Neutral Citation Number: [2017] EWHC 138 (QB)

Case No: QB/2016/0232

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2017

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE
MASTER WHALAN (Sitting as an Assessor)

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Between:

LORD CHANCELLOR	**Appellant**
- and -	
(1) EDWARD HAYES LLP	
(2) NICK WRACK	**Respondents**

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- -

David Bedenham (instructed by **Government Legal Department**) for the **Appellant**
Anthony Montgomery (instructed by **Edward Hayes LLP**) for the **Respondents**

Hearing date: 25 January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE NICOLA DAVIES DBE

Mrs Justice Nicola Davies:

1. The appellant brings this appeal pursuant to Regulation 30(5) of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the 2013 Regulations") against a decision of Costs Judge Rowley dated 25 April 2016. The first and second respondents were instructed in the case of *R v Khandaker* as solicitor and counsel respectively. The second respondent did not represent the defendant at trial but, as counsel initially instructed, was the person to whom the legal aid fees were paid pursuant to the 2013 Regulations.

2. The defendant was charged with conspiracy to assist unlawful immigration and offences of fraud. The prosecution Case Summary states that the defendant, Mr Khandaker, conspired with others:

> "2. ...(in particular those as identified by the 68 persons in the telephone text schedules) to arrange for hard copy/false/forged/counterfeit documents to be custom made for individuals, such documents purporting to evidence past, current or proposed attendance and/or performance at UK educational institutions, and doing so to illicitly assist such individuals to obtain or prolong their leave to remain in the UK on the basis of purported past, ongoing or future education.
>
> 3. The enormous scale of the operation organised by Mr Khandaker can be gleaned from:
>
> a. The wealth of communications found on a mobile phone attributed to Mr Khandaker, such communication being with agents for such individuals or indeed with those individuals themselves (the incriminating text messages say the Crown relating to some 68 agents or individuals)."

3. At the conclusion of the criminal trial the respondents submitted their claims for graduated fees on the basis that the number of pages of prosecution evidence ("PPE") included the pages served on a disc by the prosecution which consisted of downloads from the mobile phone of the defendant which had been seized by the police. The claim of each respondent was determined by a different Determining Officer of the Legal Aid Agency ("LAA"), each calculated the graduated fees on the basis that the 4,325 pages served on disc should not be included. The respondents requested redetermination but the Determining Officers concluded that the 4,325 pages were not PPE being, unused material. Pursuant to Regulation 29 of the 2013 Regulations the respondents appealed the redetermination decision which was heard by Costs Judge Rowley. By his decision dated 25 April 2016, the Costs Judge allowed the appeals. The relevant paragraphs of the judge's Reasons for Decision are set out as follows:

> "6. In relation to counsel's appeal, a point is taken as to the fact that the disc was provided directly by the prosecution counsel to the defendant counsel without going via the CPS. It does not seem to me that this is a point which should be taken by the determining officer. The provision of the information by the

Crown's advocate seems to me to be just as properly served as if it had been served by the Crown's lawyers. Whilst such an approach may not be ideal administratively, where, as here, there was time pressure on the disclosure the Crown's advocate took a sensible and pragmatic step. There is certainly no reason for the defence advocate to be penalised for that approach.

7. Neither determining officer considered the well-known decision of Haddon-Cave J in *R v Furniss* to be persuasive in this case. One determining officer has, rather boldly, simply stated that 'Furniss is not considered'. The other determining officer has, in a more measured fashion, referred to the fact that every claim must be assessed on its own particular facts. Telephone, text and cell site material may be relevant to one case, or defendant within that case, and not to another defendant or case as a whole.

8. In the case of *Furniss*, Haddon-Cave J was clear in stating that the information served on disc needed to be considered just as carefully by the defence lawyers as it had been by the prosecution lawyers before its disclosure. He concluded, at paragraph 56 in these terms:

> 'The position in law is clear: telephone, text and cell site evidence served by the Prosecution in digital form must now be included in the PPE page count and paid as such.'

9. It has been said that this description of the manner in which PPE from electronic evidence should be dealt with, is a step further than had previously been set out in various costs judge decisions. In those decisions, the importance of the particular documents had been held to be a factor of some weight when considering whether the electronic evidence should be considered as part of the served PPE rather than, for example, essentially unused material."

10. Both the solicitors and counsel refer to a comment of the trial judge in this case, HHJ Shanks, where he apparently said that the material extracted from the telephone was 'central to the prosecution case'. Mr French and Mr House, who appeared before me on behalf of the solicitors and counsel respectively, pressed home this point regarding the importance of the information taken from the telephone in order to make the prosecution's case.

11. It seems to me that this is a case where the electronic evidence is clearly central to the matters in issue and easily satisfies the importance test put forward in other cost judge's decisions. As such, there is no need for me to consider whether the decision in *Furniss* needs to be applied since the test

> applied in cases such as *R v Jalibaghodelehzi* [2014] 4 Costs LR 781 are satisfied in any event.
>
> 12. The Agency's main argument for disallowing the electronic evidence is that the relevant information has been extracted and therefore the remainder does not need to be considered or paid for. Realistically, there is no way that the prosecution can always be clear as to which information is or is not relevant to the defendant's case and so it is not simply a question of the prosecution making sure that all relevant documents are provided. Lines of argument to be run by the defendant cannot always be foreseen by the prosecution. Consequently where the evidence is important, the defendant must be entitled to look at the underlying evidence that surrounds it and not simply what the prosecution considers needs to be extracted to prove its case. Such information needs to be scrutinised by the defendant's legal team and it is entitled to be remunerated for so doing."

Grounds of Appeal

Ground 1

4. The learned Costs Judge erred in not applying the definition of "pages of prosecution evidence" contained in paragraph 1 of Schedule 1 and paragraph 1 of Schedule 2 to the 2013 Regulations. Had the learned Costs Judge applied the statutory definition he would have concluded that the 4,325 pages of downloaded data on the disc was not PPE because:

   i) It did not form part of the committal or served prosecution documents and nor was it included in any Notice of Additional Evidence ("NAE") and was provided to the defence as "unused" material.

   ii) In any event, it had never existed in paper form and neither the nature of the document or any other relevant circumstance made it appropriate to include it as PPE.

Ground 2

5. To the extent that the learned Costs Judge sought to exercise some sort of discretionary power to deem as PPE material that does not fall within the statutory definition, he was in error because no such discretionary power exists.

Statutory Provisions

Criminal Legal Aid (Remuneration) Regulations 2013

6. Paragraph 1 of Schedule 1 to the 2013 Regulations provides in relevant part:

> "(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 into account the nature of the document and any other relevant circumstances."

Paragraph 1 of Schedule 2 to the 2013 Regulations contains the same definition of "pages of prosecution evidence".

Background of the Criminal Case

7. The Crown's case at trial was that Mr Khandaker had an industrial operation to provide false and counterfeit educational documents, linked to some 500 or so applicants or beneficiaries and their applications for leave to remain in the UK. He had the potential (based on several thousand blank hardcopy completed educational documents) to provide counterfeit documentation for several thousand more potential applicants applying for leave to remain in the UK with such broad documentation. During the course of their investigation the police seized mobile telephones, one of which was attributed to Mr Khandaker, documents found at three separate premises connected to Mr Khandaker and computers which were connected to Mr Khandaker.

8. In its Case Summary concerning the seizure of the mobile phone allegedly owned by Mr Khandaker the Crown state:

> "21. From these premises of 20 Robinson House, 2 x phones were seized, they being OS/2/SEL/a and OS/12/SEL/a, they

being sent off for examination by a forensic computer analyst at Zentek (see below).

a. It is the Crown's case that the mobile phone OS/2/SEL/a is Mr Khandaker's phone.

b. The disks OS/2/SEL/a and OS/12/SEL/a contain the data downloaded from these phones (*a copy was given to defence counsel at the hearing on 16.3.15*)."

Beneath the final words in italics and in brackets is a handwritten annotation which reads "OF DISC NOT PRINTOUTS". The Case Summary continues:

"40. Zentek were provided with and then examined a mobile phone (iphone 4S) part of exhibit OS/2-SEL P1, a mobile phone seized from the home address of Mr Khandaker. Mr Pearce produces the evidential reports from the examination of this phone as 58448/CAP/001.

41. An intelligence analyst later examined the data downloads from this iPhone 4S (exhibit OS/2 SEL P1) and produced schedules by way of Excel spreadsheets of some of the data on this phone, that being produced in a number of batches for ease of use, those being exhibits NG1A and NG1B and NG1C (at e692 to e930).

42. These schedules have been created so that text messages to/from one recipient/sender are kept in one batch together. There are in total some 68 batches or conversations with 68 such individuals."

It is of note that there are further handwritten additions to the Case Summary document. After paragraph 40 and on the same line as the last sentence are the handwritten words "not served" which are then scribbled over, to the right of those words, is written "served on disc". At paragraph 41, to the right of the third line, is handwritten "selected items only".

9. From this document it would seem and it is now clarified that the mobile phone was given the exhibit number OS/2-SEL P1. The initials in the exhibit would appear to refer to PC Onkar Sandhu, a police officer who provided a number of witness statements, which were served on the court. The police officer was a witness to be called at trial. The evidential reports produced by a Mr Pearce (paragraph 40) emanate from Carl Alan William Pearce whose witness statement dated 29 September 2014 was served on the court, he was a witness to be called at trial. The intelligence analyst who produced the schedules from some of the data download from the phone being the exhibits NG1A, NG1B and NG1C was Natalie George. She made a statement dated 10 October 2014 which was served on the court and was a witness to be called at trial. In it she stated:

> "On 10 September 2014 I was requested by DC Sandhu to analyse a number of telephone downloads that had been seized as part of a fraud investigation with the Operation Dixie.
>
> In order to conduct this analysis I was provided with data downloads in spreadsheet and PDF form which related to records held within:
>
> - iPhone 4S mobile phone recovered from the home address of Mohammed Shamiul Hasan KHANDAKER. This is exhibit reference OS2 SEL P1."

It was from the analysis of Ms George that the schedules of data comprising exhibits NG1A and NG1B were prepared.

10. The text messages contained in NG1A and NG1B extracted from the downloaded data from the mobile phone of Mr Khandaker formed a significant part of the Crown's case.

11. At the hearing of the appeal the understanding was that the disc was given by prosecuting counsel to the original defence counsel at court on 16 March 2015. It was clear that a second handover of the disc had taken place. In refusing to include the contents of the disc in the PPE the original Determining Officer in his Decision Reasons stated:

> "No evidence provided of when the disc was served. There is no evidence on the NAEs or the Paginated list to show a disc was served."

In response, Michael House, of counsel, stated:

> "2. We sent you a copy of the disc. It is hard to see how we could have done so without the disc being served.
>
> 3. This case was returned to me at very short notice. It was returned on 4 April 2015 to begin on 15 April 2015. The disc was not with the papers, although the Crown claims to have served it earlier.
>
> 4. To avoid delay, it was agreed with prosecuting counsel, Richard Milne, that the CPS should be bypassed, and the disc sent directly to my chambers by the police. Hence no reference to service in the NAEs.
>
> 5. The police arranged for the disc to be sent by TNT Express and it arrived at my chambers on 9 April.
>
> 6. In support of this explanation I append copies of the following:
>
> a) 2 email exchanges between myself and Richard Milne on 9 April 2015.

b) a record of delivery of the package to my chambers."

12. In the original request for redetermination which is dated 12 August 2015 Michael House states that "The CPS failed to fill in the final NAE document properly." In the Determining Officer's reasons on the redetermination it is stated:

> "In this case, there is no evidence that the disc was served with the initial bundle of served evidence (there being no committal bundle in this case, which was sent to the Crown Court) nor that it was served under a Notice of Additional Evidence. If it was not so served, it cannot, therefore, be PPE within the definition. The fact that the disc was supplied directly by the police, or even that the prosecution had provided it previously, does not necessarily mean that the Regulatory requirements have been met."

The Appellant's Case

13. The appellant contends that the disc and its contents was not "served on the court" as required by Schedule 1 paragraph 1(2) of the 2013 Regulations nor did it form part of the "served prosecution documents" as required by Schedule 1 paragraph 1(3). The pages of downloaded data on the disc were provided to the defence as "unused" material. It is conceded that in the Schedule of unused material there is no reference to the downloaded data on the disc. Reliance is placed on the fact that there is no mention of the disc and its contents in the exhibit list. During the course of the appeal hearing the Court sought information from those who act on behalf of the appellant as to the process of the criminal trial and as to documents for example the witness statements of PC Sandhu and Carl Pearce, which were served on the court at the original trial. At the hearing the appellant was unable to provide the statements, it informed the Court it would be difficult to obtain the same. Counsel on behalf of the appellant told the Court that it was for those contesting the reasons of the Determining Officer to produce the documents. I do not agree. It is for those who bring the appeal to ensure that they have all relevant documents for its proper determination. The appellant did not. The contention by the appellant's counsel that it was easier for the respondents to obtain trial documents was a curious one given the identity of the appellant.

The Respondents' Case

14. It has always been the respondents' case that the downloaded data were served prosecution documents, as such the pages of data form part of the PPE.

Post-hearing disclosure of further evidence/information

15. On the second day following the conclusion of the hearing, the appellant produced three witness statements from PC Onkar Sandhu and an email sent by the original prosecution counsel to a CPS caseworker dated 26 July 2016. The email was a response to a request for information prompted by this appeal. Counsel was asked to recall events at trial insofar as they related to the decision of the Costs Judge in April 2016. In his email the relevant paragraphs state:

"4. I have seen and read the judgement of the costs judge dated 25th April 2016, which I take it is the judgement being ruled upon (copy attached).

5. I have attached the index to the papers as sent from the Magistrates Court (ie indices to the statements and to the exhibits) and the NAE backsheets that I believe were served in this case, though Shanty you will have to assist that they were in fact so served in that format please?

6. The text messages in this case (as taken from the mobile phone OS/2/SEL P1, as prepared from an electronic analysis of the electronic contents of this mobile phone) produced by the analyst Natalie George (statement pates 94 and pages 187 as attached) were extensive in number and particularly probative in this case, they being served in hard copy at exhibit pages e692 to e930 as exhibits NG1A and NG1B; it was these schedules of text messages both received and sent that formed the very core of the Crown's case against this defendant (see attached amended case summary dated 14.4.15 at paragraph 51 to 65), they being incorporated into a number of further schedules which cross referenced particular texts to particular documents found at the defendant's premises (see further schedules created by oic DC Sandhu as summarised in case summary at paragraphs 66 to 67).

7. My recollection is that at the outset of the trial, the defence were not prepared to agree the admission into evidence of the text messages in NG1A and NG1B, nor indeed were they prepared to agree the subsequent schedules produced by DC Sandhu, as and until they were provided with and had available to them the underlying electronic source material as taken from the mobile phone OS/2 SEL P1, that being to enable the defence to check that all such data being relied on by the Crown was in fact present on the mobile phone. Faced by such a refusal, I as prosecution counsel was obliged to provide to defence counsel the discs containing such electronic information (that is the complete electronic download of mobile OS/2 SEL P1), this having been ventilated with the trial judge at the outset of the trial, he having approved and indeed endorsed such a course of action.

8. To that end, I do not disagree with the account summarised in the costs judge ruling at paragraphs 5 and 6 as to how the material was provided to the defence by myself as prosecution counsel.

9. It is a matter of interpretation for the High Court as to whether such source electronic material handed over by myself to the defence as contained on the discs is evidence that was

> served (ie to be included in the PPE) or was unused material (not to be included in the PPE).
>
> 10. All I can say is that it was not possible just to hand over discs containing solely the material in NG1A and NG1B, the electronic material for which exhibits was contained within the entirety of the download of the mobile phone OS/2 SEL P1."

16. The email from prosecution counsel is a document which should have been disclosed in advance of the appeal hearing. It was not. No satisfactory explanation has been provided for this failure.

17. Further, the post-hearing disclosed documentation included the witness statement of PC Onkar Sandhu dated 24 September 2014. The statement reads:

> "On 27/06/2014, police attended Flat 20 Robinson House, Selsey Street, E14 7AZ to conduct arrest enquiries for Mohammad Shamiul Hassan KHANDAKER. Whilst at the address two mobile phones were seized and exhibited as OS/2/SEL and OS/12/SEL. These phones were sent to Zentek for download.
>
> The discs containing the data from the phones have been returned and copies have been created for the defence and CPS, the working copies and originals have been retained at Lunar House, Croydon in the property store.
>
> The discs have been exhibited as OS/2/SEL/a and OS/12/SEL/a.
>
> These copies have been exhibited and handed to CPS. They contain the data extracted from the phones along with a report."

18. During the course of the appeal hearing it was the Court which pressed for information as to what had taken place at trial. This presentation of the case on behalf of the appellant was striking for the absence of any knowledge as to the dynamics of the original trial. One point taken by the appellant was that if the respondents had concerns that the entirety of the downloaded data was not included in the list of exhibits by the conclusion of the trial this should have been raised. It was. Present at the appeal hearing was trial defence counsel. He informed the Court that the matter had been raised with the judge, the point had been contested by the Crown, and the judge declined to engage with the point. This directly contradicted the assertion in the appellant's Grounds of Appeal that the judge refused to include this data as part of the PPE.

19. The disc containing the downloaded data was provided on two separate occasions to defence counsel. On the first occasion by prosecuting counsel at court, on the second occasion, as a matter of urgency, by the police using a courier service to the chambers of defence counsel. Given the circumstances of the transmission it is not difficult to understand the point made by original defence counsel in his written request for redetermination when he states that the CPS failed to fill in the final NAE document

properly. The Crown seeks to rely on the absence of this evidence within the category of exhibits in the case, however, its difficulty is that this evidence is nowhere identified in the unused material.

20. The disc of downloaded data is not listed as an exhibit, its service was not accompanied by a NAE, it is not listed in the schedule of unused material. Given the absence of such formal identification the Court will make its own determination of the evidential nature of the data. It is undisputed that the text messages extracted from the downloaded data of the defendant's mobile phone were an important part of the Crown's case. I note that in his email at paragraph 15 above prosecution counsel describes the schedules of text messages as being at the "very core of the Crown's case". Given the importance of the evidence it is unsurprising that the defence refused to agree to admission of the extracted data until it was able to examine all the data on the download. This was the defence application to the trial judge which he granted. The request was not only reasonable it enabled the defendant's legal team to properly fulfil its duty to the defendant. It enabled the defendant's legal representatives to satisfy themselves of the veracity of the extracted data and to place the same in a context having examined and considered the surrounding and/or underlying data. It also enabled the defendant's legal team to extract any communications which they deemed to be relevant. Given the importance of the extracted material to the Crown's case and resultant duty upon the defendant's team to satisfy itself of the veracity and context of the same I am satisfied that this was additional evidence which should have been accompanied by a Notice in the prescribed form. It is not difficult to understand why this did not occur. The service of the disc at court, directly to counsel and subsequently by the police to counsel's chambers was done for pragmatic reasons of time and efficiency. Overlooked in the process was the need to serve a formal Notice. The role of the trial judge in this disclosure process and his approval of the serving of the evidence is at one with the evidential importance of all of the data. This was not unused material. It formed part of the prosecution evidence which was served on the court. As such it falls within the definition of PPE for the purpose of the 2013 Regulations.

21. It is contended on behalf of the appellant that on the part of the respondents there has been double-counting of pages. The extracted data, 238 pages, is included in the total number of pages for which remuneration is sought, namely 4,325. This is disputed by the respondents. The point taken is that the 238 pages comprising the extracted data in exhibits NG1A and NG1B are not exact copies of pages in the original download. There is no mirror image of the two schedules on the disc, no carbon copy. Each new page of extracted data had to be looked at and checked against its identified counterpart in the original download. This is not duplication but additional work. I accept the respondents' submission. I note the description of prosecution counsel in his email at paragraph 15 above where he explains that the electronic material comprising exhibits NG1A and NG1B was "contained within the entirety of the download of the mobile phone OS/2 SEL P1."

22. As to the Reasons for Decision of the Costs Judge the point is taken by the appellant that the judge did not consider the specific provisions of Schedule 1 paragraphs 1(2) and 1(3) of the 2013 Regulations as to whether the evidence had been "served on the court" or was part of the "served prosecution documents". It is right that in his Reasons the Costs Judge did not refer specifically to these provisions but at paragraph

6 he clearly directed his mind to the issue of service and found that the information had been "properly served" as if it had been served by the Crown's lawyers. He also noted that such an approach may not be ideal administratively but given pressures of time the Crown took a sensible and pragmatic step. In my view the judge did direct his mind to the issue of service, he acknowledged the administrative difficulties occasioned by the approach but recognised the pragmatism of the steps taken. This Court has done the same. The Court has identified the specific provisions within the 2013 Regulations and found that the less than ideal administrative arrangements led to a failure to produce a NAE. Notwithstanding this failure the entirety of the download was in fact additional evidence and was served both on defence counsel and the court. Accordingly it falls within Schedule 1 paragraphs 1(2) and 1(3) of the 2013 Regulations.

23. The second limb of Ground 1 relates to Schedule 1 paragraph 1(5) as the evidence was served in electronic form. Evidence served in electronic form can only be included in the PPE if it is deemed appropriate to do so (taking into account the nature of the document and any other relevant circumstances). The essence of the appellant's case is that the material on the disc, save for the separate extract contained in the schedules provided by Ms George, was not material relied upon by the Crown to prove its case. It is not disputed that the trial judge regarded the text messaging evidence as being "central to the prosecution case". It was conceded by counsel on behalf of the appellant that in order to assess the evidence of the extracted text messages it would be necessary to look at the material on the disc. That point was then refined in that it was said that there would be photographs on the disc which would not require much by way of examination and it would be inappropriate for any legal aid monies to cover such an examination. Further it was contended that if work was required to examine such material an application for special preparation pursuant to Schedule 2 paragraph 20 could have been made. The immediate point taken by the respondents was that this provision applies only to solicitors and relates to issues of uniqueness, no-one would suggest the same applied to this data. There was no index to the volume of data on this disc.

24. 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.

25. The reasoning of the Costs Judge is criticised in that it is said he failed to carry out an analysis of the data which would permit him to conclude that the importance test was satisfied. In paragraphs 10 to 12 of his Reasons the Costs Judge identified the importance of the material extracted from the telephone and the requirement for those acting on behalf of the defendant to scrutinise the underlying evidence which surrounded the text messages. The assessment of the Costs Judge demonstrated an understanding of the duty on those who represented the defendant at trial which on

occasion appeared to be absent from the presentation on behalf of the appellant. In my view the second limb of Ground 1 is devoid of merit.

26. As to Ground 2 this was not pursued in oral submissions before the Court. It is not difficult to understand why. Schedule 1 paragraph 1(5) clearly envisages an exercise of discretion by the person making the determination, a power which counsel on behalf of the appellant conceded was available to the Costs Judge and which he exercised.

27. For the reasons given this appeal is dismissed.