Neutral Citation Number: [2017] EWHC 1045 (QB)

Case No: QB/2016/0280

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2017

Before:

MR JUSTICE HOLROYDE

MASTER ROWLEY (sitting as an Assessor)

- -

Between :

THE SECRETARY OF STATE FOR JUSTICE	**Appellant**
THE LORD CHANCELLOR	
- and -	
SVS SOLICITORS	**Respondent**

- -
- -

Mr David Bedenham (instructed by **Government Legal Department**) for the **Appellant**
Mr Anthony Montgomery (instructed by **SVS Solicitors**) for the **Respondent**

Hearing date: 21st March 2017

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Approved Judgment

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

....

MR JUSTICE HOLROYDE

Mr Justice Holroyde:

1. In 2015 the Respondent to this appeal, SVS Solicitors ("SVS"), represented a Ms D in criminal proceedings. SVS, and counsel instructed by them, acted under the terms of a representation order granted to Ms D by the Legal Aid Authority ("LAA") on 28th September 2015. The case fell within the graduated fee scheme. Ms D was one of four defendants sent for trial in the Crown Court at Blackfriars on a charge of becoming concerned in a money laundering arrangement. The prosecution alleged that all four were part of a criminal group led by the first defendant, who was said to have arranged to pass a rucksack containing nearly £100,000 in cash to the fourth defendant, a professional money launderer. The principal allegation against Ms D was that she had driven the second defendant, and the rucksack containing the cash, to a meeting place at which all four were arrested. At the conclusion of the trial, Ms D was acquitted. Her co-accused were convicted. SVS thereafter submitted their claim for fees to the LAA. In doing so, they included 1,571 pages of electronic material in their total count of the pages of prosecution evidence. On 19th July 2016 an LAA Determining Officer refused that part of the graduated fee claim, concluding that the 1,571 pages of electronic material were unused material and therefore did not count as PPE. SVS appealed against that decision to Costs Judge Simons, who on 28th November 2016 allowed their appeal, concluding that the electronic material should properly be included when counting the pages of prosecution evidence. The Lord Chancellor now appeals against that decision of Costs Judge Simons.

2. I am grateful to Mr David Bedenham for the Lord Chancellor, and Mr Anthony Montgomery for SVS, for their helpful submissions in a case which they both submit – and I agree - raises an important point as to the calculation of the number of pages of prosecution evidence in a graduated fee case. I am also grateful to my assessor,

Master Rowley, whose experience as a Costs Judge has been very helpful to me, though of course the decision on the appeal is mine alone.

The statutory framework:

3. It is now some 20 years since the graduated fee scheme was introduced to provide for the remuneration of solicitors and counsel, initially in relation to comparatively short cases in the Crown Court. As time has passed, the scope of the scheme has been expanded, and in practice it now applies to the majority of Crown Court cases. As is well known, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of pages of prosecution evidence (hereafter, "PPE") and the length of the trial. The scheme is intended to be administratively simple, and to avoid (for the most part) the need for a Determining Officer to consider the extent of the work actually done by solicitors and/or counsel in a particular case. 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.

4. Payment under the graduated fee scheme is, and was at the material time, governed by the Criminal Legal Aid (Remuneration) Regulations 2013, SI 2013/435, as amended. In those Regulations, the solicitor who is named in the representation order as representing an assisted person is referred to as a litigator. By regulation 5(1) –

> “Claims for fees by litigators in proceedings in the Crown Court must be made and determined in accordance with the provisions of Schedule 2 to these Regulations.”

5. Schedule 2 sets out the scheme by which a graduated fee is calculated. As I have indicated, an important aspect of the formula by which the fee is calculated is the number of PPE. In this regard, the relevant provisions of paragraph 1 of schedule 2 are in the following terms:

> “(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—
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> (a) witness statements;
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> (b) documentary and pictorial exhibits;
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> (c) records of interviews with the assisted person; and
>
> (d) records of interviews with other defendants,
>
> which form part of the 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—
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> (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.”

6. Although this appeal is concerned solely with the remuneration of solicitors, I note in passing that Schedule 1, which governs the payment of graduated fees to advocates, contains an identical provision as to PPE.

7. Regulation 24 provides for the appropriate officer (the Determining Officer) to determine the fees payable to a litigator in accordance with Schedule 2, and to authorise payment accordingly.

8. The LAA publishes "Crown Court Fee Guidance", which contains information as to how graduated fee claims will be processed. The Guidance has most recently been updated in March 2017, but without alteration of the terms of the section which is relevant to this appeal. In paragraph 2 of Appendix D, "PPE Guidance", there is a table which summarises the "PPE criteria". 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."

9. 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, eg 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."

10. A representative who is dissatisfied with the decision of the Determining Officer may appeal to a Costs Judge pursuant to Regulation 29. Notice of the appeal must be given in writing to the Senior Costs Judge, and copied to the Determining Officer. The notice of appeal must be in specified form and must state whether the appellant wishes to appear or to be represented, or will accept a decision given in his absence. Provision is then made by Regulation 29 for the Lord Chancellor to take part in the appeal:

> "(6) The Senior Costs Judge may, and if so directed by the Lord Chancellor either generally or in a particular case must, send to the Lord Chancellor a copy of the notice of appeal together with copies of such other documents as the Lord Chancellor may require.
>
> (7) With a view to ensuring that the public interest is taken into account, the Lord Chancellor may arrange for written or oral representations to be made on the Lord Chancellor's behalf and, if the Lord Chancellor intends to do so, the Lord Chancellor must inform the Senior Costs Judge and the appellant.
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> (8) Any written representations made on behalf of the Lord Chancellor under paragraph (7) must be sent to the Senior Costs Judge and the appellant and, in the case of oral representations, the Senior Costs Judge and the appellant must be informed of the grounds on which such representations will be made.
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> (9) The appellant must be permitted a reasonable opportunity to make representations in reply.
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> (10) The Costs Judge must inform the appellant (or the person representing him) and the Lord Chancellor, where representations have been or are to be made on the Lord Chancellor's behalf, of the date of any hearing and, subject to the provisions of this regulation, may give directions as to the conduct of the appeal.

(11) The Costs Judge may consult the trial judge or the appropriate officer and may require the appellant to provide any further information which the Costs Judge requires for the purpose of the appeal and, unless the Costs Judge otherwise directs, no further evidence may be received on the hearing of the appeal and no ground of objection may be raised which was not raised under regulation 28.

(12) The Costs Judge has the same powers as the appropriate officer under these Regulations and, in the exercise of such powers, may alter the redetermination of the appropriate officer in respect of any sum allowed, whether by increasing or decreasing it, as the Costs Judge thinks fit.

(13) The Costs Judge must communicate his decision and the reasons for it in writing to the appellant, the Lord Chancellor and the appropriate officer."

11. In this case, SVS indicated that they would accept a decision given in their absence. The Lord Chancellor did not make any representations or take part in the appeal to the Costs Judge.

12. Provision for an appeal against the decision of the Costs Judge is made by Regulation 30, which is in these terms:

"30.— Appeals to the High Court

(1) A representative who is dissatisfied with the decision of a Costs Judge on an appeal under regulation 29 may apply to a Costs Judge to certify a point of principle of general importance.

(2) Subject to regulation 31, an application under paragraph (1) or paragraph 11(3) of Schedule 3 must be made within 21 days of receiving notification of a Costs Judge's decision under regulation 29(13).

(3) Where a Costs Judge certifies a point of principle of general importance the appellant may appeal to the High Court against the decision of a Costs Judge on an appeal under regulation 29, and the Lord Chancellor must be a respondent to such an appeal.

(4) Subject to regulation 31, an appeal under paragraph (3) must be instituted within 21 days of receiving notification of a Costs Judge's certificate under paragraph (1).

> (5) Where the Lord Chancellor is dissatisfied with the decision of a Costs Judge on an appeal under regulation 29, the Lord Chancellor may, if no appeal has been made by an appellant under paragraph (3), appeal to the High Court against that decision, and the appellant must be a respondent to the appeal.
>
> (6) Subject to regulation 31, an appeal under paragraph (5) must be instituted within 21 days of receiving notification of the Costs Judge's decision under regulation 29(13).
>
> (7) An appeal under paragraph (3) or (5) must—
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> (a) be brought in the Queen's Bench Division;
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> (b) subject to paragraph (4), follow the procedure set out in Part 52 of the Civil Procedure Rules 1998; and
>
> (c) be heard and determined by a single judge whose decision will be final.
>
> (8) The judge has the same powers as the appropriate officer and a Costs Judge under these Regulations and may reverse, affirm or amend the decision appealed against or make such other order as the judge thinks fit."

13. Before saying more about the circumstances of this appeal, it is relevant to summarise the key provisions of the Criminal Procedure and Investigations Act 1996 which govern disclosure by the prosecutor of unused material. Section 3 of the Act imposes an initial duty on the prosecutor to disclose to the accused any prosecution material which has not previously been disclosed and which meets the disclosure test, in that it "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". Section 5 requires the accused to give a defence statement which, by section 6A, must set out the nature of the accused's case and indicate the matters of fact on which he takes issue with the prosecution, and why he takes issue. Section 7A imposes on the prosecutor a continuing obligation to review whether there is material which meets the disclosure test, and if so, to disclose it to the accused as soon as is reasonably practicable.

<u>The proceedings in the Crown Court</u>:

14. When Ms D and her co-accused were arrested, a number of mobile phones were seized from them. Each of the phone handsets was a physical exhibit in the trial. Data contained within the handsets, and on the SIM cards used in the mobile phones, were downloaded by police investigators, and call billing data were 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.

15. On 2nd February 2016 the CPS sent two letters to SVS enclosing discs of electronic material. No satisfactory explanation has been given of why two letters were sent on the same day, neither of which explicitly referred to the other.

16. The shorter of the two letters was headed with the name of the four defendants (with Ms D's name underlined) and the date of the forthcoming trial in the Crown Court at Blackfriars. It said:

> "Please find enclosed a disc containing ongoing disclosure in relation to your client. The disc is encrypted and the password remains the same."

17. The other letter said:

> "Dear Sirs,
>
> R v [D], Blackfriars Crown Court 11th March, 2016
>
> Disclosure of prosecution material under section 7 Criminal Procedure and Investigations Act 1996
>
> I write further to your disclosure request, the reasons for which were provided under cover email dated 27. 1.16.
>
> You will be aware that the Crown has already served the extracts from the telephone downloads and billing data upon which it proposes to rely, and from which the telephone schedules have been produced. The unredacted downloads

> contain names and telephone numbers of people wholly unconnected to the case. As such middle digits have been redacted so that the numbers can be seen and checked but so that the parties cannot be identified or contacted from those numbers. The Crown did so in order to protect the privacy of those people not connected with the case. In addition viber and face book chat logs were removed from the downloads as they are not relied upon in evidence.
>
> You have requested unredacted versions of the handset downloads and excel versions of the billing data. You have intimated that you require such material to be disclosed in order that you might prepare your own schedules of telephone contact and to check the accuracy of the Crown's timelines. The Crown maintains that the accuracy of the timelines can be checked with reference to the served evidence. However, we appreciate that in order to draft your own schedules you would require the entirety of those downloads in unredacted form. The billing data in an excel version has already been provided to you. The unredacted telephone downloads are now disclosed as attached.
>
> This material is disclosed to you in accordance with the provisions of the CPIA, and you must not use or disclose it, or any information recorded in it for any purpose other than in connection with these criminal proceedings. If you do so without the permission of the court, you may commit an offence."

18. I pause to note that, very regrettably, neither party was able to provide me with a copy of the e mail of 27th January 2016, which might have shed important light on the terms of SVS's request. I also note that the heading of the longer letter was not a good start: section 7 of the 1996 Act had been repealed, and replaced by section 7A, more than six months earlier on 15th July 2015.

SVS's claim for fees:

19. Both of the letters were provided to the Determining Officer. As I have indicated, the claim in respect of the 1,571 pages of electronic material was disallowed, the Determining Officer endorsing the claim form with the words "PPE assessed down to 1,105 as evidenced by NAE". By a letter dated 2nd June 2016, SVS asked for the

decision to be reviewed. In their letter, they described the discs which had been sent on 2nd February 2016 as containing "phone evidence central to the case". They submitted that the telecoms evidence, digitally served, had

> "played a key part in this case in showing the roles each defendant played and the extent of their individual involvement. It is clear from the CPS disclosure note dated 2nd of February that this telephone evidence was central to the Crown's case, of which certain extracts had been selected and served. It is also clear that in order to test the Crown's case properly and to prepare the defence for Miss [D] effectively, full service of telephone downloads was needed to prove the relationship between the defendants."

SVS went on to explain the nature of the defence, important parts of which were that Ms D had had no phone contact at all with the fourth defendant or with phone numbers which were connected to him, and that her phone contact with the first defendant was explained by their having an affair rather than by her being involved in crime. They stated that the material contained on the discs had been the evidential basis on which they had been able successfully to advance the defence case at trial.

20. The review was refused. The reasons given, on 16th June 2016, were brief:

> "I am unable to consider the discs without the NAE/exhibit list confirming that the discs were formally served by the CPS. The letters provided confirm that the discs were disclosed but they do not confirm that they were served."

21. SVS sought a further review. By letter dated 7th July they provided a note from counsel (who was pursuing her own claim for fees) which addressed the reasons given on 16th June. Counsel asserted in the note that the discs had been served, and were not unused material. She said, amongst other things, that the raw data on one of the discs –

> "… is the underlying material used by the Crown to make up various compendious schedules that went before the jury in the trial, namely exhibits CL/1, CL/2 and CL/3."

22. The Senior Caseworker on the litigator fee team considered SVS's letter and counsel's note, but concluded that the Determining Officer's decision had been correct. In a letter dated 19th July 2016 to SVS, she referred to schedule 2 to the 2013 regulations and to appendix D in the LAA's Crown Court Fee Guidance. She expressed her conclusion in the following terms:

> "My reasons for this are the discs provided were not formally served as evidence by the prosecution, therefore it falls into the category unused material. Unused evidence does not meet the ppe criteria and the work involved in considering it is already wrapped up in the graduated fee. Despite numerous requests by the litigator fee team, you have been unable to provide an NAE or exhibit list to confirm that the disc was formally served, therefore it can only be determined to fall into unused material."

23. SVS gave notice of appeal to the Costs Judge. They did so by way of an Appellant's Notice. In an accompanying note setting out the Grounds of Objection they said -

> "The point at issue is in relation to the "disclosed" telephone evidence on disc (disclosed under letter dated 2nd February 2016) and whether or not that evidence is deemed to be served evidence or unused material."

Later in the note, they said –

> "The LAA have stated in their written reasons that 'the discs provided were not formally served as evidence by the prosecution, therefore it falls into the category of unused material'. This is incorrect the discs were not served as unused material they were served as "ongoing disclosure". The question that we need a ruling on is whether the ongoing disclosure can be deemed to be served evidence? We do not intend to be present at the appeal and look forward to receiving the cost judge's decision."

24. Costs Judge Simons considered the material provided to him (which, as I have indicated, did not include any representations on behalf of the Lord Chancellor) and allowed the appeal in full. He gave his decision in writing on 28th November 2016.

Although he must have had both the letters dated 2nd February 2016, he only quoted from the short letter. At paragraphs 9 to 13 of his ruling, he said –

> "9. In my judgment the letter of 2 February 2016 served the relevant disc. The Regulations do not state that the documentation has to be formally served. The PPE forms part of the served prosecution documents or documents which are included in any Notice of Additional Evidence. The disc in this case was a served prosecution document.
>
> 10. If a prosecution document has been served, the Determining Officer is required to look in detail as to what the document consists of. There may be many instances where documentation or discs served under cover of a letter similar to that of 2 February 2016 are clearly unused material, or is material that is only peripheral to the case or the defence. In such a case the Determining Officer would be correct in determining that that material was not PPE.
>
> 11. However, there are cases such as this where *it is quite clear that the content of the disc was central to the case (as opposed to just central to the defence) as it constituted the evidential basis upon which the Crown were able to prepare and put together the telephone schedules used at trial.*
>
> 12. It would, in my judgment, be an unjust interpretation of the Regulations to conclude that material that had been served without a Notice of Additional Evidence must automatically be regarded as unused material and therefore excluded from the PPE count.
>
> 13. In my judgment, the material served under cover of the letter from the Crown Prosecution Service dated 2 February 2016 forms part of the served prosecution documents. I am satisfied that the contents of this electronically served material is such that, taking into account the nature and content of the document and all the relevant circumstances, it is appropriate that it should be included in the PPE."

The emphasis in the quotation of paragraph 11 is mine.

The appeal to the High Court:

25. Within the relevant time limit, the Lord Chancellor served a notice of appeal against that decision, accompanied by a skeleton argument from counsel dated 28th December 2016. SVS served a Respondent's Notice, setting out their grounds of resistance to

the appeal, on 23rd January 2017. The Lord Chancellor lodged an appeal bundle on 6th February 2017. On 22nd February 2017 the court gave notice that the appeal would be heard on 21st March 2017.

26. There are two grounds of appeal:

> "Ground 1: The learned Costs Judge erred in not applying the definition of 'Pages of Prosecution Evidence' contained in paragraph 1 of Schedule 2 to the 2013 Regulations. Had the learned Costs Judge correctly applied the statutory definition, he would have concluded that the 1,571 pages on the disc were not PPE because –
>
> a) they did not form part of the served prosecution documents because they were not served on the court;
>
> b) they were not included in any notice of additional evidence;
>
> c) in any event, the pages had never existed in paper form and neither the nature of the document or any other relevant circumstance made it appropriate to include it as PPE.
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> Ground 2: To the extent that the learned Costs Judge sought to exercise some sort of discretionary power to deem as PPE material that does not fall within the statutory definition, he was in error because no such discretionary power exists."

27. These grounds of appeal are very similar to the grounds advanced unsuccessfully by the Lord Chancellor in the recent case of Lord Chancellor v Edward Hayes LLP and Nick Wrack [2017] EWHC 138 (QB), a decision of Nicola Davies J on which SVS rely in this appeal.

The application to adduce fresh evidence:

28. On 15th March 2017 - less than a week before the hearing of this appeal, and three weeks after the hearing date had been fixed - a member of the Central Legal Team of the Legal Aid Agency provided a witness statement and exhibits, collectively amounting to 66 pages, in which he sought to assist the court by clarifying matters relating to the Crown Court proceedings. He did so on the basis of information and

correspondence which had been made available to him by the CPS. Then on 20th March, the day before the hearing, the same witness provided a further statement and further exhibits which he had received from the CPS.

29. Mr Bedenham applied at the outset of the hearing for permission to rely on these statements and exhibits, notwithstanding that none of them had been placed before the Costs Judge. I indicated that I would consider them *de bene esse* and reserve my ruling as to their admissibility. CPR 52.21(2) gives this court the power to receive evidence which was not before the Costs Judge. In considering whether to exercise that power, the court must act in accordance with the overriding objective, and must consider whether the evidence could with reasonable diligence have been obtained for use before the Costs Judge; whether the evidence appears to be credible; and whether the evidence would have an important – though not necessarily a decisive – influence on the outcome of the case.

30. If only the first of those three criteria were to be considered, then the application to adduce this evidence would fail: the evidence plainly could have been obtained for use before the Costs Judge. However, the Appellant is on stronger ground in relation to the other two criteria, and Mr Montgomery very fairly accepted that the further evidence had assisted SVS to identify certain errors which they had inadvertently made in making their claim for fees. He also accepted that no particular prejudice would be suffered by SVS if the evidence were admitted. In those circumstances I am persuaded that a proper application of the overriding objective of dealing with this case justly requires that the fresh evidence be admitted, and I therefore do admit it.

31. It must however be observed that the late production of this evidence was very unsatisfactory. The process of gathering the evidence appears to have started, very

belatedly, because of criticisms which Nicola Davies J made of the Appellant in the Edward Hayes case, in which relevant evidence was only provided by the Appellant in the course of the appeal hearing, and even then only at the prompting of the court. Yet in the present case, the skeleton argument which accompanied the notice of appeal submitted that the relevant electronic material did not come within the definition of PPE, and added that the position was not altered by SVS's assertion, "which is being checked with the CPS", that the documents on the disc formed the basis of telephone schedules relied upon by the Crown during the trial. It is, to say the least, surprising that that important point had not apparently been checked at any earlier stage of these proceedings, and not even before the appeal was commenced. In the result, the evidence which is relied on in support of the appeal was not served until more than 3 months after the decision under appeal. That very unsatisfactory situation was certainly not cured by the bland suggestion that the Appellant would not object to an adjournment of the hearing if SVS needed more time to respond to the evidence.

32. In the light of the fresh evidence which I have admitted, and with the benefit of oral submissions on both sides which were not made to the Costs Judge, the relevant facts – now in effect agreed between the parties – are these:

i) Ten mobile phones had been seized from the four defendants. In relation to one, it appears that no data were obtained. In relation to each of the remaining nine, the police obtained full downloads of the data stored on or relating to the phone.

ii) Seven of those downloads were served as exhibits in the case. The other two phones - one attributed to Ms D and the other attributed to the second

defendant – were differently treated: the prosecution served as exhibits, in PDF format, those parts of the downloads on which they wished to rely, but excluded those parts of the downloads which related to messages using the Facebook and Viber platforms.

iii) Those downloads and part-downloads which were treated as exhibits were listed in the prosecution lists of evidence and exhibits. The excluded sections of the downloads were not listed as exhibits, but were instead included as items in a schedule of unused material (which was not signed off by a reviewing lawyer until 5th February 2016, after the letters of 2nd February had been sent).

iv) One of the discs provided to SVS on 2nd February 2016 contained Excel versions of downloads which had already been served as exhibits in PDF format. This disc, containing 108 pages of material, was labelled "Telecoms raw data", and appears to have been sent with the shorter letter. It was provided in a helpful response to a defence request for the data to be provided in a format which could more easily be read and manipulated by the defence.

v) The other disc – labelled "Ongoing disclosure to [Ms D]", and apparently sent with the longer letter - contained 1,467 pages of material comprising a full version of data which had previously been served as exhibits in redacted form. This disc accordingly contained some data – 201 pages - which had already been exhibited and was therefore already in the possession of the defence.

vi) SVS now acknowledge that the figure of 1,571 pages of electronic material for which they claimed remuneration was inadvertently overstated in two respects: first, because SVS overlooked the fact that the 108 pages of "Telecoms raw

data" was material which was in a different format but was otherwise identical to material which they already had; and secondly, because they failed to take into account that 201 pages of the material on the "Ongoing disclosure" disc merely duplicated the redacted material previously provided to them. On that basis, it is acknowledged that the 1,571 pages which the Costs Judge ruled should be included in the number of PPE should be reduced to 1,262 pages.

33. The issues between the parties thus relate to the 1,262 pages of electronic material which comprised those parts of the downloads from two phones which the prosecution had initially excluded from the exhibited data. In a nutshell, Mr Bedenham argues that the excluded material was not relied on by the prosecution and was therefore not exhibited: it was only ever disclosed as unused material, and could not form part of the PPE for graduated fee purposes. Mr Montgomery argues that the totality of the downloads were central to the case and that, however the excluded parts were initially viewed by the prosecution, the Costs Judge was right to conclude that they formed part of the served prosecution documents and so were correctly included as PPE.

The submissions:

34. Mr Bedenham submits that the PPE are limited to the material on which the prosecution rely to prove their case, and that the four categories of material identified in paragraph 1(3)(a-d) of Schedule 2 to the 2013 Regulations comprise an exhaustive list of the only material which can qualify as PPE. He notes that in Sturdy (SCTO 18th December 1998) Master Rogers held that a notice of additional evidence "must by definition be in writing", with the result that the PPE count could not include material which should have been included in a notice of additional evidence, but was

not. Mr Bedenham points out, however, that that early decision has been overtaken by the decision of Costs Judge Campbell in Qu and others [2012] 3 Costs LR 599 to the effect that served prosecution documents which should have been accompanied by a notice of additional evidence, but through no fault of the defence were not, could properly be counted as PPE. Mr Bedenham accepts that decision as correct, and also accepts that a similar approach should be adopted if served prosecution evidence were, through no fault of the defence, not "served on the court".

35. Mr Bedenham emphasises that unused material does not form part of the PPE, even though it is helpful to and deployed by the defence. To illustrate the point he refers to Powell (SCCO ref 7/16), in which Master Rowley concluded on the facts that certain material had merely been provided as unused material and had not been served by the prosecution. A further illustration may be provided by the decision of Costs Judge Leonard in Motaung (SCCO Ref 179/15). On the facts of this case, Mr Bedenham submits that the Facebook and Viber messages were not served as evidence and cannot be treated as if they were. The downloads containing those messages were, he says, explicitly disclosed under the CPIA 1996 as unused material and were not relied on by the prosecution. On the basis of the late witness statement, which relies on information provided by the CPS, Mr Bedenham submits that the prosecution did not need to serve the contentious material in order to prove the schedules which they wished to put before the jury: those schedules were based on, and could be proved by, the data which had been exhibited. The additional material may well have proved useful to the defence, but that does not convert unused material into prosecution evidence. The longer of the letters sent on 2nd February 2016 makes it clear, he says, that the relevant parts of the downloads were only ever unused material.

36. Mr Bedenham criticises the decision of Haddon-Cave J in Furniss and others [2015] 1 Costs LR 151, in particular the statement of the learned judge at paragraph 11 that –

> "There is simply no proper basis upon which either the CPS or LAA can refuse to include telephone material served in digital form in the PPE, or caseworkers can refuse to make payment according to that PPE page count."

Mr Bedenham submits that statement went too far in seeking to impose a hard and fast rule when a case-by-case assessment of the relevant circumstances by the Determining Officer is needed. In any event, he says, Furniss can only apply to served prosecution evidence, and in this case the contentious 1,262 pages were not served. In this case, he argues, the prosecution did not rely on the Facebook and Viber messages, and therefore did not need to serve them as exhibits and did not serve them as exhibits. The discretion given to a Determining Officer or Costs Judge by paragraph 1(5) of Schedule 2 therefore could not arise here, and insofar as Costs Judge Simons purported to exercise a discretion, he had no power to do so.

37. Mr Montgomery submits that the letters sent on 2nd February 2016 refer to "ongoing disclosure" and refer to the CPIA 1996, but do not actually say that the discs are unused material. In any event, he argues, it is for the Determining Officer or Costs Judge to assess the true nature of the material. The prosecution were in reality relying on the physical evidence of the seized handsets and the data recovered from those handsets or supplied by the service providers. The exclusion of the Viber and Facebook messages from the exhibits was an artificial sub-division which cannot be justified, any more than it would be justified for the prosecution to delete from a witness statement those passages which did not directly support the prosecution case and seek to exclude the deleted passages from the PPE count. Even if the prosecution only relied on those parts of the download which they chose to exhibit, and even if the

schedule which the defence are asked to agree was drawn exclusively from the exhibited material, the defence could not verify the accuracy of the schedule without reviewing the whole of the download and were therefore entitled to have the whole download served as evidence. He submits that the telecoms data as a whole was central to the prosecution case that the communications between the four defendants could only be explained by their involvement in a conspiracy. Ms D was able to use the material disclosed on 2nd February 2016 to show otherwise.

38. Mr Montgomery argues that the terms of paragraph 1(5) of Schedule 2 provide a sufficient control mechanism to ensure that defence representatives cannot claim remuneration for reading material which is plainly irrelevant to the case. As to the exercise of the discretion given by that sub-paragraph, Mr Montgomery does not seek to go back to the test – applied in some earlier cases – of whether the relevant material would, in the pre-digital age, have been printed out. He relies on the decision of Costs Judge Gordon-Saker in Jalibaghodelezhi [2014] 4 Costs LR 781, in particular a passage at paragraph 11. The Funding Order which was in force at the material time in that case was in this respect in terms similar to the 2013 Regulations. The learned Costs Judge said -

> "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. 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. 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 (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."

The LAA Guidance to which I have referred above is consistent with that judgment.

39. The overall submission of Mr Montgomery is that Costs Judge Simons was right to conclude that the entirety of the downloads were served prosecution documents, that the learned judge therefore had a discretion, and that his exercise of that discretion cannot be faulted.

40. Both counsel agreed that neither the word "served" nor the phrase "served on the court" is defined in the Regulations. Mr Bedenham submits that the concluding words of paragraph 1(3) of Schedule 2 must mean that evidence or exhibits can only be part of the PPE if they are either served as part of the initial evidence and exhibits on the basis of which the case is sent for trial, or are subsequently served by way of notice of additional evidence (even if, as in Qu, the formalities of such service are overlooked). He relies in this regard on the decision of Costs Judge Gordon-Saker in Ward [2012] 3 Costs LR 605.

Discussion:

41. In Jagelo (SCCO Ref 96/15), a case primarily concerned with the special preparation provisions of the graduated fee scheme, Master Rowley referred (at paragraph 51) to paperless trials and suggested that the concept of PPE is unlikely to survive long when pages cease to be provided on paper at all. He suggested that the present graduated fee scheme may therefore be time-limited. I respectfully agree: the digital case system is now in force, and the reference in paragraph 1(5)(a) to an exhibit which "has never existed in paper form" will apply to an ever-increasing proportion of the

exhibits in any given case. Moreover, the Ministry of Justice has recently concluded a consultation exercise in relation to proposed amendments to the litigators' graduated fee scheme, which are intended to reflect the changing nature of evidence in criminal cases. For now, however, the scheme continues to apply.

42. In Furniss, Haddon-Cave J – who, as trial judge, was in the best position to assess all relevant circumstances – concluded that the electronic material was clearly –

> "… integral to the prosecution case and required the defence to review and examine it in detail for the purposes of properly preparing the defence cases. The crucial nature of this material to the trial was not in any dispute."

He emphasised forcefully that the defence advocates had had to check all of the telephone downloads with care if they were to agree to the schedule of calls and other details which the prosecution wished to put before the jury. He noted that it would have been open to the defence teams to refuse to agree the schedule until all relevant material had been properly served.

43. Similarly, in the Edward Hayes case, Nicola Davies J noted that the prosecution relied on a schedule of text messages which were at the core of the Crown's case. She said, at paragraph 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 date 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."

44. I respectfully agree with those general observations as to the duties of the defence when asked to agree a schedule or some proposed agreed facts. The agreement of schedules and/or agreed facts, which reduce a mass of evidence and exhibits to a much more convenient and efficient form, is central to the proper progression of very many criminal trials. But it is important to bear in mind that the role of the defence lawyers is often not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include: it often extends also to 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 therefore often be necessary to review what has been omitted before being able to agree to the accuracy of that which has been included.

45. It is of course also important to bear in mind that the prosecution are not obliged to call every witness who may have some admissible evidence to give about the facts of a case, and that the prosecution are obliged to follow the provisions of the CPIA in relation to disclosure of unused material. The distinction between evidence and exhibits which are served, and unused material which is disclosed, is a crucial one.

46. I make those general observations because it seems to me that difficulty has arisen in the present case because both the CPS and the Determining Officer assumed that only the evidence and exhibits on which the prosecution rely can ever be "served", and that "served" evidence is necessarily identical to the evidence and exhibits on which the prosecution rely. Sometimes that will be so; but it is in my judgment a mistake to

think that it will always be so. It is frequently the case that the prosecution evidence and exhibits include material which cannot realistically be said to be "relied upon" by the prosecution, for example because it is an irrelevant part of a statement or exhibit which also contains relevant material, or because it is a part of the material which is inconsistent with the way the prosecution case is put but is necessarily included in order to be fair to the defence. In the present case, as I have indicated, the prosecution exhibited the complete downloads of data relating to seven of the ten seized phones: it seems unlikely that they "relied on" every piece of those data.

47. It will of course sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material. But it seems to me that such situations will not arise very often, because even in the example I have given, fairness may demand that the whole of the data be served, for example in order to enable the defence to see what other use the defendant was making of his phone around the times of calls which are important to the prosecution case. The key point, as it seems to me, is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be

necessary for all of the data from that source to be exhibited so that the parts on which the prosecution rely can fairly be seen in their proper context.

48. This means, of course, that decisions as to the service of evidence and exhibits, and therefore as to the inclusion of material in the PPE, will be case-specific. Insofar as Haddon-Cave J in Furniss may have suggested a blanket approach (which I am not sure he did) I must respectfully disagree with him. But I agree with him that it will very often be the case that, where the prosecution rely on part of the data in relation to a mobile phone, and seek agreement of either those data or a summary of them, fairness will demand that all of the data be exhibited so that the full picture is available to all parties.

49. As cases such as Furniss and Edward Hayes show, it is possible for the trial judge to be asked to make a ruling as to whether particular material must be served in evidence. I respectfully agree with those decisions that the court has that power as part of its case-management powers, though in a particular case it may decline to exercise the power. The court also has the power under section 78 of the Police and Criminal Evidence Act 1984 to exclude evidence on grounds of fairness. But it would in my view be wholly undesirable if trial judges were routinely, or frequently, asked to make such rulings: this is an area in which it ought almost always to be possible for sensible agreement to be reached between the prosecution and the defence.

50. Against that background, and in the light of the submissions made and cases cited to me, I set out the following summary of what are, in my judgment, the principles to be applied to issues such as have arisen in this case:

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. I do not think that "service on the court" is 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 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.

51. Applying those principles to the present case, my conclusions are as follows:

i) On the information available to the Costs Judge, he was plainly entitled – for the reasons he gave, which I have quoted above - to conclude that the contentious electronic material had in fact been served. The shorter of the letters sent on 2nd February 2016 was wholly unclear as to the status of the material sent with it. The longer letter was to my mind clearly intended as a disclosure of unused material rather than as service of an exhibit; but the Costs Judge had to consider that letter in the light of the information available to him as to the central importance which was in fact attached at trial to all the data relating to Ms D's phone. The letter asserted that the material which had already been exhibited was sufficient to enable the defence to "check the accuracy of the timelines"; but the defence contended otherwise, and the Costs Judge was entitled to accept their submissions, as he did at paragraph 11 of his ruling (quoted in paragraph 24 above).

ii) The additional evidence which I have permitted the Appellant to adduce provides some welcome clarification, and has come close to persuading me that the Cost Judge's decision was reached on a mistaken basis and cannot stand. After careful reflection, however, I do not reach that conclusion. As I have indicated above, the view initially taken by the CPS is not necessarily decisive of the status of material for the purposes of counting pages of PPE. In explaining why the relevant material was initially treated as unused, the witness statement belatedly adduced by the Appellant says that the prosecution did not need to rely on the material contained on the "Ongoing disclosure" disc in order to prove their case "because they were not relevant to the issues in the case". That assertion, however, is plainly contradicted by the note provided by defence counsel, and it is a striking weakness of the Appellant's case before me that no evidence has been adduced as to how the case was conducted at trial or as to how the material on the disc was in fact put before the jury. Moreover, the witness statement does not provide any very clear explanation of why the downloads from two of the seized phones were treated differently from the downloads relating to seven other phones: on the face of it, there is no obvious reason why they should have been treated differently, and it is curious that the prosecution should have been unwilling to serve an exhibit which was so important to the case that, if served, it would plainly fall within the LAA Guidance as to examples of material which will usually be counted as PPE. I do not doubt the information which the CPS have provided to the Appellant's witness; but I can only accept the witness statement as evidence of what it says, and not as evidence of what it does not say.

iii) I am therefore not persuaded that Costs Judge Simons was wrong to conclude that the relevant material was a served prosecution exhibit.

iv) Having reached that decision, he was plainly entitled to exercise his discretion under paragraph 1(5) as he did, and to conclude that the material should be included in the PPE.

52. It follows that, but for the concession made by SVS as to their error in relation to 309 pages, this appeal would fail. In the light of that concession, the appeal succeeds only to this limited extent: that the decision of Costs Judge Simons that 1,571 pages of electronic material should be included in the PPE count be varied to refer instead to 1,262 pages.

53. In an attempt to assist those who have to operate the current graduated fee scheme in the digital age, I conclude by sounding two warnings about risks which are illustrated by the facts of this case. First, I would underline the need for all parties to be clear as to the status accorded to particular material: a litigator or advocate who wishes to contend that particular material should be counted as PPE should if at all possible resolve that issue at trial, and ensure that it is recorded in the appropriate notice, rather than leaving the point to be considered at a later stage by the Determining Officer or Costs Judge. Secondly, in a case in which the Lord Chancellor has not made any representations before the Costs Judge, but wishes to exercise her right of appeal to the High Court, any "fresh evidence" should be adduced as soon as possible: failure to do so may cause prejudice to the respondent (who may be given insufficient time to gather evidence in response) and may therefore lead either to the court refusing to admit the evidence or to a sanction in costs.