



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 197/16

Dated: 16 March 2017

ON APPEAL FROM REDETERMINATION

REGINA v WALSH

CROWN COURT AT CHESTER

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

CASE NO: T20150523

LEGAL AID AGENCY CASE

DATE OF REASONS: 28th October 2016

DATE OF NOTICE OF APPEAL: 12th November 2016

APPLICANT: Mr Jonathan Turner, Counsel

The appeal has been successful (in part) for the reasons set out below.

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

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Mr Jonathan Turner, Counsel ('the Appellant') appeals 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 his Advocate Graduated Fees ('AGF') claim.
2. The Appellant represented Nicholas Walsh pursuant to a Representation Order dated 29th June 2015. Mr Walsh pleaded guilty at Chester Crown Court in July 2016 on charges relating to the supply of Class A drugs.
3. In the AGF claim submitted on 15th July 2016 the Appellant claimed 5722 PPE. The Respondent has allowed 81 PPE. 5641 PPE remain in dispute and comprise the point in issue in this appeal.

The relevant facts

4. Nicholas Walsh and Roxanne Carter were arrested on or about 26th June 2015. They were charged with offences relating to the possession of drugs with intent to supply. Their cases were transferred from Crewe Magistrates' Court to Chester Crown Court on or about 29th June 2015.
5. On 15th September 2015 the prosecution served on the court and the defence a Notice of Additional Evidence ('NAE') which listed 43 statements, 38 exhibits and one map from nine witnesses. N. Mason, an E-Forensics Technician employed by Cheshire Constabulary, swore a statement which exhibited, inter alia, telephone records from three mobile phones recovered from Walsh and Carter under Police Reference BM/1. DC Marsden, another witness, also gave a statement that referred to the datum on BM/1. The NAE referred additionally as follows: "*NB Please note an additional exhibit reference BM/1 – BM/1/10/08/15 has been served in the form of a DVD data disc*". The telephone datum on BM/1 comprised, therefore, prosecution evidence served on the court and the defendants, which existed in electronic (the DVD disc) and not paper form.
6. Nicholas Walsh pleaded guilty on 5th July 2016 to an indictment containing two counts of possession of a Class A drug (cocaine and heroin) with intent to supply.
7. The Appellant states (in his Grounds of Appeal dated 12th November 2016) that: "*Following the conclusion of the case DC Marsden requested the return of the exhibit BM/1 as it contained sensitive information required in respect of outstanding defendants being investigated*".

The Regulations

8. The applicable regulation is The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'). 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".

The claim

9. The Appellant's AGF claim was submitted on or about 15th July 2016. The Respondent allowed 81 PPE and a Redetermination was requested. Written reasons were requested and received dated 28th October 2016.

The Appeal

10. The Notice of Appeal was lodged on or about 12th November 2016. I have read the Appellant's typed Grounds of Appeal of that date. The Respondent relies on the written reasons dated 28th October 2016. No application was

made by the Appellant for an oral hearing and so I have determined this appeal on the papers.

The Appellant's submissions

11. The Appellant, in distilled summary, states that all the PPE claimed, including exhibit BM/1, was served by the prosecution and the court in the NAE dated 15th September 2015. Exhibit BM/1 was relevant to the Crown as it was used to establish contact between the Defendants and other, unknown persons in relation to the possession and supply of drugs. BM/1 was served in electronic form and never existed in paper form. It was impossible for the Appellant to supply the Respondent with BM/1 as this had been returned to DC Marsden at the request of the police. Apparently the police were concerned to secure the disc as it contained material that was sensitive potentially to other, ongoing investigations.

The Respondent's submissions

12. The Respondent, in distilled summary, states that it was impossible effectively to consider the inclusion of electronic exhibits as PPE as the Determining Officer had no opportunity to see and evaluate the evidence. All material served by the prosecution was relevant necessarily in the case. Repeated requests were made of the Appellant to provide BM/1 but the disc was never served. Thus: *"Without sight of the material, the assessor is not in a position to make any assessment of the relevance/admissibility of the material in question and, in accordance with the Regulations, if the Determining Officer does not consider that it is appropriate to include it as PPE the material is excluded from account"*. Specific reliance is placed on the findings of Costs Judge Simon in R v. Tunstall (2016) SCCO Reference 220/15, which states:

"11. The basic position is therefore that electronically served PPE is not included in the number of pages of prosecution evidence. However the Determining Officer can decide to include this evidence when taking into account the nature of the document and any other relevant circumstances. In this instance, without the discs, the Determining Officer is unable to make a judgement as to the importance of the contents of this evidence within the context of the case. Accordingly, in my judgement, the Determining Officer was correct in refusing to allow the contents of the disc to be included as pages of prosecution evidence".

My analysis and conclusions

13. It is clear that exhibit BM/1 was served on the court and the defence under a NAE dated 15th September 2015. This constitutes compliance with para. 1(3) of the 2013 Regulations. Documents served by the prosecution in electronic form are included in the PPE (para 1(4)) but this is subject to para. 1(5).
14. Para. 1(5) requires the Determining Officer to decide whether or not it would be appropriate to include the documentary exhibits served electronically by *"taking into account the nature of the document and any other relevant*

circumstances". It is clear to me the exercise of this function obliges the Determining Officer to take into account (perhaps not exclusively) "*the nature of the document and* (my emphasis) *any other relevant circumstances*". It is common ground that if the Determining Officer either fails to discharge this task and/or exercises it incorrectly, the court, which has the same powers as the Determining Officer, can re-make the decision or remit it to the Respondent.

15. Obviously it is desirable that the Determining Officer has access and an opportunity to consider the electronic document. I do not, however, see this provision as a necessary pre-requisite in every case to a Determining Officer carrying out his or her function at para. 1(5) of the Regulations. I do not interpret the findings of Costs Judge Simon in R v. Tunstall (ibid) as a finding that an electronic document cannot be included in the PPE unless it is supplied to the Determining Officer, but rather an assessment based on the facts of that case. If I am wrong, I would disagree respectfully with such a finding. In every case the Determining Officer should consider "*any other relevant circumstances*" and in many cases this will be enough to allow a fair determination as to whether the documentary exhibit is to be included, included in part or excluded from the PPE. I would note for my part that this should be the case specifically where the documentary exhibit has been returned to the police or prosecution and that body then fails (as appears to be the case here) to provide it to the Determining Officer. No claimant or appellant should be prejudiced for a failure to serve a document that is no longer in his or her possession, custody or control. In such cases, where the electronic document cannot be produced, through no failure or omission of the applicant, para. 1(5) can only, in my judgement, be applied practically and justly if it is read effectively as "*the nature of the document and/or any other relevant circumstances*". Alternatively, it is possible in many cases to consider the nature of a document without having direct access to it.
16. It seems clear to me from the written reasons that the Respondent, having concluded that BM/1 had not (for whatever reason) been served by the Appellant, determined to disallow it as PPE without any additional consideration of "*any other relevant circumstances*". This constituted a failure to discharge properly the obligation at para. 1(5) of the Regulations and for this reason the appeal must be allowed. It seems to me desirable I undertake this consideration rather than remitting the claim to the Determining Officer. On the one hand, when Walsh and Carter were arrested, drugs were found on her but not on him. My understanding (from the "Agreed Facts" put before the judge at Chester Crown Court), was that the mobile telephone evidence was central to the case linking Walsh to the possession of the drugs with intent to supply. No attempt, so far as I am aware, was made by the police or CPS to compile a sub-schedule from BM/1 identifying the records relied on specifically within any larger body of telecommunication datum. It seems to me, therefore, that BM/1 was relevant specifically in the case against Walsh. On the other hand, DC Marsden required the return of BM/1 as it also contained "*sensitive information*" relevant to the investigation of other outstanding defendants, suggesting thereby that not all the datum in BM/1 was relevant to the prosecution of Walsh. In my conclusion, based on a

consideration of the available, relevant circumstances, the balance of advantage must favour the Appellant. I find, doing the best that I can, that 4000 pages of BM/1 should be included within the number of PPE. The appeal is allowed to this extent.

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