SENIOR COURTS
COSTS OFFICE

SCCO Ref: 89/18

Dated: 21 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v LENA

WOOD GREEN CROWN COURT

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

CASE NO: T20177244

LEGAL AID AGENCY CASE

DATE OF REASONS: 20 April 2018

DATE OF NOTICE OF APPEAL: 11 May 2018

APPLICANT: TRAYMANS LLP	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 (as applicable before 1 April 2018) 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..."

5. The Appellant seeks remuneration on the basis of a PPE count of 3,220, including 2,874 pages of electronic evidence served on disc. According to the determining officer's written reasons, she took the view that it was appropriate to include only 1,845 pages of the electronically served material in the PPE count and approved payment, accordingly, on the basis of a total of 2,192 pages.

6. There is a lack of clarity in the papers about the total PPE count: with the claim for costs suggests a total count of 3217, including 343 pages served on paper. The determining officer and the Appellant seem to agree that 346 pages were served on paper, which would make the amount allowed by the determining officer 2,191 pages, not 2,192.

7. That would seem to be immaterial, because the issue before me is the total number of pages to be included from the electronic evidence. It is agreed that the maximum number that could be included is the Appellant's claimed total of 2,874 pages whereas the determining officer has allowed 1,845.

Background

8. The Appellant represented Daniel Lena ("the Defendant") in criminal proceedings before the Central Criminal Court. The Defendant was charged with possessing a firearm, possessing ammunition without a firearms certificate, possessing a controlled class A drug with intent to supply and possessing a controlled drug of class B.

9. The police searched the Defendant's home address on 9 February 2017 under a firearms warrant obtained on the same day. The Defendant was at the time 17 years old. Under his bed they found a containing a small amount of MDMA ("ecstasy"), drug paraphernalia and a rolled-up sock. Within the sock was a loaded pistol.

10. Police Officers also seized an iPhone found on the Defendant's person at the time of arrest (KLB/1) and an Alcatel mobile telephone found on the floor of his bedroom (NRW/2).

11. As part of the investigation police analysts attempted to extract the contents of both telephones. However, the Alcatel telephone was incompatible with the extraction software and it was not possible to extract the contents. Instead it was necessary for the Police Officer to take photographs of the relevant text messages.

12. A DVD containing eight separate PDF reports of telephone data, entitled "Lena phone downloads", was handed to the defence team informally at a preliminary hearing. The disc contained a Sim Card report for NRW/2; a report consisting of photographs of the sim card for NRW/2; the "XRY Log" from NRW/2; a report containing the photographs of relevant text messages from NRW/2; a full download for KLB/1; a report containing photographs from KLB/1; a report containing images of the sim card from KLB/2; and a download of the sim card for KLB/1.

13. The data extracted from the telephones was considered in some detail and a report prepared by DS Broughton, an expert in drug trafficking. Certain text messages, song/rap lyrics and folders were extracted from the body of evidence and formally exhibited. DS Broughton's statement ran to 30 pages. Aside from the officer in the case, he was the only live prosecution witness required at trial.

14. The Alcatel phone was identified as a "drugs" phone used exclusively for the purposes of facilitating the supply of drugs (primarily MDMA) under the alias "Dizzle Dennis". The iPhone appeared to be the Defendant's personal telephone, but also contained messages relating to the supply of drugs, often under the alias "Dennis". Both phones had a number of mutual contact numbers saved to KBL/1 as "Client" followed by a number. The police analyst also identified rap lyrics written by the Defendant saved in the "notes" section of KBL/1 which boasted of drug dealing and gang culture, and images on the phone of the Defendant posing with large amounts of cash (inferred to be the proceeds of his drug dealing).

15. A "Note on Taxation" prepared by counsel in support of the Appellant's claim for costs confirms that the "Lena phone downloads" DVD was never itself formally exhibited. Messages, images and notes from KBL/1 and NRW/2 were however served as exhibits. Exhibit 002 comprised relevant content from KBL/1 (e-mail and messages). Exhibit 003 comprised relevant images from KBL/1. Exhibit 005 comprised extracted notes from KBL/1. Exhibit 007 contained text messages. Various text messages from both phones are set out and analysed in a witness statement (of DC Kane Ball).

16. The Defendant pleaded guilty to the drugs offences prior to trial, saying that he was using the money generated from the sale of drugs to fund a drug habit which he had developed to cope with the psychological impact of the murder of friend, who had died in his arms not long before his arrest. He entered a not guilty plea in respect of the charges relating to possession of the firearm. He was acquitted of the firearms offences.

17. The Appellant says that the information extracted from the mobile phones was a central plank of the Crown's case. The Crown said that notwithstanding the relatively small quantity of MDMA found, evidence from the phones showed it was possessed with intent to supply and that the gun was carried for protection in the Defendant's drug enterprise or, failing that, to avenge his friend. The defence case at trial was that the gun had been forced upon the Defendant by men unknown to them, with the motive of diminishing his value as a witness to the Crown in respect of his friend's murder. The Crown argued that the telephone evidence showed that he was not a vulnerable individual but a fully functioning, capable young man who developed a successful drugs business. He had uploaded to his phone rap and social media references to gang culture, firearms and drugs.

The Authorities

18. Two judgments, both on appeal from costs Judges, have a particular bearing upon this appeal.

19. The first is the decision of Mrs Justice Nicola Davies DBE in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB). In that case the Lord Chancellor appealed, unsuccessfully, against a decision of Master Rowley to the effect that the entirety of telephone download evidence, served in similar circumstances, should be counted as PPE. The facts were that 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 NAE or listed in a schedule of unused material.

20. In the absence of such markers, the court made its own determination of the evidential nature of the phone download data served by disc. 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.

21. The learned judge concluded that notwithstanding that the Crown had not served a NAE, 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. Further, there was no duplication between the downloaded material itself and the reports extracted from it, because each new page of extracted data had to be considered and checked against an identified counterpart in the original download. This was not duplication, but additional work.

22. 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."

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

24. Holroyde J formulated a number of useful guidelines for judging PPE claims They are set out at paragraph 50 of his judgement. Many of them address the

question of determining whether material has been "served", which is not in issue in this case, but because of the way in which the Appellant's case is put, I find it necessary to refer to them quite fully:

i) "The starting point is that only served 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" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant...

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 seek 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. As I have indicated above, 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.

xii) 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."

The Determining Officer's Decision

25. The determining officer agreed with the Appellant that all the electronic evidence on disc should be treated as served. She exercised her discretion however, under sub- paragraph 1(5) of Schedule 2, to include only 1,845 pages of the total within the PPE count because she took the view that only parts of it were relevant to the case against the Defendant.

26. The determining officer included, accordingly, all pages relating to communication and images linked to the supply of drugs and glamorisation of gang culture. Taking the view that it was for the Appellant to satisfy her that electronically served exhibit should be included within the PPE count, she was unable to accept that pages comprising, for example, device information, network information, device event logs, records of installed applications, calendar events, web history and searches and system logs were relevant. Her conclusion was that time spent on the remaining 1029 pages should be remunerated as special preparation under paragraph 20 of schedule 2.

The Appellant's Submissions

27. The Appellant's primary submission is that the court should find that the data served on one disc comprises one exhibit. Alternatively, as the entire content of two mobile phones, it comprises two exhibits or, being divided into eight files, at an absolute maximum eight exhibits.

28. On that basis, the Appellant argues that once a determining officer has decided to include any part of an exhibit within the PPE count, the wording of the rules, referring as they do to "a documentary or pictorial exhibit…" do not allow any part of that exhibit to be excluded.

29. This, argues the Appellant, is consistent with the principles outlined by Holroyde J in *Lord Chancellor v SVS Solicitors*, which also refers to the service of "an" exhibit and whether "it" should be included within the PPE count. The Appellant says that it was not appropriate to raise the issue with the trial judge, as this would have drawn attention to further material not identified by the Crown which could have been used against the Defendant.

30. In the alternative, the Appellant argues that it was necessary for the defence to consider the entire contents of the disc, to place the material extracted by the Crown in context. This was essential to confirm the material used by the Crown did not convey misleading view of the contents of the phone and convey a false impression to the jury. This was of central importance to the trial.

31. In this respect, the Appellant refers to *Lord Chancellor v Edward Hayes* and argues that in the circumstances of this case, it is not reasonable to distinguish between part of the evidence which may or may not have been relevant. It will, in this case as in that one, have been necessary to check all of the data before coming to any conclusion about relevance, to extrapolate any additional data relevant to the evidence relied upon by the Crown, to assess the context and to check the accuracy of the data relied upon by the Crown.

The LAA's Submissions

32. Mr Rimer for the LAA does not dispute that the electronic material on disc was served by the prosecution as used material. The issue in dispute is whether the determining officer was correct to include some, but not all, of the electronic material within the pages of prosecution evidence.

33. In summary, the determining officer considered that three of the eight PDF reports contained material that was sufficiently relevant to the underlying case to be included within the pages of prosecution evidence. From those three reports the determining officer exercised discretion to allow all of the communications data from both devices and relevant social data (images and notes). Mr Rimer argues that this was the correct decision.

34. The Regulations, he says, draw a clear distinction between the treatment of material served in paper format and material served electronically. The basic position under the Regulations is that electronically served evidence is not included in the number of pages of prosecution evidence. However, the determining officer can decide to include some or all of this evidence taking into account the nature of the document and any other relevant circumstances.

35. It is well established, he says, in various Cost Judge decisions that the determining officer is permitted, and in fact, bound to carry out a qualitative assessment of the material on disc when exercising discretion under paragraph 1(5). The judgment of Holroyde J in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB) emphasises the importance of that exercise of discretion.

36. The range of factors that the determining officer may take into account when determining whether to include electronically served material within the pages of prosecution evidence is not limited. However, generally, the determining officer will consider whether the material was of pivotal to the case and the amount and nature of the work required to be done, including whether the evidence required a similar degree of consideration as a page of evidence served in paper format. Mr Rimer refers me to paragraph 11 of *R v Jalibaghodelehzi* [2014] 4 Costs LR 781, paragraph 29 of *R v Napper* [2014] 5 Costs LR 947 and paragraph 37 of Appendix D to the Crown Court Fee Guidance for the relevant period.

37. Where, taking into account the nature of the document and any relevant circumstances, the determining officer does not consider it appropriate to include electronically served evidence within the pages of prosecution evidence an additional payment, at the appropriate hourly rates, may be made in respect

of reasonable time spent viewing or considering the electronically served material under paragraph 20(1)(a) of Schedule 2.

38. Mr Rimer refers me to paragraph 10 of *R v Sana* [2014] 6 Costs LR 1143:

> "A line has to be drawn as to what evidence can be considered as PPE and what evidence can be considered to be the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the determining officer decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances."

39. The LAA, accordingly, does not accept either that as the full download was served, the entire contents of the "Lena phone downloads" DVD should be remunerated as PPE, nor that the data contained in each of the eight reports on that DVD should be treated as indivisible.

40. It would, submits Mr Rimer, simply be wrong to treat the DVD as one single exhibit. It is no more than a means of delivery suitable for allowing large amounts of data to be served efficiently. Each report clearly was a separate entity. They related, first, to two separate telephones and, second, to separate aspects of those devices. Some, for example, referred to physical properties of a sim card or handset. Others contained contents extracted from the sim card and handset. Each report is separate and distinct.

41. It is, says Mr Rimer, well established in a number of cost judge decisions that a single disc may comprise a mixture of used and unused material. That clearly could not be the case if the disc were to be treated as an indivisible entity. He cites *R v Samoon & Baryali* (SCCO Ref: 222/15), *R v Powell* (SCCO Ref 7/16) and a number of other decisions.

42. In this case, the PDF reports containing the telephone downloads are says Mr Rimer broken down into a number of self-contained and clearly identifiable categories or sections, some of which are highly relevant to the case against the defendant and some of which are either peripheral or wholly irrelevant to the underlying case.

43. Each section contains a clear heading and so it is easy to distinguish those sections containing the pertinent information from those which contain peripheral or irrelevant material. It is he says appropriate to draw a distinction between those sections which have been identified as a central feature of the prosecution case, such as messages and other communications pertaining to the sale and supply of drugs and social material in the form of notes and images that tended to reinforce the position that the Defendant was involved in the supply of drugs and wider gang culture, which require a careful degree of consideration, from those sections which can readily be discounted as peripheral or irrelevant on an initial view.

44. There is a clear distinction between the communications data (call log, contacts, e-mails, messages), images and notes, from which formed the basis, for example, of prosecution exhibits 002, 003, 005 and 007 and the other material on disc. It is on the basis of the Appellants' submissions regarding the importance of this data to the case that the determining officer exercised her discretion to allow all of the communications data, notes and Images rather than just those parts extracted by the Crown and formally served.

45. The Defendant's telephone, says Mr Rimer, also contained a vast amount of technical data that was peripheral to or wholly irrelevant to the case. The Prosecution did not rely on this information. It did not form part of the case against the Defendant. Nor could it put any of the extracted material in context or provide anything that would have been useful to the Defendant in answering the charges against him.

46. By way of example, Mr Rimer refers me to the largest section of the report containing the full download of the Sim Card contained in exhibit NRW/2. That is the "XRY System log". It runs to 50 pages but does not contain any extracted data. It is simply a record of the extraction process. The report of the download of Exhibit KBL/1 contains, similarly, several hundreds of pages of technical data with no relevance to the case. He argues that including several hundred pages of peripheral or wholly irrelevant data would greatly produce a fee disproportionate to other cases of similar nature and disrupt the fair and predicted economic balance of remuneration for the case upon which paragraph 29 of *R v Napper* puts such emphasis.

47. He does not suggest that other sections do not have to be considered at all, or that the Appellant should not be remunerated for considering them. His point is that, given the peripheral relevance of the information in these sections, they are more properly remunerated by way of special preparation under paragraph 20(1)(a) of Schedule 2. It would, he submits, be wrong to remunerate such work on the same basis as considering the key evidence in the case. This data would not have required the same careful degree of consideration.

48. The Appellant has, he submits, not put forward any compelling submissions as to why the material excluded from the PPE by the determining officer was relevant to the case against the Defendant and required a careful degree of consideration.

49. Mr Rimer has produced a very detailed breakdown of the evidence on the "Lena phone downloads" DVD which appears to support both his submissions and the determining officer's conclusions. If anything, he suggests, the determining officer was on a full analysis, rather too generous.

Conclusions

50. Before me, Mr Owen for the Appellant was unable to identify any material way in which the Appellant takes issue with Mr Rimer's analysis of the content and relevance of the electronic evidence on the "Lena phone downloads" DVD.

51. It seems to me that the primary difficulty with the Appellant's insistence upon a very literal application of the word "exhibit" is that the "Lena phone downloads" DVD was, according to the note on taxation provided by counsel, never an "exhibit". The logical outcome of the Appellant's argument would be that none of the evidence on that DVD could be included within the PPE count, because Paragraph 1(5) of Schedule 2, which deals with electronic evidence, refers only to "... a documentary or pictorial exhibit".

52. That cannot be right. As *Lord Chancellor v Edward Hayes LLP* and *Lord Chancellor v SVS Solicitors* demonstrate, whether a body of evidence has been served as one exhibit, as a number of exhibits, or not as an exhibit at all (which is likely be to be determined by practicality and convenience) is not to the point. Whether served electronic evidence should be included within the PPE count depends upon its substance, importance, relevance, and context.

53. So much is clear, I believe, from a full reading of paragraph 50 of Holroyde J's judgment in *Lord Chancellor v SVS Solicitors*, as quoted above. He refers not only to exhibits, but to "served evidence and exhibits ". It seems to me to be consistent with the authorities to interpret the words "documentary or pictorial exhibit" at paragraph 1(5) of Schedule 2 as referring to any item of documentary or pictorial evidence served electronically.

54. As Mr Rimer emphasises, the starting point is then that electronic evidence is excluded from the PPE count. A determining officer has a discretion to include it if it is right to do so, applying the published Crown Court Fee Guidance. That is the approach endorsed by Holroyde J. It follows that a determining officer can decide whether all or part of the body of served electronic evidence should be included in the PPE. Otherwise, the Crown Court Fee Guidance cannot be applied. That conclusion is consistent with authority and, as Mr Rimer rightly says, with the approach generally taken by Costs Judges.

55. The alternative argument, urged on me by the Appellant, is in my view unworkable. If a determining officer were obliged to make a binary choice between including within the PPE count all of the data on a disc, however peripheral or irrelevant, or none of it at all, then the obvious choice would be to allow none of it, as the only way of avoiding overpayment. Similarly, to base the PPE count upon whether a given body of evidence has been divided into one exhibit or, say, ten exhibits would be both arbitrary and contrary to the clear intention of the 2013 Regulations.

56. As for the Appellant's argument based upon *Lord Chancellor v Edward Hayes*, each case has to be judged on its own facts. *Lord Chancellor v Edward Hayes* was a case in which electronic evidence which had been included within the PPE count could only properly be managed by reference to the remainder of the electronic evidence, which in consequence should also fall within the PPE count. That will not be so in every case. If it were, then it would follow that in every case, all electronic evidence would have to be included within the PPE count (up to the 10,000-page limit) and the guidance given in *Lord Chancellor v SVS Solicitors* would be meaningless.

57. It was clearly not so in this case. The determining officer here reviewed the electronic evidence served and, applying the appropriate guidance, made a judgment about the amount to be included within the PPE count. I have been offered no basis for concluding that any of the evidence excluded by the determining officer from the PPE count sheds any light upon the evidence which she has included. Mr Rimer has performed a very thorough analysis of the data on disc which appears to demonstrate that the contrary is true. The Appellant has been unable to show that there is anything wrong with that analysis: in fact, before me was broadly accepted as correct.

58. In short, I have no basis for concluding that the entire contents of the evidence served on disc should be included within the PPE count, and no basis for concluding that the determining officer's conclusions were incorrect.

59. For those reasons, this appeal fails.

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