could not have read its contents) and various exhibits being reduced by a few pages e.g. by disallowing a "glossary" which would not have served any purpose in putting Mr O'Rourke at the crime scene (or far away from it). Again, I would not criticise that decision of the DO at this stage either.

27. For the purpose of this Appeal, therefore, the key exhibits are those where the LAA accepts that the exhibit was relevant, and agrees that it should be paid for, but objects to paying for the larger page count generated by Excel as opposed to PDF format. These exhibits are as set out in the following table:

PS/T	Pages (on print preview)	What WAS it? (according to NFR/CCCP 9)	Allowed?
2 (XLS)	2,453	Attribution schedule 2 phone numbers linked to Michael O'Rourke	No; allowed 54 PDF
6 (XLS)	1,415	Attribution schedule 1 phone number linked to Nicola Smyth	No; allowed 35 PDF
10 (XLS)	477	I cannot find this in NFR/CCCP 9	No; allowed 13 PDF
14 (XLS)	224	I cannot find this in NFR/CCCP 9	No; allowed 76 PDF
16 (XLS)	594	I cannot find this in NFR/CCCP 9	No; allowed 90 PDF
Excel:	**5,163**		**None; PDF 268**

28. Pausing here, the difference between the above 5,163 pages of XLS disallowed and the 5,249 pages "in dispute" in this Appeal will be made up as to the various smaller disallowances to which I have referred at paragraphs 22 and 23 above and

which I have indicated I do not criticise as I find no fault with the DO's exercise of discretion on them.

29. I cannot identify exactly what exhibits PS/T 10, 14 and 16 are; it would make sense if they included an attribution schedule of the two numbers that (as in paragraph 8 above) Kieran Cameron "had the use of" but in any event the LAA does not dispute their relevance, just their size. I also note that in the case of exhibit 21 the PDF at 19 pages was bigger than the Excel at 18; ditto exhibit 22 (PDF 26 versus Excel 24). However, across the above 5 exhibits the number of PDF pages allowed (268) were about 5% of the number of Excel pages claimed and overall, the LAA's decision to allow PDF rather than Excel format has led to a major reduction.

30. I do not wish to descend to the fine detail of calculating how much each of these exhibits comes to as claimed, versus how much has been allowed; based upon an allowance of £8,433.38 for 572 pages of PPE (for BCA) the 268 PDF pages allowed, at a straight pro rata share, would be worth £3,951.30. In contrast, the amount "in dispute" at £32,377.64 is about eight times that figure and the vast majority "in dispute" clearly relates to the above 5 exhibits.

31. The figures for Counsel are much lower; Miss Bagley claimed £4,715.01 and received £463.32 leaving £4,251.69 "in dispute". For Mr Malcolm QC I note his fees as claimed were £30,841.30 net of VAT and that he was allowed £21,683.20. That is a difference of £9,158.10. The portion of his fees that was claimed for PPE was £10,846.02 and if the entire shortfall has been applied to PPE then he has been allowed £1,687.92 to go through these exhibits.

32. Referring back to paragraph 16 above, and in particular to the quote from R v Napper therein:

"*whether the evidence is pivotal, whether the evidence underpins the understanding or admissibility of any other piece of evidence, and whether the volume of evidence disrupts the fair and predicted economic balance of the remuneration paid for a case in the light of the Legal Aid Agency's position statement that the statutory changes were not designed to disrupt the status quo*"

33. This evidence was clearly pivotal, and the LAA has accepted that it should be paid for. Not only has Leading Counsel explained in some detail how the telephone evidence was central to this case, but also the learned Judge who heard the case has endorsed Counsel's note as set out at paragraph 10 above.

34. The learned Judge's reference to the avoidance of delays is relevant as, whilst I appreciate the DO is tasked with protecting the public purse, the bigger picture in terms of avoiding delay to a Crown Court Trial for Attempted Murder, Wounding with Intent and Witness Intimidation, with three Defendants and a great many Witnesses, including Police Witnesses, has to be considered. Clearly the work that the legal team did on this telephone evidence has avoided wasted Court time.

35. As to the second part of the quote from R v Napper, does this volume of evidence disrupt the fair and economic balance of the remuneration paid for the case? In my view, it clearly does if the LAA's stance on PDF files is upheld. Taking

the largest single exhibit (PS/T 2) as set out in the table at paragraph 24 above, this was the attribution schedule of the two telephone numbers linked to Mr O'Rourke, the Defendant represented by BCA, Miss Bagley and Mr Malcolm QC.
36. On the LAA's preferred method of calculation, the PPE allowed to the legal team for considering all of their own client's telephone records, bearing in mind it was crucial to establish where he was and who was with him, is 54. The volume of relevant material actually included therein is (in Excel format) 2,453 pages and I am in no doubt that the latter figure will more accurately reflect the work that was done on this exhibit.

37. Similarly, the next largest exhibit (PS/T 6) as set out in the table at paragraph 24 above, this was the attribution schedule of the telephone number linked to Nicola Smyth. Whilst she was not the client of BCA, Miss Bagley and Mr Malcolm QC, she was not only Mr O'Rourke's co-Defendant, she was also his alibi. Hence the attention to detail that her telephone records would require, would again be significant but on the LAA's preferred method of calculation, the PPE allowed for considering them, is 35. The volume of material actually included therein is (in Excel format) 1,415 pages and I am in no doubt that the latter figure will more accurately reflect the work that was done on this exhibit.

38. I am in slightly more difficulty with exhibits PS/T 10, 14 and 16 insofar as I have not found out what these actually were. Purely from their size, these are likely to be yet more phone records possibly including those of Mr Cameron the co-Defendant (I think that is a reasonable speculation since his phone records do not appear anywhere else and we know he "had the use of" two phones). Mr Cameron's whereabouts could equally serve to exonerate Mr O'Rourke if he could be proven to be far away at a time when Mr Redmond alleged they were jointly engaged in a murderous assault upon him.

39. The LAA has not suggested (as is often the case) that there were vast quantities of irrelevant material, whether it be photographs, games or whatever, in these exhibits. They accept the material is relevant, they just wish to pay for the shortest version that was served by the Crown.

40. This will always be a fact-specific question, and I anticipate that the facts in this case, whereby almost all of several thousand pages of material is accepted by the LAA as being "relevant" will seldom occur. I am in no doubt on the facts in this case that the allowance of 268 PPE for the Defendant's phone records, those of the Defendant's alibi and the three other exhibits, bears no resemblance to the work that the legal team put into this case. As such in my view it was not a reasonable exercise of the DO's discretion to limit the PPE as has been done here.

41. Accordingly this appeal succeeds and I direct the LAA to pay the balance of the Excel exhibits claimed, giving credit for the PDF exhibits already allowed, and accounting for the irrelevant material referred to in paragraphs 25 and 26 above, plus their £100 Appeal fee, and costs.

To: APPLICANTS

BERNARD CHILL & AXTELL
SOLICITORS
10 CARLTON CRESCENT
SOUTHAMPTON SO15 2EZ

MR ALASTAIR MALCOLM QC
DRYSTONE CHAMBERS
DX 332
LONDON

LOUISA BAGLEY (COUNSEL)
BERNARD CHILL & AXTELL
SOLICITORS
10 CARLTON CRESCENT
SOUTHAMPTON SO15 2EZ

RESPONDENT:

ELISABETH COOPER
LAA
DX 10035
NOTTINGHAM