

Judgment: approved by the Court for handing down  
(subject to editorial corrections)\*

Delivered: 29/11/2013

**IN THE COURT OF JUDICATURE IN NORTHERN IRELAND  
TAXING OFFICE  
BEFORE TAXING MASTER A WELLS**

AND in the matter of an Appeal under Rule 14 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ('the 2005 Rules') as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2005 ('the 2011 Amendment Rules').

NOTICE OF DECISION AND REASONS

To: Logan and Corry, Solicitors ('the Solicitors')  
And The Northern Ireland Legal Services Commission ('the Commission')  
Department of Justice ('the Department')

Defendant	Certificate Nos. Taxing Ref No	Charges (in brief)
Ian Mark Cameron	CC/12/05/06303 T/CC/13/00358	Possession of indecent images of children

'PPE' means 'Pages of Prosecution Evidence'.

The Solicitor Representative appeals against the decision of the Commission to allow remuneration under the 2011 Amendment Rules on a PPE count of 170 pages rather than including an additional 15,322 (approximately) images of pictorial exhibits served as part of the prosecution evidence on CD or digital format. The solicitors say the proper PPE count is over 15,000.

The Defendant pleaded guilty some time after arraignment. The Solicitors claim costs on their analysis of the PPE of just over £85,000.00. The Commission have allowed costs fee on their analysis of the PPE of £3,240.00.

In good time and as required by the 2005 Rules, the Solicitors lodged this appeal to the Taxing Master against the Commission's decision by letter and Notices of Appeal. They wished to appear and be heard.

Notice of the appeals was sent to the Department who have not made representations in this case, but they have in a very recent and similar appeal. I discussed some of the submissions with the solicitor on this appeal. In those general representations the Department submit that the methodology required to determine the PPE ought to involve a determination of the work actually done in relation to the "disputed" documents (their emphasis) and whether this was "reasonably undertaken and properly done".

The appeal was listed for hearing before me on 21 November 2013. Mr Sally of the Appellant solicitors appeared. I greatly appreciate the points that he raised and the integrity of his position.

The Defendant was charged with possession of computer-held indecent images of children. The Offence fell within Class D (being "*Serious sexual offences, offences against children*"). Following his plea, he was sentenced to a Probation Order (according to the Solicitors' claim form). This was nevertheless a serious matter.

The 2011 Amendment Rules amended the 2005 Rules which prescribed the Crown Court remuneration for solicitors and counsel assigned under the Legal Aid, Advice and Assistance (NI) Order 1981 ("the 1981 Order"). *Inter alia*, the 2011 Amendment Rules substituted reduced levels of Standard Fee remuneration for guilty pleas, trials and other hearings. "Very High Costs Case" recognition ceased to exist.

The 2005 Rules created Standard Fees, to the intent that remuneration would be similar across a Class of Offence appropriate to the Representative. Rule 11 (2) of the 2005 Rules provides that

*the Commission shall allow fees for work allowed by it . . . in accordance with Schedule 1.*

Rule 2 (which is the Interpretation clause) is amended by the 2011 Rules to include: -

*"PPE Range" means the number of pages of prosecution evidence, and for this purpose 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,*

*served on the court*

Rule 4 (2) of the 2005 Rules, which deals with the general principle and which in turn is subject to Rules 16 and 17 (which relate to Very High Cost Cases)('VHCC') provides: -

*In determining costs, the [Taxing Master] shall, subject to and in accordance with these Rules –*

- (a) Take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and*
- (b) Allow a reasonable amount in respect of all work reasonably undertaken and properly done."*

The Department submit that determination of material within the PPE ought to have regard to the Rule 4(2)(a) criteria of relevance etc.

Schedule 1 of the 2005 Rules, as amended by the 2011 Rules, at Paragraph 9 provides: -

*. . . . the fee appropriate to any offence shall be that specified in the Table below as appropriate to whether the case was a Guilty Plea 1 or a Guilty Plea 2, the representative (including the category of advocate instructed, as applicable) and the Class within which that offence falls according to paragraph 5.*

The relevant parts of the Table following paragraph 9 as relate to a Class F offence are: -

#### Guilty Plea 2 Fees

Offence PPE Range

Fee	Class F	Solicitor	Queen's Counsel	Led Junior Counsel	Sole Junior Counsel
1 - 733		£3,240.00	£3,200.00	£1,500.00	£1,950
734 -1631		£11,236.00	£8,400.00	£4,200.00	£5,460
1632 +		£25,282.00	£18,900.00	£9,450.00	£12,285

It can be seen that the fees increase dramatically to reflect the potential for greatly increased volume of material to be examined in a particular case.

The Basic Trial Fee under the 2011 Rules is not related to the PPE. The PPE formula only relates to Guilty Plea 2 Fees (on occasions, the Representatives can be much better remunerated with a GP2 Fee than with a Basic Trial Fee).

It is of relevance, to draw attention to the all-inclusive nature of the standard fees provided in the 2005 Rules, as amended. There is a wide range of offences that the 2005 Rules table into various classes. There is the same standard fee for work done in each class; this perhaps reflects the value for money test as represented by Article 37 (2) of the 1981 Order, as amended; but it must also reflect a 'swings and

roundabouts' nature of the standard fees in the 2009 Rules; I refer to the cases of R v Heaney [2005] NICA 53 and McLean and Anor v Buchanan [2001], SCCR 475. These latter cases were very recently considered in Northern Ireland and generally approved by Morgan LCJ in In the Matter of an Application by Raymond Brownlie for Judicial Review [2013] NICA 57.

The principle on which the 2001 Rules is based is not one of providing fair remuneration by reference to the amount of work done, but it is a rule-based system; its *modus operandi* is one of swings and roundabouts.

As noted, the Department submits that I ought to consider if the additional pages were reasonably and necessarily worked on. It seems to me that the problem with this submission is that I ought to apply a similar test to all of the PPE, not just the disputed digital material. There may be much material with the paper PPE that is not substantive and may not need much attention. As a general proposition, it is more than likely that the strands of case will turn on a limited number of documents that need considerable scrutiny.

In their reasons for paying the GP2 Plea fee based on the 678 - 1225 PPE Range, the Commission said in their letter to the Solicitors of 26 June 2013 that:

“The panel referred to the official PPE count on the PPS records/ICOS records which was confirmed as 170. The panel believes that the PPE count includes the relevant pages served to the court identifying a summary of the categorisation of the photographs as presented in evidence by the Crown. The panel does not consider that the 15,322 images were pictorial exhibits before the crown.”

I have a copy of the Commission's Guidance. It notes that the Rule 2 criteria (above) includes all: -

- a) *Witness statements*
- b) *Documentary and pictorial exhibits*
- c) *Records of interviews with assisted persons; and*
- d) *Records of interviews with other defendants.*

*served on the court*

The Guidance goes on to set out material that is to be excluded from the PPE. This includes: -

*“Evidence that is served in electronic format”*

Firstly, the Guideline detail of what is to be excluded cannot over-ride the Statutory Rule of what is to be included.

Secondly, the facts of each case may well require that material served by the Prosecution might need to be included in the PPE count. By way of obvious example, material might come to light during the course of the evidence of a prosecution witness that justice requires to be admitted. That evidence might very well not have been served as part of the committal papers, nor supported by a Notice of Additional Evidence, but still it must fall to be considered within the PPE count.

Thirdly, the Rule 2 definition of the PPE does not expressly exclude material served by the prosecution and which is in electronic format or on a DVD or CD. I accept that audio or video evidence so served cannot be considered in terms of 'pages'. A page is a page and nothing more.

It is worthwhile to note that the equivalent guidelines in England and Wales as originally drafted excluded from the PPE: -

*"Any document provided on CD-ROM or by any other means of electronic communication."*

The England and Wales current guidelines acknowledge the increasing use of digital material and increasing use of digital evidence. With effect from August 2012, the guidelines suggested that if the evidence that is relied upon would previously have been served in paper form, it should be included in the PPE.

***Introduction***

*1. The criminal justice system is moving towards digital working which means service of digital evidence will increase. Therefore, in order to ensure there is no difference in legal aid funding when evidence is served digitally or on paper, the Ministry of Justice amended the definition of PPE in the Criminal Defence Service (Funding) Order 2007 in April 2012.*

*2. The intention behind the amendment is to preserve the status quo insofar as remuneration is concerned, despite the change in the manner of service. If evidence is relied upon that would previously have been served in paper form it should be included in the PPE count.*

*3. The following table summarises the position as of 1 April 2012:*

<b><i>Type of prosecution evidence</i></b>	<b><i>Type of service by prosecution</i></b>	<b><i>PPE or special preparation</i></b>
<i>Paper witness statements, interviews and documentary and pictorial exhibits</i>	<i>Paper</i>	<i>PPE</i>
<i>Paper witness statements,</i>	<i>Digital</i>	<i>PPE</i>

*interviews and documentary and pictorial exhibits that are converted into digital format*

*Witness statements or interviews that have only ever existed in digital format*

*Digital*

*PPE*

*Documentary and pictorial exhibits that have only ever existed in digital format*

*Digital*

*Special preparation unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence, i.e. because would previously have been served in paper format These are not specifically mentioned in the Funding Order but the MoJ has confirmed that where the transcript is relied upon by the prosecution, it will be treated as PPE*

*ABE interviews*

*Paper or digital*

*Other digital exhibits*

*N/A*

*Included in the fee*

#### ***Witness statements and interviews***

*4. All witness statements included in the bundle or under a notice of additional evidence will count as PPE whether the original statement was created in paper form or digital form. Similarly, if the prosecution create a summary or transcript of an interview with a defendant, this does not need to have existed in paper form to be paid as PPE.*

#### ***Documentary and pictorial exhibits***

*5. In relation to documentary and pictorial exhibits, although it has not been possible to draft the wording of the Funding Order in such a way as to make this explicit, it is intended that where the prosecution serve such a digital document, which has never existed in paper form, the appropriate officer will assess whether this would previously have been served in digital form or printed out.*

*6. If the former, then the special preparation provisions will apply. If the latter, then the number of pages that would have resulted will be added to the PPE.*

*7. The assessment will be subject to redetermination and appeal to a Costs Judge.*

*8. An example of the new procedure is where the prosecution obtain telephone records or financial records on a disc, and extract the relevant material, i.e. the material on*

*which they rely. (This may or may not be produced as an exhibit to the statement of a prosecution witness in a statement).*

*9. The relevant material would be payable as PPE, but the underlying source material, which may be voluminous but is not specifically relied on by the prosecution, would not count as PPE, if the appropriate officer decides that it would not previously have been printed out and served in paper form. It would instead be subject to an assessment under the special preparation provisions (assuming it is not unused material).*

*10. Therefore, the only difference between the old and new systems is that whereas previously the relevant material would have been printed and served in paper form, now it will remain in digital form, but will be paid as PPE if the determining officer considers that it would previously have been printed. Any material that would not previously have been printed (whether specifically relied on or not) will not be paid as PPE, but as special preparation."*

I recognise that there are similarities and differences between the position in England & Wales and Northern Ireland. The 2011 Rules do not provide for "Special Preparation". In Northern Ireland there is no "Appropriate Officer". However, in England & Wales there is a direct equivalent to Rule 4(2) above.

In this case, the page count is noted by the Crown Court Clerk from the List of Exhibits (Form 24) served by the Prosecution for the Committal Proceedings in the Magistrates' Court, there were 170 pages of statements and a range of documents.

The pictorial images were never reduced to hard copy. I understand that an expert examined these images in controlled circumstances. While it is outwith this decision, the material was felt to be so offensive that it ought not be released in any way (the expert viewed the images on a PSNI/prosecution computer).

There would be no issue with the quantity of the material on the DVD.

The Solicitors did not print out the material. They did not view the material, nor did counsel. An expert viewed and reported on the material.

The electronic material on the computer/DVD was not readily able to be converted into a 'page' count format, capable of being paginated.

Each case may well be fact-specific. There is, undoubtedly, an ever-increasing use of electronic and digital technology, not only to serve material, but also to process it during the Trial. This is both proportionate and correct; the criminal justice system ought not to ignore the progress of technology that is adopted in other jurisdictions (in civil litigation, Discovery is very often given by disclosing documents on disc or memory stick).

I have earnest regard to the point earlier raised by Mr Cullen that I ought to look at and take into account the Rule 4(2) criteria above in relation to the material served in electronic format. He is quite correct in the principle; material on disc will not automatically fall to be part of the PPE unless it is worked on and reasonably so.

I am satisfied that on the particular facts of this case, that the electronic material on the computer/disc, being 'photographic' images, would never have been served in hard or printed format and that it would not have been reasonably necessary for the solicitors to work on the material.

I dismiss the appeal. The PPE correctly falls within the lowest PPE Range of up to 733 PPE.

Taxing Master A Wells