In the Crown Court at Leeds **T2017 0574**

The Queen

v

MA

Ruling on an application for the court to order the service of raw data discs

1. Counsel for the defendant ("JT" hereafter) has applied to the court for an order that the CPS serve on the defence in this case what is described as the "phone material" but more specifically the 2 discs DP/1A and DP/1B and the PDF report DP2. He asks that they be ordered to be served not as unused material, but as part of the served prosecution case with numbered PPE (Pages of Prosecution Evidence) for the purposes of the LGFS and AGFS, the Litigators' and Advocates' Graduated Fee Schemes.

2. The prosecution, through counsel ("RS" hereafter), resist that application, saying that it is wrong in principle for the court to make such orders and that it is wholly inappropriate in the circumstances of this case to do so.

3. The defendant is charged with money laundering. The indictment alleges that between 16.01.14 and 04.11.15 he entered into or became concerned in an arrangement, namely allowing the bank account of T Limited ("T" hereafter) to be used by persons unknown, knowing or suspecting that the arrangement would facilitate the acquisition, retention, use or control of criminal property by another.

4. The prosecution case is very straightforward. It is based on the movement of monies through the bank account of T, which it is not disputed the defendant controlled. Witness statements and documents, about which no complaint is made, show that in January 2014 the defendant was registered as the Sole Director of T. Barclays Bank dealt with the defendant in the opening of the account for the company which he told them was involved in the wholesale supply of insulation material for houses. The following month he told the bank (see J960-961) that he was a "global wholesaler" with contacts in "pretty much any industry" and that he "knows the (retail) industry from top to bottom". He also told them that he had clients such as L'Oreal and Samsung. In March 2014 he set up a telephone banking arrangement. In the latter months of 2014 he discussed with the bank setting up another business account. A vast number of his calls to the bank and discussions with bank staff were recorded and have been transcribed and are exhibited. (See DCS sections J13 to J19). In August 2015 the bank suspended the account being suspicious that it was being used for "online banking fraud". In September he spoke to them about setting up a corporate account. Throughout he was discussing with them payments to a number of overseas places including Hong Kong and Cyprus. By November 2015 over £4.5 million had passed through the account of which £4.3 million was in cash. On 4.11.15 he was arrested on suspicion of fraud. A white iPhone was seized at the time his arrest - ML JD/1.

5. In the course of interviews which then followed the defendant gave various accounts about his dealings with the bank account. In the 1st interview he accepted being responsible for T and its business account. He said he was responsible for running the business and completing such things as accounts and VAT. He then said that he had 2 silent partners he did not wish to name. He said that he had sourced his own buyers for goods, and had put some of his own money in, but the rest was through the silent partners. He was however unable to give any details of the day-to-day running of the business and could not name a single customer or supplier. He did not know either the telephone number or the exact location of either the offices or the warehouse for the company. In a subsequent interview he named his 2 silent partners as HN and MC and also referred to 2 other men known as I and W. He then said that none of the money restrained with Barclays belonged to him. In a final interview a number of calls recorded by Barclays were played to him. Apart from the first call he accepted that he was the person speaking to Barclays in all the calls. Other than that, he gave a prepared statement denying any knowledge of illegal activity.

6. The prosecution have served evidence from HMRC setting out the details of the relevant tax returns from the defendant and T. They do not provide any basis for there being any legitimate business which would have enabled the defendant to pay those sums through the account legitimately.

7. The defence statement asserts that "it is not accepted that the electronic transfers representing credits received into the bank accounts were criminal property before they were transferred" and further that "the defendant did not know or suspect that his actions would facilitate the transfer of criminal property, and maintains that the property was not criminal."

8. JT pursues that approach in his skeleton argument and submissions saying that there is no proof that the monies passing through the account were criminal property prior to them passing through the account. In my judgement that is a submission without any substance given the evidence to which I have referred. That evidence provides an abundant source of material upon which a jury properly directed could conclude that the monies passing through the account were criminal property. Of course the jury may be persuaded not to come to that conclusion, but that will be a matter for them.

9. There is another paragraph in the defence statement which says "if the Crown are to rely upon the contents of telephone download report KD 15_0704 it must be served as used material as until that point data said to have been extracted from it will be considered by the defence to be inadmissible. As such the defendant will not receive advice upon its contents as it is not in evidence. As such no comment is made upon data said to have been extracted from that report in this defence statement." In fact the reference KD 15_0704 is a reference number for the case on one of the police systems. The download and report are given reference numbers as set out in para 12 below.

10. That paragraph in the defence statement encapsulates the argument that JT has advanced before the court.

11. Before coming to the details of his argument it is important to consider exactly what prosecution have produced and rely upon.

12. The iPhone ML JD/1 seized at the point of arrest by DC Dean was then examined by PC Parkinson. He did a number of things. He took some photographs of what was exhibited on the phone screen on several occasions. He then subjected the phone to an examination using forensic software to do so. The outcome of that examination was the production of 2 discs of data from the phone - DP1A and DP1B, and the PDF report of the contents – DP2.

13. The fact that it took 2 data discs to accommodate the totality of the data on the phone will of course come as no surprise to anyone who has any understanding of modern technology.

14. DC Killey then examined DP2 and has produced various parts of it as "extracts". These extracts are produced by him as exhibits and numbered with his initials RMK plus a series of successive numbers. In his skeleton argument RS sets out what they reveal – a series of text messages covering the summer and autumn of 2015 when this offending was in full swing. They are texts which on the face of it are exchanges between the defendant and Barclays Bank and interspersed with those are texts with persons whom the prosecution allege were involved in the money laundering with him. They are not selected but are the full string of texts for the relevant period. They are powerful evidence in support of the prosecution case. There are then some selected texts in relation to specific events such as "cashing out"; obtaining a "burner phone"; getting a "car clocked"; getting cheap hotels on "dodgy cards". There are also some WhatsApp chats abut ordering Samsung phones and saying they have not arrived; and some other subjects also. All of these messages and communications go to the heart of the matter that the defence have put in issue, namely whether money passing through the bank account the defendant controlled was criminal property. On this evidence a jury could clearly come to the conclusion that the prosecution had established that that was the case in the absence of any apparent legitimate source of monies of that amount being available to the defendant or to T.

15. The question arises as to whether this evidence downloaded by Parkinson and examined and extrapolated by DC Killey is admissible as evidence in the way that it has been produced.

16. I pause at this stage to note that this is not a new argument before the courts in Leeds. It is an argument that has been run on a number of occasions over a number of years. In 2015 this was recognised by the CPS and the police as an issue that they needed to address. In September 2015 the then branch prosecutor, Mr Andrew Penhale, produced a document which I annex to this judgement, in which he set out the policy that would be followed when phones were seized or communications data was obtained. My understanding is that since early 2016 that is the process that has been used in determining what material should be served as part of the prosecution case and what should be supplied and in what circumstances as unused material. In short the process involves the downloading of the entire phone data; the identification of potentially relevant strands of material (such as texts, email messages, video footage, internet searches, and web-based social media chats) and copying that onto a disc; the analysis of that disc and selection of material actually considered relevant to the prosecution case; the preparation of searchable files (usually on excel spreadsheets) which set out the evidential material upon which the prosecution rely. A copy of the original download will be supplied to the original owner of any seized phone via his lawyers and arrangements will be made for co-defendants' lawyers to have access to a copy of the material in a controlled environment so they can be satisfied about the accuracy of the material served and sometimes they are provided with copies of certain parts of the

download, care being taken not to disclose material that is private and has no relevance at all, such as family photographs.

17. On the whole litigators and advocates have accepted until recently that that is a proper approach and many cases have been dealt with on that basis.

18. More recently, and driven entirely by a supplementary argument, that all the material served must be served as part of the prosecution case and given "PPE" status in order to enhance the fees that will be paid to the litigator and the advocate, there has been an increase in the number of applications for such service to take place. From my perspective as a Resident Judge of a busy court centre it seems that this has now become a cottage industry amongst certain defence practitioners. As appears in Mr Penhale's document at paragraph 15 when the case involved raw telephone data rather than the telephone download, the original disc of raw data was referred to as a "golden copy". Thus the discs that are now sought to be served with PPE as part of the prosecution case are often referred to as the "Golden Discs". One can see why that is. This case is one in which the representation order pre dates 01.12.17 when the PPE cap for litigators was reduced from 10,000 to 6,000 pages. In a large scale fraud (which is class K in the banding of cases) if we assume that the 'paper PPE' was 3,000 pages and it was a 2 day trial (and I take that length as it has not escaped the notice of many judges how many of these cases plead on the 2nd day of the trial), the litigator's fee for that case would be £31,615.84. If a golden disc was served that took the case up to the cap of 10,000 pages the litigator's fee would then be increased to £105, 875.75, an additional £74,241.91. The similar increase in the PPE page count for the advocate in a two day trial would take the fee from £5,819.28 to £14,051.28 an increase of £8,232.00. Of course for the litigator the actual payment per page of PPE varies according to the class of the case. But these figures are those that apply in the highest level class and show the potential rewards for both litigator and advocate when such orders for service are made. Further, many of these cases, unlike this case I am dealing with, are multi-defendant cases and that additional cost to the Legal Aid fund is multiplied by the number of defendants in the case, as what is "served" on one must be served on all. I can therefore well understand why this argument is pursued in case after case, and why rulings ordering the service of data as PPE are circulated and cited. As I said it has become a cottage industry.

19. The most recent legal aid statistics show that the workload in the quarter to December 2017 is down compared to the same quarter in 2016. However, although the magistrates' court expenditure is down 9% the same as the reduction in workload, in the Crown Court whilst the solicitors' workload is down by 7% the expenditure has increased by 1%. The advocates' workload is down by 4% but expenditure is only down by 2%. There is a caveat in the report stating that the figures should be treated with caution as they may be revised when claims are assessed further on appeal and further payments added to the value of some of the completed claims. Those appeals will no doubt in some cases include claims for material of the sort I am considering here. It appears therefore that even before any such appeals the payments on a fixed fee scheme have not gone in the same direction and to the same level as the downtown in workload. It seems to me to be clear that the increasing number of cases where golden discs are being served and paid as PPE up to the limit of the cap is a significant factor affecting this direction of travel. Certainly I am given to understand that a high proportion of high value LGFS claims now include discs of electronic evidence. This is of course significant when you consider that this small minority of cases are taking a disproportionate amount of the LGFS/AGFS fund spend, which will inevitably restrict any

wider distribution of the monies that would otherwise have been available from a downtown in the work load.

20. JT has cited in his skeleton argument a number of decisions where judges have ordered the service of such data discs as PPE. Of course he relies not only on the decisions of several circuit judges (and one High Court Judge) who have made such orders for service but also on decisions in taxation appeals determined by two High Court Judges sitting with assessors who have said that such data should be treated as PPE even when served as unused material.

21. However he begins his argument by taking a point about admissibility. He says that in this case the prosecution are in breach of the real or best evidence principle and that they are purporting to produce hearsay material without having made the relevant application, which he by implication infers should be refused as 'the original' should be produced which he says is the whole of the data file. He says that unless that is served then it is not evidence. He relies in support of his argument on the various decisions to which I have just referred which he says establish the principle that in cases concerning digital evidence full data sets should be served as only the full set is the true evidence.

22. In my judgment his argument is fallacious from start to finish. There are several reasons why that is the case.

23. First, the origin of the evidence is a set of digital data. It does not exist in its original state as a document. The phone has been used as we all now use phones not only to make calls, but also to send texts, to use Apps such as WhatsApp, and to take photographs. We also send and receive emails and browse the web using the phone. The phone has made a record in its memory of those events and transactions. But you cannot open up the phone and read the record as you would a document. It is possible by the use of software programmes to download the digital memory and then to produce material in a readable or visual format. However there is no human intervention, apart from starting the operation of the programme, involved in creating that product. The law has long recognised the distinction between computer products that are dependent on human input and those that are not as being a significant distinction – see *R v Coventry Justice, ex parte Bullard* (1992) 95 Cr App R 175.

24. The law that I can just remember – ss.68 & 69 of PACE 1984 – in relation to the admissibility of computer records and proving the accuracy of the same, was repealed by s.60 of the YJCEA 1999. The explanatory note for s.60 stated "Following the repeal, the ordinary law on evidence will apply to computer evidence. In the absence of any evidence to the contrary, the courts will presume that the computer system was working properly. If there is evidence that it may not have been, the party seeking to introduce the evidence will need to prove that it was working."

25. This is now set out in s.129 of the CJA 2003.

    (1) Where a representation of any fact—

        (a) is made otherwise than by a person, but

        (b) depends for its accuracy on information supplied (directly or indirectly) by a person,

the representation is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate.

(2) Subsection (1) does not affect the operation of the presumption that a mechanical device has been properly set or calibrated.

26. However there is a further point in relation to JT's assertion that this is hearsay evidence. The prosecution are not relying on the texts as proving the truth of things said in the text (which would be hearsay evidence), rather they are relying on the fact that the things being said in text messages sent by the defendant show his participation in a criminal enterprise.

27. The text messages as recorded on the phone are the real thing. The witness who downloads them using a computer programme is not making any assertion he is simply producing the digital thing that exists on the phone. He can provide that to someone else, in just the same way that someone who goes to a crime scene and downloads from a digital camera a copy of the digital file that can be "played", can pass that digital file to someone else who can then put it in evidence where anyone with the appropriate software can then play it for others to view.

28. In relation to the service of evidence the Criminal Procedure Rules Committee have provided in the Criminal Practice Direction at CPD 3B for the pagination and indexing of served evidence. Of course the Rules and the Practice Direction were written when paper bundles were served in all cases. That is no longer the case, as in the vast majority of cases the case is now served digitally using the Digital Case System. However the DCS has a method of counting the pages so as to enable fees to be paid in accordance with the LGFS and AGFS. But the Practice Direction provides at CPD 3B.5

> "For the purposes of these directions, the number of pages of prosecution evidence served on the court 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 defendant; and
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> (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,
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> but does not include any document provided on CD-ROM or by other means of electronic communication."

29. That Criminal Practice Direction recognises that evidence served electronically is in a different category from ordinary statements and exhibits. But this case raises an issue beyond that foreseen in the CPD. The CPD is speaking about documents served electronically. In my judgement the download of a digital file which is capable of being viewed with the assistance of software in a readable format is yet a further step away from paginated documentary evidence than that envisaged in CPD 3B.5.

30. In my judgement it is the failure to understand what is the true nature of digital evidence, that has led judges to go down the route they have done in ordering the formal service as part of the prosecution case of thousands of "pages" that in reality do not exist and which will never be read. I myself recall, while still at the bar, and when download evidence first

began to be served, it was served in printed form on sheets of paper, although in nothing like the volume now involved. Litigators and advocates protested that this was unmanageable and asked for it to be served on Excel spreadsheets so that it could be searched. In no time at all that became the normal practice.

31. Much has been said in the various cases about the need to check the various schedules of calls made and/or received against the original. That sounds not only laudable but necessary, until you actually think about what is involved. When dealing with telephone data the making of each call or the sending of each text is represented by a line of data produced by the service provider's software from the digital records created when those calls are made and texts sent. When that file is copied each line will be copied. When a filter is applied and a selection of calls to particular people is extracted each of those lines will remain what it was on the original file. If anybody imagines that we are in some way dependent upon a person copying lines of data and perhaps entering a wrong detail they should be disabused of that idea. I know of no instance where anyone has discovered that a line in such a schedule does not accurately reflect the same line on the original data. That of course is different from checking the "Timeline document" which is often produced in cases. That document is compiled in part from the schedules of calls interspersed with other events so that the jury can read the "story of the case". But that is checking two served documents against each other, both of which are part of the prosecution case and part of the PPE, and that is surely part of the ordinary preparation of any case.

32. What the defence usually do in relation to these schedules of data when served as part of the prosecution case will of course depend upon the defendant's instructions.

33. That is why it will be important to take his or her instructions on the material served as soon as possible. The first issue is usually attribution - if it is said to be his or her phone the defendant will have to decide whether they accept that. If not, then they will need to address the evidence upon which the prosecution rely in saying that it is their phone. If they do accept that it was their phone, then they will need to say why they were making what are said to be significant calls to particular people at particular times. They may well admit making the calls but say that the subject of discussion was quite innocent, that they were discussing a future fishing trip rather than an imminent drugs deal. Sometimes the prosecution rely upon the fact that there are a lot of calls between particular people and want to put the pattern before the jury. In those instances the defendant may say that it is not dissimilar to their pattern of calls with other people about whom the prosecution do not assert criminality. In those circumstances it will be necessary to examine the rest of the data. However the way that that is done is by using the filter tool on the spreadsheet, selecting another number or numbers and producing a list of such calls in identical format to that which the prosecution have produced. That and other analyses of the call data can be carried out using the filter tool in a matter of seconds. The result of that exercise may or may not support what the defendant says.

34. I have considered all the various authorities cited by JT in his skeleton argument and I find in none of them any understanding of what it is that is actually done by litigators and advocates with the files that are being sought to be served as PPE.

35. One of the early cases that is cited is that of *R v Furniss & others* [approved ruling 21.01.15] a case at first instance being heard by Haddon-Cave J at Nottingham Crown Court. I quote from parts of the written ruling using the original paragraph numbers:

> "11. The Prosecution has not paginated the material underpinning the Schedule, nor included it as part of the Page Count of served material, i.e. the PPE. The Prosecution's Notice of Additional Evidence ("NAE") dated the 3rd November 2014 purported to cover the service of only 3,446 pages of PPE, comprising 2,679 pages of exhibits and 767 pages of statement. This additional material amounted to a further 24,407 of served pages of evidence. I understand that the additional material itemised in the schedule to the Order attached to this Ruling includes only the most relevant material served by the Prosecution on the Defence and does not include material not covered by the Graduated Fee Scheme (see below), such as the numerous video exhibits in this case. I also understand that the page count of 24,407 has been done on a conservative basis, i.e. on the PDF file pagination, which is more modest than the Word or Excel exhibits of the same material.
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> 12. It is clear, in my judgment, that the material listed in the schedule to the Order was 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.
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> 16. ……. I understand that the Defence teams pointed out a number of respects in which the Prosecution Schedule was wrong, inaccurate, or incomplete. In addition, on a number of occasions during cross-examination, the Defence introduced further telephone evidence from the pool of Prosecution telephone material in order to supplement aspects of the Prosecution Schedule or to put telephone calls or texts or silences in proper context. None of this would have been possible had not the Defence advocates spent a considerable amount of time, and effort, reading and studying this base material served and exhibited by the Crown as part of their case.
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> 20. The material covered by PPE are all matters of evidence in 'document format' (i.e. which could have been traditionally written/typed/printable evidence) which the Crown serve as part of their case in the form of the Committal Bundle: viz. statements and exhibits and NAE, normally including witness statements, interviews, photographs, charts etc.
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> 24. Prosecuting authorities have, for quite understandable reasons of technical convenience and saving printing costs, taken to serving large tranches of material on disc which would have previously appeared in written/printed form by way of un-paginated electronic format. In the past, material such as telephone records, telephone downloads, even photographs, would have been printed off in paper format and would, therefore, automatically have formed part of the printed PPE material served by the Prosecution. Now such material is served electronically in digital format as explained above."

36. It is to be noted in para 24 the judge speaks of "serving large tranches of material on disc which would have previously appeared in written/printed form by way of un-paginated electronic format". I do not believe that that is the case. This is not a matter of putting onto disc what had originally been written or typed by hand. This is in reality the production of a

quantity of digital material which can be produced in a viewable and readable format so as to be able to be understood, but the totality of it will never be read in the manner in which traditional statements are read. It is a different animal altogether.

37. Later in the paragraph he says "In the past, material such as telephone records, telephone downloads, even photographs, would have been printed off in paper format and would, therefore, automatically have formed part of the printed PPE material served by the Prosecution. Now such material is served electronically in digital format as explained above.", I am afraid that I again disagree. The pages on which the prosecution rely are of course printed on schedules and tables and are included in the paginated bundle. However the idea that the whole of the unused data was similarly historically served in a paginated bundle is simply not true.

38. He also speaks of the work of the defence lawyers, both litigators and advocates. In para 12 he says they must "review and examine in detail"; in para 16 he speak of the "considerable amount of time, and effort, reading and studying this base material". But all of this is on the basis that they will have spent hours pouring over the 24,000 pages of documents. I don't accept that such work as he appears to have envisaged takes place in the way he describes.

39. I acknowledge that he was told, and I accept that it will have happened, that as a result of examining the underlying material, matters were pointed out to the prosecution and schedules were amended and other material added in. He refers to occasions where the defence were able to show that "the Prosecution Schedule was wrong, inaccurate, or incomplete". No particulars of what was wrong are given. I am aware of the dangers of speculating, but I am confident that those errors will not have included a call being recorded that did not take place or of which the particular details were wrongly itemised on the original schedule of calls served as part of the prosecution case. I do understand and readily accept that as a result of some work with the filter they will have been able to readily list other calls of interest that they wanted to add to the schedule. But I cannot accept that that justifies an additional fee of £'000s to both litigator and advocate of the scale I have identified at paragraph 18 above.

40. Whenever there are real issues about phone data that need the underlying material to be examined or checked then of course that is not done by the lawyers, but the lawyers obtain prior authority to instruct experts who do that work and provide a report on the issues. That occurs regularly when cell site evidence needs to be checked and I have never known any difficulty about the instructed solicitor getting that authority, obtaining the report and calling the witness to deal with the issue. Similarly in indecent image cases where a phone needs to be examined and a report obtained about how those images might have come to be on the phone other than by being downloaded by the defendant, experts are regularly instructed and do the necessary work.

41. So it seems to me that the basis of the order in the Nottingham case was flawed in two respects. First the ruling does not recognise the genuinely different nature of truly digital material. Second it does not really understand how advocates deal with such material, but accepted bland statements about what had to be done without a real understanding of how that work was done given the digital nature of the material being examined.

42. The next case cited is that of the *Lord Chancellor v Edward Hayes LLP and another* [2017] EWHC 138 (QB). This was decided by Nicola Davies J sitting with Master Whalan an assessor.

This was a taxation appeal in relation to the decision of the Costs Judge to include in the PPE, 4,325 pages of material served on disc as unused material, the Determining Officer having refused to do so. In his decision the Costs Judge cited the case of *Furniss* quoting the concluding paragraph in which Haddon-Cave J had said "the position in law is clear: telephone, text and cell site evidence served by the Prosecution in digital form must now be included in the PPE page count and paid as such". The Cost Judge had also said

> "The (Legal Aid) Agency's main argument for disallowing the electronic evidence is that the relevant information has been extracted and therefore the remainder does not need to be considered or paid for. Realistically, there is no way that the prosecution can always be clear as to which information is or is not relevant to the defendant's case and so it is not simply a question of the prosecution making sure that all relevant documents are provided. Lines of argument to be run by the defendant cannot always be foreseen by the prosecution. Consequently where the evidence is important, the defendant must be entitled to look at the underlying evidence that surrounds it and not simply what the prosecution considers needs to be extracted to prove its case. Such information needs to be scrutinised by the defendant's legal team and it is entitled to be remunerated for so doing."

43. Nicola Davies J refused the Lord Chancellor's appeal against that decision. JT relies upon parts of her ruling which he has highlighted and to which I shall refer, again using the paragraph numbers from the original judgement:

> 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 ….. 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 the 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."
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> 21 "…. Each new page of extracted data had to be looked at and checked against its identified counterpart in the original download. This is not duplication but additional work."
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> 24 "Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown and to check the accuracy of the data finally relied on by the Crown. I regard the stance taken by the appellant in respect of the surrounding material on this disc as unrealistic. It fails to properly understand still less appreciate the duty on those who represent defendants in criminal proceedings to examine evidence served upon them by the prosecution."

44. It is apparent from the judgment that the judge was not given all the help she would have liked in the case. In particular various critical references were made to the conduct of the appeal on behalf of the appellant. I note in particular it was said "During the course of the appeal it was the Court which pressed for information as to what had taken place at trial.

This presentation of the case on behalf of the appellant was striking for the absence of any knowledge as to the dynamics of the original trial". One would have hoped that the appellant, given what was at stake as an issue of principle, would have prepared themselves to help the Court have a real understanding of what had happened in the real world of the trial. It was not to be. I note that the same counsel appeared for the Lord Chancellor in this and the next case (*SVS*). So far as I am aware he is not someone who has experience as an advocate of doing this sort of case at trial.

45. What troubles me is that in addition to the two matters that I have referred to in relation *Furniss*, namely the nature of digital material, and the manner in which material is checked, there is in this case the omission of any reference to the role of the defendant in relation to his or her case. And that particularly concerns me in the case that I am now dealing, where the defence lawyers say they will not ask the defendant about the material until they have had the opportunity to check it. I simply do not understand that at all. The prosecution have served material which they say provides prime face evidence of the case against the defendant. Part of that consists of a series of text messages which they say he was a party to exchanging. Surely the duty of the defence litigator and advocate is to ask this defendant what he says about it. He may say "I never sent that text, I have been fitted up, it's a police and prosecution conspiracy against me". If he does, then clearly the matter will need to be investigated and in all likelihood an expert instructed to examine the phone and do whatever else may be required depending upon the defendant's instructions to check the integrity of the material. On the other hand he may say "that's only half the story, there will be other texts which put this into a different context, my case is…". When that is put into a defence statement there is a duty on the prosecution to re-examine any material they hold and to provide anything that might assist what is said to be his defence or that might undermine their case. Or thirdly he may say "yes I did send that text but it didn't mean what they think it meant, it meant…". That is what is classically known as a "confess and avoid" defence. Or fourthly he may say "All right, it looks like they can prove my guilt, can we try and negotiate a basis of plea …".

46. What I do not understand is the origins of the doctrine that before any instructions can be taken, the defence must check out the authenticity and accuracy of every line of the prosecution case. Nor do I understand how it has been allowed to take root in the way that it seems to have done. Not only has it always been the practice to take the defendant's instructions upon what the prosecution say is their case; it is also the system as set out in the Criminal Procedure and Investigations Act 1996 ("CPIA" hereafter) which provides for initial disclosure, for the provision of a defence statement and for secondary disclosure following the defence statement.

47. Paragraph 24 of the judgment in the *Edward Hayes* case says that "Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown and to check the accuracy of the data finally relied on by the Crown." But surely the first task of those acting on behalf of the defendant when supplied with text messages, was not to carry out their own researches, but to ask the defendant what he said about them. If he denied that they were from him then they would need to look at the context and check the accuracy. It is these "dynamics of the

trial" that should have been drawn to the attention of Nicola Davies J by the appellant in her case. Sadly they were not.

48. I note that in the *Edward Hayes* case defence counsel refused to agree to the admission in evidence of the text messages which had been extracted from the phone until they had been able to check them against the originals. Consequently a disc was supplied, and as a consequence the schedules of texts were admitted. I will return to this when considering the next case. But it seems to me that proper management of the case might have led to this issue being dealt with differently. The judge would have been entitled to enquire whether there was any challenge by the defendant as to the texts the prosecution were relying on as being texts sent and received by the defendant. If so then they were admissible. The next issue was what the defendant said about them as I have set out in the preceding paragraph. The judge would also have wanted to know whether the defence had had the other texts, if there were any others, provided as unused material to enable them to do their checking for context, balance etc. All of that should have been enquired into and the trial would have been able to progress. In the end the prosecution would have been entitled to call the witness who had produced the schedules from the raw data disc and put them before the jury for the reasons I have rehearsed above arising from the nature of digital evidence. We are not told what the defence was in this case, or what the defendant said in his defence statement about these texts. Those matters were not directly relevant to the issues in the appeal given the history of the case. However, it seems to me, that any orders for service of papers beyond what the prosecution produce as part of their primary case, must follow the principles and procedures set out in the CPIA 1996.

49. The question as to what should be part of the primary disclosure was of course addressed in the third case relied upon namely *The Secretary of State for Justice, The Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). This was another taxation appeal, on a smaller scale from the earlier case, there being 1,571 pages of material classed by the Determining Officer as unused material, but allowed by the Costs Judge as PPE. The Law Chancellor appealed and the appeal was heard by Holroyde J, as he then was, sitting with Master Rowley as an assessor.

50. The Costs Judge said in his ruling at para 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."

Consequently he allowed the material to be included as PPE.

51. In the hearing before Holroyde J it is clear that he was given much more assistance, certainly as far as the law is concerned, even though much of it came very late in the day, than had been given to Nicola Davies J. The result is that there is a very thorough and helpful review of the law both in relation to disclosure and in relation to the Graduated Fee Scheme and how claims are to be assessed.

52. At paragraph 5 there are recited the provisions of Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 and their reference in paragraph 1 (5) to documentary or pictorial exhibits which have been served in electronic form but have never existed in paper

form. They are not included within the number of PPE unless the appropriate officer decides that it would be appropriate to include it in the PPE taking into account the nature of the document and any other relevant circumstances. This is clearly critical because it does give to the determining officer ("DO" hereafter) a discretion to count such material as PPE where appropriate to do so. Of course that is dependent upon it having been served.

53. At paragraph 8 reference is made to the Legal Aid Authority ("LAA" hereafter) Crown Court Fee Guidance and how DOs should approach the matter. They will take into account whether the document would have been printed by the prosecution served in paper form prior to 01.04.12. If so, then it will be counted as PPE. If the DO 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 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. That is clearly the correct approach as it enables the DO to ensure that those who have done necessary work will be rewarded. It is certainly not intended to grant a substantial golden bonus to all litigators and advocates simply because there was a mass of electronic data in a case.

54. The judge then refers to how the guidance goes on at paragraph 38 (para 15 of the most recent version of the Guidance) of Appendix D to deal specifically with raw phone data and how the DO should deal with such cases.

55. Having set the procedural background, the judge then at paragraph 13 refers to the CPIA 1996, and to the initial duty of the prosecutor under section 3 to disclose to an accused any material which has not previously been disclosed which "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". Reference is then made to section 5 and the defence statement. Finally there is section 7A which 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.

56. It is perhaps important at this stage to pause and consider that process. In many cases the accused, on advice, when interviewed by the police makes no comment. In those circumstances the prosecution's duty is clearly to disclose anything which they consider might be capable of undermining their case. However their task in relation to assessing what might assist the accused's case is more difficult. If they have any clear clues then they must act accordingly. Otherwise they are entitled to await the service of the defence statement before reviewing any material they have in order to see if there is anything there which might assist that defence.

57. There is however no question but that material served in that way as part of ongoing disclosure is classed as unused material. It is quite different where as a result of the defence statement the prosecution decide to serve something currently unused as part of their case to rebut that which the defendant now asserts in his or her defence statement. In that case the additionally served statements and/or exhibits will become part of the prosecution case with the necessary PPE.

58. The judge then reviewed what had happened in the case and the uncertainty that was said to have arisen because "a disc containing ongoing disclosure in relation to your client" had been served. In addition to a letter enclosing the disc that simply stated that, there was a

further letter sent the same day which was a response to a disclosure request (which was no longer available) but which seems to me to be drawing a clear distinction between what had already been served and upon which the prosecution proposed to rely and other material disclosed so that the defence could draft their own schedules. That letter makes clear that what is served is ongoing disclosure under section 7A of CPIA 1996 and further draws the attention of the defence solicitors to the limitations that Act imposes upon them in relation to their use or further disclosure of the material.

59. In that case the prosecution were clearly asserting that the extracted telephone downloads and billing data were the evidence. They conceded the need for the defence to check the accuracy of the "timeline", a document all judges and practitioners are familiar with, which is a human compilation from other evidence properly served in order to assist the jury to follow what is said to be the unfolding story of the alleged criminality. For reasons that I have set out earlier I agree with the prosecution contention that the Timeline itself could be checked against the accuracy of the extracted evidence which had been served (see para 31 above).

60. The judge then rehearsed the history of the claim for fees by SVS. It began on their request for review to the DO with their assertion that the discs sent with the 2 letters contained "phone evidence central to the case". They said "it is also clear that in order to test the Crown's case properly and prepare the defence for Ms D effectively, full service of telephone downloads was needed to prove the relationship between the defendants." They expanded on that by saying that important parts of the defence were that Ms D 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 her having an affair rather than by her being involved in crime. They stated 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.

61. It seems to me that that confirms some of the things I have already said. On taking the defendant's instructions she said she had no contact with the fourth defendant. Upon being provided with the Excel spreadsheet of the raw data they would select her number in one column, the fourth defendant's number and the numbers of others connected to him from another column, they would have pressed 'enter' and they would then have seen in front of them a screen that showed no calls had been made between those numbers. They would print that off, show the prosecution what it said, and invite an admission to that effect. That analysis is the work of seconds rather than hours. Ms D's explanation of her admitted contact with the first defendant is a classic case of "confess and avoid". The key to that would not be checking the number of calls, although again by entering the two numbers on the spreadsheet and pressing 'enter' they would produce a full list of the calls which they could then use as they chose to do. They key to advancing her defence would be her giving an account of the calls so as to put forward her case in relation to the affair and other matters.

62. The key question as put before the Costs Judge was "whether the ongoing disclosure can be deemed to be served evidence?". The Costs Judge's ruling in favour of the litigators said:

> "However there are cases such as this where it is quite clear that the content of the disc was <u>central to the case</u> (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."

63. It seems to me that there is confusion in that assessment. The content of the disc was the download of the phone and the telephone raw data. The prosecution did not rely upon everything on the disc. The prosecution had selected the material which they said was probative of their case. That they had served. That was central to their case. Nothing else was. It seems to me that a useful analogy is surveillance evidence. There are cases where such observation evidence is central to the case as law enforcement officers describe their observations, sometimes accompanied by photographs, of the activities of the defendants. The undercover operation may have lasted for several months. There will be logs of every day's observations. On some of those days the prosecution may say that nothing significant took place. They will not usually serve statements or logs in relation to those insignificant days as part of their case. On the other hand, depending upon what the defences are, they may become disclosable. When they are disclosed as such it will be as unused material and not as part of the prosecution case, notwithstanding that it could be said that "the observation evidence is central to the prosecution case". It seems to me that that is a better comparison than that advanced on behalf of SVS which suggested that choosing what parts of download material to rely upon was like deleting parts of witness statements.

64. Not surprisingly, the case of *Furniss* and the case of *Edward Hayes* were cited in the appeal. In particular paragraph 11 in the *Furniss* ruling and paragraph 20 in the *Edward Hayes* judgement. I have already referred to each of those paragraphs.

65. Commencing what the judge described as the 'discussion' about these issues he looked forward to a time when a scheme based upon PPE as a proxy would no longer exist. He referred to paragraph 12 in *Furniss* and paragraph 20 in *Edward Hayes*, and said that he agreed with "the general observations as to the duties of the defence when asked to agree a schedule or some proposed agreed facts". He went on to say that the role of defence lawyers "is often not confined to checking the accuracies of the summaries 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." He went on to say that "the distinction between evidence and exhibits which are served, and unused material which is disclosed, is a crucial one" he then went on to describe the difficulties had arisen in that case because of the assumption that served evidence is necessarily identical to the evidence and exhibits on which the prosecution rely. He said "sometimes that will be so; but it is in my judgement a mistake to think that it will always be so." He then spoke of the possibility of the prosecution subdividing an exhibit and serving only part of it on which they rely as relevant to and supportive of their case. He posited the example of a filing cabinet with only one relevant file. RS, for the Crown, relies on that analogy in his written argument in this case. It seems to me that it is not dissimilar to my comparison with surveillance evidence. However he thought that the situations of such sub-division in relation to data would not often arise. He said that that would be the case because "*Furniss* 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 subset 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." He went on to disagree with Haddon-Cave J's blanket approach saying that decisions as to service will be case specific. But he said "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."

66. It seems to me that that reference to fairness gives rise to confusion. Of course fairness requires that the defence have the material in order to carry out whatever checks they want and to look at issues of context and completeness. But there is no suggestion that they will not be provided with that material. So in terms of the fairness of the defendant's trial there is no requirement that this material be served as evidence. It is sufficient for the purposes of the fairness of the trial that it is served as it always has been and as it was in all of these cases as unused material.

67. The issue of fairness of remuneration is a different matter. The two have become confused in all of these cases. It seems to me that a lack of understanding of what digital material is, how it comes into being, how it is handled, and how it is analysed has never been the subject of any real examination in these cases. When it is, then it seems to me that the scheme for payment which gives the DO a facility to include data as PPE deals with the issue of fairness of remuneration. That provision is now set out in the most recent version of the LAA Crown Court Fee Guidance (the earlier version was referred to at paragraph 54 above) in Appendix D at paragraph 14,

> "Therefore, claims for electronic evidence will be assessed according to the following principles:
>
> - Whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012 is a relevant circumstance under paragraph 1(5) of Schedules 1 and 2 to the Regulations that the determining officer will take into account. If the determining officer can conclude that the material would have been printed prior to 1 April 2012, it will be counted as PPE for both the litigator and advocate.
>
> - If the determining officer is unable to make that assessment, the determining officer 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."

68. Further provision is then made in paragraph 24 which provides:

> "Where there is an issue regarding the status of certain material, the determining officer should have regard to the principles set out in paragraph 50 of Lord Chancellor v SVS Solicitors (2017) EWHC 1045 (QB):"

And in sub paragraphs vii) and viii):

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

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

69. It seems to me that that scheme ensures that where the issue of fairness is one of remuneration the DO has the ability to include the appropriate number of pages as PPE having regard not only to the importance of the evidence but also to the amount and nature of the work done and by whom.

70. It is very significant that the judge said in paragraph 51 that "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." Those words clearly resonate with the words of Nicola Davies J to which I have already referred at paragraph 44 above). And so he, like her, had to deal with the case as best he could in comparative darkness as to what had really happened.

71. The judge said that in his view it is wholly undesirable for trial judges to be routinely or frequently asked to make rulings about service. He said it almost always ought to be possible for sensible agreement to be reached between the prosecution and the defence.

72. The problem is that because of the potential financial benefits arising from the service of a golden disc, the defence will almost inevitably ask the prosecution to serve one when it is known to exist. The CPS will quite properly want to draw the distinction between what they are under a duty to serve as part of their case and what they are under a duty to supply as unused material. Consequently they will refuse to agree to serve what they properly regard as unused material as part of the case. In those circumstances judges, as I am in this case, are being asked to make orders for service.

73. This review of the authorities has only confirmed my view that the court must approach these applications with the principles of the CPIA 1996, the Criminal Procedure Rules and the Criminal Practice Direction very firmly in mind. That is where we find laid down, in authority that binds us, clear directions as to how a criminal case is to proceed. The duties in relation to service of the case, primary disclosure, defence obligations to serve a defence statement, and the ongoing duty of disclosure are all clearly laid out and as plain as could be.

74. In the context of that procedure, the courts need to understand the nature of digital evidence. This is not just evidence served electronically, this is a different animal, it is digital material that has come into being in any number of different ways and now exists in all manner of different places including the clouds. As such it is real evidence, not hearsay evidence, although it might possibly contain some hearsay evidence.

75. Then the court also needs to understand how that evidence is dealt with by practitioners. In some instances they need to obtain expert help, particularly if there is to be any challenge to the integrity of the evidence itself. For the most part the digital material will be provided in a searchable and analysable format. When it is, then the analysis that is usually carried out, particularly in order to examine context or to see if it can be viewed in a different pattern, is work that can be quickly and easily carried out with a few clicks on a computer screen.

76. Applying all that to the current application, I am quite satisfied that the prosecution have properly performed the task of serving their case. For the reasons set out earlier I am satisfied that there is a prima facie case to answer and indeed I note that there has been no application to dismiss the charge. The next stage following service in this case was for the defendant to file his defence statement. That he has done but it is clearly defective because it does not deal with significant parts of what the prosecution rely on, namely the text messages. I reject the argument that he is not required to do so until the full data disc has been served as part of the prosecution case. It is, after all, his own phone that has been downloaded. Nobody knows better than him what text messages he sent and received using it. He is perfectly capable of giving instructions to his lawyers about them. And of course he has been supplied with a copy of the full download as unused material. When he has served a defence statement that deals with those matters the prosecution will no doubt consider the issues raised by him and consider what further disclosure if any is to be made, bearing in mind that he already has the full download of the phone.

77. This application is refused.

HHJ Peter Collier QC

The Recorder of Leeds 18th April 2018

GUIDANCE ON THE SERVICE OF TELECOMMUNICATIONS EVIDENCE

1. This paper is prompted by regular problems concerning the service of seized phone evidence and communications data. The issue has become particularly problematic since the costs decision in Furniss which has resulted in frequent defence applications for the service of additional phone evidence, as well as requests for the CPS to provide page counts. Sometimes the service of evidence and provision of a page-count immediately precedes guilty pleas from all parties, thereby demonstrating that the issue is not necessarily one that concerns the administration of justice.

2. The debate has conflated two issues and caused some confusion. The first issue involves an evidential question, namely, whether or not the Crown has properly served their case, sufficient to resist an application to dismiss. The second question involves an argument around proper remuneration for defence solicitors and counsel. The Crown's position on the second question is that, in publicly-funded cases, the question of defence remuneration is entirely a matter between the respective lawyers and the Legal Aid Agency.

3. In CPS Yorkshire & Humberside, it is recognised that there may have been occasions where the served case may not have provided the continuity of evidence which made the Crown able to resist an application to dismiss. When judges have raised the issue, recognition of the problem has prompted further service to plug the evidential gap.

4. This has prompted debate, internally and with the police, about what evidence needs to be provided by the police to meet a proper evidential threshold, for service by the Crown.

A. SEIZED PHONES (when you have the phone handset)

5. It is important to note that modern phones are computers holding sometimes very significant quantities of data which may include texts, e-mails, photographs, audio and video footage, created pictures, word documents, PDFs. The quantity of data may, in some cases, be vast. Any seized phone may therefore contain evidence but it is also likely to contain relevant unused material and also material which is not relevant because it is incapable of having any bearing on the issues of the case. Some of that material may be confidential or sensitive. For instance, there may be pictures of the defendant's family or intimate text messages with his partner which have no relevance to the case.

6. The Crown should treat mobile phones in exactly the same way as any other seized computer and only that material which is required for the Crown's purposes should be served in evidence. The remaining material should be assessed as unused material and disclosure made, as appropriate. For instance, in a case involving indecent images, it would never be argued that service of 2,000 indecent images of children from a device should be accompanied by service of an entire computer hard-drive. Equally, fraud prosecutions would become impossible to manage if seized computers had to have their entire hard-drives served in evidence, in order to produce a small quantity of probative material.

WORKED EXAMPLE – SEE ANNEX A

7. A police officer seizes an I-phone from a suspect and exhibits it as AB/1.

8. A (technical) officer downloads the entire contents to a police hard-drive, creating a copy of the phone at that point in time (bearing in mind that phones will constantly change thereafter, as they accept new data). The (technical) officer gives a reference number to the hard-drive copy of the contents of AB/1, labelling it HD123456 and provides a statement explaining what they have done.

9. The officer in the case then examines HD123456 and identifies various strands of evidence. These include text and e-mail messages, video footage demonstrating association and an internet history which shows the suspect visiting sites of interest. This evidential material is copied by the officer onto a disk which he exhibits as OC/1, the evidential material being OC/1a. The officer does the same with another 5 phones and the evidential product is placed onto OC/1, as items OC/1b –OC/1f.

10. The material on OC/1 is then examined and placed into a chronological spreadsheet by a police analyst / officer to assist in the presentation of the case. The analyst / officer refers to this spreadsheet as PA/1. That forms the basis of the Crown's case. The Crown include in the served case the following:

    a) Statement from the officer who seized AB/1; statement from the (technical) officer who downloaded the contents of AB/1 onto the police hard-drive, storing it as HD123456; statement from the officer who created and exhibited OC/1 and its contents using HD123456; and statement from the analyst producing the report.
    b) AB/1 and other phones retained by the police.
    c) OC/1 – including all the relevant material copied from the various phones OC/1a-f.
    d) PA/1 – Analyst report which summarises all the material relied on by the Crown.

11. We believe that this achieves the object of ensuring evidential continuity.

12. HD123456 is copied in its entirety and disclosed to the original owner of the seized phone AB/1, via his lawyers. The lawyers for linked defendants are not provided with a copy of HD123456 but are given access to a copy of it in a controlled environment, in order to be satisfied that the served material accurately reflects that on the original copy. Some material which had already been identified as disclosable is copied onto a disk and provided to them. Non-relevant material is not shown to them. HD123456, for instance, includes hundreds of photographs of the defendant's family, including children and other's unrelated to the case and intimate pictures of his girlfriend.

B. <u>COMMUNICATIONS DATA</u> (when you have the phone number but not the handset)

13. This may include outgoing call data records, account information (subscriber details, top-up details and payment details) and cell-site information (including incoming calls and

resolution of IP addresses). Whatever the source of the information or type of information produced, it is essentially generated in the same way and should be exhibited as such.

14. In the past, the police obtained data on an intelligence basis, at a point when operations were being conducted covertly. When prosecutions were subsequently instituted, the police were forced to then request the same material again in an evidential form, with a statement from the service provider (CSP). These statements were not from technical staff at the CSP but simply from liaison officers who could not, in reality, give evidence about the accuracy or otherwise of the served computer-generated communications data. The CSPs would only provide statements once it was confirmed that proceedings were to be contested and they charged for the service, costing police £millions. The process built enormous delays into the Criminal Justice System.

15. In recent years, the police have been able to operate a far more rapid and cost-effective process. A police single point of contact (SPOC) will request communications data from a CSP or access and capture the data directly, on receipt of a valid RIPA 2000 authority to do so. It is the SPOC who then produces the received data and stores a "golden copy", from which any evidential material is then obtained. The SPOC will only obtain the data once and will not mention the date it is received, in order to protect any sensitive technique which may be revealed by the timing.

WORKED EXAMPLE – SEE ANNEX B

16. Following a validly authorised RIPA request in relation to a suspected drugs conspiracy, the police SPOC obtains communications data from various CSPs relating to 4 different mobile phone numbers, covering the period 01.01.14-31.12.14:

    07748 ***070 (believed to be linked to the main conspirator X)
    07589***471 (seized from leading lieutenant)
    07898***321 (seized from man in control of drugs)
    07962***123 (belonging to X's 16 year-old daughter).

17. The SPOC provides a statement detailing that he has received the above communications data and saved it onto a CD labelled CD/987654. This includes the following:

    a) Account information: including subscriber details, pay-as-you-go top-up details and payment details (all 4 phones);
    b) Call data records (all 4 phones); and
    c) Traffic data: including cell-site, incoming call data and resolution of IP address (for 070 phone only).

18. The police data analyst or officer (PDA) reviews this material and extracts the following evidential material which he copies to a CD (Exhibit PDA/1) and contains the following exhibits:

    i) PDA/1a – Subscriber details for 123 phone which shows that X is the registered subscriber and address linking to him.

ii) PDA/1b – Payment details for 123 phone which shows that monthly payments were made towards the telecom bill account from X's bank account.
iii) PDA/1c – Details of 3 telephone calls from the 123 phone made to the 070 phone, at times where X is observed on surveillance using a mobile phone.
iv) PDA/1d – f – subscriber information for 070, 471 and 321, showing that all 3 are pay-as-you-go mobiles with no registered subscriber information.
v) PDA/1g – i – payment details for the 070, 471 and 321 phones which show cash top-ups on regular occasions; including a top up of 070 and 471 at a time when both X and the leading lieutenant were observed together at a newsagent where the phones were topped up.
vi) PDA/1j – call data for the 471 phone covering the whole 12-month period, including very regular contact with 070 throughout and heavy contact with 321 shortly before the drugs were received by the man controlling the drugs.
vii) PDA/1k – call data for the 321 phone which was only switched on 2 weeks before the drug exchange and made regular calls to the 471 phone during that period and 5 calls to the 070 phone on the day of the drug exchange.
viii) PDA/1l – call data for the 070 phone covering the whole 12-month period which shows regular contact with 471 throughout and contact with 321 on the day of the drug exchange.
ix) PDA/1m – cell-site and incoming call data for 070, covering the 12-month period which shows that 070 is located proximately with X throughout the period; including an occasion when X is observed using a phone through surveillance, at a time when the 070 receives a call from the 123 (daughter's phone).
x) PDA/1n – IP address resolution relating to internet usage of 070 which links to X.

19. PDA/1 and the exhibits contained within it are served on all parties in a digital, searchable format. Despite defence requests, the Crown decline to provide an estimate of PPE, on the basis that the defence may claim any time spent reviewing the material.

20. The analyst / officer uses the data to create an excel spreadsheet, PDA/2, which includes the various strands of call-data in a chronological order and merges that with surveillance observations and text messages (evidenced elsewhere). The Crown's case is based around regular contact between the 070, 471 and 321 phones, consistent with an agreement between their users to supply the seized drugs.

21. The Crown to include the following in the served case:

    a). Statements from the SPOC, detailing that he has received the various pieces of data, following properly authorised RIPA requests and he has transferred this data onto CD/987654.
    b). Statement from the analyst, exhibiting the various strands of data on PDA/1, containing PDA/1a-n.
    c) Statement from the analyst, describing her creation of the PDA/2 spreadsheet.
    d) Report from the analyst, explaining the attribution of the 070 phone to X, based around: cell-site evidence showing a consistent pattern with X's known location; the link with his daughter's phone at a time when he was using a phone; and his presence at the location of a top-up of the phone, along with that of the 471 phone.

22. Over the period 1.01.14-31.12.14, the 123 phone makes thousands of calls, none of which have any have any link to the conspiracy. The remaining non-evidential data is included on a

non-sensitive unused material schedule and assessed as Clearly Not Disclosable (CND). However, as the accuracy of the PDA/1c exhibit is contested, the defence lawyers are offered the opportunity to view the unused data to ensure that it accurately reflects the original data. The remaining data, including thousands of calls to X's daughter's friends is not served in evidence or disclosed more generally.

23. It is our view that the above process demonstrates a properly served case. The example is intended to highlight that the amount of data served in evidence will depend on the nature of the case involved. Where specific data is required to establish an evidential point (as in the daughter's connection with her Dad's "dirty" phone), there is no reason why that data cannot be plucked out of the raw data and exhibited to prove that point. There is no need to serve the remaining data. Indeed, it should not be routinely served as the vast majority of the data has no relevance and may breach confidentiality and data protection principles.

24. On the other hand, where there is call data which is exhibited over an extensive period, to prove the existence of a conspiracy, it may be impractical to pluck evidential data out and exhibit it separately. In addition, the context of the calls, alongside other phone usage may rightly need to be explored. In these circumstances, the entirety of the call data may need to be served to predicate any prosecution analyst report. On the other hand, where call data is obtained from January-December 2014 but the Crown's case alleges a conspiracy between 1 June and 30 November, the Crown should only serve data between those dates. The amount of data to be served will very much depend on the nature of the case alleged by the Crown.

25. There is no need, nor is it desirable, for the Crown to provide an estimate of PPE, in relation to the served data. It would often be very difficult to do so, in any event, because the material exists in spreadsheets and PDFs, in an electronic form.

Andrew Penhale

7 September 2015