SENIOR COURTS
COSTS OFFICE

SCCO Ref: 214/18

Dated: June 2019

ON APPEAL FROM REDETERMINATION

REGINA v SALMAN AHMED

SNARESBROOK CROWN COURT

APPEAL PURSUANT TO THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013 PARAGRAPHS 1(2)-(5) OF SCHEDULE 2

CASE NO: T20177250

LEGAL AID AGENCY CASE

DATE OF REASONS: 3 October 2018

DATE OF NOTICE OF APPEAL: 24 October 2018 (RECEIVED)

APPLICANT: Stewart Begum Solicitors
28 Leman Street
LONDON
E1 8ER

The appeal has been successful and as such £840.00 costs including VAT plus £100 Court Fee is to be added to the additional sum payable.

COSTS JUDGE
JENNIFER JAMES

REASONS FOR DECISION

Reasons for Decision

1. The Appellant is a litigator firm which seeks to appeal the decision of the Determining Officer (DO) dated 3 October 2018 to calculate the graduated fee on the basis that there were only 1,184 pages of prosecution evidence (PPE). The DO took the view that 677 pages of evidence on disc had not been served as evidence in the case, but disclosed as unused material. The DO also made some minor reductions to the statements and evidence uploaded to DCS to take into account that a number of the statements had been duplicates. The Appellant had originally sought remuneration on the basis that there were **2,028 PPE** but the dispute has now crystallised to 576 electronic pages, as set out below.

On disc/electronic	**Claim**	**Allowed**	**Shortfall**
Pages already allowed	457	457	0
AK3 handset report – Defendant's iPhone PDF	423	0	423
AK3 sim card report – Sim card in Defendant's iPhone PDF	61	0	61
MRB30OCT171 – Sim card in MK's drug phone	30	0	30
Cleaned -350 – Call/cell site data re: Defs 11/13 Feb - Excel	10	0	10
Cleaned - 629 - Call data for tel no 629 9/15 Feb - Excel	115	0	115
Cleaned - 456 pt 1- Call data for tel no 456 9/15 Feb – Excel	20	0	20
Cleaned- 456 pt 2 - Call data for tel no 456 on 15 Feb– Excel	4	0	4
Statements by DC Bushell re: telephone evidence.	4	0	4
Subtotal electronic	**1124**	**457**	**667**
Breakdown of pages already allowed			**pages**
MRB23DEC1710 REDACTED			10
MRB23DEC179B REDACTED			7
MRB23DEC179A REDACTED			17
MRB23DEC178			387
MRB23DEC177E			4
MRB23DEC177D			1
MRB23DEC177C			1
MRB23DEC177B			2
MRB23DEC177A			2
MRB23DEC176			20
MRB23DEC175			2
MRB23DEC174 REDACTED			1
MRB23DEC172			2
MRB23DEC171			1
Total pages already allowed			**457**

2. Having reviewed matters the Respondent conceded that the material on disc was served as used evidence. However, having considered the contents of this material the Respondent submits that only **25 pages** of evidence from the disc should be added to the PPE on the basis that much of the evidence on disc was only peripherally relevant to the case against the Defendant or duplicates the **458 pages** of call data served by e-mail and already included within the PPE.

3. This would bring the total PPE to **1,210 pages.** 2,028 minus 1,210 pages = 818 pages, of which the Respondent asserts that **458 pages** were duplicates of material already allowed and the remaining **360 pages** were only peripherally relevant. 177 of these pages are paper pages and the remainder (641) are electronic. Only 576 of the electronic PPE are being pursued and I deal with them below. Following the conclusion of the case the Appellant submitted their claim for a graduated fee, on the basis that there were 2,028 PPE which were reduced to 565 pages on assessment as no evidence was provided to support the fact that the electronic evidence had been served as used material. This was later increased to 1,184 as further details were supplied about the paper evidence and the DO accepted that the call data specified in Prosecution Counsel's e-mail was used data.

4. The 177-page shortfall in the paper pages has not been challenged and nor are four pages of Statements by DC Bushell re: telephone evidence. The Respondent offers 26 further pages and the Appellants accept that 61 pages were duplicated. Written submissions from the Respondent came in May 2019 and adopted a completely new position (accepting the material was served but taking the view it was mostly either duplicated and/or peripheral). The Appellant responded in June 2019. Both parties' positions are set out below; the dispute has crystallised to 576 pages of electronic material.

Electronic pages – description	**Number**
Electronic pages (667 unpaid minus DC Bushell 4 unchallenged)	663
Duplicates conceded by Appellant	61
Extra pages allowed by Respondent	25
Arithmetical error corrected by Respondent	1
Balance of electronic pages still in dispute	**576**

Background

5. The Appellant represented the Defendant, Salman Ahmed, in criminal proceedings before the Snaresbrook Crown Court on multiple charges of conspiracy to kidnap, conspiracy to falsely imprison a person and two counts of conspiracy to supply class A drugs. The Defendant alongside his co-Defendants was allegedly part of a gang involved in the supply of class A drugs, operating from premises where they would prepare and package drugs; this activity came to light following allegations made by Million Kidane (MK) that in February 2017, having become indebted to the gang, he was threatened, moved and detained against his will and forced to participate in the preparation and supply of the gang's drugs by the Defendant and Ahmed Issa (AI).

6. He described a terrifying ordeal where he was taken to a flat in another location, held there against his will and only escaped by making a 999 call and being able to flag down a passing Police vehicle, whereupon he gave a full account of the gang's illegal activity to Police. The next day, Police officers attended at the flat, where the Defendant was present as were a large quantity of class A drugs and equipment used in the preparation of drugs for onward supply. The Defendant was also in possession of a large quantity of cash and two mobile telephones. The Defendant was arrested alongside others.

7. A few days later, others contacted MK to try and bribe or threaten him to drop the case or lie about what happened; one of these was arrested 8 months later. Once telephone

numbers were attributed to each of the Defendants call and billing data was obtained directly from the service providers. This billing/call data was subsequently used to compile various Schedules showing the contact between the Defendants in the relevant period. The telephone handsets belonging to the Defendant and MK were also downloaded.

8. The disc containing the telephone evidence including the 667 pages of raw telephone data (handset and billing data) was disclosed as unused material on 30 November 2017. On 11 January 2018, Prosecution Counsel provided the Defence with all the billing data obtained from the network provider (458 pages) used to compile the HM exhibits (call schedules). A further schedule (ACM/11) concerning all telephone contact between the Defendant and an unattributed number on the day of kidnap (11 February 2017) was produced from CCTV material.

9. The call and message data was taken from AK3 the download of the Defendant's iPhone; Prosecution Counsel subsequently confirmed that the disc of 667 pages of evidence initially disclosed as unused material was in fact relied on as evidence whilst at trial. Ultimately, the trial collapsed with the Prosecution offering no evidence as a result of undisclosed issues with MK's evidence.

10. The Appellant wished to that the Prosecution alleged the Defendant was "the leader of the group" and that the conspirators were involved in drug dealing in and around Southend and East London on multiple dates, with multiple people, beyond those indicted. It was alleged that the Defendant orchestrated the kidnapping of the complainant and his transportation to flat in Southend, that he did this by phone and was in constant contact with the kidnapper(s) while the complainant was being taken at gunpoint to the flat, for which the Defendant paid the rent. It was also alleged that the Defendant paid the taxi fare upon arrival at the flat and that he personally gave the complainant his orders and instructions for selling drugs and forced him to practice concealing them in his rectum.

11. The Defendant was said to have then left, commanding the complainant to remain in the flat, selling drugs until his return, and to have given him a phone for this purpose and for the purpose of contacting one of the gang members if necessary. He was said to have left the complainant under guard of a further co-conspirator who is described as being 'older' and using crutches due to having only one leg. This (per the Appellant) underlines the fact that the Prosecution case was that the Defendant was one of, if not the main player in, all of the offences and used mobile telephony to facilitate them all.

12. The Defendant's case was that he was not involved in any drug dealing and had nothing to do with the kidnap and false imprisonment of the complainant. He disputed knowing any of the alleged conspirators on more than a casual basis and disputed knowing the one-legged man at all. The Defendant said that he himself was a drug user and was only ever in the flats in Southend and East London to buy drugs for his own use. It was in this way that he knew the complainant was a known local drug addict who had chosen to make a malicious allegation against him because the parties had once had an altercation in a park in East London.

Regulations

13. Paragraph 1(2)-(5) of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013 provide that:

"(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."

Submissions

14. The material on disc comprises the electronic items in the table at paragraph 2 above and in respect of these the parties' submissions can be summarised as follows:

AK3 (Handset 423, sim card 61 total 484 pages)

15. The Respondent conceded that 25 pages of data from the 423-page handset download should be included within the PPE to include all communications data from the telephone e.g. contacts, calls and messages which underpinned exhibit ACM/11, but did not accept that simply because the download was served it should automatically be included within the PPE; it is not automatically included but the DO can decide to include some or all of it taking into account the nature of the document and any other relevant circumstances. The DO is permitted, and in fact, bound to carry out a qualitative assessment of the material on disc when exercising discretion under paragraph 1(5)and the relevance of material to the case against the Defendant will be an important consideration for the DO.

16. Paragraph 50(ix) of the High Court decision in ***Lord Chancellor v SVS Solicitors*** [2017] EWHC 1045 (QB) makes clear that a qualitative assessment by the DO, 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."* The Respondent relies upon paragraph 11 of ***R v Jalibaghodelehzi*** [2014] 4 Costs LR 781; paragraph 29 ***R v Napper*** [2014] 5 Costs LR 947 and paragraph 37 of Appendix D to the Crown Court Fee Guidance and does not accept that the Handset report in this case should be considered an indivisible whole. It was broken down into a number of self-contained and clearly identifiable categories or sections: some of which are highly relevant and some of which are peripheral or wholly irrelevant to the underlying case. It is easy to distinguish the relevant, from the peripheral or irrelevant material, and it is appropriate to deal with sections identified as a central feature of the Prosecution case, and the other data on the disc.

17. The Defendant's telephone 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 formed no part of the case against the Defendant and nor did it provide any context to the extracted material or material that would have been useful to the Defendant in answering the charges against him. For example, the Files: Documents section runs to 127 pages i.e. 30% of the total pages claimed in respect of the report, but just contains technical meta data about text files on the device such as user settings and preferences. It is not information that the Defendant put into the phone and has no bearing on the underlying case. The Respondent relied upon ***R v Napper*** [2014] 5 Costs LR 947 in this regard.

18. Other sections had to be considered, and the Appellant should be remunerated for considering this data, by way of special preparation under paragraph 20(1)(a) of Schedule 2 of the Criminal Legal Aid Remuneration Regulations 2013. It would be inequitable to pay as PPE on the same basis as the key evidence for data that would not have required the same careful degree of consideration. The Respondent relies on ***R v T Mahmood & Z Mahmood*** (SCCO Refs: 149/16, 155/16), ***R v Spray*** and ***R v Lena.*** Such decisions tend to turn on their own facts as examples of how the discretion may be applied and are not in my view determinative of how it should be applied on the facts in this case.

19. The 61-page sim card report appears twice and it would not (per the Respondent) be appropriate to include the same material within the PPE twice. The Appellant now concedes this. However, in respect of the remaining material the Appellant maintains its claim, both by reference to recent case law (*R v Mooney* – see below) and by reference to the contents of this item. They assert that as the handset download report of the Defendant, said to be the main player in a drug dealing and kidnapping conspiracy, it is commonplace that such an item plays a pivotal role in such a case and that it is not appropriate to seek to view the report in discrete parts (as the Respondent has done) for the following reasons:

The report is indisputably a single document

20. The Appellant refutes that the download is broken down into clear sections which can be sorted by relevance; it runs as one continuous PDF document, was not served as different files within a folder and does not contain any headings or subheadings as claimed. It has no contents page, index or bookmarks and contains no separate sections. The Respondent's AK3 schedule separates the report into different parts, but that could not have been achieved without consideration of the whole documents as there is little to demarcate the beginning or end of any portion.

The report contains information important to both the Prosecution case and Defence case

21. The examples provided by the Respondent do not accurately demonstrate the content of the report. For example, in respect of the photos shown in the report, the Appellants enclosed three examples of the photos described (AK3.1-AK3.3). The first two images are such as commonly used by the Crown to suggest a 'gang lifestyle', which the Defendant denied having. AK3.1 shows him posing with an expensive watch and AK3.2 shows a co-conspirator making a 'gang sign' with his ring clad fingers and expensive watch. AK3.3 connects the Defendant to the one-legged guard he claimed not to know.

The technical parts of the report are relevant

22. The Prosecution case was that the Defendant was using his phone for criminal purposes at the relevant times whereas he stated that he was not doing this, that he never did and that his phone would reveal only benign and legitimate use at the relevant times. This use was included calls and messages, mobile internet usage, uploading and downloading items often at times when he was allegedly using his phone for criminal communications, including the selling of drugs and the orchestrating of the kidnap.

23. The report details clear times and dates when various activities were performed by the Defendant's phone, and the amount of data used and was considered so as to test the veracity of his version of events and the accuracy of the Crown's evidence. Hence the methodology and processes undertaken by the Crown in producing its evidence (such as the images mentioned above) also required careful scrutiny in order to test accuracy.

24. The Respondent's wish to divide the report into different parts is artificial and unrealistic. The Appellant could not know the importance of every part of the report until it had been considered in full. Further, those parts that transpired to be less important than others must be viewed in the context of the document as a whole.

MRB30OCT171 – sim card in Defendant's iPhone PDF (30 pages)

25. 30 pages are claimed in respect of the download of MK's drugs phone BB/1 which as per Megan Bushell's witness statement was exhibited under the above reference and uploaded to DCS at Section J0013. 88 pages have already been included within the PPE in respect of this exhibit and the Respondent asserts that it is "unclear" whether the 30 pages on disc are additional to, or included within, these 88 pages, but says it is "likely" these 30 pages have already been included within the PPE.

26. Even if not, remuneration for time spent considering the extra 30 pages should be by way of special preparation rather than PPE, because the Appellant did not receive the disc material until 18 January 2018 (i.e. during trial) and the main focus of the consideration of the disc material was to verify the contents of ACM/11 (schedule of contact from Salman Ahmed's phone on 11 February 2017). The sim card report for BB/1 contains no contact with the Defendant or the unattributed 050 number in contact with Ahmed on 11 February 2017, which can be checked using search and find.

27. The report comprises primarily of network messages from Lebara about the pay as you go balance of the phone, spam messages from "credit angel" regarding loans, deleted messages signed by "baz" and a number of messages from Mo saying "Yo" : per the Respondent, it is unclear to what extent this report contained data relevant to the underlying case against the Defendant.

28. Per the Appellant, this is the telephone download report of the phone forced on the complainant by the conspirators in order for him to make drugs deals, albeit under duress. It contains evidence of the conspirators' drugs operation and the force used on the complainant as part of the kidnap and false imprisonment. It is impossible to see how this could not be central to the allegations. The statement of PC Megan Bushell of 11th January 2018 expressly states that report contained communications of relevance. As to the Respondent's submissions upon the report, per the Appellant they are misrepresentative of the type of material contained in the report and imply that it is of little relevance to the case, which is factually incorrect, and at odds with the evidence of PC Megan Bushell in her earlier statement, dated 27 December 2017 in which she details the type of relevant messages within the report. Some examples are:

> *"Hi its demi's mum* [customer]*, u about 2 day, any food?"* ['Food' is a commonly used slang for drugs]*; and*
> *"Yo st* [co-conspirator] *what time i am going to back to the area"; and*
> *"Its moe* [co-conspirator] *wer u"*

29. The Crown's case relied on such communication to establish the sale of drugs and the connection between co-conspirators. Part of the careful scrutiny employed by the Appellant involved discerning such relevant communications from the trivial ones cited by the Respondent. It is submitted that this supports the argument for the items to be paid as PPE. Further, in the context of the case, it is immediately apparent that the contacts list containing names 'ST' and 'Mo' (alleged co-conspirators); 'MK' and 'Million' (the complainant); and 'Line' (meaning 'drugs line') are highly relevant to the case.

30. The document is a single document that differs from that uploaded to CCDCS. Where this one is 30 pages long, that one is 88. Only on careful analysis could the differences between the documents be ascertained; the analysis conducted by the Appellant could not, professionally, be limited to one particular issue. The Appellant had to be aware of the relevance any piece of evidence might have towards any part of the Prosecution case in respect of the Defendant and the conspiracies as a whole. It had to consider all aspects of the case against the Defendant and his defence to the allegations. This necessarily involved seeking to ascertain the nature and extent of the communications between the alleged co-conspirators and the complainant, not just those involving the Defendant.

31. Further, as the Defendant's case was that the complainant was a drug addict who had made malicious allegations against him it was clearly necessarily to check the nature of the communications on the phone found in the complainant's possession. This is an evidential report not served elsewhere, it was central to the Crown's case and required careful scrutiny. It meets the criteria for payment a PPE and should be paid accordingly.

Excel data – Cleaned 350 (10 pages) Cleaned 629 (115 pages) Cleaned 456 (2 parts, 24 pages) total 149 pages

32. The Respondent submits that the Excel "cleaned" call data duplicates the call data contained provided to the Defence by Prosecution Counsel as listed in the e-mail of 11 January 2018 and which was used to produce the HM call schedules. As per Prosecution Counsel's e-mail:

407 pages of call data was served in respect of telephone number 629;
10 pages of call and locations data re telephone number 350 (Salman Ahmed); and
24 pages of call data was served in respect of telephone number 456.

33. As was made clear in the e-mail, these are the records that were specifically used to produce the various communication schedules used by the CPS and hence (per the Respondent) these 441 pages were included in the PPE by the DO and ought not to be paid twice. Hence it is submitted that the pages of Excel "cleaned" call data in respect these same telephone numbers, as contained on the disc provided to the Respondent on appeal, duplicates the call data found in the documents specified in Counsel's e-mail dated 11 January 2018. These Excel documents do not contain additional call data that required separate detailed consideration - they simply replicate data already included within the PPE in a different format.

34. The issue of duplication has previously been considered by Master Rogers in the case of ***R v El Treki*** (SCCO Ref 431/2000). In that decision 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 of duplication has been considered more recently in the context of electronic material in the cases of ***R v Daugintis & Ors*** *(*SCCO Ref: 154/17, 155/17 & 177/17); ***R v Ladic*** (SCCO Ref:73/17); ***R v Frempong*** (SCCO Ref 84/18) and ***R v Zameer Ahmed*** (SCCO Ref 145/18). In all of those decisions and several others the Cost Judge concluded both that duplication of material is a relevant consideration that should be taken into account when determining whether to include electronically served evidence within the PPE, and that where material is duplicated the PDF version should be included in the PPE.

35. The Respondent therefore submits that as 407 pages of call data relating to these telephones has already been included within the PPE it would not be reasonable to include the duplicate Excel call data within the PPE. The above total 663 pages; the Respondent invites the Court to allow the appeal to the limited extent set out (26 extra pages).

36. Per the Appellant, the Respondent has not suggested which of the spreadsheets on the disk are supposed to duplicate which of the PDFs emailed by the Prosecutor. The Appellant submits that the documents are clearly distinct from each other and from those served by the Prosecutor by email. Upon initial consideration, it is clear that the number of pages does not bear any resemblance, and this cannot be explained by formatting differences. Closer scrutiny shows that those emailed by the Prosecutor comprise PDF call records directly from the call providers, bearing their logos, and schedules drafted by the Prosecution. Those provided on disk are the raw material, in Excel format, from which the schedules appear to be drawn. They present different information over different dates. It is therefore submitted that this material is payable as PPE for the reasons given in appellant's submissions of 24th October 2018.

37. The Appellant applied for leave to introduce a new argument not previously made to the DO based upon *R v Mooney (2019) SCCO 99/18*. Given the length of time all of this has taken (and the fact that *R v Mooney* was not decided when the DO considered this matter) I am prepared to consider that argument.

38. Per the Appellant, in *R v Mooney (2019) SCCO 99/18*, Master Rowley considered a situation on similar facts to the instant case. At paragraph 14 of his judgement the Master stated:

"It is agreed that it was reasonable for the solicitor to look at 129 pages of a total of 136 in a particular category of documents. In determining what was a reasonable course of action, the use of hindsight has to be guarded against. I ask, perhaps rhetorically, how the solicitors could reasonably be expected to know which documents could reasonably be studied for the purposes of PPE and which only merited reading time for a claim for special preparation? The artificiality of this situation is stark. By the time a litigator (or counsel) has considered each document, time has been spent reasonably on those documents which ultimately appeared to be less relevant with the benefit of hindsight than others. In my judgment, the determining officer ought to take a rather broader approach to what has been allowed than has been demonstrated by the schedule before me. Where a category is clearly reasonable to view in principle, the correct approach ought to be to allow all of those entries. The same is true in this case, where 425 of 427 documents have been agreed. It seems to me that if a category has been allowed in part then it would be an unusual case where it ought not to be allowed in full."

39. In *Mooney* the parties were closer in terms of the amount of PPE in issue, but the Appellant submits that the principle remains applicable to the instant case. The item in question is the handset download report of the main player in a drugs drug dealing and kidnapping conspiracy. Telephone evidence was central to the case. It required very careful consideration. It should have been agreed as evidence and as PPE by the DO. The Respondent now concedes this, albeit in respect of 25 pages only, but for the reasons set out above, the Appellant submits that the outstanding amount of PPE (which is 576 pages) should be paid in respect of this item.

Discussion and decision

40. In *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) Nicola Davies J (as she then was) noted that the Prosecution relied on a schedule of text messages which were at the core of the Crown's case. She said, at para 20:

"*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.*"

41. In *SVS* Holroyde J (as he then was) observed:

"Importantly for present purposes, one feature of the scheme is that it generally does not provide remuneration for defence lawyers to review and consider material which is disclosed by the prosecution as unused material, however extensive that material may be and however important it may be to the defence case: a fee for special preparation may be claimed in specified (and very limited) circumstances, but in general the remuneration for considering unused material is deemed to be "wrapped up" in the fees calculated in accordance with the statutory formula.

42. It is not necessary for me to set out in detail the judgement of Holroyde J in *SVS* as the appeal in that case centred primarily on the issue as to whether relevant material should be treated as served. But the judgement of Nicola Davies J in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) (including in particular para. 20) and the judgement of Holroyde J in *SVS* (including in particular para. 44 to 48) are also relevant in determining how the DO or Cost Judge should exercise his or her discretion under subpara. 1 (5) set out above and I have considered them in this context. In his judgement Holroyde J, when dealing with the issue as to whether served material should be regarded as PPE, said this:

"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.

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".

43. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

"In relation to documentary or pictorial exhibits served in electronic form (i.e. those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –

"*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the defendant*."

44. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

"*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the defendant's case*.

Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the defendant's case, e.g. it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the defendant's involvement.

Raw phone data where the case is a conspiracy and the electronic evidence relates to the defendant and co-conspirators with whom the defendant had direct contact."

45. In his decision Holroyde J also cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. <u>It seems to me that the more obvious intention of the Funding Order is 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.</u> So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining]

46. Following the guidance set out or referred to above, downloaded material is not to be regarded as one integral whole, as a witness statement would be. To use the analogy of Holroyde J, the downloaded material, which was itself a copy of the material held electronically on the Defendant's and second Complainant's telephones, was more in the nature of the contents of a filing cabinet capable, in principle, of subdivision so that some material may count towards PPE and some may not. It does not follow that simply because the material was served that it was relevant and appropriately dealt with as part of the PPE: that is apparent from the rules themselves and confirmed by the guidance I have set and referred to above. Whether it is appropriate to subdivide material and indeed how any such subdivision should occur is, of course, a matter to be determined on the facts and having regard to the discretion set out in the relevant provisions and the guidance.

This case

47. On the facts in this case, Trial commenced on 15 January 2018 and collapsed on 23 January 2018 due to issues with MK's evidence; there was a retrial on 29 and 30 January 2018 but that too collapsed after the Crown offered no evidence, again due to issues with ML's evidence (the issues were not disclosed and nobody, including the Appellant, knows what they were).

48. Be that as it may, some of the electronic pages were served on disc on 30 November 2017 and again, in what is described in representations for LF2 as "useable form" on 18 January 2018. Further electronic evidence was served under cover of e-mails dated 11 January 2018. The breakdown of the 457 "pages already allowed" in the table above, appears in a schedule of electronic evidence attached to the indictment. These pages were served under emails dated 11 January 2018, a few days before Trial. The 663 pages served in November 2017 and again on 18 January 2018 (during the Trial) are as described above.

49. I am unclear as to why the Respondent has allowed the later 457 pages and not the earlier 663 pages. I appreciate that the Crown only confirmed after Trial had actually started, that this was "used" material, but it is entirely unrealistic to assume that the Appellant firm would not have started to look through this material as soon as it came in, or at any rate between its receipt in November 2017 and confirmation of its "used" status in January 2018. It is artificial to suggest that the Respondent is not liable to pay for work done on these earlier pages prior to confirmation that they were indeed "used". It is clear from the papers that this material was always "used" and the Crown's delay in confirming this fact until after the Trial was already under way, is not fatal to the Appellant's right to claim these pages as PPE.

50. I am also concerned by the Respondent's production of a completely new (and radically different) set of reasons, so many months into the process. The original Written Reasons were produced in October 2018 and erroneously rejected the claim on a false "unused material" premise. It was not until May 2019 that the Respondent went through the material and sought to justify its stance by an ex post facto dissection of what this material contained. I have considered the submissions made and my only comment is that if the Respondent did not have time to go through the papers in this level of detail until some seven months after the fact, it is unreasonable to expect the Appellant to have done so in the few days available to them, when their attention was no doubt focussed upon their client's predicament rather than their fees. I also take the view that homing in upon what the Appellant has said was the focus of their attention by the time the Prosecution accepted that this material was "served" (to verify the contents of ACM/11) in order to reject their claim for PPE, is unrealistic.

51. I am not persuaded by the Respondent's approach to the telephone evidence. Conspiracy to kidnap MK, to falsely imprison him and to supply Class A drugs (heroin and cocaine) are very serious offences, and I am not at all surprised that the Appellants went through the download carefully. Had they had time to go through the download in the way that the Respondent has done, and as an aside I note that even with ample time the Respondent has come up with two separate figures and two completely separate case theories, the Appellant firm might have been able to shelve some pages as the Respondent suggests. Instead they had to absorb this material over a very short period of time in order to allow the Trial to go ahead. The page numbers and descriptions of the contents of the two sets of electronic pages, did not correlate to one another (as the Appellant has averred) so that it would not have been obvious that there was overlap.

52. Even after all this time the Respondent's case is stated no higher than that it "appears" that material has been uploaded, is "likely" that this was the case or is "unclear" what relevance the extra material had. To disallow such a significant proportion of the PPE and especially after taking so long to put forward its case, the Respondent would need to be much clearer than that. If there had been (as is often the case) a mass of material that has no bearing

upon the case, and ample time for the Appellant to read selectively, apply search filters and so on, then that is one thing.

53. Here, there are relatively few pages and the material has either come to light at an extremely late stage (days before Trial) or was embargoed by the "unused" tag until after the Trial had already started. In that context, the Respondent's methodology of sifting through the material with a toothcomb to find the lowest possible number of recoverable pages, would (having regard to the nature of the material and the circumstances) be neither reasonable nor fair to the Appellant.

54. It does not meet the fair and predicted economic balance of the remuneration paid for a case of this type and the suggestion that the rest can be remunerated by way of special preparation, cannot rescue the position. Having cherry-picked the relevant pages (as it sees them) and paid them at the very low PPE rate, the Respondent could assert that the special preparation to look at the "irrelevant" pages would only be minimal. I appreciate that as matters have never got that far I cannot state with certainty what the Respondent would purport to allow by way of special preparation but it is not unreasonable to assume it would be well below the difference between the 1,124 electronic PPE claimed and the 483 PPE now offered/allowed by the Respondent. Certainly, if the Respondent were to allow all or most of the shortfall by way of special preparation then this exercise will have been a huge waste of everyone's time and scarce resources, which (ironically) the Respondent was no doubt trying to preserve.

55. I do not think (and it has not been argued) that this case can be distinguished from ***Lord Chancellor v Edward Hayes LLP*** **[2017] EWHC 138 (QB)** because in that case the telephone material exonerated the Defendant. In my view on these facts the telephone evidence in this case was clearly of sufficient relevance to the case, to come within the *Edward Hayes* decision. The fact that that the Trial collapsed twice because of issues with the complainant's evidence, is not the issue. The electronic material was certainly relevant being material relevant to the mobile telephones connected not only to the Defendant but to those accused of conspiring with him. Given the seriousness of the offences charged, the (relatively) small number of pages involved and the assertion by the Defendant that he happened to be in the area on the date in question for entirely innocent reasons, it was inevitable that the Appellants would scrutinise this material very closely.

56. Was it reasonable and necessary to go through the telephone evidence in case contacts with the complainant or others, tended to corroborate or indeed to undermine the Defendant's version of events? Clearly it was and to ascertain the contents and contexts of the messages the approach promulgated by the Respondent, on the facts in this particular case, is not persuasive. The Appellant had very little time on hand and could not risk overlooking anything; they had to look through the material irrespective of what Counsel was also doing.

57. So far as *R v Mooney* is concerned, that case was decided upon its own facts and whilst I respectfully agree with the decision of the learned Costs Judge in that case, it has not been determinative of the outcome in this one. This case turns upon its own facts which, in my view, clearly favour a further award of 449 PPE (the additional 576 pages in dispute, minus 127 pages of meta data – see paragraph 17 above) on top of the 457 PPE already paid and the 26 either paid or to be paid, as conceded by the Respondent. I would also allow £840.00 costs plus £100 Appeal fee to the Appellant.

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