SENIOR COURTS
COSTS OFFICE

SCCO Ref: 70/18

Dated: 1 November 2018

ON APPEAL FROM REDETERMINATION

REGINA v MUIYORO

HARROW CROWN COURT

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

CASE NO: T20167355

LEGAL AID AGENCY CASE

DATE OF REASONS: 9 MARCH 2018

DATE OF NOTICE OF APPEAL: 29 MARCH 2018

APPLICANT: IBB SOLICITORS	SOLICITORS	

The appeal has been dismissed for the reasons set out below.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, for working on evidence received from the Crown. Payment is claimed under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations.

2. Payment for working on evidence served by the Crown is made by reference to the number of Pages of Crown Evidence ("PPE"), subject to an overall "cap" of 10,000 pages.

3. Paragraph 1, (2)-(5) of Schedule 2 explains how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

4. Paragraph 20 of Schedule 2 makes provision for payment on a different basis for served documents which are not considered by the Determining Officer to be appropriate for inclusion within the PPE:

> 20.— Fees for special preparation
>
> (1) This paragraph applies in any case on indictment in the Crown Court—
>
> (a) where a documentary or pictorial exhibit is served by the prosecution in electronic form and—
>
> (i) the exhibit has never existed in paper form; and
>
> (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence or
>
> (b) in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000,
>
> (2) Where this paragraph applies, a special preparation fee may be paid…
>
> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable…"

Background

5. On 19 May 2016, Kevin Muiyuro ("the Defendant") was stopped whilst driving with two passengers. Police officers noted a strong smell of cannabis coming from the car and all three occupants were detained whilst a search was conducted. A large quantity of cannabis was found in a sports bag. The Defendant was found to have on his person and in the driver's door pocket £675 in cash. Due to the amount of cannabis found in the car and the amount of cash in the Defendant's possession he was arrested for possession with intent to supply. The Defendant maintained that the cannabis was for his own personal use.

6. On 11 September 2016 the Defendant was arrested again in Harrow after police noticed a strong smell of cannabis emanating from his vehicle. He resisted arrest violently, resulting in an injury to a police officer. As he attempted to escape on foot the Defendant discarded a green Tesco bag. He was apprehended by police, and the Tesco bag was found to contain a large amount

of cannabis. A large quantity of cash was found in the vehicle. He was arrested in relation to possession with intent to supply and assault with intent to resist arrest. He refused to provide the pin for his iPhone.

7. Although I do not seem to have a complete copy of the relevant indictments, it would appear that the Defendant, in relation to the arrest on 19 May 2016, faced three counts: possession of a controlled drug of class B with intent to supply; possession of a controlled drug of class B; and possessing criminal property. From the arrest on 11 September 2016, he faced another 3 counts; one of assault with intent to resist his lawful apprehension; one of possession with intent to supply a controlled drug of class B; and one of possessing criminal property.

8. At a Plea and Trial Preparation Hearing, all the charges against the Defendant were dealt with together. The Defendant pleaded guilty to the September 2016 drug charges, but not guilty to the May 2016 charges or the September assault charges. The Defendant claimed that in May he had been in the process of purchasing cannabis for personal use (from the passenger who had escaped arrest) and that the money was family rent money.

9. The remaining charges were listed for trial together in February 2017. On the first day of the trial, the count of assault was severed from the main indictment. The Crown offered no evidence on that count. The Appellant has claimed a cracked trial fee for that indictment (not in itself the subject of this appeal).

10. Downloads from the Defendant's telephone were served electronically on disc NRC/1 on 6 December 2016. The disc came under cover of a letter from the CPS stating "I enclose a copy Notice of Further Evidence (disc recording of telephone download)." It was accompanied by a formal notice which on the face of it is intended to incorporate the entire content of NRC/1, but nonetheless provides an updated page count of 23 statements, 48 exhibits and 9 witnesses. The notice does not include in that count, for example, photographs (of which, on the evidence I have seen, there are thousands on NRC/1).

11. The material on NRC/1 is in four formats: PDF, Excel, JPEG/PNG and Notepad. The PDF documents are reports produced by the Crown. They link to other documents in the disc, which are themselves, says the Appellant, primary evidence.

The Determining Officer's decision

12. Following the conclusion of the case, the Appellant submitted a claim for payment in respect of each of the two indictments on the basis that the PPE count in each case was 9,123 including the entire content of NRC/1.

13. The Determining Officer noted that NRC/1 included text messages apparently inviting others to purchase drugs, photographs containing drug paraphernalia and otherwise apparently evidencing a course of drug dealing, but also noted significant duplication within the material on disc. She assessed the PPE allowed in respect of the first indictment ("Claim 1") at 4,426 pages, to include

PDF and Excel reports prepared by the Crown, but disallowing duplicated Chat Messages and Images many of which were duplicated elsewhere.

14. The Determining Officer concluded that the great majority of the photographic material on disc was irrelevant and that it would be inappropriate to include in the PPE count, photographs and messages already incorporated into PDF reports which had already been included. She excluded photographic stills making up a video, which is not payable as PPE, and thumbnails of music, each of which she found to be duplicated eight times in each of several folders. She did not accept that the style of music favoured by the Defendant had any significance as evidence to the effect that he was involved in drug dealing.

15. The PPE in respect of the second indictment ("Claim 2") was assessed at 71 pages, representing only the paper statements and exhibits served. The electronic material was excluded from the PPE count on the basis that the Determining Officer did not consider that it was relevant to the charge of assault with intent to resist arrest.

The Authorities

16. I have been referred to a number of authorities upon the identification of the correct PPE count for documents served electronically. Two are of particular importance, being binding decisions of High Court Judges on appeals from a Costs Judge.

17. The first is the decision of Mrs Justice Nicola Davies DBE (as she then was) in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB). In that case the defendant had been charged with offences arising from a large-scale conspiracy to assist unlawful immigration, involving systematic fraud on a large scale.

18. A disc containing the complete data downloaded from two mobile phones had (for purely practical reasons) been handed by prosecuting counsel to defence counsel at court, and subsequently re-sent to defence counsel's chambers by courier. That had followed the defence's refusal to agree the admission into evidence of selected text messages and schedules derived from that evidence, without sight of the underlying source material. The source material itself had never been listed as an exhibit, served with a Notice of Additional Evidence or listed in a schedule of unused material.

19. In the absence of such markers, the court made its own determination of the evidential nature of the phone download data served by disc. Nicola Davies J noted that the text messages extracted from that data had been an important part of the Crown's case; that the defence had refused to agree to the admission of that extracted data until it was able to examine all of the downloaded data; that their examination satisfied the defendant's legal representatives of the veracity of the extracted data, and put it in context; that it enabled the defendant's legal team to extract any communications which they (as opposed to the prosecution) deemed to be relevant; and that the trial judge had

entertained, and approved, an application for the full downloaded evidence to be served.

20. The learned judge concluded that notwithstanding that the Crown had not served a Notice of Additional Evidence, the entirety of the download served on disc was in fact additional evidence, served both on the defence and on the court. Accordingly it all fell within the definition of PPE for the purposes of the 2013 Regulations.

21. As to the fact that the evidence was served in electronic form, so falling within subparagraph (5) of paragraph 1 of Schedule 2 to the 2013 Regulations, the Lord Chancellor argued that there would be material on the disc that would not require much by way of examination and that legal aid funds should not be spent on such an examination, which if appropriate might be claimed as special preparation. Nicola Davies J said this (at paragraph 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."

22. The second decision to which I must refer in some detail is the judgment of Mr Justice Holroyde in *The Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB).

23. In that case, the defendant had been charged with a number of others, with involvement in a money laundering arrangement. A number of mobile phones had been seized from the Defendant and her co-accused. Data contained within the handsets, and on the SIM cards used in the mobile phones, was downloaded by police investigators, and call billing data was obtained from the relevant service providers. As part of their evidence and exhibits against the accused, the Crown Prosecution Service ("CPS") served some of the data, and also served and relied upon schedules which extracted from the data those details upon which the prosecution relied

.

24. Holroyde J observed that the role of a defence lawyer is not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include. It often extends to also checking the surrounding material to ensure that the schedule does not omit anything which should properly be included in order to present a fair summary of the totality of the evidence and exhibits which are being summarised. It may often be necessary to review what has been omitted before being able to agree the accuracy of that which has been included.

25. Holroyde J rejected the proposition that the evidence and exhibits upon which the prosecution rely are the only documents that can ever be "served". He also observed that "served" evidence is not necessarily identical to the evidence and exhibits upon which the prosecution relies. The former may include material which is not realistically being "relied on" because, for example, it is an irrelevant part of a statement.

26. The learned judge formulated a number of useful guidelines for judging PPE claims They are set out at paragraph 50 of his judgement as follows:

i) The starting point is that only <u>served</u> evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.

ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.

iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispensed with the need for service of a notice of additional evidence before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

v) The phrase "served on the court" does no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. "Service on the court" is not a necessary precondition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages would be excluded from the count of PPE merely because the notice had for some reason not reached the court.

vi) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of

service cannot of itself necessarily exclude material from the count of PPE.

vii) Where the prosecution seeks to rely on only part of the data recovered from a particular source, and therefore serve an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

viii) If – regrettably - the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Officer (or, on appeal, the Costs Judge) will have to determine it in the light of all the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) would be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) would be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.

ix) If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. The LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.

x) 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.

xi) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply.

The Appellant's Submissions

27. Mr. Ilyas for the Appellant points out that NRC/1 was served under a Notice of Additional Evidence and that the Crown did not identify which part of the evidence on disc was relied upon and which part was not. It follows, says the Appellant, that all the evidence on NRC/1 was served evidence.

28. The disc contains data downloaded from all of the Defendant's confiscated phones, including his iPhone. His refusal to provide a pin code for that phone raised an inference to the effect that he was unwilling to make the information on that phone available to the police, and it does contain material which would have given them cause for concern. That includes text messages which appear to be inviting customers to purchase drugs, photographs of drug paraphernalia, of a "burner" mobile phone of an old-fashioned type commonly used for drug dealing, or giving an insight into the Defendant's musical tastes, a common theme of which is the glorification of drug dealing and the lifestyle that goes with it. The significance of the Defendant's musical tastes is says the Appellant amplified by the presence on his phone of an original composition of the Defendant, very much in that vein. Personal photographs will always be relevant as they make attribution of a handset much easier. This was not a case of multiple co-defendants: all of the material on NRC/1 was directly relevant to the Defendant.

29. The Appellant submits that the defence has a duty to analyse all of the evidence served by the Crown. Relying upon *Law Chancellor v Hayes*, the Appellant argues that where documents on NRC/1 are duplicated, any work in relation to the duplicates is additional work, but generally the evidence overlaps, rather than simply being duplicated.

30. So, says the Appellant, the PDF reports are different from the Excel documents. The PDF versions contain pictures whereas the Excel versions do not. Even the PDF reports have only thumbnail images or links which are not properly viewable within the PDF report: one has to go to the full-sized copy elsewhere on the disc.

31. The PDF documents are, says the Appellant, produced by a police officer with the intention of presenting the telephone data in a simplified format more accessible to a jury. Each however links to documents on NRC/1 outside the PDF report itself, and not limited to data in the Excel reports. This underlines the Appellant's point about duplication: time is spent moving and cross-

referencing from one document to another. So, for example, if a particular photograph cannot be found in the excel document, it can be located by using the link on the PDF document. All of the evidence works together. The precise content varies with each format, each of which has its own features. The Appellant will have moved and cross-referenced between Excel, PDF and image files as necessary.

32. So, says the Appellant, the PDF report is no more than a tool which is used to direct the reader to other documents containing the pivotal evidence. Some of its pages contain columns and rows, the second column containing the links, and each row representing a different document. Without those supporting documents, argues the Appellant, the simplified PDF report would have no proper evidential basis. Removal of the supporting documents would remove them from the PDF report. Further, it is arguable that the PDF reports themselves are hearsay and not admissible that service of the underlying evidence, and that the report assembled by the police officer is an expert report, giving rise to the need to verify its sources.

33. Further, the PDF and Excel reports were ordered in a way which heavily supported the prosecution case. It was incumbent upon the Appellant to check that the PDF report was representative, and to ensure that evidence was not "cherry picked by the Crown". The evidence on NRC/1, even if extracted automatically by dedicated software, was still chosen by the Crown.

34. As for "Claim 2", the Appellant, on the authority of *R v Hussain and Others* [2011] 4 Costs LR 689, claims the benefit of the fact that the Defendant faced two indictments in this case, with the result that two properly calculated graduated fees are payable.

The LAA's Submissions on Claim 1

35. Mr Rimer for the LAA does not dispute the status of the material on NRC/1 as served evidence. It does not follow that all of it must be included within the PPE count. The basic position under the Regulations is rather that electronically served evidence is not included in the PPE count unless the Determining Officer decides to include it, taking into account the nature of the document and any other relevant circumstances. That was the analysis adopted at paragraph 11 of *R v Tunstall* (SCCO Ref: 220/15, 10 February 2016, Master Simons).

36. Paragraph 50(ix) of the judgment in *Lord Chancellor v SVS* also makes it clear that a qualitative assessment by a determining officer, applying the principles outlined in the Crown Court Fee Guidance, "is an important and valuable control mechanism which ensures that public funds are not expended inappropriately."

37. Where some pages or sections from a particular exhibit are included in the PPE, it does not follow that the entire document must be included. Similarly, where some reports are included in the PPE count, it does not follow that all reports and other supporting electronic evidence must be included. It is entirely appropriate to allow only the relevant data within the PPE and to remunerate

time spent checking the remainder of the electronic material as special preparation.

38. That is particularly so, Mr Rimer says, in a case such as this, where the Defendant pleaded not guilty to substantive offences committed on specific dates. Such sub-division of material has he says been endorsed in a number of Cost Judge decisions including *R v Alex Corderio De Las Neves* (SCCO Reference 24/17); *R v Ladic* (SCCO Reference 73/17) and *R v Robertson* (SCCO Reference 223/17).

39. Mr Rimer submits that the Appellant's argument that the PDF and Excel reports on NRC/1 were shaped by the police from the raw data is entirely misconceived. The handset and sim card reports were, he says, digitally created by extraction software which allows data from a telephone to be extracted as raw data in various digital files and also exported directly into PDF or Excel spreadsheet format.

40. Nor did the police, or a police-instructed expert, select the data that went into the reports. The full download is included. There is no human intervention, nor any opportunity to select the data included in reports produced in this way. Such reports do not constitute expert evidence nor "hearsay" evidence so as to require service of the "source material".

41. The police are not responsible for the order in which the information is presented in such reports. That follows a set format set by the software used to extract the data. In most cases, after the summary and content pages, the data is presented according to category in alphabetical order. In more advanced reports there may be separate "Files" and "Analytic" sections at the end with sub categories, again arranged in alphabetical order. Within each section the material is presented in chronological order. There is no ability to order the material in a way that favours the prosecution case.

42. In Excel, each section of the report is an individual worksheet (spreadsheet page) but the content is the same as the PDF report except that the Excel format does not allow image data to be imported, so the individual images are not displayed. The Excel report contains only the technical data relating to the image files.

43. The material in the other sub-folders on NRC/1 (presented in JPEG (images) or Plain Text format (chat messages)) is identical to that included in the PDF reports (though pictures may be larger). It only differs in the way in which the data is expressed and presented.

44. If there is an error due to data becoming corrupt within the extraction process, this will manifest itself in the external data and the PDF and Excel reports. It is not the case that the external data is the "original data" and the report data a copy of it.

45. The LAA does not accept that the PDF reports on NRC/1 need to be considered by reference to additional material on the disc. The PDF reports contain a

number of hyperlinks to individual Chat Message threads and Images in Plain Text and JPEG/PNG format but those are links to messages and images already within each report. The linked data contains no extra information. If anything the external image files contain less information, as they do not contain the date and time data displayed in the PDF report.

46. Mr Rimer submits that each PDF report is a self-contained document that presents the disparate and individual chat conversations in Plain Text format or the individual images in JPEG/PNG format, in an organised and readable way, designed to be read without having to refer to the duplicated data. If the source data were deleted the links in the PDF report would not open, but this makes no appreciable difference as the PDF report still contains the chat messages and images that the external links refer to.

47. In fact, he says, the CPS in many cases serves only the handset report containing the links but not the additional "raw" data. The link functionality is lost, but this does not diminish the usefulness of the report or mean that it is missing any data. It follows that the data on NRC/1 did not require separate consideration in multiple formats.

48. The fact that material was duplicated is a relevant consideration that the Determining Officer was bound to take into account. To include the same material multiple times within the PPE count would artificially inflate the graduated fee and disrupt "the fair and predicted economic balance of the remuneration paid for a case", contrary to the principle set out at paragraph 29 of *R v Napper* [2014] 5 Costs LR 947.

49. The issue of duplicate formats has previously been considered in *R v El Treki* (SCCO Ref 431/2000). Master Rogers concluded that the spirit of the Regulations is that where the same material is served in different formats only one version should be included in the page count. The issue has been considered more recently by Master Brown in the cases of *R v Daugintis & Ors* (SCCO 154/17, 155/17 & 177/17, 8 January 2018) and *R v Ladic* (SCCO 73/17, 28 February 2018). Master Brown found that the fact that material is duplicated is a relevant factor that the Determining Officer should take into account. He also found that the PDF version of a duplicated report, being similar in layout to a paper document, is the most appropriate to use when counting PPE

50. So, says Mr Rimer, the Determining Officer was correct to exclude individual images and chat messages from the page count on the basis that these were duplicated in the reports already allowed.

51. Mr Rimer goes further than the Determining Officer. Referring again to the conclusions of Master Brown, he submits that the content of the Excel reports duplicates that of the PDF reports. The differences between the PDF and Excel reports are superficial, relating to the order in which material is presented and the exclusion of the images from the Excel report.

52. Where evidence is served in multiple electronic formats, he says, the format that most closely approximates a page of paper evidence should be used to

calculate the graduated fee. Material served in PDF format is designed to be 'read' page by page, similar to documentary exhibits served in paper format. PDF reports and documents are formatted in such a way that can easily be printed and considered in detail. A printed page of PDF formatted material will reflect the page as it appears to the viewer on screen. Evidence served in PDF format will ordinarily require the same degree of consideration as paper evidence and therefore, where that evidence is pivotal to the case, will meet the test set out at paragraph 11 of *R v Jalibaghodelehzi* [2014] 4 Costs LR 781.

53. Excel and CSV formatted material, in contrast, is primarily designed to be manipulated and analysed via the application of various tools & filters. It is designed to be viewed electronically and not 'read' in the same way that PDF formatted material is. It is difficult to ascertain a representative page count for a report in CSV or Excel format. Any estimated page count generated using the "print preview" function will often bear little or no resemblance to an actual 'page' of information and is not representative of what the viewer will have considered on the screen. A printed copy of an excel document will split various columns and rows that are readable on single screen across several, often un-sequential, pages, so that any single page will be of limited use as it will be isolated from its original context and order.

54. The proper method of remuneration for time spent considering and manipulating the Excel version of a PDF report is special preparation, which will be based on time actually and reasonably spent and not on an artificially inflated, and unpredictable page count generated via the Excel "print preview" function.

55. Mr Rimer therefore submits that the PPE count should be limited to the relevant reports in PDF format only and the graduated fee should be revised downwards to reflect this. His PPE count on this basis is 735. He has arrived at that figure on the basis that the Determining Officer has incorrectly included four reports in sub-folder "Preliminary- Raw -1- Handset Reports" in the PPE count. Those reports contain no data relevant to the case against the Defendant, comprising mainly of generic images. There are no texts or other communications that could be linked to the Defendant's drug dealing activity. This may, he suggests, have been the Defendant's personal telephone, not used for any drug dealing activities. The Appellant, in its own breakdown of the material on disc, has conceded that they found nothing of relevance in the contents of those reports.

56. Whatever the position regarding the PDF and Excel reports, Mr Rimer submits that the Determining Officer was correct to exclude the image files on NRC/1 as insufficiently relevant to the case against the Defendant to be included in the pages of prosecution evidence taking into account the nature of the document and other relevant circumstances.

57. The Defendant had pleaded not guilty to substantive charges relating to the possession of a significant quantity of cannabis with intent to supply it to others on a single day in May 2016. His defence was that he had in fact been attempting to purchase the cannabis for his own personal use from one of his passengers. The Crown relied on a small number of text messages from the

weeks preceding his arrest that appeared to show the Defendant arranging and participating in the sale of drugs to support the contention he was the seller

58. The images which the Determining Officer declined to include in the PPE count comprise a mixture of images and logos downloaded from the internet such as images of celebrities, album covers, movie posters and social images of friends and family "selfies". They are duplicated many times both within the same and different subfolders. They offer no direct evidence of the Defendant's offending (as opposed to the messages which show him arranging specific drug deals), nor could they provide him with any defence to the charges faced (again in contrast to messages, which may have supported his account that on 19 May he had contacted someone else in order to purchase rather than sell drugs). They are not sufficiently relevant to the case against the Defendant to be included within the PPE count. Time spent viewing the full-size images should, Mr Rimer submits, be claimed as special preparation.

59. The attribution of a handset may be made easier by photographic evidence but there is nothing in this case to suggest that the Defendant disputed that the relevant telephones were his or that the Prosecution used any photographs to establish that they belonged to him.

The LAA's Submissions on Claim 2

60. The Appellant's claim for 9052 pages of electronic evidence for the separate assault charge seems, says Mr Rimer, to be based on the contention that if material is included within the PPE count in one case, it must be included for the other.

61. Mr Rimer submits that the Determining Officer was correct not to include the electronic material on NRC/1 in the page count for the second fee. It did not require separate consideration for each case, which until the first day of the trial had been proceeding as a single case and in any case was simply not relevant to the charge of assault with intent to evade arrest on 11 September 2016.

62. That case turned on whether the Defendant assaulted a police officer as he attempted to evade arrest having been stopped by the police. None of the telephone data offers evidence relevant to the assault offence. Had it proceeded separately from the drug case from the outset, the Crown would not have served the telephone evidence.

Conclusions

63. The Crown's approach to the service of the evidence on NRC/1 was singularly unhelpful, but the position has been simplified by the LAA's concession that its contents should all be treated as served evidence. The focus must, therefore, be upon whether all of that evidence should be included within the PPE count, and Mr Rimer (for the reasons given by Master Simons in *R v Tunstall*) is right in saying that the fact of service is not enough. It must be appropriate to include the evidence within the PPE count, and in that respect one must have regard to the guidance given in *R v Hayes* and in *The Lord Chancellor v SVS*.

64. The starting point, then, is the importance of the relevant evidence. The decision of Nicola Davies J in *R v Hayes* was informed by the fact that the Crown was relying upon telephone evidence which was of central significance and that that evidence can only properly be evaluated by reference to the larger body of evidence from which it had been extracted. In *Lord Chancellor v SVS* the Defendant was accused of taking part in a conspiracy. Again, telephone communications were of central importance and extracts from those communications could only be properly judged by reference to the larger body.

65. Each case, as Holroyde J observed, turns on its own facts. As Mr Rimer says, the key evidence against the Defendant was that he was, on a given day, driving a car containing amounts of amounts of drugs and money consistent with drug dealing. His defence was that he was a purchaser rather than a dealer. Text messages on his telephones giving evidence to the contrary were evidently of crucial significance. In contrast, images on his phone, with a few exceptions such as an image of a "burner" phone, will simply not have had that degree of significance. Images evidencing the fact that the Defendant enjoyed music associated with a drug-dealing lifestyle would have been of little evidential value, even if he did try writing some lyrics for himself.

66. The obvious conclusion is that all the text messages and chats extracted from the Defendant's mobile phones should be included in the PPE count. It does not follow that duplicates of those messages should be included. My review of the PDF reports on NRC/1 indicates that every chat, text message and similar communication has been included. The reports themselves say so, and a brief review of the files indicates that that is correct.

67. This is not, therefore, a case in which (as in *R v Hayes*) duplicates are of necessity reviewed as part of a wider body of evidence. The whole body of evidence, as far as chats, text messages etc are concerned, has already been included in the PDF report. A review of stand-alone electronic copies, downloaded to a separate file on NRC/1, will add nothing to the preparation of the case.

68. Before me, Mr Rimer conceded that not all of the images from the Defendant's telephones might have appeared on the PDF reports prepared by the Crown. Some, he conceded, might have been left out as irrelevant. This seems to me to undermine his case to the effect that the reports and other evidence on NRC/1 was automatically generated without human intervention. Someone must have decided what was relevant.

69. Again, however, each PDF report specifies the number of image files included in the report, as against the total download, and only the handset report on the Defendant's iPhone ("LMC/5") shows any difference: 1709 files included, as against a total of 1716. The actual volume of images on disc is much larger, but that seems to be accounted for by a massive amount of duplication. I do not know whether duplicates were eliminated from the PDF report by a mechanical process or by human agency, but obviously that had to be done if the report itself was not to become hopelessly unwieldy.

70. In short, I am unable to accept the Appellant's characterisation of the PDF reports on NRC/1 as documents produced for the benefit of the prosecution and to the detriment of the Defendant. However they were produced, they come much closer to Mr Rimer's description of a comprehensible report of all the relevant material on each phone.

71. As I have accepted what Mr Rimer says about the importance of the image files on the Defendant's phones, my conclusion is that they should not be included within the PPE count even to the limited extent that (duplication aside) they exceed in number those images included within the PDF reports.

72. I have also compared two of the PDF reports (including the largest one, on the iPhone labelled LMC/5) with the equivalent Excel spreadsheet reports and Mr Rimer seems to me to be quite right in saying that such differences as there are, are of no significance for PPE purposes. Insofar as there are differences in content between the two formats, they are largely technical and of appear to me to have no evidential significance.

73. The Determining Officer's conclusions in relation to the total PPE count were based upon the premise that there were sufficient differences between the Excel and PDF reports for the Appellant to have to cross-reference. I have been unable to identify any such differences, and my conclusion is that Mr Rimer is again correct in saying that it is inappropriate to include both the PDF reports and the Excel reports in the PPE count.

74. I also agree that the PPE count should be based on the PDF reports, not the Excel reports. That is for the reasons given by Mr Rimer and also because of the principle identified by Master Gordon-Saker in *R v Jalibaghodelezhi* [2014] 4 Costs LR 781, as referred to by Holryde J in *Lord Chancellor v SVS*:

> "... It seems to me 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..."

75. Master Gordon-Saker referred to an earlier set of regulations, but the principles are the same.

76 The outcome is that I find myself obliged to accept Mr Rimer's submission that the PPE count should be revised below that allowed by the Determining Officer. I do however differ with his view that the PDF reports relating to handset "RAW 1" (totalling 979 pages) should be excluded from the PPE count as having no material evidential value. That seems to me to be inappropriate, because the PDF reports served should be considered as a whole. The fact that one phone may have been used for innocuous purposes was part of the context against which the use of the Defendant's mobile phones generally was to be judged. All of the PDF reports contain a good deal of innocuous material, but it has

(rightly) not been suggested that the PPE count should be reduced further for that reason.

77. Accordingly, my conclusion is that for Claim 1 the correct PPE count, including all of the PDF reports, is 1227 pages. I take it from Mr Rimer's submission that the LAA will be willing to entertain a revised claim for Special Preparation in relation to the remainder of the contents of disc NRC/1, but I must leave that to the parties.

78. As for claim 2, the Appellant is of course right in pointing out that two graduated fees are payable. That is not disputed. It does not however follow that the appropriate graduated fee for one indictment is going to be exactly the same as the appropriate graduated fee for the other. Insofar as the fee stands to be calculated by reference to the PPE count, then one must have regard to the specific offence. The evidence appropriately to be included within the PPE count with regard to the charge of drug dealing has little or no bearing upon the charge of assault and in my view the Determining Officer was entirely right to refuse to include it.

79. For those reasons, the appeal fails.

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