Lord Chancellor v Ian Henery Solicitors Limited

Case No: QB/2011/0255

High Court of Justice Queen's Bench Division

8 December 2011

[2011] EWHC 3246 (QB)

2011 WL 5903341

Before: The Honourable Mr Justice Spencer (sitting with Master Hurst and Mr Alexander Hutton as assessors)

Date: 08/12/2011

On Appeal from

Costs Judge Gordon-Saker

Hearing date: 28th October 2011

Representation

Mr David Bedenham (instructed by The Treasury Solicitor) for the Appellant.

The Respondents did not appear, and were not represented.

Judgment

Mr Justice Spencer:

Introduction

1 This appeal raises an issue of considerable practical importance concerning the payment of advocates and litigators in the Crown Court under their respective graduated fee schemes created by the Criminal Defence Service (Funding) Order 2007 . It raises the vexed question: *when does a trial begin?* The issue in the appeal is whether the case should be paid as a “trial” or as a “cracked trial”, but the question of when a trial begins also arises in other contexts in the graduated fee schemes, for example in relation to calculating trial length.

2 The circumstances of this case commonly occur in the Crown Court across England and Wales, week in week out. A trial is listed to start in the afternoon. The judge is part heard in another case. He is assured that it is a firm trial, and to minimise inconvenience to jurors and to save time next day, a jury is empanelled, sworn and sent away. Next day, before the defendant is formally put in the jury's charge, the prosecution decide to accept a plea of guilty to a lesser charge. The indictment is amended, the guilty plea is entered, and the jury is discharged. For the purpose of the graduated fee schemes, has the case “proceeded to trial”? If so, the advocates and litigators must be paid the fees prescribed for a trial. If not, they must be paid the fees prescribed for a cracked trial.

3 In the present case the decision of the Legal Services Commission, when the defendant's solicitors submitted their claim, was that the case had not proceeded to trial. They were only entitled to be paid for a cracked trial. They were paid £1,459.36. Had the decision been that this was a trial, they would have been paid £1,710.28. The difference is only £250.92. However, with criminal fees for litigators and advocates pared to the bone, the accumulation of such sums can be very significant for individual practitioners. Viewed cumulatively across all the Crown Courts in

England and Wales, the difference must involve a very substantial sum of public funds.

4 The litigators in this case, Ian Henery Solicitors Ltd, appealed to the Costs Judge against the Commission's decision. The Costs Judge, Master Gordon-Saker, upheld the appeal. The Lord Chancellor appeals against the decision of the Costs Judge.

5 Pursuant to article 31 of the Funding Order , exceptionally, the Lord Chancellor is not required to obtain permission for such an appeal. However, it is axiomatic that the Lord Chancellor will only pursue an appeal in a proper case. As Sir Charles Gray observed, sitting a Judge of the High Court in Lord Chancellor v Rees and others [2008] EWHC 316 (QB) , at paragraph 7:

> "… it appears to me that it is incumbent on the Lord Chancellor in any appeal to the High Court to identify some question of law or principle which arises, since the High Court would be slow to differ from the assessment of the Costs Judge on an issue of fact or judgment…"

6 For the reasons I have already identified, I am satisfied that an important question of law or principle does arise in this case, namely the proper interpretation and application of the provisions of the respective graduated fee schemes for litigators and advocates in determining whether, and if so on what date, a case has "proceeded to trial".

7 The solicitors have not appeared or been represented at the appeal. That is understandable. The amount of fees involved is small, despite the importance of the principle, and they made clear in a letter to the court that they have nothing to add to their previous submissions. They rely upon the reasoning of the Costs Judge who found in their favour.

8 In hearing the appeal I have sat with and been greatly assisted by Master Hurst, the Senior Costs Judge, and by Mr Alexander Hutton, a barrister assessor.

The Factual Background

9 Ian Henery Solicitors Ltd are experienced criminal solicitors practising in the West Midlands. They represented a client who was charged jointly with two other defendants on an indictment containing a single count of false imprisonment. On Tuesday 10th August 2010 the case was listed for trial before His Honour Judge Warner in the Crown Court at Wolverhampton, marked "not before 2pm, no witnesses until Wednesday". There had been a plea and case management hearing on 9th March 2010 at which not guilty pleas were entered. The case had been adjourned for trial with a time estimate of 3 days.

10 On the day of trial a grade C fee-earner from the solicitors, a paralegal, attended court to instruct counsel. The court log shows that at 3.05pm the case was called on. The judge confirmed that it was an effective trial. The judge was informed that a prosecution witness (a police officer) was not available, but defence counsel confirmed that he was not required. There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made.

11 At 3.17pm a jury was empanelled and the jurors were sworn. The court log records that the jury was sent home to return at 12 noon the following day, "they are NOT put in charge today, to be put in charge tomorrow". The case was adjourned until 11am the following day.

12 Next day, Wednesday 11th August, the case was called on at 11am and counsel requested more time, which the judge allowed. At 12.40pm the prosecution applied to add a second count to the indictment, against each defendant, alleging affray. The application was granted. At 12.51pm the judge informed counsel that he would discharge the jury, the court log again recording that the jury had not been "put in charge". No doubt the judge was concerned that the jury had already been waiting for nearly an hour. Once the jury had been discharged, all three defendants pleaded guilty. Their cases were adjourned for sentence and pre-sentence reports were ordered.

13 Each of the three defendants was represented by separate counsel. It is not without significance that two of the three counsel claimed the graduated fee appropriate for a cracked

trial, and were paid accordingly. It is not entirely clear on what basis the third counsel was paid, but from the limited records available it looks as though he claimed a graduated fee appropriate for a trial, rather than a cracked trial, and was paid accordingly. For reasons I shall explain shortly, it was slightly to counsel's advantage to be paid for a cracked trial rather than a trial.

14 It is an anomalous feature of the graduated fee schemes created by the Funding Order that *litigators* (such as the solicitors in this case) can find themselves worse off when paid for a cracked trial rather than a trial, whereas in the same case *advocates* can find themselves better off for being paid for a cracked trial rather than a trial. Many of the previous decisions of Costs Judges which I shall examine were on appeals by counsel seeking to have the case treated as a cracked trial under what was, at that time, a more generous earlier version of the scheme, and they illustrate the harshness and inflexibility of the scheme in various situations.

The relevant provisions of the Litigators' Graduated Fee Scheme

15 The graduated fee scheme for litigators is set out in Schedule 2 to the Funding Order . The essence of the scheme is that there are fixed fees, according to the class of offence charged, comprising a basic fee prescribed for each class of offence and varying according to whether the case falls to be paid as a trial, a cracked trial, or a guilty plea. There are then various uplifts and adjustments. For each class of offence there is a cut-off figure for pages of prosecution evidence (PPE). If the number of pages of prosecution evidence exceeds the prescribed figure, an uplift is payable.

16 The basic fee for this case (a class B offence) was £1202.92 as a trial, £1036.20 as a cracked trial and £609.44 as a guilty plea.

17 The litigators' graduated fee scheme, unlike the advocates' graduated fee scheme, makes no allowance for the stage at which a trial cracks. The same basic fee (with the uplifts mentioned) applies whether the case cracks a week after the plea and case management hearing when a not guilty plea entered, or a week before the trial date, or on the day before trial. This is no doubt a reflection of the “swings and roundabouts” ethos of the graduated fees schemes under the Funding Order .

The relevant provisions of the Advocates' Graduated Fee Scheme

18 The advocates' graduated fee scheme is set out in Schedule 1 to the Funding Order . The essence of the scheme is that the advocate receives a basic fee for the case, with uplifts for the number of pages of prosecution evidence (above a certain threshold) and in certain circumstances an uplift for the number of prosecution witnesses (above a certain threshold). The advocates' graduated fee scheme prescribes different basic fees for the same offence according to whether the case is a trial, a guilty plea, or a cracked trial. However, unlike the litigators' graduated fee scheme, a distinction is drawn between the basic fee where the case cracks in the “first third” (in which event the basic fee is the same as for a guilty plea) or in the “second or final third” (in which case the basic fee is significantly greater, but still less than the basic fee for a trial). There are detailed rules for determining in which “third” the case cracks, calculated (broadly) by reference to the period between the fixing of the trial date and the date the trial is due to commence. The purpose, clearly, is to reflect the expectation that the closer to trial the case cracks, the more work the advocate is likley to have done in preparing the case for trial.

19 By way of illustration of the practical working of the advocates' graduated fee scheme, in the present case counsel's basic fee for a guilty plea or a cracked trial in the first third was £802. For a trial which cracked in the second or final third counsel's basic fee was £1,179. For a trial, counsel's basic fee was £1,509.

20 The reason why, in the present case, counsel were in the end better off being paid for a cracked trial rather than for a trial lies in the calculation of uplifts, and the allowance of a separate fee where there is an “ineffective trial”. For illustration purposes, it is worth explaining this in detail.

21 As a trial, counsel's basic fee in this case would have been £1,509. There were 88 pages of prosecution evidence and 13 prosecution witnesses. Paid as a trial, the uplift for pages of

prosecution evidence only applies after the first 50 pages, so only 38 pages would attract the uplift of £1.13, producing a total uplift of £42.94. Similarly, the uplift for the number of witnesses only applies to witnesses after the first 10. So there were only 3 witnesses attracting the uplift of £5.66, producing a total uplift of £16.98. This makes a total fee for counsel, paid as a trial, of £1,568.92. As already mentioned, the records (although incomplete) seems to suggest that one of the three counsel was paid on this basis.

22 By contrast, counsel paid in this case on the basis of a cracked trial received a lower basic fee, £1,179. However, the uplift for pages of prosecution evidence did not have any threshold. Thus counsel were paid for 88 pages of prosecution evidence at £4.03, producing a total uplift of £354.64. There is no uplift for prosecution witnesses where the case is a cracked trial or guilty plea. In addition, however, paragraph 13 of Schedule 2 provides for "fees for ineffective trials". That fee is payable "in respect of each day on which the case was listed for trial but did not proceed on the day for which it was listed, for whatever reason". The fixed fee for an "ineffective trial payment" was £150 per day. Thus the two trial counsel who claimed and were paid on the basis of a cracked trial received in total £1,683.64. That is £114.72 more than they would have been paid had they claimed and been paid for the case as a trial.

The definition of a "cracked trial"

23 There is no definition in the Funding Order of the word "trial". On the face of it that may seem a curious omission, but it may simply be that the intention was to preserve some degree of flexibility. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and in Schedule 2 (for the litigators' graduated fee scheme).

24 The material part of the definition is as follows:

> "cracked trial" means a case on indictment in which –
>
> (a) a plea and case management hearing takes place and–
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence…"

25 The key words in the definition, highlighted above, are:

> "the case does not proceed to trial…"

The issue in this appeal is whether the case against the defendant whom the solicitors represented did or did not "proceed to trial" within the meaning of the definition of a "cracked trial".

26 The Commission gave the following reasons for upholding, on review, their decision that this was a cracked trial:

> "Following receipt of your LF 2 review form in which you claim a two day trial, I contacted Wolverhampton Crown Court. The Court Clerk has stated that the jury were sworn in on 10th August 2010 but not put in charge, but on 11th August 2010, the defendant pleaded guilty. With no evidence called the jury was then discharged… and therefore a cracked trial fee applies."

27 In their written submissions on appeal to the Cost Judge, dated 12th January 2011, the solicitors referred to paragraph 3.4 of the Litigator Graduated Fee Scheme Guidance , published by the Legal Services Commission, last updated on 3rd February 2011:

> "Trial" is defined as including all hearings that pertain to the main case i.e. from when the jury is sworn and evidence is called or from the date of a preparatory hearing, to the

day of the acquittal or sentencing verdict hearing (sic).”

28 The solicitors cited a previous decision of a Costs Judge, R v Alyas [2007] Costs LR 321 , asserting that it was held in that case that a trial which was “settled” by the prosecution offering a lesser charge to which the defendant pleaded guilty was nevertheless a trial for the purpose of the litigators' graduated fee scheme. As I shall explain in due course, that was not an accurate summary of what the case decided.

29 The solicitors submitted that “from the moment the trial starts, we should get paid for reaching the trial stage. The cracked trial stage only applies if the client pleads not guilty at the plea and directions hearing and covers proceedings up until just before the trial”.

30 The Lord Chancellor made written submissions to the Costs Judge, dated 15th February 2011, in opposition to the appeal. A number of previous decisions of Costs Judges were cited. The thrust of the submissions was that these decisions illustrate that where the swearing of the jury had been for administrative convenience only, it did not follow that the trial had begun for the purpose of the graduated fee scheme (or its predecessor). The key question was whether the trial had started “in any meaningful sense”. The submissions took issue with the solicitors' interpretation of the decision in R v Alyas .

31 The solicitors made further written representations, dated 2nd April 2011, in response to the Lord Chancellor's submissions. They contended that the decisions of previous Costs Judges relied upon by the Lord Chancellor were made under earlier different regulations. They submitted that although the “swings and roundabouts” approach of the scheme was supposed to ensure that, on average, litigators were properly remunerated, the “balance is thrown” if the Commission pays only a cracked trial fee when a case has reached trial. They submitted that once the jury was sworn on 10th August, to the layman, and to the defendants, it was a trial day. Their paralegal had attended for two days. It would be anomalous for her to have spent two days in court only for the solicitors to be paid no more than they would have received had the case cracked before the hearing date. The submissions ended with a cri de coeur that “if the Legal Services Commission keeps paying solicitors firms less than they should, then solicitors firms would be forced to give up criminal legal aid work”.

32 The Costs Judge, Master Gordon-Saker, gave his decision in writing on 7th April 2011. There was no hearing before him. He set out the factual history. He referred to the paragraphs quoted from the Litigator Graduated Fee Scheme Guidance . He referred to the authorities that had been drawn to his attention, and to a decision of his own (R v Wembo) which had not been cited. He concluded that a trial starts, at the latest, when a jury is sworn, and it matters not that the defendant may not at that stage have been put in charge of the jury. There is no requirement that evidence must have been called before a trial can be said to have started. He therefore concluded that this case did “proceed to trial”. It was not a “cracked trial”. The solicitors were entitled to be paid a graduated fee for a trial. He allowed the appeal, and awarded the solicitors costs of £350.

The Lord Chancellor's case on this appeal

33 Mr Bedenham, who appeared on behalf of the Lord Chancellor, took us through previous decisions of Costs Judges, and occasionally of High Court Judges, to demonstrate that certain principles have developed from recurring factual situations, and variations thereof. Mr Bedenham made it clear that the Lord Chancellor's purpose in bringing this appeal was to seek to clarify the circumstances in which a case may properly be said to have “proceeded to trial”, so as to achieve certainty and consistency in the interpretation of the graduated fee schemes. He submitted that in the present case Master Gordon-Saker concentrated unduly on the fact of the jury being sworn, when the focus of his attention should have been on whether there was a trial in any meaningful sense. Very much as a secondary point, Mr Bedenham submitted that even if, contrary to his main argument, the swearing of a jury could be regarded as the touchstone for deciding that a trial had begun, the fact that in this case the defendants were not put in the jury's charge meant that even that threshold had not been passed.

34 I have not found this a straightforward case. The instinctive view of a criminal practitioner might well be that the swearing of a jury clearly marks the start of a trial in the Crown Court.

However, it is only by examining the factual situations on which Costs Judges have been called upon to adjudicate previously, and such authority as there is from judges of the High Court at first instance or on appeal, that a properly informed conclusion can be reached. I therefore make no apology for reviewing the authorities in some detail.

The definition of a "trial", outside the context of assessment of fees

35 Reliance was placed by Master Gordon-Saker on authorities in the general sphere of criminal law and procedure where courts have had to consider when a jury trial in the Crown Court begins. In *R v Tonner [1985] 1 All.E.R. 807* the issue of when a trial began was crucial to the decision whether the defendant still had the right, under the Criminal Evidence Act 1898 , to make an unsworn statement from the dock. That right was abolished by section 72 of the Criminal Justice Act 1982 which came into force on 24th May 1983. The new law did not apply "to a trial… which began before the commencement of this section". The defendant had been arraigned at a hearing in April 1983. The defendant was being tried in October 1983. He argued that his trial had commenced when he was arraigned in April. The judge ruled that the trial began when the jury was sworn and the defendant was put in the charge of the jury. That happened after the law changed. Accordingly he had no right to make an unsworn statement from the dock.

36 The judge's decision was upheld in the Court of Appeal. The Court examined a large number of authorities, including Commonwealth authorities. The Court found particularly instructive the judgment of Ritchie CJ in the Supreme Court of Canada in Morin v R [1890] 18 SCR 407 :

> "Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the jury member's oath seem to show this… all that takes place anterior to the completion and swearing of the jury is preliminary to the trial. How can a prisoner be tried until there is a court competent to try him? And how can there be a court until there is a judge on the bench and a jury in the box duly sworn? Until there is a court thus constituted there can be no trial, because there is no tribunal competent to try him. But when there is a court duly constituted the prisoner being present and given in charge to the jury this trial in my opinion commences, and not before."

37 Giving the judgment of the Court of Appeal, Watkins LJ said (at page 818):

> "That expresses more aptly and clearly than we think we could what we deem to be the true position. We go further and say that our experience as judges in the criminal courts leads us inevitably to the conclusion, unassisted by the authorities to which we have referred in the course of this judgment, that it would be wholly insensible to speak of the commencement of the trial as being other than when the jury have been sworn and take the prisoner into their charge , to try the issues and, having heard the evidence, to say whether he was guilty or not of the charge against him, always remembering that it is inevitably a trial by jury, not by a judge." (emphasis added)

It should be borne in mind that practice in the Crown Court in 1985 was very different from today; it would have been almost unheard of for a jury, once sworn, to have to wait for days whilst preliminary matters were decided.

38 On the question of whether the defendant must be put in the jury's charge before the trial can be properly be said to begin, Master Gordon-Saker helpfully referred in his judgment to a passage from Archbold (Criminal Pleading, Evidence and Practice) 2011, at paragraph 4–266:

> "When a full jury have been sworn (or made solemn affirmation where entitled to do so…) the clerk of the court addresses the jury as follows: "Members of the jury, are you all sworn? The [prisoner or defendant] stands indicted for that he on the [*stating the substance of the offence charged in the indictment].* To this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he be guilty or not." Although this is a traditional part of the procedure, it is not essential and failure to follow it does not render the trial a nullity: *R v Desai [1973] Crim L.R. 36, CA* ; R v

> Olivo 28 Cr.App.R 173, CCA ."

39 In R v Olivo (*supra*) the trial had been wholly irregular in that three separate indictments were tried together at the same time. The Court of Criminal Appeal was very critical of the absence of a full shorthand note of that part of the proceedings where, according to the record, "the jury were duly sworn and charged." A verbatim transcript would have shown whether the defendants really were put in the charge of the jury on three separate indictments. The convictions were quashed.

40 In R v Desai (*supra*) the report in the Criminal Law Review is very short indeed:

> "Although giving a defendant in charge to the jury is a traditional part of trial procedure it is not an essential part of the trial and failure to do so does not render the trial a nullity".

Examination of the transcript of the Court's judgment sheds more light on the facts of that case.

41 It was a non-counsel application, in which the Court was considering the defendant's renewed application for leave to appeal on many disparate grounds. One ground was that he was not formally put in charge of the jury. The transcript of the trial confirmed that the indictment was put to the defendant, who pleaded not guilty. The jury was sworn, but instead of reading the indictment to the jury and reminding them it was their duty to listen to the evidence and decide whether the defendant was guilty or not, the clerk of the court merely announced the title of the suit by saying: "The Queen against Ebrahim Mohamed Desai". The clerk then sat down and prosecuting counsel opened the case to the jury. Karminski LJ said:

> "Technically it appears there was a lacuna in the trial in the sense that what is normally done was not done; but, in the judgment of this Court, this is, though an omission, an omission rather in the character of omitting the *allocutus* ; the cases on that topic indicate that while this is part of the traditional business of the court, it is not an essential part of the trial and its omission does not involve a re-trial. In the opinion of this Court, there is nothing in the point. It is abundantly obvious that prosecuting counsel must have outlined the nature of the indictment to the jury in his opening speech and the judge read the indictment to the jury in his summing up before explaining its meaning."

42 *Ex Parte Guardian Newspapers Ltd [1999] 1 All E.R. 65* was another case from the general criminal law in which the court had to decide when a trial begins. The defence wished to make an abuse of process application, and served notice pursuant to rule 24A (1) of the Crown Court Rules 1982 that they required the application to be heard in camera. That rule applied only where the application was that "all or part of a trial" be held in camera. The issue was whether those words were apt to cover a pre-trial application to stay proceedings for abuse of process. The Court of Appeal held that the words "all or part of a trial" meant "all or part of the trial process". At paragraph 10 of the Court's judgment, Brooke LJ said:

> "We should add that it is well settled that the trial does not start on arraignment, unless there is a statutory provision creating this effect. It starts when a jury is sworn and the defendant is put into the charge of the jury (R v Tonner)…"

43 Whilst these authorities provide some general guidance on when a trial does or does not begin, they must be read in the context of the issue which the court was considering in the particular case. They do not, in my judgment, provide any definitive guidance for determining when a trial begins for the purpose of the graduated fee schemes.

44 There are, of course, statutory provisions defining, for specific purposes, the time when a trial begins. For example, in connection with custody time limits, section 22(11A) of the Prosecution of Offences Act 1985 (as amended) provides:

> "For the purposes of this section, the start of a trial on indictment shall be taken to occur at the time when a jury is sworn to consider the issue of guilt or fitness to plead or, if the

> court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted…"

45 There is an identical definition of "the start of a trial" in section 39(3) of the Criminal Procedure and Investigations Act 1996 , in connection with the meaning of a pre-trial hearing at which a judge may make a ruling as to admissibility of evidence or any other question of law relating to the case. This was the valuable and liberating statutory amendment which permitted such matters to be dealt with by the trial judge without the cumbersome and inconvenient formality of swearing a jury and sending it away until the matter had been determined and the trial proper was ready to proceed.

46 Special provision is made for particularly serious cases, including serious fraud, where a judge orders a preparatory hearing under section 7 of the Criminal Justice Act 1987 (in the case of fraud), or under section 29 of the Criminal Procedure and Investigations Act 1996 (in other serious cases) so that the trial is deemed, by statute, to begin with that hearing.

47 Like the decisions in the general criminal law to which I have referred, these statutory provisions do not provide any definitive guidance on whether a case has "proceeded to trial" for the purpose of interpreting the graduated fee schemes. Rather, it is necessary to examine previous decisions of the Costs Judges as issues have arisen.

Other relevant provisions of the Graduated Fee Schemes

48 It is also necessary to have regard to the interlocking provisions of the schemes themselves. For example, as already noted, the advocates' graduated fee scheme specifically contemplates a fixed payment — the "ineffective trial fee"- for any day on which:

> "… the case was listed for trial but did not proceed on the day for which it was listed, for whatever reason."

It is also necessary to bear in mind that the advocates' graduated fee scheme provides for fixed fees to be paid for specified hearings which sometimes take place on the day on which the trial is due to commence. These include fixed fees for an abuse of process hearing (defined in paragraph 10(1)(a) of Schedule 1); hearings relating to disclosure (defined in paragraphs (10)(b) and (c)…); and hearings relating to the admissibility of evidence (paragraph 10(1)(d)).

49 The advocates' graduated fee scheme includes provisions for payment for a hearing of the kind mentioned above (abuse of process, disclosure, admissibility, withdrawal of plea) where that hearing took place on any day of the "main hearing" of the case. The phrase "main hearing" is defined, in paragraph 1(1) of the schedule containing each scheme, as meaning:

> "in relation to a case which goes to trial, the trial…"

Paragraph 10(2) of the advocates' graduated fee scheme provides:

> "(2) Where a hearing to which this paragraph applies is held on any day of the main hearing of a case on indictment, no separate fee is payable in respect of attendance at the hearing, but the hearing is included in the length of the main hearing for the purpose of calculating the fees payable."

50 It is to be noted that in the definition of "main hearing", the phrase used is " *goes* to trial" rather than " *proceeds* to trial". That difference does not, however, in my view affect the interpretation of when a trial starts for present purposes. The phrase "goes to trial" is used elsewhere in Schedule 1 , for example in paragraph 15 which deals with fees payable to advocates for wasted preparation. That paragraph applies if either "the case goes to trial, and the trial lasts for 5 days or more, or the case is a cracked trial and the number of pages of prosecution evidence exceeds 150."

51 The Litigator Graduated Fee Scheme Guidance , issued by the Legal Services Commission (3rd February 2011 reissue) provides, at paragraph 3.7:

> "If the court considered other matters for days or parts of days before a jury is sworn such as disclosure, admissibility, abuse of process or Public Interest Immunity (PII) hearings, then these whole days are not treated as part of the trial".

For reasons which will become clear when I examine the authorities, that guidance is not altogether accurate.

The evolution of the current Graduated Fee Schemes

52 Before I turn to the previous decisions of Costs Judges and Judges of the High Court construing the provisions of the graduated fee scheme, it is necessary to set out briefly how the scheme has changed over the years because this explains the context and basis of some of those decisions. It is also necessary to bear in mind that there have been minor changes to the wording of relevant definitions.

53 The first graduated fee scheme was introduced in 1996 by way of amendment to the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 . The scheme was contained in a new schedule to those Regulations, Schedule 3 , inserted by the Legal Aid in Criminal and Care Proceedings (Costs) (Amendment) (No.2) Regulations 1996 (SI 1996/2655).

54 Paragraph 9(3) of Schedule 3 provided, so far as relevant:

> "A case on indictment in which a pleas and directions hearing takes place is a cracked trial if ….the matter did not proceed to trial (whether by reason of pleas of guilty or for other reasons)….".

However, pursuant to paragraph 2(4) of Schedule 3 , cracked trials were excluded from the graduated fee provisions altogether if –

> (a) at the pleas and directions hearing it was accepted by the court that the trial would exceed 10 days in length (or 5 days where one of the counts was for an offence falling within class I);
>
> (b) the prosecution evidence exceeded 250 pages; or
>
> (c) the number of prosecution witnesses exceeded 80.

55 Thus, in the costs appeals decided under these regulations the issue was often whether the case should be paid as a "cracked trial", where ex post facto "taxation" applied (with counsel submitting the familiar "red corner" claim form), or whether the case fell within the graduated fee scheme where prescribed fees applied, without any discretion on the part of the determining officer.

56 Between 1997 and 2001 there were various minor amendments to the original graduated fee scheme, but none is relevant to the issues in the present appeal.

57 When new primary legislation was introduced in the form of the Access to Justice Act 1999 , it was necessary to introduce a comprehensive new set of regulations: The Criminal Defence Service (Funding) Order 2001 (SI 2001/855). There was no substantive change to the provisions of the scheme, which was effectively reproduced as Schedule 4 to the 2001 Funding Order .

58 The next substantive change to the 2001 Funding Order came in 2004 with The Criminal Defence Service (Funding) (Amendment) Order 2004 (SI 2004/2045). However, none of the changes had a material effect on the issues in the present appeal.

59 In 2005 parliament brought to an end the long standing exclusion of cracked trials from the graduated fee scheme, where there was a trial estimate of more than 10 days (5 days for a class

I offence), in excess of 250 pages of evidence or in excess of 80 witnesses. The exclusion was removed by The Criminal Defence Service (Funding) (Amendment) Order 2004 (SI 2005/2621).

Previous decisions of Costs Judges and judges of the High Court

60 Against this background I turn to the previous relevant decisions of Costs Judges. Those decisions are not binding upon me, but if the decisions disclose a consistency of approach over a significant period it would be wrong to depart from them without good reason. All except three of the cases to which I am about to refer are decisions of Costs Judges. Of the others, two are decisions of High Court Judges on appeal from a Costs Judge. The other is a case at first instance in the Crown Court where Mitting J gave valuable guidance on the proper approach, in that case, to determining when the trial had commenced. In order to discern more clearly the streams of principle and practice flowing from these various decisions, it is necessary to examine them in chronological order.

61 In R v. Maynard [SCCO 461/99] (29th November 1999) , counsel argued he should be entitled to be paid for a “cracked trial”, rather than a trial. The jury had been sworn, the case opened, and the evidence of one of the complainants had been given in chief. Then the defendant changed his plea. As the case had plainly “proceeded to trial”, Master Rogers held on appeal that it could not be a cracked trial. He was sympathetic to counsel's position but there was no “equity” in the regulations to permit him to “stretch a point”. The cracked trial fee would have been nearly double the fee counsel was paid for the case as a trial. In the course of his judgment, Master Rogers said:—

> “At the oral hearing Mr [X] accepted that a trial, though not defined, starts (except in circumstances which are not applicable here) when the jury is sworn, and clearly the jury was sworn here, so, on the face of it, he cannot bring himself within paragraph 9 (3) (a).”

The case had plainly proceeded to trial on any view, so counsel's concession that a trial starts when the jury is sworn was of limited significance. This was, however, the decision which Master Gordon-Saker relied upon in the crucial passage of his judgment in the present case as supporting his conclusion that the swearing of the jury itself meant that there was a trial.

62 In R v. Karra [SCCO 375/99] (23rd February 2000) , the same situation arose. Counsel argued that he should be paid for a cracked trial (rather than a trial) despite the fact that the jury had been sworn, the case opened, and the first witness cross-examined before the defendant changed his plea. Again, the cracked trial fee would have been substantially higher than the trial fee counsel was paid. Master Rogers repeated his sympathy for counsel's position, emphasizing that in all statutory or regulatory schemes a certain degree of arbitrariness may creep in.

63 In R v. Rahman [SCCO 119/2000] (26th May 2000) , there was undoubtedly a trial, but the issue was on what date the trial began. On the first two days of the hearing no jury was empanelled because there was a *voir dire* to determine the admissibility of police interviews. On the third day the jury was empanelled and the trial proceeded. Master Rogers upheld the decision that the trial did not start until the jury was sworn, so the first two days could not be treated as trial days for the purpose of calculating the length of trial uplift. Master Rogers noted that the practice had grown up of dealing with the *voir dire* before empanelling the jury, but that did not affect the position. As will become apparent when I come to much more recent authorities, it is likely that if the same point arose today the decision would be different.

64 These three cases, all decisions of Master Rogers, were considered and distinguished by Master Rogers himself in the important case of R v. Brook [2004] 1 Costs LR 1780 (16th October 2003) . The issue was whether counsel was entitled to be paid on an ex post facto basis because the matter had not proceeded to trial, or whether the case could only be paid as a trial under the graduated fee scheme. The difference was huge. Paid as a trial, counsel would receive only one-tenth of what she would receive if the case could properly be treated as a cracked trial (thus entitling her to be paid ex post facto). The case had been listed for trial on 21st October. There was to be an abuse of process application. The jury was sworn but sent away until the conclusion of the abuse application. When the application was dismissed, the defendant pleaded guilty. The trial would have lasted four weeks. In accordance with the Graduated Fee Scheme Guidance

then current, which was based upon the three decisions of Master Rogers already referred to, the determining officer decided there had been a trial because a jury had been sworn. Master Rogers was persuaded, however, that those three cases were not fatal to counsel's argument because:

> "…..this was not a trial in any meaningful sense".

It had been recognised by everyone, including the judge, that if the abuse application failed there would be a discussion about pleas and that is what happened. Accordingly a cracked trial fee was payable.

65 The concept of "no trial in any meaningful sense" is one to which I shall return, because the Lord Chancellor submits that it is, in essence, the proper test.

66 In *R v. Baker and Fowler [2004] 4 Costs LR 693 (17th June 2004)* Master Rogers was faced with a similar situation on appeal by counsel for two of ten defendants charged in a drugs conspiracy with a trial estimate of 7 weeks. The trial was due to start on Monday 9th June. One of the principal defendants was wavering over his plea. The judge allowed more time for counsel to take instructions. The principal defendant was still wavering on Thursday 12th June. The court could not sit on Friday 13th June so the judge decided to empanel a jury, which was then sent away until Monday 16th June. The principal defendant decided over the weekend to change his plea and on Monday 16th June his guilty pleas were entered. His pleas were repeated in front of the jury when they came to court at 2pm, and other defendants then also entered guilty pleas. The jury was discharged.

67 The determining officer held that because the jury had been sworn the case fell within the graduated fee scheme in Schedule 4 to the 2001 Funding Order , relying upon the three decisions of Master Rogers already mentioned but not his most recent decision in R v Brook . That decision was, however, drawn to the determining officer's attention when a redetermination was sought, but the decision was maintained. In the course of his judgment, Master Rogers said:

> "I am conscious that my decision in Brook makes an inroad into the fairly rigid rule which defines what is and what is not to be treated as an [ex post facto] case and which turns on the wording of the Regulations, in which I have held on numerous occasions, there is no equity. I am persuaded, however, that these cases are at least as strong and probably stronger than Brook and I ought to follow Brook rather than Maynard , *Carra* or Rahman ."

Accordingly he held that the case fell to be treated as a cracked trial, and should be paid outside the graduated fee scheme on an ex post facto basis.

68 In *Meek and Taylor v Secretary of State for Constitutional Affairs [2006] 1 Costs LR 1 (23rd March 2005)* defence counsel appealed to the High Court against the decision of the costs judge who upheld the determining officer in concluding that counsel must be paid under the graduated fee scheme for a trial, rather than ex post facto as a cracked trial. The appeal was heard by David Clarke J. The defendant was charged with serious sexual offences and was represented by leading and junior counsel. The trial was expected to last 3 weeks. A jury was sworn and prosecuting counsel began to open the case. After only 20 minutes of the opening the luncheon adjournment intervened, and over the adjournment the defendant decided to change his plea. Counsel were paid under the graduated fee scheme on the basis of a one day trial. They argued that this was grossly unfair and provided no proper remuneration for the work involved. They contended that they should be paid on an ex post facto basis. Counsel, recognising that there was no "equity" in the interpretation of the scheme, argued that they were entitled to a special preparation fee under paragraph 17 of Schedule 4 to the 2001 Funding Order . Having examined the prerequisites for such a payment and having found that they did not apply, David Clarke J said at paragraph 19:

> "In my judgment the determining officer and the costs judge reached the only conclusion that they could properly reach, however they might have wished to be able to recognise the harsh anomaly which this factual situation has thrown into such sharp relief. I am acutely aware of the unease of the profession about the Graduated Fee Scheme , which is being ever extended and has been extended in 2004 in the way which I have related.

> I am aware of the mechanistic, somewhat formulaic way in which it has to be applied, and indeed I have some sympathy with the Crown Court staff, who have to apply it in relation to claims made by counsel and who have no doubt in Exeter, just as in other places that I am more familiar with, a good close working relationship with members of the Bar who work regularly in those courts. But I cannot, I am afraid, find a way of avoiding the impact of these regulations. In those circumstances this appeal must fail."

69 In *Secretary of State for Constitutional Affairs v Stork [2005] EWHC 1763(QB) [2006] 1 Costs L.R. 69 (3rd August 2005)* the issue for determination in an appeal by the Lord Chancellor to the High Court was whether counsel was entitled to be paid the daily "length of trial uplift" for the whole length of the trial, or whether his entitlement to such an uplift was limited to the days when he actually attended the trial. The appeal was heard by Gray J sitting with assessors. The case raised a different point entirely from that presently under consideration, but in the course of his judgment Gray J gave a helpful analysis and explanation of the graduated fee scheme, concluding with the following:

> "My assessors have informed me that the amounts laid down in the Tables were worked out as a result of a complex statistical analysis of historical costs across the whole range of Crown Court cases carried out by the Bar Council and the Department prior to the introduction of the scheme. The object of this was to provide "cost neutrality" as between the old ex post facto regime and the new graduated fee scheme. That is to say that, following the introduction of the scheme, barristers as a whole would receive, and the legal aid fund would pay out, neither more nor less in real terms than what had been received and paid in the year preceding the scheme's introduction. To achieve this laudable aim, however, many arithmetical compromises were required with the result that, as was readily recognised at the time, there is a large element of "swings and roundabouts" in the amounts payable to advocates carrying out work rewarded by the graduated fee scheme. Since the scheme was introduced, the Department have added to it and expanded it."

Later in his judgment, at paragraph 29, Gray J observed (albeit not in the present context) that it was "curious" that there was no definition in the scheme of the phrase "the trial".

70 In December 2005, in R v Dean Smith and others , Mitting J made some highly pertinent observations, for present purposes, in the course of trying a case at Birmingham Crown Court. They were carefully considered observations which he intended should be transcribed, and they have been quoted with proper deference in several of the later decisions of Costs Judges (to which I shall return). It is, therefore, important to set out Mitting J's observations in full:

> "I have been asked to state when in my view the trial began for the purposes of the assessment of counsel's fees on the graduated fee scheme. When I made preliminary rulings in this case of some importance and substance, and no little difficulty, I did so exercising amongst other powers my inherent powers as trial judge. I did so before a jury was sworn, in accordance with modern and helpful and economical practice.
>
> "Trial" as far as I could determine, is not defined in the regulations. I would simply say this: that if without an express statutory definition "trial" were to be interpreted by those responsible for assessing fees as meaning the moment which the jury was empanelled until the moment of delivering a verdict,… I would regard that as a misconstruction. In a case such as this (which will be increasingly common in the future) when important preliminary rulings have to be given as part of the trial process, then in my view, and for the purpose of assessing the appropriate fee, "trial" means and should be taken to be the date upon which those submissions are first made to the trial judge in a continuous process which results in the empanelling of a jury without break of time and in the leading of evidence and the returning of a verdict. (emphasis added)
>
> If that were not so, then I have little doubt that there would be a strong and not unreasonable temptation to revert to the previous and inconvenient practice of making submissions after the jury have been empanelled, often in the middle of their consideration of the evidence, at a time which could only disrupt the flow of the trial and

> potentially lead to a disruption of the jury's concentration.
>
> Such a result would be deplorable. It can easily be avoided by sensible interpretation by those responsible of the meaning of the word “trial”. In my view, this trial began on October 3.
>
> Counsel: Would your Lordship allow a transcript to be made of those remarks, please?
>
> Mitting J: Certainly, that is why I made them.”

71 This decision of Mitting J is important because it establishes a line of authority, followed in subsequent decisions by Costs Judges, that, for the purpose of the graduated fee scheme, the trial can be regarded as beginning *before* a jury is empanelled.

72 Next, chronologically, is *R v Alyas [2007] 2 Costs L.R. 321 (7th November 2006)* . This is the decision relied upon by the solicitors in the present case in their written submissions on appeal to the Costs Judge. It was another example of a case where counsel would be seriously disadvantaged if they were paid under the graduated fee scheme for a trial, rather than ex post facto as a cracked trial. The case involved five defendants, charged with offences of disorder and violence at a family wedding. The trial was due to last four weeks. On the first day, 18th April, following legal argument several indictments were amended and consolidated in a single indictment. On the second day the jury was sworn. The case was opened and the evidence was called. At the conclusion of the evidence on 28th April there was a submission of no case to answer. The judge allowed the case to continue only on one of the counts (violent disorder) and directed that he would not be opposed to the substitution of a lesser charge of affray. Next day the prosecution amended the indictment accordingly, and all five defendants were re-arraigned and entered guilty pleas. All counsel submitted claims for payment as a cracked trial, on an ex post facto basis. The determining officer concluded that as the jury had been sworn and evidence heard, a trial had undoubtedly commenced, so the case could not be treated as a cracked trial or a guilty plea.

73 Master Simons acknowledged in his judgment that here was a unique set of circumstances, compared with other costs appeals, in that an additional count was added as a result of judicial intervention. That count was never before the jury. However, the definition of a “cracked trial” in paragraph 9 of Schedule 4 to the Funding Order 2001 applied if “…the matter did not proceed to trial…” The Master said (at paragraph 16)

> “In my judgment *the matter* did proceed to trial, and proceeded for a number of days. The fact that the nature of the trial then changed and, as a result, a new indictment was preferred, to which the defendants pleaded guilty and which was not before the jury, does not in my judgment, mean that the matter did not proceed to trial.”

74 In *R v Sanghera [2008] 5 Costs L.R. 823 (24th June 2008)* the issue, once again, was whether counsel were entitled to a cracked trial fee rather than a trial fee. It was a murder case with a time estimate of 5 weeks. When the case was listed for trial on Friday 16th February one of the defendants pleaded guilty. In respect of the other defendants a jury was selected but not sworn. On Monday 19th February two other defendants pleaded guilty. The prosecution elected not to proceed against the final defendant. The determining officer refused to treat the case as a cracked trial. She allowed the appropriate graduated fee for a trial on 16th February and a refresher on 19th February. She based her decision on the fact that there had been an exchange between counsel and the judge, leading to the swearing of the jury, which meant that a preparatory hearing had begun for the purposes of the Criminal Procedure and Investigations Act 1996 , and that day became day one of the trial. The determining officer also relied upon the observations of Mitting J in R v Dean Smith (*supra*).

75 Counsel's appeal to the Costs Judge was heard by Master Rogers. He referred to his own previous decisions in R v Brook (*supra*) and in R v Baker and Fowler (*supra*). He concluded, at paragraph 32:

> “I have no doubt in my own mind that the appellants are entitled to succeed because this was indeed a cracked trial on February 19th and should have been so treated by

> the determining officer and paid appropriately under the graduated fee scheme in respect of all the appellants."

In other words, even though a jury had been selected (albeit not sworn) on Friday 16th February and sent away, there had been no trial "in any meaningful sense". Contrary to the position in R v Dean Smith (Mitting J's case) there were to be no submissions or arguments before the opening, simply an adjournment for the prosecution to gather and serve their evidence. Nothing at all took place in court on Friday 16th February other than submissions that the jury should not be sworn.

76 The next and (in my judgment) very important decision is R v Bullingham [SCCO Ref: 68/10] (29th October 2010) , a decision on appeal by Master Campbell. Regrettably this decision was not cited to Master Gordon-Saker in the present case, although it had been decided nearly six months earlier. This time the appeal was by solicitors rather than by counsel. They had acted for the defendant in a large scale drugs conspiracy case in which guilty pleas were eventually entered after several days preliminary argument which involved hearing evidence on the *voir dire* . The solicitors claimed to be paid for a trial. The Commission processed the claim as a cracked trial. The difference amounted to £129,020. The trial had been due to start on Monday 26th October. By that stage there were only two defendants who had not pleaded guilty. On 26th October the prosecution agreed to accept a plea of guilty to a lesser charge by the co-defendant, so the defendant now faced trial alone.

77 When the case was called on for trial on 26th October defence counsel explained that he had submissions to make on late service of additional evidence and on non-disclosure of relevant material. The judge did not swear a jury but instead adjourned the case until Friday 30th October for a *voir dire* in relation to the admissibility of the evidence. It was agreed that this issue needed to be resolved before the case could be opened to the jury. On 30th October the judge heard evidence on the *voir dire* and gave rulings in favour of the defence. As a result the prosecution considered their position and agreed to accept lesser pleas from the defendant which were duly entered.

78 In the course of a very thorough and analytical judgment Master Campbell reviewed all the decisions to which I have referred. His conclusion, allowing the solicitors' appeal, was that the facts were akin to those in R v Dean Smith , where the first week had been taken up with substantial and complex legal argument leading Mitting J to conclude that trial had started when those arguments had first been put. Master Campbell was satisfied that he should approach the matter in the same way. He held that the trial began on 26th October when the judge directed that there should be a *voir dire* .

79 In reviewing the authorities Master Campbell said, at paragraph 23:

> "It is common ground that where a jury is sworn and evidence heard, that that is a trial. From R v Brook it is also clear that where a jury is sworn, but no evidence is heard and the defendant pleads guilty, a cracked trial fee rather than a trial fee is payable. However, there appears to be no case on the point that where no jury is empanelled, but evidence is heard, (in this case at the *voir dire*) and as result of the outcome, the defendant pleads guilty, whether in those circumstances, the trial has started".

80 Master Campbell also made it clear in his judgment that whether or not a jury is sworn is not the all important factor. Referring to the decision of Mitting J in R v Dean Smith he said, at paragraph 28;

> "Mitting J… held that the trial had begun, even though he never presided over the swearing of a jury. For these reasons I do not agree that whether or not a jury has been sworn is the trigger point for deciding if the trial has commenced."

81 At paragraph 33, having considered the cases of R v Baker and Fowler, Meek and Taylor v Secretary of State for Constitutional Affairs and R v Sanghera he said:

> "From these cases it is clear that the mere selection and/or swearing of the jury is not

> conclusive of whether the trial has started. On the contrary, they demonstrate that if a jury is sworn and sent home, so that those chosen know they must return another day and that those not selected can be released, there is [a] cracked trial, not a trial, if the defendant then changes his plea. On the other hand, if the jury is sworn and the prosecution opens its case, the trial has started even if minutes later the defendant changes his plea and the trial cracks from that moment."

I accept and adopt that passage of Master Campbell's judgment as a correct analysis of the relevant decisions.

82 At paragraph 38 of his judgment, Master Campbell very helpfully drew together the threads in this way:

> "To conclude, it is my judgment that:
>
> (i) the LSC's contention that as no jury was sworn, the trial could not have started, is wrong, since it is plain from the authorities that the swearing of the jury is not the conclusive factor in deciding under the Scheme when the trial begins.
>
> (ii) Even if a jury is sworn, the trial will not start unless it begins "in a meaningful sense", that is to say, otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.
>
> (iii) If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.
>
> (iv) Where (as here), no jury is sworn, but the judge directs that there will be a *voir dire* involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction."

Again, I accept and adopt this passage of Master Campbell's judgment as a correct analysis of the authorities and a correct exposition of the relevant principles.

83 The final and most recent case was the decision of Master Gordon-Saker himself in R v Wembo (SCCO Ref: 193/10) (21st December 2010) . It was an appeal by leading counsel against the disallowance by the determining officer of daily attendance fees in an attempted murder case which had undoubtedly proceeded to trial. The issue was when the trial had begun. The trial was listed for 16th November. That day and the following day were taken up with argument as to whether anonymity orders should be made in respect of some of the witnesses. That was not an argument about the admissibility of evidence for which fixed fees (under the advocates' graduated fee scheme) could be allowed. The argument was, however, central to and part of the trial and the court had to consider the evidence that the relevant witnesses would be giving. Master Gordon-Saker referred (inter alia) to the cases of R v Tonner, Ex Parte Guardian Newspapers , and R v Rahman . He relied heavily upon the observations of Mitting J in R v Dean Smith .

84 Having quoted the definition of the word "trial" in the Oxford English Dictionary:

> "The examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused person by a court"

he said:

> "It seems to me that if that process involves a preliminary argument which would previously have been heard after the jury was empanelled but is now heard as a matter of "modern…and economical practice" before the jury is empanelled the argument nevertheless forms part of the trial. If a fixed fee were payable then the analysis would be different. But where, as here, there is no fixed fee payable and the hearing is of the kind referred to by Mitting J in R v Dean Smith , then the hearing must form part of the trial."

He concluded, therefore, that the case started on 16th November and counsel was entitled to

daily attendance fees for 16th and 17th November even though the jury was not sworn until 18th November.

The decision of Master Gordon-Saker in the present case

85 Against the background of these authorities, it necessary to examine the reasoning of Master Gordon-Saker in the present case. He referred to the decisions in R v Alyas , R v Maynard , R v Karra , R v Rahman , R v Brook and R v Baker and Fowler . He referred to his own decision in R v Wembo , helpfully setting out the relevant paragraphs of his judgment. He referred extensively to R v Tonner , and to Ex Parte Guardian Newspapers Ltd , and set out the passage from Archbold which I have already quoted.

86 Referring to the guidance in Archbold that putting the defendant in the charge of the jury is not essential, and that a failure to follow that course does not render the trial a nullity, the Master expressed his conclusion as follows:

> "If this is not an essential part of the trial then, it seems to me, a trial can be said to have started where it has not happened. On that basis a trial, starts when a jury is sworn (although the dicta of Mitting J in R v Dean Smith and others would suggest that, for the purposes of graduated fee regimes, it may start before the jury is sworn in the circumstances that he describes). There is no contrary authority binding on me to the effect that the trial does not start until evidence is called. The Commission's Guidance is simply guidance. In R v Maynard Master Rogers would appear to have accepted counsel's concession "that a trial, although not defined, starts (except in circumstances which are not applicable here) when the jury was sworn. Accordingly in my judgment as the jury was empanelled in the present case before the defendant changed his plea the case did "proceed to trial" and therefore falls outside the definition of a cracked trial in paragraph 1(1) of schedule 2. It follows that the solicitors are entitled to a graduated fee for a trial and the appeal is allowed."

Discussion

87 In referring to R v Maynard in this part of his judgment, Master Gordon-Saker seems to have given undue status to the inevitable conclusion, on the facts of that case, that a trial had commenced because a jury had been sworn. As already explained, in addition to swearing the jury the case had also been opened and evidence called before the defendant changed his plea. The key decision, in my judgment, whose significance Master Gordon-Saker did not fully address (although he referred to the case), is R v Brook .

88 In Brook , it will be recalled, a jury had been sworn but sent away until the abuse of process application had been determined. It was held that there had not been "a trial in any meaningful sense". This was an important new stream of authority, followed in R v Baker and Fowler . It is unfortunate that the Lord Chancellor did not draw to the attention of Master Gordon-Saker the decision in R v Bullingham , where the relevant decisions are so helpfully analysed.

89 On the facts of the present case there was nothing which took place on the afternoon of the first day, 10th August, which could be categorised as in any way similar to extended legal argument (R v Dean Smith , R v Wembo) or evidence on the *voir dire* (R v Bullingham) such as to justify the conclusion that a trial had started in any meaningful sense. The jury was sworn, quite properly, for the convenience of the jurors, and the convenience of the administration of the court, and not because the trial was at that moment beginning. The very clear indication in the court log that the jury was not "put in charge" serves to underline the Judge's intention that the trial would not begin until the following day.

90 At the hearing of this appeal we did not have the advantage of oral submissions on behalf of the solicitors. In the course of argument I therefore put to Mr Bedenham possible alternative tests for determining whether, and if so when, a trial begins, endeavouring to draw together the strands of authority.

91 One suggestion might be that a trial begins "when the trial begins in a meaningful sense, and

at the latest when a jury is sworn". The difficulty with the latter part of this formulation is that it undesirable to lay down any rigid rule of this kind which is liable to produce an air of artificiality when (as in this case) there was no trial in any meaningful sense. It would be unfortunate in the extreme if practitioners felt compelled to insist on a jury being sworn at a particular stage purely for financial reasons rather than to further the interests of justice by accommodating and respecting the convenience of members of the public called upon to perform jury service.

92 There may be some cases where the swearing of the jury, or possibly even the selecting of the jury, can properly be regarded as marking the beginning of the trial provided the court is genuinely dealing thereafter with matters which directly affect the orderly progress of the trial so that, even without the jury, the trial is proceeding in a meaningful sense.

93 As was said in R v Bullingham (*supra*), the swearing of the jury is not the conclusive factor in deciding whether and if so when a trial has begun. Nor, in my judgment, should any fine distinctions be drawn depending upon whether the jury has merely been selected, or has been sworn, or has actually been put in charge of the defendant. The key issue is whether the trial has commenced in a meaningful sense.

94 In this regard it is right to note the growing practice throughout England and Wales of selecting but not swearing jurors on the first day of a long trial. It is a practice encouraged and advocated in the Crown Court Bench Book "Directing the Jury", published by the Judicial Studies Board (as it then was) in March 2010, at page 278–9. It sensibly allows the jurors the opportunity to reflect overnight whether they would have any practical difficulty in serving on a jury for many weeks, before they are finally sworn and the defendant is put in their charge next day. Commonly a great deal of important work by the advocates and the litigators, vital to the smooth running of the trial, will be going on in court on the day on which the jury, in such circumstances, is selected but not sworn. Depending on the circumstances, and consistent with the dicta of Mitting J in R v Dean Smith (*supra*), that may well mean that the trial has begun in a meaningful sense.

Conclusions

95 For all these reasons I have reached the clear conclusion that, contrary to the decision of the Costs Judge, this was indeed a cracked trial, because the case did not "proceed to trial" in the requisite sense. The fact that the jury had been sworn was only one of the relevant factors to be considered. There was no trial in any meaningful sense.

96 I would summarise the relevant principles as follows:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard , R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (R v Brook , R v Baker and Fowler , R v Sanghera , Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the

leading of evidence (R v Dean Smith , R v Bullingham , R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith , in the light of the relevant principles explained in this judgment.

97 It follows from my conclusions that some of the propositions set out in the Litigator Graduated Fee Scheme Guidance (last reissued 3rd February 2011) are inaccurate and require revision. For example the purported definition of “trial” in paragraph 3.4 (set out in full at [27] above) is inaccurate and incomplete. Paragraph 3.7 (set out in full at [51] above) may require revision, in the light of the observations of Mitting J in R v Dean Smith . Days when the judge is considering such matters as disclosure, admissibility of evidence, abuse of process and public interest immunity may, depending on the circumstances, count as days which form part of the trial, and the trial is thus the “main hearing” for the purpose of paragraph 10(2) of Schedule 1 .

Costs

98 Mr Bedenham indicated at the conclusion of the hearing that if the Lord Chancellor succeeded in this appeal there would be no application for costs against the solicitors. The solicitors were themselves awarded costs below in the sum of £350 (plus VAT) by Master Gordon-Saker, together with the repayment of their appeal fee of £100. In my judgment, despite the outcome of the appeal, that costs order should stand. The solicitors raised a proper point of substantial importance on which they succeeded before the Costs Judge. The Lord Chancellor pursued this appeal not to penalise the solicitors in the particular case, but to clarify the meaning of the graduated fee schemes. Furthermore, it was an unfortunate omission that the Lord Chancellor did not draw to the attention of Master Gordon-Saker the decision of Master Campbell in R v Bullingham , an omission which may conceivably have led him into error. The costs order made in the solicitors' favour will therefore stand.

Postscript

99 Although the decision in this appeal has been (as it must be) mine and mine alone, my assessors have read this judgment in draft. I am gratified that it is a decision with which they both strongly agree.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 51/16

Dated: 15 March 2017

ON APPEAL FROM REDETERMINATION

REGINA v COLES

CROWN COURT AT CARDIFF

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

CASE NO: T20157052

LEGAL AID AGENCY CASE

DATE OF REASONS: 11th February 2016

DATE OF NOTICE OF APPEAL: 9th March 2016

APPLICANT: Collingbourne Henna Law

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

The appropriate additional payment, to which should be added the sum of £ 500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Collingbourne Henna Law, Solicitors in Newport, Gwent ('the Appellants') appeal the decision of the Determining Officer in a claim under the Litigators Graduated Fee Scheme ('LGSF'). There are two issues for determination. The first (and primary) issue is whether the fee allowed for the trial on the 19th October 2015 should be for a one-day trial or a 'cracked trial'. The second (and servient) issue concerns the assessment of the solicitors' claim for photocopying charges.

Background

2. Mr Grant Coles was one of ten co-defendants charged on an indictment alleging conspiracy to supply a Class A drug, namely cocaine. He was sent for trial at Cardiff Crown Court and pleaded not guilty at a preliminary hearing on 29th June 2015. The trial was listed at 10:30 hours on 19th October 2015 with a time estimate of three days.

3. On 16th October 2015 the CPS contacted the defence to suggest that the swearing in of a jury be postponed to 14:00 hours on 19th October, thereby leaving the morning for all counsel to discuss issues concerning the indictment, some questions of admissibility of evidence and the drafting of thirteen "timeline documents" (factual chronologies relevant to the alleged conspiracy) which would be put before the jury. This proposal was approved by the trial judge.

4. On the morning of 19th October 2015, counsel for the prosecution and defence spent several hours negotiating various matters concerning the admissibility of certain Section 10 admissions, the admissibility (or otherwise) of other evidence and the content of the thirteen timeline documents. As a result of this negotiation – and to the evident surprise of counsel for Mr Coles – the defendant was offered a guilty plea to conspiracy to supply a Class B drug, namely nephedrone (known as NCAT). He agreed to this proposal. At 12:51 hours the court convened and Mr Coles was identified. At 12:52 hours, the defendant was re-arraigned and pleaded guilty. At 12:53 hours the prosecution confirmed that the guilty plea of conspiring to supply a Class B drug was acceptable to the Crown. At 12:56, the defendant's case was adjourned for sentencing on 20th November 2015.

5. I understand that at 14:00 hours on 19th October 2015 a jury was sworn for the trial of Mr Coles' co-defendants. Ultimately, two co-defendants pleaded guilty to conspiracy to supply a Class B drug. The fate of the other co-defendants is unknown.

The LGFS claim and the Appeal

6. The solicitors' LGFS was submitted on or about 14th December 2015. It claimed a graduated fee based on a one-day trial for 19th October 2015. On

or about 21st December 2015, the Determining Officer held that the 19th October should be paid as a cracked trial. A re-consideration was requested and the Determining Officer upheld her decision. This was confirmed in written reasons dated 11th February 2016.

7. A Notice of Appeal was filed on or about 9th March 2016.

8. At the oral appeal hearing on 20th February 2017, the Appellant was represented by Mr A. Keogh, counsel and the Respondent by Ms Weisman, Senior Legal Adviser of the Legal Aid Agency.

The Regulations

9. The Representation Order is dated 3rd February 2015 and so the applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'). The Determining Officer cites paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations, which states:

> ""*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places and –*
>
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*
>
> *(ii) either –*
>
> *(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place…*"

Case guidance

10. I was referred by both the Appellant and the Respondent to the guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

"96. *I would summarise the relevant principles as follows:*

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by the defendant, or a decision by the prosecution not to continue (R v. Maynard, R v. Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v. Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (the present appeal)).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v. Dean Smith, R v. Bullingham, R v. Wembo).

(6) If, in accordance with modern practise in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be

prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J. did in R v. Dean Smith, in the light of the relevant principles explained in this judgment".

11. Ms Weisman refers also to R v. Wood [2015] SCCO Ref: 178/15 and R v. Boland [2016] SCCO Ref: 33/16.

12. In Wood Master Simons considered the issue of a trial or cracked trial where, in circumstances where a jury had been selected but not sworn, the prosecution and defence engaged in "*discussions regarding the contents of schedules and jury bundles*" and also conducted "*other housekeeping discussions*". In finding the solicitor should be paid as a cracked trial and not a trial, Master Simons stated (at para. 11) that:

> "*In this case, the negotiating and agreeing schedules with the prosecution were case management matters that are normally dealt with prior to trial. They were, of course, going to be of assistance to the trial and to the judge and to the jury, and could well have led to the shortening of the trial. However, in my judgment, "substantial matters of case management" go much further and mean that the judge is dealing with issues that require rulings by him regarding the trial, evidence etc. There has been no indication that there were any such rulings in this case, so that the court was not dealing with substantial matters of case management*".

13. In Boland Master Rowley considered the relevance (or otherwise) of work undertaken prior to the hearing date as to whether the court had dealt with "*substantial matters of case management*". He concluded (at para. 16) that:

> "*It seems to me to be clear that the question of whether a trial has begun requires a consideration of the events that occurred on the relevant hearing date only. The fact that work was done to be ready for trial which were immediately ineffective and adjourned does not count towards whether a trial had begun*".

The Appellant's submissions

14. The Appellant's submissions are set out in a letter dated 14th December 2015 and in a Skeleton Argument drafted by Mr Keogh in March 2016. Mr Keogh, as noted, made oral submissions to the court on 20th February 2017.

15. The Appellant, in distilled summary, relies on sub-paragraphs 96(6) and (7) of the guidance in Henery (ibid). The solicitors submit that although no jury had been selected or sworn, the court had dealt with substantial matters of case management and so, in turn, there had been a trial in a meaningful sense. It is accepted that discussions concerning the admissibility of Section 10 admissions would not constitute substantial matters of case management.

Other evidential discussions and, more particularly, the detailed negotiation of the thirteen timeline documents did, conversely, constitute substantial matters of case management. This negotiation had occurred with the consent of the trial judge throughout the first morning of the trial listing. Had counsel for the prosecution and defence not agreed pragmatically to the issues concerning evidence and the timeline documents, these matters would have been argued before and determined by the trial judge, in circumstances where it would be impossible to conclude that the trial had not begun in a meaningful sense. It would be wrong, argues the solicitors, to favour effectively uncooperative advocates whose obstructive approach requires judicial determination, over constructive, efficient or pragmatic advocates who agreed matters without recourse to judicial determination. It was a surprise, in any event, that Mr Coles was offered a guilty plea to Class B drugs, as this had been canvassed by the defence in pre-trial correspondence but rejected specifically by the prosecution.

The Respondent's submissions

16. The Respondent's submissions are sent out in the written reasons dated 11th February 2016 and in Further Representations drafted by Ms Weisman conveyed in an e-mail dated 2nd August 2016. Ms Weisman, as noted, made oral submissions to the court on 20th February 2017.

17. The Respondent, in distilled summary, states that whether or not there had been a trial in any meaningful sense turns on a number of relevant factors applicable to the facts of each individual case. Although the selection and/or swearing of a jury or not is a relevant factor, it is only one factor and not determinative per se. It is common ground in this case that no jury was selected or sworn. Discussions that took place between prosecution and defence counsel on the morning of 19th October 2015 did not constitute "substantial issues of case management". Reliance is placed on the court's approach in R v. Wood (ibid) and R v. Boland (ibid).

My conclusions

18. I find, on the particular facts of this appeal, that on the 19th October 2015 the court had dealt with substantial matters of case management, with the consequence that the trial had begun in a meaningful sense. It follows that payment under the LGFS should be one for a one-day trial and not a cracked trial. This case was not listed for a long trial and no jury had been selected. I would agree certainly that in many cases the question of whether or not the court had engaged in substantial case management would turn on the fact (or otherwise) of direct judicial determination of disputed issues. In respectful contrast to Master Simons in Wood, however, I do not conclude that the issue is dependent per se on the fact of judicial determination of disputed issues. The guidance at paragraph 96(7) in Henery (ibid) permits a broad, pragmatic determination on a case by case basis. It seems to me if, as here, the parties are engaged in discussions of significant, evidential import, at the direction (or with the permission) of the trial judge, over a period during which the jury would ordinarily have been sworn and the prosecution case opened, it can be held reasonably that the trial has begun in a meaningful sense. I agree with

Mr Keogh that to conclude otherwise in these circumstances would penalise unfairly constructive, pragmatic advocates and encourage unreasonably less cooperative advocates content to rely on direct judicial intervention as a means of establishing later remuneration under the LGFS. Obviously the more straightforward housekeeping – such as the negotiating and agreeing of schedules referred to in R v. Wood (ibid) – would not constitute substantial matters of case management, as these are the sort of discussions inherent in most criminal trials. Conversely, in my conclusion, the negotiation of thirteen timeline documents in a ten-handed drug conspiracy, with the consequence that the indictment is re-drafted significantly, does constitute substantial matters of case management. I conclude accordingly that the appeal is allowed on the first issue and hold that this was a trial and not a cracked trial.

Photocopying

19. The solicitors sought and on 15th June 2015 obtained prior authority for photocopying in the total sum of £6,804, comprising 45,360 pages at 15p per page. It seems that by the time the authority was granted, the prosecution case had developed to the extent that the solicitors were obliged ultimately to copy 67,497 pages, 22,137 more than the prior authority, representing an additional expenditure of £3,320.55. This additional expenditure was claimed by the solicitors in the LGFS claim but it was not paid or, indeed, referred to in the written reasons dated 11th February 2016. Hearing the submissions of Mr Keogh and Ms Weisman, it was clear to me that the only reason or explanation for this omission was an administrative oversight. There was and is no real issue or dispute as to the fact or reasonableness of the solicitors copying 67,497 pages of prosecution documents. I find, in these circumstances, that the appeal should also be allowed on the second, photocopying issue. The Appellant should be paid for 67,497 pages in the total sum of £10,124.55.

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COPIES TO:

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GA - COSMA

34174

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 99/16

17 November 2016

ON APPEAL FROM REDETERMINATION

REGINA v COSMA

CROWN COURT AT SNARESBROOK

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

CASE NO: T20157744

LEGAL AID AGENCY CASE

DATE OF REASONS: 26 APRIL 2016

DATE OF NOTICE OF APPEAL: 9 MAY 2016

APPLICANT: COUNSEL GRAHAM ARNOLD

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

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Graham Arnold of counsel against the fees allowed to him by the determining officer under the Advocates Graduated Fee Scheme.

2. Counsel was instructed on behalf of Billy Cosma who was accused of doing an act intending to pervert the course of public justice in approaching the victim of an aggravated burglary and asking her to drop the case.

3. The trial was due to start on the 23 February 2016. According to the determining officer's written reasons, Cosma was late in arriving at court via his prison van and at 10:06 the case was released to the listing office with a time estimate of 1 to 2 days. Counsel's request for a redetermination describes it as being a floating trial and that a jury could not be obtained until late in the day. According to the determining officer that occurred at 16:10 when a jury panel was sworn in and the case was adjourned at 16:30 until the following day.

4. Based on this information the determining officer has concluded that the trial did not begin until 24 February 2013 2016 and consequently the fee for 23 February was simply a TNP ("trial not proceed") and did not count towards the trial fee.

5. Counsel did not accept that determination and consequently requested a redetermination under the regulations. Within that document he states that he and the prosecution counsel were dealing with admissions and substantial outstanding disclosure matters throughout the day. Once the jury had been sworn and put in charge, both counsel discussed matters with the judge regarding the resolution of those issues.

6. This further information did not sway the determining officer in changing her mind as to the correct classification for 23 February. The redetermination and the written reasons maintained the position set out above based on the limited information in the court log.

7. When seeking to appeal the written reasons, counsel sought to clarify the disclosure matters that were discussed on that day. He indicated that there were a number of outstanding disclosure requests based on the defence case statement that had been served including outstanding CCTV and various reports.

8. Counsel appeared before me by telephone on this appeal. He referred to a skeleton argument which he informed me had been sent to the Agency beforehand. His skeleton argument dealt with matters referred to above and sought to argue that admissions and disclosure matters were matters of substantial importance. He described this as being his secondary submission.

9. Counsel's primary submission was also set out in the skeleton argument but did not appear to me to have been put forward previously. His request for

redetermination had relied upon the case of the Lord Chancellor v Ian Henery Solicitors Ltd [2012] 1 Costs LR 205 in which Spencer J reviewed various cases which had considered the question of when a trial had begun and produced guidance drawn from the threads contained in the various cases. Those principles are set out at paragraph 96 of his judgment.

10. Counsel had not, in my view, really explained to the Agency the way in which he relied upon Henery. The determining officer would therefore be forgiven for thinking that counsel's argument was simply that the case had begun in a meaningful sense i.e. the secondary argument.

11. In fact, counsel's primary argument was that a trial had obviously begun in this case because it had run to a conclusion several days later. This case therefore fell within subparagraph (5) of Henery where Spencer J said that *"a trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the panelling of the jury, the opening of the case, and the leading of the evidence."*

12. In my view counsel's argument does not really rely upon the case of Henery at all. That case involved considering whether a case had proceeded to trial in the context of cases which had settled when the case had barely started, if at all. For example, on some occasions the jury was sworn some time before any evidence was given and in the meantime the defendant decided to plead guilty. In this context, there clearly had to be something more substantial than counsel simply attending the hearing for it to be deemed a trial rather than a cracked trial or a guilty plea for the purposes of the graduated fee scheme.

13. The case of Henery did not contemplate situations where, as here, there was clearly an effective trial that ran to its conclusion. In the Henery guidelines, any case in which evidence had started to be given was sufficient to demonstrate that the case had "proceeded to trial." That is not relevant to this case in the sense that the determining officer has paid for all of the days of hearing once evidence had started to be given. The issue is whether or not the trial began on 23 February.

14. Counsel's main point was that once a trial has started, counsel is entitled to a refresher fee on each day of the trial regardless of whether he was engaged for only a few minutes or for the entire day. It is only if the case did not proceed at all that a TNP fee would be payable. I am sure counsel is right in this respect and it is not obvious to me therefore why the first day should be treated in any different manner from subsequent days where the trial has clearly been effective. The jury was sworn in part way through a day and that would necessarily involve some time in court being spent by counsel. As such, it seems to me to be clearly the first day of the trial just as the same amount of time would amount to an effective day of trial subsequently. Certainly the efforts of counsel in considering evidence with the prosecution with a view to shortening the length of the trial overall would be an entirely legitimate use of part of a trial day. The fact that the case did not come on for hearing until later in the day does not render that work ineffective.

15. It seems to me undoubtedly the case therefore that where a trial has taken place, the day the jury is sworn in will be an effective day of trial. Such a conclusion does not contradict the decision in Henery for the reasons given above. Indeed, I note that in Henery, Spencer J refers to the "instinctive view" of a criminal practitioner that the swearing in of the jury clearly marks the start of the trial. His decision dealt with cases where the trial collapsed shortly after the swearing in (if any) took place. That is not the situation here.

16. Accordingly counsel is successful in his appeal and is entitled to his costs in addition to the recalculation of his graduated fee.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 285/18

Dated: 20 September 2019

ON APPEAL FROM REDETERMINATION

REGINA v YOUNG

CROWN COURT AT PRESTON

APPEAL PURSUANT TO SCHEDULE 2 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20180135

LEGAL AID AGENCY CASE

DATE OF REASONS: 20 December 2018

DATE OF NOTICE OF APPEAL: 11 January 2019 (received)

APPLICANT: Mr J Turner
Kenworthys Chambers
DX 718200
Manchester 3

The appeal has been successful and in addition to the sums due to the Appellant as a result of this decision, I award the Appeal fee of £100.00 plus £500.00 towards costs.

COSTS JUDGE
JENNIFER JAMES

REASONS FOR DECISION

Background to the Case

1. The issue arising in this appeal is as to whether the fee payable to Appellant Counsel under the Criminal Legal Aid (Remuneration) Regulations 2013 for his representation of the Defendant should be on the basis that the case proceeded to Trial or not; if not, it is be regarded as two days of ineffective Trial prior to a 'cracked trial' some months later, for the purposes of the payment of the fee. Pursuant to Schedule 1 of the 2013 Regulations the fees payable to Advocates for cases which proceed to trial are different from those applicable to ineffective hearings prior to a 'cracked trial'.

2. Whilst the appeal was initially listed for an in-person hearing in April 2019, following word that the Appellant was not going to be available on the date listed, both parties were content that I should decide the appeal on the basis of the written submissions of the Appellant and the Written Reasons of the Legal Aid Authority ('the LAA'). Regrettably, I did not then retrieve the file in order to deal with this decision expeditiously, causing a further delay for which I apologise on behalf of the SCCO but for which the responsibility is my own.

3. The Defendant was represented by the Appellant in respect of an indictment for causing serious injury by dangerous driving. On 28 August 2018 the case was listed to begin before HHJ Woolman; the Jury was empanelled and sworn by 15:54 (case called on at 15:38). It appears that the Appellant was at Court for most of that day and was either conferring with his own client, or in discussions with the Prosecution. Given the late hour at which the case was called on, the learned Judge adjourned until the following day and indicated that a bad character application that had been made, would be heard then.

4. There were also (per the Appellant) submissions regarding the Prosecution's reliance upon evidence from two Witnesses who were inconsistent with the Prosecution case and the learned Judge gave a ruling that further Statements ought to be taken from them and that the disclosure had better be in good order by the morning. The learned Judge was specifically asked whether the Trial had begun on 28 August 2018 to which the reply was yes; however, the Court Log does not reflect this and at present the only evidence for this is the Appellant's recollection.

5. On 29 August 2018 there was a further Hearing, commencing at 10:43. It became clear that there was "...an issue with photographs..." which I understand to have been such that the series of photographs, coupled with the Statements of two of the Prosecution Witnesses, revealed that the Defendant could not possibly have been the driver of the car. It is not clear whether these were the two Witnesses in respect of whom submissions were made the previous day, and for reasons which neither party has made clear, this did not result in an acquittal but rather in the Jury being discharged at 12:26 and a new Trial date fixed for 28 (or 21 – both dates are given) November 2018. In other words the issue regarding the photographs and who was driving the car, appears not to have been addressed as a question of exculpatory evidence, but of the case not yet being Trial-ready.

6. The Appellant represented the Defendant at Trial in November, but that Trial cracked; I am not told how it cracked. The LAA's position (as per the Written Reasons) is that the Appellant should submit, EITHER evidence to support his statement that the learned Judge stated in Court that the Trial had begun on 28 August 2018 OR a claim for two ineffective Trial dates (in August) and a cracked Trial (in November). The Appellant has stated in very strong terms that if the LAA doubts his word, they should pay for a transcript and that their doubting the word of a Barrister, is libellous. He also opined that the learned Judge would never remember this case out of all the cases he had heard since (given the LAA's suggestion that the learned Judge be asked for an e-mail confirming that Trial had started). If that was true at the time the Appellant lodged his Appeal it is of course even more so now.

Case Law and guidance

7. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is as follows:

"cracked trial" means a case on indictment in which—
(a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea 1 and—
(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence;
....

8. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the

opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment."

9. To expand on Principle 5, the ***R v Bullingham*** 2011 judgment states:

i. The LSC's contention that as no jury was sworn, the trial could not have started, is wrong since it is plain from the authorities that the swearing of the jury is not the conclusive factor in deciding under the scheme when the trial begins.

ii. Even if a jury is sworn, the trial will not start unless it begins "in a meaningful sense", that is to say otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.

iii. If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.

Where...no jury is sworn, but the judge directs that there will be a voir dire involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction.

10. The Appellant contends that given a jury was selected and sworn in this case, and given that the Court was dealing with substantial matters of case management (literally, whether the case was fit to proceed) I should conclude that the trial had commenced. Reliance is placed in particular upon what was said by Spencer J at paragraph 96 of *Henery* (above). The Determining Officer commented that this was not to be a lengthy trial, it was estimated to last three days. On her reading of the Court Log, there were no substantial matters of case management nor any evidence heard, nor any legal argument in August 2018, justifying the conclusion that the trial had not commenced in a meaningful way.

Decision

11. I respectfully disagree with the decision of the Determining Officer. Looking at the above extracts from *Henery* it seems clear that the Trial had started in a meaningful sense on 28 August 2018 with the Jury sworn in, discussion of bad character, and submissions regarding two Witnesses; there was then further argument in the learned Judge's Chambers on 29 August 2018 but the Trial was then aborted on the second day, when it became clear that it could not proceed, and it was re-listed for several months hence.

12. The LAA assert that paragraph 96(4) of *Henery* fits the facts in this case, saying that a Trial will not have begun, even if the jury has been sworn "*...if there has been no trial in a meaningful sense...*" The cases cited as examples of no Trial in a meaningful sense having taken place, include *Henery* in which the Judge, being part-heard in another Trial, but being assured that Henery was a firm Trial, empanelled, swore in and sent away the Jury. However, next day and before the Defendant was formally put in the Jury's charge the Prosecution decided to accept a plea of Guilty to a lesser charge.

13. Given those facts (from *Henery*) it is very clear that no Trial took place in a meaningful sense as indeed Spencer J held at paragraph 95. However, are those facts really on par with the facts in this case? In my view they are not; in this case, there were discussions of evidence that, on the face of it, could have led to an acquittal but in respect of which the learned Judge (who of course had much fuller papers than I have) instead decided to adjourn for several months to enable the Prosecution to get its case in order.

14. The principal discussions about whether the Trial was ready to proceed, apparently took place in the learned Judge's Chambers (presumably because, the Jury having been sworn, these would not be matters that they ought to hear) so that their absence from the Court Log is not to be wondered at. In any event as the LAA is well aware, the Court Log is at the best of times a partial record of events and it would certainly (in my view) be possible for the Court Log to omit any reference to the learned Judge confirming that Trial had started on 28 August 2018, even if it was said in open Court.

15. In considering what amounts to 'substantial matters of case management' it seems to me relevant to have regard to what was said in *Henery* at [89] by Spencer J. He described the event which took place (the empanelling of the jury on 10 August) at [10]. He noted the Judge was informed that a prosecution witness (a police officer) was not available but defence counsel confirmed that he was not required ; there was further discussion between counsel and the Judge about the lack of defence statements for the other two Defendants and the Judge enquired if and when bad character applications were to be made. At [89] Spencer J commented that nothing which occurred on this day could be categorised as in any way similar to the extended legal argument or evidence on the *voir dire* such as to justify the conclusion that the Trial had started in a meaningful sense. At [94] he went on to say:

"In this regard it is right to note the growing practice throughout England and Wales of selecting but not swearing jurors on the first day of a long trial. It is a practice encouraged and advocated in the Crown Court Bench Book "Directing the Jury", published by the Judicial Studies Board (as it then was) in March 2010, at page 278-9. It sensibly allows the jurors the opportunity to reflect overnight whether they would have any practical difficulty in serving on a jury for many weeks, before they are finally sworn and the defendant is put in their charge next day. Commonly a great deal of important work by the advocates and the litigators, vital to the smooth running of the trial, will be going on in court on the day on which the jury, in such circumstances, is selected but not sworn. Depending on the circumstances, and consistent with the dicta of Mitting J in R v Dean Smith (supra), that may well mean that the trial has begun in a meaningful sense."

16. I have considered carefully the decisions of other Costs Judges: ***R v Coles* 51/16** and ***R v Sallah* 281/18**. In *Coles* Master Whalan accepted that a Trial had begun where the parties had spent time negotiating the content of a number of 'time line' documents (factual chronologies relevant to the conspiracy alleged). Disagreeing with the decision of Master Simons in *R v Wood* 178/15; Master Whalan concluded that the issue as to whether or not there had been substantial case management, as envisaged by Spencer J, was not dependent per se on the fact of judicial determination of disputed issues. He held that the parties were engaged in discussions of significant evidential importance at the direction (or at least with the permission) of the Trial Judge in a period during which the jury would originally have been sworn and the prosecution case opened. In these circumstances he held that the Trial had begun in a meaningful sense. To conclude otherwise would be to punish constructive and pragmatic advocates and encourage less cooperative advocates content to rely only upon direct judicial intervention as a means of establishing remuneration under the scheme.

17. In *Sallah* prior to a jury having been sworn in, the Court was addressed on a substantial issue relating to admissibility of the evidence. Counsel for the Defendant drafted a skeleton argument; the prosecution took the Court through the skeleton and indicated which matters remained controversial. Time was granted for the Crown to confirm whether the identification witnesses would be relied upon. Further enquiries apparently revealed that there was some suggestion that both witnesses had been inadvertently influenced in their identification, to the extent that prosecution counsel felt unable to rely upon them as giving uncontaminated evidence. The prosecution then indicated that it would not be seeking to rely upon the two witnesses. There was thereafter a discussion as to whether it was appropriate to proceed simply on the basis of other evidence being, as I understand it, CCTV evidence. Prosecution counsel in considering the matter indicated the case could not proceed and no evidence was offered. Agreeing with Master Whalan, Master Rowley did not consider that it was necessary for the Court to make any a formal determination for a Trial to have been commenced and held that it had commenced in a meaningful way on the facts. Those two cases, in my view, resonate with this case much more strongly than *Henery.*

18. Given that he had Written Reasons in December 2018, that stated that evidence in support of his statement (as to the learned Judge confirming that Trial had started on 28 August 2018) was required, the Appellant did not serve his own interests well by indicating this was a "libellous" request and going straight to Appeal.

Regrettably, memories can play tricks upon people; the Appellant himself has asserted that the learned Judge would not remember this case from August 2018 until January 2019, for example. It was perfectly reasonable for the LAA to request evidence.

19. Given the facts as stated by the Appellant, it seems likely that the exchange (about Trial having commenced on 28 August 2018) was one of the last matters raised on that date. Obtaining a non-urgent transcript of the last 30 minutes, or last hour, on that date, would have taken a couple of weeks and cost very little. Needless to say if the transcript vindicated the point that the Appellant wished to make, I would look favourably upon that cost being included in the Appellant's costs of Appeal, subject to it being a reasonable sum (which, given his ability to specify the approximate time at which it was said, and thus order only a fairly short transcript, it certainly should be). In that way, Counsel could have resolved this matter during January 2019, at a cost probably lower than the Court Fee he paid for this Appeal.

20. However, given the above cases whilst the Appellant might have been able to resolve this matter long ago and at little cost by obtaining a transcript of the relevant comment by the learned Judge, on the facts in this case Trial clearly had begun in a meaningful sense. Evidence of the learned Judge saying so in open Court would certainly have helped, but the lack thereof is not fatal to the Appellant's claim; nor is the fact that the Trial, having begun in a meaningful sense, was abortive because of Prosecution/disclosure issues.

21. Master Whalan noted that it was accepted by the appellants in *Coles* that discussion concerning the admissibility of section 10 admissions would not constitute a substantial matter of case management. Nor would more straightforward housekeeping – such as the negotiating and agreeing of schedules – have been enough, in his judgement, as these were inherent in most criminal Trials. However, it is not inherent in most criminal Trials that the Prosecution evidence is in such a poor state that the Trial cannot continue, and yet is not so poor that the Defendant is entitled to acquittal rather than postponement. That was a serious, significant and non-routine turn of events and not on a par with the above hypothetical scenarios from *Coles* in my view.

22. It follows that the Appeal has succeeded and I award the Appellant Appeal costs of £500.00 plus £100.00 Appeal fee. I appreciate that is likely to be only a contribution towards his actual costs, particularly given that he is based at a considerable distance from the SCCO. However, had he obtained a transcript the need for a Hearing could have been avoided.

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The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 281/18

18 March 2019

ON APPEAL FROM REDETERMINATION

REGINA v SALLAH

CROWN COURT AT SOUTHWARK

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

CASE NO: T20177377

DATE OF REASONS: 15 OCTOBER 2018

DATE OF NOTICE OF APPEAL: 18 DECEMBER 2018

APPLICANT: SOLICITORS EBR ATTRIDGE

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by EBR Attridge solicitors of London in respect of the decision by the determining officer to calculate the fee payable under the Litigators Graduated Fee Scheme on the basis of there having been a cracked trial.

2. The solicitors were instructed on behalf of Pababou Sallah who was charged with wounding another person contrary to both sections 18 and 20 of the Offences Against the Person Act 1861.

3. The case was listed for trial on 3 April 2018 and on that day Mr Paul Raudnitz of counsel represented Mr Sallah. He provided an attendance note of the day's events contemporaneously and that description of events has been used by both the determining officer and the solicitors. The determining officer has seemingly also relied on the court log albeit it is not clear exactly what the log said in relation to events on 3 April 2018 (as opposed to earlier hearings).

4. Mr Raudnitz's note says as follows:

> "2. The case was called on at approximately 11:45am. I had drafted and served a skeleton argument dealing with a number of issues of admissibility. The Crown took the Court through the skeleton and indicated which matters remained controversial. A request for time was then granted for the Crown to confirm whether the two police identification witnesses (Philips and Steel) would be relied upon. The Court rose just before midday.
>
> 3. In due course, further enquiries revealed that there was some suggestion that both witnesses had been inadvertently influenced in their identifications, to the extent that Prosecution Counsel felt unable to advance them as giving uncontaminated evidence. Prosecution Counsel confirmed that in the circumstances the Crown would not be relying on either Philips or Steel.
>
> 4. I suggested that it would be inappropriate to proceed simply on the basis of the CCTV (whose quality was very poor). Prosecution Counsel took instructions and the view was taken that the case could not proceed.
>
> 5. The case was then called on again at 2pm. Prosecution Counsel offered no evidence on both counts, and formal verdicts of "not guilty" were entered. The defendant was awarded £20 travel costs."

5. Based upon these events the solicitors claimed a graduated fee calculated using a one day trial. The determining officer did not accept that the trial had commenced and therefore calculated the graduated fee based upon a cracked trial. There was also a dispute regarding the number of pages of prosecution evidence, but that aspect has subsequently been resolved. The issue at the heart of this appeal is whether or not the trial had commenced so that a trial fee should be used rather than a cracked trial fee.

6. The determining officer's written reasons are extremely brief on this point. He records that the case was listed for trial on 3 April 2018 and then says, "however after further submissions were considered the prosecution offered no evidence on the counts." The determining officer says that this cannot amount to the trial having begun in any meaningful sense and consequently a cracked trial fee is payable.

7. The determining officer's reference to the trial beginning "in a meaningful sense" is a reference to the case of the Lord Chancellor v Ian Henery Solicitors Limited where Spencer J gave guidance on the issue of when a trial is to be considered to have commenced. Paragraph 94 of his judgment is as follows:

> "(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.
>
> (2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so, even if the trial comes to an end very soon afterwards, through a change of plea by a Defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).
>
> (3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).
>
> (4) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened, the Defendant pleads guilty (R v Brook, R v Baker & Fowler, R v Sanghera, The Lord Chancellor v Ian Henery Solicitors Ltd (the present appeal)).
>
> (5) A trial will have begun even if no jury has been sworn if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case and the leading of evidence (R v Dean-Smith, R v Bullingham, R v Wembo).
>
> (6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management, it may well be that the trial has begun in a meaningful sense.
>
> (7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purposes of the Graduated Fee Schemes. It would often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so, when it begun, the Judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the Determining Officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment".

8. Subparagraphs 4 to 6 above are relevant to this case. The determining officer has taken the view that there were no substantial matters of case management being dealt with such that the trial had begun in any meaningful sense. (It is agreed that there was no jury sworn at any point.)

9. The solicitors and the Legal Aid Agency have agreed that I should deal with this matter on paper without a hearing. Mr Rimer, on behalf of the Agency, has provided submissions in support of the determining officer and Mr Brazier of the solicitors has provided submissions in support of the appeal.

10. Mr Rimer points to the fact that there was only 15 minutes of court time involved in this case and that no submissions were made to the trial judge which required any ruling on any matter. There did not appear to be any discussion between the parties after the adjournment and before the case reconvened at 2pm at which point no evidence was offered. Mr Rimer submits that those events do not suggest that any substantial case management took place. He characterises it instead as being a situation where the defendant's counsel made submissions which the Crown considered and decided not to proceed.

11. Mr Rimer relies on two cases heard by Master Simons, namely R v Wood and R v Abdullah. In both cases the appeal was dismissed on the basis that the defence advocate and the Crown advocate, in *"negotiating and agreeing schedules with the prosecution",* were dealing with the sort of case management matters normally dealt with prior to trial. Master Simons accepted that they would be of assistance to the Judge and the jury but, in his view "substantial matters of case management" went much further and meant issues that required rulings by the trial judge.

12. Mr Brazier relied on the case of R v Coles which was decided by Master Whalan. In that case, with the agreement of the trial judge, the advocates for the Crown and defence dealt with formal admissions under section 10 of the Criminal Justice Act 1967 and what were described as 13 timeline documents which required detailed negotiation. It was accepted that the formal admissions did not constitute substantial matters of case management but Master Whalan found that the timelines did come within this characterisation.

13. Master Whalan went on to say that he disagreed with Master Simons in the need for the judge always to give formal decisions on substantial matters of case management. He pointed out that if that were determinative, it would favour an uncooperative approach so as to require judicial decision rather than a more collaborative approach to achieve the same end. On the facts of that case, Master Whalan decided that the trial had begun in a meaningful sense as a result of the work done. Mr Rimer described this case as being fact specific

and one which resulted from the trial judge giving the parties specific case management directions regarding the agreeing of the timeline documents.

14. Furthermore, Mr Rimer sought to distinguish the case of Coles on the basis that it was intended that the trial would begin at 2pm on the first day of trial but did not do so simply because the prosecution offered the defendant the chance to plead to a lesser offence which had come as a surprise to the defence. In Mr Rimer's submission, there was nothing in the papers in this case to indicate that the parties expected a jury to be sworn and the trial to begin later on 3 April 2018.

15. Mr Brazier disagreed about the work that had been done and referred to counsel's skeleton argument regarding the admissibility of evidence. The matters covered by counsel's skeleton related to hearsay evidence; suspicion of drug dealing; identification evidence; evidence relating to the arrest of the defendant; cell site evidence and evidence of bad character. Mr Brazier submitted that the amount of time spent in court was not a guide to whether or not the issues were substantial. He pointed out that the prosecution's decision not to proceed with the case was a result largely of the issues raised by the defence in respect of the identification evidence.

16. I take the view that Mr Brazier's arguments are to be preferred in this appeal. Having had the benefit of considering the 10 page skeleton argument regarding the admissibility of evidence, it seems to me that they dealt with fundamental matters relating to the trial that was due to take place on 3 April 2018. I do not think that matters can be characterised as Mr Rimer suggests of simply saying that the defendant made submissions on which the prosecution took instructions and decided not to proceed. According to Mr Raudnitz's note, the prosecution counsel took the judge through the various matters raised by the defence and pointed out the matters which were controversial. If the prosecution had not ultimately accepted the points made, then determinations would have had to have been made by the trial judge as to the central witnesses of the prosecution's case. In such circumstances, I do not think there would be any doubt that substantial matters of case management had been addressed.

17. Here, however the prosecution decided not to put matters to the judge which is essentially the mirror image of the situation in Coles (where the parties' agreement avoided the need to come before the judge.) In this case it is the persuasive nature of the defence skeleton argument that has persuaded the Crown to decide not to use two of the witnesses. If counsel's skeleton argument had been less persuasive, then the matter would have been decided by the judge. If the Agency's approach is correct in this case, then the defence team would be penalised for having done a persuasive job.

18. The fact that the trial judge was not required to make a formal determination upon the issues raised by the defence was in the hands of the prosecution. The case had to be fully prepared as the defence could not be sure that the prosecution would accept the defence's argument. The success of the defence arguments resulted in the case no longer having any reasonable prospect of a successful prosecution. That would seem to be, by definition, matters of

substantial case management that were being dealt with. To my mind, this is not at all a situation where the prosecution has simply decided not to offer any evidence.

19. Accordingly, this appeal succeeds.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2019CRI-000137

Dated: 22 May 2020

APPEAL FROM REDETERMINATION

REGINA v SHAIKH

CROWN COURT in BIRMINGHAM

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

CASE NO: T20170150

LEGAL AID AGENCY CASE

DATE OF REASONS: 29 November 2019

DATE OF RECEIPT OF NOTICE OF APPEAL: 3 December 2019

APPELLANT: Solicitors/Litigators
Hussain Solicitors

This appeal is successful for the reasons set out below. In addition the Respondent shall pay Appellant costs of £750 plus VAT in respect of counsel's fee and the fee for lodging the appeal of £100.

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. The issue arising in this appeal is as to whether the fee payable to the Appellants under the Criminal Legal Aid (Remuneration) Regulations 2013 for their representation of the Defendant should be on the basis that the case proceeded to trial or not; if not, it is be regarded as a 'cracked trial' for the purposes of the payment of the fee. Pursuant to Schedule 2 of the 2013 Regulations the fees payable to litigator for cases which proceed to trial are different from those applicable to a 'cracked trial'.

2. At the hearing, which took place by video link on 4 May 2020, Mr McCarthy, counsel, represented the Appellant, and Ms. Weisman, employed lawyer, represented the Legal Aid Authority ('the LAA') .

3. The Appellant litigator firm represented the Defendant who was charged with converting criminal property (count 1 on the indictment) and possession of criminal property (count 2). Both counts stemmed from allegations of involvement in money laundering. The court log shows that the Defendant changed his plea to Guilty on the day the case was listed for trial and no jury was sworn.

4. The Appellant claimed payment for a one day trial, whereas the Determining Officer determined that payment for a 'cracked trial' was appropriate.

5. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is as follows:

"cracked trial" means a case on indictment in which—

(a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea 1 and—

(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence;

….

6. The issue for determination is whether the case proceeded to trial. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment."

7. The Appellants assert that substantial matters of case management took place at court on the hearing date, such that I should conclude that the trial had commenced in a meaningful sense. Reliance is placed by the Appellants upon two decisions of Cost Judges: *R v Coles* 51/16 and *R v Sallah* 281/18.

8. In *Coles* Master Whalan accepted that a trial had begun where the parties had spent time negotiating the content of a number of 'timeline' documents (factual chronologies relevant to the conspiracy alleged). He concluded that the issue as to whether or not there had been substantial case management, as envisaged by Spencer J, was not dependent on whether there had been a judicial determination of the disputed issues. The application of the guidance in *Henery* permitted a broad pragmatic determination on a case by case by basis. He held that the parties were engaged in discussions of significant evidential importance at the direction (or at least with the permission) of the trial Judge in a period during which the jury would originally have been sworn and the prosecution case opened. In these circumstances he held that the trial had begun in a meaningful sense. He said that to conclude otherwise would be to punish constructive and pragmatic advocates and encourage less co-

operative advocates, content to rely only upon direct judicial intervention as a means of establishing remuneration for a trial, under the scheme.

9. In *Sallah* prior to a jury having been sworn in, the Court was addressed on a substantial issue relating to admissibility of the evidence. Counsel for the Defendant had drafted a skeleton argument; the prosecution took the Court through the skeleton and indicated which matters remained controversial. Time was granted for the Crown to confirm whether the identification witnesses would be relied upon. Further enquiries apparently revealed that there was some suggestion that both witnesses had been inadvertently influenced in their identification, and it appears that prosecution Counsel felt unable to rely upon them as giving uncontaminated evidence. The prosecution then indicated that it would not be seeking to rely upon the two witnesses. There was thereafter a discussion as to whether it was appropriate to proceed simply on the basis of other evidence being, as I understand it, CCTV evidence. Prosecution Counsel, in considering the matter, indicated that the case could not proceed and no evidence was offered. Master Rowley concluded in such circumstances that there had a been substantial matters of case management and that a trial fee was due.

10. In the present case, the matter was listed for trial on 27 November 2018 at 10.30 a.m. The court log record that the matter was in fact called on at 10.57am, when the Defendant made an application to exclude a conviction of another Defendant in the alleged conspiracy from the evidence. This application was dismissed at 11.01 am with reasons given by the judge, HH Judge Henderson. The case was then adjourned until 11.15am. but the Court log suggests that it was not until 11.52 am that the case resumed. At 11.56 am an application was made to amend the indictment to alter the dates (and the financial extent) of the conversion; this was not objected to. It then appears that the Defendant made an application for a *Goodyear* indication. At about 11.58 a.m. having heard submissions from the prosecution and defence the Judge gave such an indication at about 12.01 p.m. At 12.03 p.m. an application was made for a fresh arraignment on count 1 only, following which the Defendant pleaded Guilty to count 1 and no evidence was offered on count 2. At 12.05 p.m. a Not Guilty verdict was entered on count 2.

11. The Determining Officer concluded that there were no substantial matters of case management and no discussion of significant evidential import. She concluded that a cracked trial fee only was payable,

12. In respectful agreement with the decisions of Costs Judges Whalan and Rowley in *Coles* and *Sallah* it seems to me clear that it is not necessary for the judge to make any deliberation on the issues arising in order for a matter to amount to a substantial matter of case management. I also accept that the Court Log may not be a complete record of all that occurred. It appears from a Note from Counsel for the Defendant that the Judge required the advocates to address the format and presentation of the evidence. I am satisfied that Counsel did have substantial discussions about the financial documents and WhatsApp messages, in particular as to their disclosure and evidential status. I accept also that these documents were a significant feature of the evidence to be presented and (as described by Mr. McCarthy) that these documents were voluminous in nature.

13. There were also two applications which were determined by the Judge. Ms. Weisman says that they were dealt with briefly by him; the Court log suggests that the time spent in Court dealing with applications was indeed brief but this appears to be because, as regards the first application, much of the matter had been addressed in writing (the application was set out over 5 pages). Moreover, the brevity of time with which this matter was dealt with in Court does not seem to be a decisive factor. I have to consider whether an issue of case management was substantial in the context of the case, being a case involving an alleged drug related money conversion. It seems to me it was substantial; the guidance in *Henery* does not apply only to very substantial criminal proceedings. In the context of this case the admission of the prior conviction was a matter of substance.

14. In any event looked at as a whole, I am satisfied that the matters of case management dealt with, were substantial. They were still being addressed for a considerable time after the hearing had been called on.

15. I understood Ms, Weisman to accept that it is not a decisive factor that the jury was not empanelled. Like Ms. Weisman I do not read the judgment of Spencer J as so providing. As Mr. McCarthy pointed out, if Counsel who was more attentive to the funding arrangement had been involved, he might have requested the empanelment prior to his application to exclude evidence. The fact that Counsel did not do so in this case is not to my mind determinative albeit I have had regard to it[1].

16. Both parties, had in advance of the date listed for trial, informed the Court that they were 'trial ready'. Ms. Wiesman said nevertheless that it could to be inferred that there never was going to be a trial. She draws my attention to a request by the Defence for a *Goodyear* indication as early as 7 February 2018 and suggests the Defendant was simply 'testing the evidence' by way of what she described as a dismissal application. I am not satisfied that the guidance in *Henery* requires me to make a judgment on such a matter, or that it would be possible to do so as a matter of generality, at least with any confidence. I accept however that if it were the case that the Defendant had simply sought a *Goodyear* indication at the outset it would be difficult to conclude that the trial had commenced. In this case the Defendant had not in fact made a dismissal application, he had sought to exclude the evidence of another Defendant's conviction. In any event it is not clear to me that the determination made on this, and the events which took place afterwards, did not in fact have a significant bearing upon the decision made by the Defendant to change his plea. Moreover, it is significant to note in this context that in the course of discussion significant concessions were also made by the prosecution such that count 1 was not pursued and a basis of plea was accepted which led to the Defendant receiving a suspended sentence (in circumstances where he might otherwise have faced an immediate custodial sentence) - the prosecution being satisfied that the Defendant was not a party to any drug related money conversion.

17. It seems to me clear that the Defendant's representative would have prepared in full for trial and that the discussions with the prosecution and the applications were determined on the understanding that a jury could be sworn in imminently.

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[1] See also *R v Evans* BRO/SC-2020-CRI-000007 at para 11.

18. Although inevitably not wholly on all fours with the two decisions cited, it seems to me that there is no real basis for distinguishing this case from them in principle: over a period during which the jury could be expected to have been empanelled substantial matters of case management were indeed undertaken, such as admissibility of another Defendant's conviction and other matters, which were part of a continuous process which would have resulted in the jury being empanelled in respect of the trial. In respectful disagreement with the Determining Officer, I do think that on the facts of this case the trial had commenced in a meaningful sense.

19. Accordingly, this appeal is allowed.

20. There was no dispute as the costs payable in the event that the appeal should be allowed and they are as set out on the front page of this decision.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2021-CRI-000121
SC-2021-CRI-000124

8 December 2021

ON APPEAL FROM REDETERMINATION

REGINA v SHABIR & KHAN

CROWN COURT AT LEEDS

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

CASE NO: T20207802 / T20217328

DATE OF REASONS: 9 SEPTEMBER 2021 / 16 SEPTEMBER 2021

DATE OF NOTICE OF APPEAL: 10 SEPTEMBER 2021 / 21 SEPTEMBER 2021

APPLICANT: SOLICITORS HARRIS SOLICITORS

ELDWICK LAW

The appeals have been successful for the reasons set out below.

The appropriate additional payment, to which should be added in each case the sum of £750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to each Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This decision concerns appeals by Harris solicitors and Eldwick Law solicitors against the decisions of determining officers to categorise the fee payable as a cracked trial fee under the terms of the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Kamran Shabir and Jhazeb Khan respectively. The two defendants, together with others, were charged with various violent offences including kidnapping and attempting to cause grievous bodily harm with intent as well as possessing an imitation firearm with intent to cause fear of violence and blackmail.

3. Most of the defendants ultimately pleaded guilty to the offences with which they were charged and I was informed that some of those sentences were in excess of 10 years. The trial was listed to last for four weeks.

4. The trial was called on for hearing at 2pm on 17 August 2021. Crown counsel indicated to the judge that the prosecution was ready to proceed but then indicated that he imagined there were "discussions in play". One of the defence advocates asked for the rest of the afternoon for discussions and the judge decided against empanelling the jury on that date. He indicated that he had given four weeks for the trial and that two specific dates were ones on which the court would not sit.

5. Later in the afternoon of 17 August 2021 14 potential jurors were selected and the judge indicated that until the jury was sworn, credit would be retained for any guilty pleas that were made. It was agreed that the jurors would not be required until 2pm on the following day but the defendants would be brought in for 10:30am "so counsel can have their discussions" as the court log put it.

6. The case came before the court at 12:29 on 18 August 2021 where leading counsel for one of the defendants asked for more time. That defendant had produced a written application to exclude evidence and the judge appears to have given an indication about that application without lengthy oral submissions. The judge also indicated that the jury would not be required until the following day. The case was adjourned until 3:30pm and during which time count three on the indictment was deleted and count five was added to it. The counts were renumbered and then re-arraignment took place at 3:30pm in respect of the relevant defendants with not guilty pleas being entered.

7. After this occurred the prosecution counsel addressed the judge indicating that the afternoon had been productive but there remained one final stumbling block. The judge indicated his agreement to adjourning at that point but that even his patience was beginning to run thin. He indicated that as soon as the jury was sworn in the morning then residual credit for guilty pleas would have ended.

8. At 10:30 on 19 August 2021 the court was informed that there would be no need for a jury; that no evidence would be offered against Kamran Shabir; and that

a new indictment was to be preferred. The other defendants pleaded guilty to the revised indictment and the cases were adjourned for sentencing.

9. Based upon the court log, the determining officers concluded that the trial had cracked before it had begun and as such a cracked trial fee was payable to each litigator. That remains the Legal Aid Agency's position through the redetermination and written reasons procedure. That position was supported by Francesca Weisman of the Agency who appeared on the appeal on its behalf.

10. The solicitors say that these events amount to a trial having begun and as such the solicitors ought to be paid by reference to a three-day trial.

11. Guidance on this area was given by Spencer J. in the case of the Lord Chancellor v Ian Henery Solicitors Limited. Having reviewed a number of decisions, he distilled into paragraph 94 of his judgment the following propositions:

> "(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.
>
> (2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so, even if the trial comes to an end very soon afterwards, through a change of plea by a Defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).
>
> (3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).
>
> (4) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened, the Defendant pleads guilty (R v Brook, R v Baker & Fowler, R v Sanghera, The Lord Chancellor v Ian Henery Solicitors Ltd (the present appeal)).
>
> (5) A trial will have begun even if no jury has been sworn if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case and the leading of evidence (R v Dean-Smith, R v Bullingham, R v Wembo).
>
> (6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management, it may well be that the trial has begun in a meaningful sense.

> (7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purposes of the Graduated Fee Schemes. It would often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.
>
> (8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so, when it begun, the Judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the Determining Officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment".

12. Appeals do not tend to occur in relation to the situation set out at subparagraphs 2 and 3 because it is clear that a trial has begun in those circumstances and payment is no doubt made accordingly. In this case, no request has been made of the trial judge for his view (subparagraph 8) and so we are left with the retrospective view suggested at subparagraph 7 in order to decide whether there has been a trial in any meaningful sense. As can be seen from subparagraphs 1 and 4, the swearing of the jury is not the conclusive factor. The issue in this case, as in so many which are repealed, is whether the case management that has occurred prior to any opening submissions being made is sufficiently substantial to count as if it were part of the trial. If it is, then the trial will be deemed to have begun and a trial fee paid. If it is not, however, then the defendant will have been taken simply to have pleaded guilty before the trial began and a cracked trial fee would be payable instead.

13. The advocates before me had previously appeared before Costs Judge Brown in the case of R v Shaikh (SC-2019-CRI-000137) and it is clear that many of the submissions made there were, in essence, the same ones that are made here. Costs Judge Brown accepted that the case management that had taken place was sufficiently substantial to amount to the trial having begun. He took the same approach as other costs judges had previously in concluding that case management matters did not necessarily need to involve the judge making formal rulings. In Shaikh, two applications were made to the judge. One related to excluding a conviction of the defendant and the second was an application for a Goodyear indication regarding sentencing.

14. In this case an application to exclude evidence was also produced. It was described by Mr McCarthy, who had had the opportunity to see it on the DCS, as being a detailed skeleton produced by leading counsel for one of the co-accused. The amendment of the indictments and rearrangement was, in Mr McCarthy's submission, another significant case management event and showed that the prosecution was giving thought to the counts which could be pursued. There were also challenges to the cell site evidence and expert evidence which had been produced by the solicitors at the last minute.

15. In support of some of these matters, Mr McCarthy relied on a taxation note produced by the instructed advocate Jeremy Hill-Baker dated 25 August 2021. Mr Hill-Baker indicated that Shabir was ready to proceed to trial when the case was first brought before the court. The delays involve matters of the co-

accused's. The prosecution's decision to offer no evidence against Shabir only occurred once the co-defendants had decided to plead guilty to certain offences.

16. A note for taxation was also produced by Kieran Galvin, the counsel for Khan. In it, he indicated that Khan did not serve a defence statement on advice and it was always envisaged that this would be a contested matter. According to Mr Galvin, it was anticipated the Crown would have difficulty in proving matters against Khan.

17. Ms Weisman, as well as querying whether the case management was sufficiently substantial, also raised the question of whether the various issues dealt with were aimed at resolution of the case by a plea rather than in order to enable a trial to take place. In Ms Weisman's submission, it was more likely to be the former and that everything put forward on the court log and in Mr McCarthy's submissions could equally be seen as the parties working hard to resolve matters. For example, comments to the trial judge regarding resolving stumbling blocks overnight and from him concerning the retention of credit until the jury was sworn were all entirely understandable as being indications of parties looking to plead guilty on a particular basis.

18. Ms Weisman referred to the retrospective comments of Spencer J in Henery (subparagraph 7) in considering whether the case properly looked as if it was the beginning of the trial. In Ms Weisman's submission, the trial did not begin in any meaningful sense even though a lot of work was no doubt done by the parties' lawyers.

19. In my judgment this case falls comfortably within subparagraph 6 of the Henery guidance. The jury was selected but not sworn and then the parties were required to deal with various matters, some of which were brought before the judge for indication. The court log makes no reference to the issues concerning the telephone evidence and the prosecution being put to proof of it; nor to the evidence of the defendant's expert in this respect. These matters would undoubtedly impact on the trial itself and "modern practice" dictates that such matters are dealt with before the jury is sworn rather than having begun the trial in a traditional sense and then left the jury to wait whilst such matters were resolved.

20. The effect of this approach is that some defendants are no doubt manoeuvring towards the possibility of pleading guilty to a limited number of charges or a lesser charge if that is possible. However the motivation for the defendants does not seem to me to be a determining factor. It would take both the prosecution and the defence to agree to such a resolution to avoid a trial and so it is not simply in the gift of the defendant. Furthermore, if that approach was said to be determinative a defendant such as Shabir in this case, who did not plead guilty, would inevitably be considered to have been involved in a trial up to the point when the prosecution ultimately decided not to offer any evidence against him.

21. In Shaikh the question of a Goodyear ruling seems more obviously to suggest that at least some defendants were contemplating a guilty plea prior to the trial commencing. No such situation arose here and the events which took place strongly indicate the trial work required to enable a multi-handed case to begin its four-week trial hearing.

22. Consequently, I conclude that the trial had begun in a meaningful sense and that both solicitors are entitled to a three-day trial fee and not the cracked trial fee which has been paid to date.

23. Accordingly, these appeals succeed and the solicitors are entitled to costs in respect of the appeals.

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Neutral Citation No. [2022] EWHC 2230 (SCCO)

Case No: T20210301

SCCO Reference: SC-2022-CRI-000032

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 21 July 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
DALE

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Harwood Solicitors**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 15 April 2021, and the 2013 Regulations apply as in force at that date.

2. The issue on this appeal is whether the Appellant solicitors, who represented Elliot Dale ("the Defendant") in the Crown Court at Preston, should be paid the Graduated Fee appropriate to a trial that has started, or appropriate to a cracked trial. The Appellant has been paid for a cracked trial but maintains that a full trial fee is payable.

3. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> > (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
> >
> > (ii) either—
> >
> > (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or
> >
> > (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea,
>
> declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…"

4. "Trial" is not defined in the 2013 regulations, and in many cases the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

5. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.
> (2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a

> defendant, or a decision by the prosecution not to continue…
> (3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes…
> (4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty…
> (5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence…
> (6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.
> (7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.
> (8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer… in the light of the relevant principles explained in this judgment."

6. To help put those principles in context, it is worth repeating the summary of events given by Spencer J at paragraphs 10-13 of his judgment in *Lord Chancellor v Henery*:

> On the day of trial a grade C fee-earner from the solicitors, a paralegal, attended court to instruct counsel… at 3.05pm the case was called on. The judge confirmed that it was an effective trial. The judge was informed that a prosecution witness (a police officer) was not available, but defence counsel confirmed that he was not required. There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made…
>
> At 3.17pm a jury was empanelled and the jurors were sworn. The court log records that the jury was sent home to return at 12 noon the following day, "they are NOT put in charge today, to be put in charge tomorrow". The case was adjourned until 11am the following day…
>
> Next day… the case was called on at 11am and counsel requested more time, which the judge allowed. At 12.40 pm the prosecution applied to add a second count to the indictment, against each defendant, alleging affray. The application was granted. At 12.51 pm the judge informed counsel that he would discharge the jury, the court log again recording that the jury had not been "put in charge." No doubt the judge was concerned that the jury had already been waiting for nearly an hour. Once the jury had been discharged,

all three defendants pleaded guilty. Their cases were adjourned for sentence…"

5. On those facts, Spencer J found that there had been no trial in any meaningful sense. The question in this case is whether, applying the principles he set out, a different conclusion should be reached.

The Facts of This Case

6. The Defendant was charged on an indictment containing 11 counts; four of causing a child to watch a sexual act; one of attempting to engage in penetrative sexual activity with a child; two of being concerned in making an offer to supply a controlled drug of Class A; three of making indecent photographs of a child; and one (count 11) of possessing an extreme pornographic image.

7. Counts 1-10 related to alleged incidents involving the Defendant's cousin and her friend. The Defendant was 18 and the girls were 13 and 14.

8. The case was listed for a pre-trial preparation hearing (PTPH) on 17 May 2021 with another unconnected allegation of rape (T20217197). The Defendant entered not guilty pleas. The rape trial was fixed for 6 December 2021 and the trial of this case, counts 1-11, was fixed for 10 January 2022.

9. At a hearing on 7 October 2021 the Crown offered no evidence on counts 1 to 10 and not guilty verdicts were entered.

10. On the listed count 11 trial date of 10 January 2022, Defence counsel was awaiting the result of a Covid test. The case was adjourned to the following day with new Defence counsel to be instructed if necessary.

11. On 11 January 2022 the case was listed for trial at 12.20. New Defence counsel attended. The court log records Prosecution counsel advising the Judge, His Honour Judge Medland QC, that she had tasked the officer in the case to deal with enquiries from the Defence and that the Crown needed the Defendant to put his position into a Defence Statement so that the Crown could consider it.

12. HHJ Medland QC asked Defence Counsel when this position had arisen and, upon the defence being outlined, observed that it must be set out clearly in a Defence Statement. Prosecution counsel indicated that in response to the statement further evidence needed to be obtained and further work needed to be done.

13. HHJ Medland QC offered his assistance if requested, and stated that he was not minded to swear in a jury at that point. The case was adjourned until 12:55, when Defence Counsel advised the court that the position was unchanged and that the Defence Statement was about to be uploaded. HHJ Medland observed that if the Defendant were to plead guilty, he would face a financial penalty, but Defence counsel confirmed that the Defendant wished to continue. The case was adjourned until 10am on 12 January, HHJ Medland QC indicating that a Jury would be sworn in then.

14. The case was listed at 10.00 on 12 January before Her Honour Judge Lloyd. The court log however records that when the case was called on at 10:46, Prosecution counsel advised HHJ Lloyd that the Crown would offer no evidence on count 11, putting on the record her dissatisfaction at the fact that had the Defendant served a Defence Statement prior to 10 January, the case could have been disposed of without the need to list it for trial at all.

15. HHJ Lloyd asked whether the Crown would be applying for wasted costs and was advised that there would be no such application. HHJ Lloyd then advised Defence counsel in emphatic terms that she required within 7 days a full explanation from the Appellant, as a huge amount of court time had been dedicated to the case, precious trial time had been wasted and she regarded it as the fault of the Defendant and the Appellant that the requisite information had not been provided. There would, she said, be no wasted costs and no defence costs if applied for. The court log records "Trial Cracked or Ineffective: K - Prosecution end case: public interest grounds… Late service of defence statement".

16. Following the hearing as required by HHJ Lloyd, Mr Younas of the Appellant firm offered a written explanation for the late production of the Defence Statement, in these terms:

> "Previous trial counsel took instructions from Mr Dale when he faced an 11 count indictment and the defence statement adequately addressed the case as it was against him at the stage 2 date.
>
> Previous trial counsel did not conduct the rape trial and subsequently did not see Mr Dale. It was at the conclusion of the rape trial that the Crown finalised their position as to the remaining count on this case.
>
> Having read the opening of the Prosecution case that the Crown recently tightened up their evidence in respect of the 3 images sent via WhatsApp. Therefore it would only have been on the 10th or 11th January 2022 that instructions would have been needed on the issue of sent messages.
>
> New trial counsel only came into the case on Tuesday 11th January. The 3 counts were previously just count 11 on the original indictment and contained reference to 18 videos as opposed to these specific 3 videos. That was only specified this week by the crown so in terms of taking his instructions on these 3 videos in particular, that only happened on the trial day."

17. HHJ Lloyd did not accept this explanation, replying:

> "I do not concur with Mr Younas view of the situation.
>
> Whether trial counsel has seen Defendant or not, it is for Defence solicitors to prepare a defence statement in accordance with the CPR and directions made at PTPH i.e, stage 2. Putting Prosecution to "strict proof" is not an adequate defence statement particularly as the burden of proving that Defendant has a statutory defence is upon Defence.

> The evidence was not "tightened up" by Prosecution nor was there an opening. It was only when Defence counsel served the Defence Statement on the second listed day of trial that Prosecuting counsel was able to act upon it. Had an adequately detailed defence statement been served when it should your client's case in relation to the images may have resolved much sooner."

Submissions

18. In the Appeal Notice the Appellant offers the following account of events.

19. Further telephone attribution was served by the Crown on the morning of 11 January, which the Defence team had to go through with the Defendant at length, advising the Defendant on the effect of this new evidence on his case. .Discussions also took place between the Defence and Prosecution counsel regarding "the public interest", and the Defence planned to have the conversation with the Judge in open court. At this point Prosecution Counsel confirmed that the CPS would not drop the matter on public interest grounds.

20. Prosecution Counsel also asked the Defence to produce and serve a new defence statement based on the defendant's instructions that morning, which was subsequently written, signed and served on the court just before the lunch break.
21. Given the instructions that the Defendant gave to the Appellant, the Defence had several other questions for the Prosecution, including how the videos were presented in WhatsApp chat. All these discussions took place in court.

22. Following service of the new Defence Statement, and queries raised by the Prosecution regarding the defence, the Defence team in the afternoon of 11 January went to Hutton Police Station. The purpose was to analyse the phone download, which due to the sensitive nature of the evidence this had to be undertaken at the police station.

23. On 12 January 2022, as a result of what the defence team analysed at the Hutton Police Station, the Crown following consultation decided to offer no evidence on all charges, on what was effectively day 2 of the trial.

24. The Appellant in the Appeal Notice contends that in accordance with modern practice the court was dealing with substantial matters of case management and that the trial had begun in a meaningful sense.

25. The Appellant's case was expanded upon in written submissions by Mr McCarthy of counsel. These submissions appear to have been prepared on the instructions of the Appellant without sight by Mr McCarthy of the court log or the post-trial correspondence between the Appellant and HHJ Lloyd, and which in consequence (and I emphasise that this is not a criticism of Mr McCarthy) do not appear to me to be entirely factually accurate.

26. Mr McCarthy points out in his written submissions that the case was listed as a trial throughout. On 11 January 2022, it appears that the matter was not called on until 12:20pm because the Crown served additional evidence in advance, which included telephone attribution material. The case was based on materials sent on a telephone via WhatsApp. Telephone evidence was consequently vital and had to be considered with

care. The various defence statements served addressed the issues clearly and disclosure was sought in relation to the downloads relied upon.

27. On 11 January the Crown served a witness statement of Abby Twiname. This was accompanied by four exhibits of extracted telephone material. It was this material that generated further discussion between the parties and the Defendant on 11th January. As a result of consideration of this material, the Defendant updated his defence statement on the same date.

28. Counsel on both sides were in discussion during the day as to the way in which the Crown now put the case. There were discussions as to presentation of the evidence, based in particular on the new material served. Much of this discussion took place outside the Court room but matters were also canvassed with the Judge during the day.

29. As a result of service of the updated defence statement, the Defence team was permitted to attend at the Police station to view the fuller telephone material. Given the sensitivity of the material, it could not be provided in any other way. This is a common process in such cases. Following this review, the Defence held further discussions and representations were made to the Crown.

30. On 12th January 2022, the matter was again listed for trial. The Defendant was steadfast in his refusal to accept the allegations. The defence made further representations. On a careful review by the Crown, including the updated defence statement and submissions from Counsel and Solicitors, the Crown decided that it had no alternative but to offer no evidence. This bought the case to an end.

31. Mr McCarthy's oral submissions on the hearing of the appeal were based on better information. He indicated that all parties anticipated a trial. New Defence counsel, on 11 January, had he said expressed concerns about the adequacy of the Defence Statement and it would appear that until 11 January the Appellant had not properly reviewed the sensitive material held at Hutton Police Station. It is unclear whether counsel accompanied the Appellant to view the material on 11 January, but the Crown's decision to offer no evidence on count 11 must have come about first because of the review of the sensitive material on 11 January and second from service of the Defence Statement on the same date.

32. Mr McCarthy accepted that the Defence is under a duty to serve a Defence Statement in good time but submitted that was done in good time when new counsel determined that an updated Defence Statement was required. That is not ideal, but it is not unusual.

33. This was not a large, complex multi-handed case, but, Mr McCarthy submitted, it was important and it did result in a positive outcome for the Defendant, who had held out for a trial. Possible slowness on the part of the Defence team in reviewing the sensitive material and preparing a Defence Statement does not detract from the fact that a trial had, in a meaningful sense, begun, matters of substantial importance having been addressed. The question must be addressed in the context of the case.

34. There are always cases where work is undertaken later than it should have been, but that does not, he submitted, have a bearing upon whether a trial has started. The

Defendant could, for example, have declined to update the Defence Statement until a point when it was unarguable that a trial had started. Under statute the responsibility for serving a Defence Statement lies with a defendant, and so the decision as to whether to serve a Defence Statement is that of a defendant. Whilst failure to do so might be held against a defendant, or a trial Judge might well be dissatisfied at the late production of or amendment to a Defence Statement, that does happen, and the timing has no bearing on the question of whether a trial has begun.

Observations

35. Mr McCarthy has referred to a number of Costs Judge decisions concerning "substantial matters of case management" which, of necessity, are fact sensitive. Mr Orde has focused rather on an interpretation of *Lord Chancellor v Henery* which I might well find too restrictive, if I thought it necessary to analyse his submission in detail for the purposes of this appeal. Although I am grateful to both Mr McCarthy and Mr Orde for their submissions, I do not find it necessary to go into them in depth, for these reasons.

36. I start by expanding on observations I have made in several recent judgments on the question of whether a trial has started. Arguably, the "substantial case management" criterion will only be met if the court itself engages in substantial matters of case management. As I have said before, it seems to me that that must be what Spencer J had in mind in *Lord Chancellor v Henery*.

37. A number of judgments at Costs Judge level have however accepted that "substantial matters of case management" may in effect be delegated by the court to Prosecution and Defence counsel, who may resolve them through discussion rather than through active intervention by the trial Judge, and that in such circumstances a trial may be said to have started in a meaningful sense.

38. In principle I do not disagree, but many appeals are now presented on the basis that almost any discussions between Prosecution and Defence on the date set for trial involve "substantial matters of case management". That is not the case. Proper regard must be had to the nature of the discussions.

39. "Substantial matters of case management" (*R v Wood* (SCCO 178/15)) must involve significant issues concerning the conduct of the trial which, if not agreed, would fall to be determined by a ruling from the trial judge. That does not extend to any other discussion between Prosecution and Defence, even if the subject matter (such as negotiating a basis of plea or, as in *Lord Chancellor v Henery*, a change to the indictment) can be said to be important in a wider sense. To broaden the definition of "substantial case management" to that extent is to depart from the guidance of Spencer J.

40. Applying that definition, I have seen nothing to justify the proposition that substantial matters of case management were addressed in this case between 10 and 12 January 2022. Service and consideration of a quite limited body of telephone evidence would not qualify. Nor would service of a proper Defence Statement on a public interest defence, which should already have been served as a routine matter.

41. Further, the Appellant is relying, not as the appeal suggests on work appropriately undertaken at trial to persuade the Crown to withdraw its case, but upon a proper review of the sensitive evidence and the preparation of an adequate Defence Statement that should have been, but was not, undertaken pre-trial. There is an inherent contradiction in the proposition that a trial must have started because a solicitor has belatedly undertaken work that, if done in good time, could have avoided a trial altogether. When Spencer J referred to the court dealing with "substantial matters of case management" he could scarcely have had that in mind.

42. Whilst Mr McCarthy is right in saying that the ultimate responsibility for serving a Defence Statement lies with a defendant, the ultimate responsibility for any step taken by any party to any litigation, civil or criminal, always lies with that party. It does not absolve a solicitor from the responsibility to give due consideration to the evidence and to advise the client appropriately, in this case on the availability of a statutory defence and the timely service of an adequate Defence Statement. For the reasons given by HHJ Lloyd it is evident that the responsibility for that not being done, and for the attendant waste of court time and cost, lies with the Appellant.

Conclusions

43. For the reasons I have given, I do not accept that "substantial matters of case management" were addressed in this case so as to justify the conclusion that, applying the guidance of Spencer J in *Lord Chancellor v Henery,* a trial started in a meaningful sense.

44. Further, when Spencer J envisaged the court addressing "substantial matters of case management" he could not have had in mind work belatedly undertaken by Prosecution and Defence on the date set for trial because a Defence solicitor had failed to prepare a defendant's case properly pre-trial: especially where, if that work had been done in good time, a trial might have been avoided altogether..

45. The Appellant's conduct in this case brought about a substantial waste of valuable court time and resources. The Appellant seems to have been lucky to have escaped a wasted costs order. Whilst the 2013 Regulations must be applied mechanistically, there is no proper basis in this case for concluding that the same conduct should be rewarded by an increased Graduated fee.

46. For those reasons, the appeal fails.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2021-CRI-000093

Date: 10 March 2022

ON APPEAL FROM REDETERMINATION

REGINA v TINKLER

TEESIDE CROWN COURT

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

CASE NO: T20190059

LEGAL AID AGENCY CASE

DATE OF REASONS: 14 July 2021

DATE OF NOTICE OF APPEAL: 26 July 2021

APPLICANT: Harris Solicitors

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

The appropriate additional payment, to which should be added the sum of £1,200.00 for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MASTER NAGALINGAM
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. This appeal concerns the decision of the Determining Officer at the Legal Aid Agency in response to a claim under the Litigators Graduated Fee Scheme ('LGFS'). The issue for determination is whether the fee allowed for attendance on 23 June 2021 should be for a trial or a cracked trial.

Background

2. The Defendant was indicted on one count of being concerned in supplying a controlled drug of class B to another, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971, in that between 4 July 2018 and 23 July 2018 she supplied a quantity of cannabis to another.

3. Following her arrest and a no comment interview, the Defendant appeared at court on 27 February 2020 where she pleaded not guilty and the court gave directions to proceed to trial. At a pre-trial review on 18 May 2021 a trial was listed for 23 June 2021 where the Defendant was to be tried along with her co-accused, Darren Towler.

4. The defence case was that the Defendant had no knowledge of the drugs in question and to effectively ascribe all blame upon her co-accused (who was also her partner). The crown sought to rely on evidence, including handset evidence, which it was said demonstrated the Defendant's active involvement in the supply of drugs. In the course of events on 23 June 2021 the Defendant changed her plea to not guilty.

5. The Respondent says that in the circumstances a cracked trial fee is payable, and the Appellant has been remunerated as such. The Appellant says the trial had begun and therefore they ought to be remunerated accordingly.

Relevant Legislation and case guidance

6. The Representation Order is dated 30 January 2020 and so The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply. Schedule 2 states:

> ""*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places and –*
>
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*
>
> *(ii) either –*
>
> *(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or*

(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or

(b) the case is listed for trial without a plea and case management hearing taking place…"

7. I was referred by both the Appellant and the Respondent to the guidance in *Lord Chancellor v. Ian Henery Solicitors Limited* [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

"96. I would summarise the relevant principles as follows:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by the defendant, or a decision by the prosecution not to continue (*R v. Maynard, R v. Karra*).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (*Meek and Taylor v. Secretary of State for Constitutional Affairs*).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (*R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited* (the present appeal)).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (*R v. Dean Smith, R v. Bullingham, R v. Wembo*).

(6) If, in accordance with modern practise in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J. did in *R v. Dean Smith*, in the light of the relevant principles explained in this judgment".

The Appellant's Submissions

8. The Appellant's submissions are set out in the grounds of appeal and written submissions dated 22 November 2021. Mr McCarthy attended the hearing and made oral submissions.

9. The Appellant submits it is important to look at the events leading up to and including 23 June 2021, including the note of counsel. The court log reflects this matter was listed as a two defendant trial, and that the parties were ready for trial. For example, on 22 June 2021 the prosecution uploaded their opening note, agreed facts, expert's report and the jury bundle.

10. Mr McCarthy referred to the court log and invited focus on the references to "trial" in reference to the Defendant.

11. Mr McCarthy submits that across 22 and 23 June 2021 the case facts were discussed, and at that stage the judge and the parties clearly expected the trial to proceed. During this time the Appellant had to read and prepare.

12. Mr McCarthy advised that that further witness statements and exhibits were uploaded by the crown on 22 or 23 June 2021, including the transcript of a lengthy interview of the Defendant, and photographs from the Defendant's phone, and that consideration of the same on 23 June 2021 all goes to case management.

13. With reference to paragraph 2 of counsel's note wherein it states "Throughout the day counsel were engaged in preparation and agreement of finalised jury bundles and other matters of substantial case management including the exclusion of evidence for the purposes of trial", Mr McCarthy submits this can only refer to the evidence uploaded on 22 and 23 June 2021.

14. Further, the Appellant's case is that Defendant trial counsel's note demonstrates an "unequivocal declaration" from the trial judge that the trial had begun, and that the note has significance in the absence of a mirror note in the court log and/or no log entry to the contrary.

15. Mr McCarthy acknowledges that Mr Arnold's note refers to attending court on '24 June 2021' but advises this is an obvious error where Mr Arnold meant to refer to 23 June 2021. (This was not challenged by Mr Rimer).

16. Mr McCarthy accepts that the comments of a trial judge are not determinative of a question as to remuneration regarding whether or not the trial had begun, but invited significant weight be attached to the making of such comment because such comment is not routinely given.

17. In terms of the authorities relied on, Mr McCarthy considers even the Respondent's authorities weigh in the Appellant's favour.

18. As to whether case management in this matter was substantial, Mr McCarthy invited me to consider that question in the context of this particular case. That is because he accepts the index matter was not a complex, evidence-heavy case but when the work done is placed in the factual matrix of that context, matters of substantial case management are demonstrated and the trial had started in a meaningful sense.

The Respondent's Submissions

19. The Respondent's submissions are set out in the written reasons dated 14 July 2021 and written submissions dated 2 February 2022. Mr Rimer of the Legal Aid Agency attended the hearing and made oral submissions.

20. Mr Rimer considers the Appellant has put all their eggs in the basket of paragraph 96(6) of *Henery* and has a "steep hill to climb".

21. Mr Rimer submits this was not a "long case". No jury was selected, and whilst the jury bundle may have been uploaded that is something which happens in every case and will have included evidence the Appellant had been in possession of for weeks or months already. Mr Rimer therefore questioned how can it be said the uploading of the jury bundle amounts to matters of substantial case management?

22. Mr Rimer also argued that the test is whether the court is dealing with matters of substantial case management, not private discussions between the parties.

23. Regarding the note of Mr Arnold, Mr Rimer accepted the same contained a simple date error. Mr Rimer invited focus on paragraph 1 of the note which states "I can confirm that the judge within his discretion indicated that 24/6/21 was the first day of the trial despite the fact that at the conclusion of the day the case was resolved by guilty pleas".

24. Mr Rimer questioned why the judge would say it was the first day of trial given the circumstances. Mr Rimer then went on to speculate what the trial judge had actually said or meant.

25. As to the jury bundle, Mr Rimer submits the same amounts to run of the mill work, and that it is not substantial case management to consider the same.

Analysis and decision

26. This appeal concerns a single issue as to whether a trial had begun in a meaningful sense or not. It is agreed there is no definition of trial within the remuneration regulations.

27. As per paragraph 96(2) of *Henery*, the fact that a jury was not sworn is not determinative of the question of whether the trial had begun in a meaningful sense.

28. The terminology of "meaningful sense" is found at paragraph 96(6) of Henery and invites consideration of whether "the court is dealing with substantial matters of case management" such that "it may well be that the trial has begun in a meaningful sense."

29. Where the answer to that question is not obvious, it is necessary to "see how events have unfolded".

30. Further, it is clear that Defendant trial counsel sought to anticipate potential difficulties in deciding whether a trial had begun by reference to counsel's note in which an indication was requested from the trial judge, and given, that 23 June 2021 was the first day of trial.

31. Counsel's note is short, and reads in full as follows:

> "I can confirm that the judge within his discretion indicated that 24/6/2021 (sic) was the first day of the trial despite the fact that at the conclusion of the day the case was resolved by guilty pleas.
>
> "Throughout the day counsel were engaged in preparation and agreement of finalised jury bundles and other matters of substantial case management including the exclusion of evidence for the purposes of trial.
>
> "It was on this basis, within the criteria outlined in Lord Chancellor v Henery [2012] 1 Costs LR 205, that it was requested that 24/6/21 be deemed the first day of trial."

32. As to the note of Defendant trial counsel, I do not intend to rehearse the totality of supporting case law regarding such notes, save to acknowledge that a note of counsel ought to be accepted in place of where a court log is lacking.

33. Further, and not that I was invited to, I am loathe to find Mr Arnold's note amounts to an embellishment or exaggeration. I am equally loathe to be drawn on speculation by the Respondent as to what the trial judge said or didn't say. Counsel's note ought to be accepted at face value.

34. However, as indeed the Appellant acknowledged, the comments of the trial judge are not determinative but rather something that may be weighed in the balance.

35. That balance includes the court case logs for both the Defendant and her co-accused, Mr Towler (both on 23 June 2021).

36. The court case log for the co-defendant, Mr Towler, demonstrates that the case was called on at 13.02 following which the trial judge was advised Mr Towler was feeling unwell, had been denied access to the court building pending a covid test, and that he now intended to plead guilty via video. The log at 13:04 records **"**Tinkler to be a trial".

37. Following confirmation of acceptance by the crown that Mr Towler may plead guilty via video link, the log records at 13:06 "lets do that at 2.00pm" (with respect to hearing by video Mr Towler's guilty plea) and "still a trial for Tinkler", followed by "hopefully we can get a jury sworn at least today".

38. Following Mr Towler's guilty plea, the log records a direction to delay his sentencing until after a more serious matter Mr Towler was due to be tried for in March 2022. Having directed as such, the log records "regarding Ms Tinkler – we start in about an hour" (14.09). The log then records at 14.11 "Case adjourned until 15:10" and at 14.17 "Hearing finished for DARREN TOWLER".

39. The court case log for the Defendant is consistent with the above, and confirms the case was adjourned to 15:10 following Mr Towler's guilty plea and the trial judge's subsequent directions.

40. At 15:39 the log records that the judge addressed the advocates; "bad news – we don't have another jury panel. this case unfortunately will be going off. discussing facts of case." The log then records a conversation between the trial judge and the prosecution in which category of offence and likely sentencing are discussed. The judge then addressed the Defendant and her advocate as to those same issues, before the case was adjourned for a further 30 minutes, to 16:15.

41. Upon resumption the crown made an application to amend the indictment which was granted unopposed, shortly after which the Defendant changed her plea to guilty and sentencing was addressed.

42. In terms of counsel's contemporaneous note, he cites preparation and agreement of finalised jury bundles and exclusion of evidence for trial as specific examples of substantial matters of case management.

43. I am assisted to some degree by the additional cotemporaneous note of the Appellant fee earner, Atta Rehmen, in terms of consistency (with the court case log and counsel's note) and context. Mr Rehmen's note explains lengthy discussions with the prosecution as to the exclusion of messages discussing the supply of cocaine. The prosecution argued the inclusion of such messages

demonstrated a pattern of drugs supplying. The defence argued the inclusion of such evidence was prejudicial, went to bad character and was inadmissible.

44. Whilst there appears to be no suggestion that such matters were argued in court before the judge, that does not mean engaging in such discussions are rendered incapable of being matters of substantial case management. Inclusion or exclusion of evidence for trial is clearly an important issue and is no less a matter of case management simply because the parties agree the issue following discussions.

45. Mr Rehmen's note also includes reference to the impact of the included evidence on the parties' opening statements. Upon agreement being reached as to excluded evidence, edits to the expert witness statement also had to be agreed. The jury bundle was thereafter amended. All such amendments and edits are a natural consequence of the exclusion of evidence that previously formed part of the jury bundle and index.

46. Reading Mr Rehmen's note and the court log together, it is also clear that the trial judge addressed the parties as to likely sentencing, and indicated that a non-custodial sentence would likely be imposed in the circumstances as they presented (i.e. as to indictment).

47. I am also advised that the crown had served their opening note, jury bundle index and agreed facts – which were then appropriately amended or edited following the agreement as to excluded messages outlined above.

48. Whilst I disagree generally with the pleaded submission that the trial judge's declaration on 23 June 2021 amounted to the first day of trial is determinative of the outcome of this appeal, it is comment which weighs in the Appellant's favour in my determination of the single question before me on this appeal.

49. I also take into account references in the court case log to the Defendant's hearing being a trial. Further to this is the context in which the withdrawal of messages concerning the supply of cocaine should be placed, given the balance of the evidence available with which to try the Defendant. What presented was a substantial dispute as to evidence capable of having a material effect on the outcome of the trial and therefore, in my view, a matter of substantial case management in the context of the factual matrix of this case.

50. There is also the fact of clear address and discussion with the judge as to amending the indictment, the sentencing options available to the judge, and the subsequent application to amend.

51. All of the above preceded the Defendant's change to a guilty plea and in my view it is clear that the court was responsible for matters of substantial case management for much of 23 June 2021.

52. I also take into account that all logs and notes I have read concerning 23 June 2021 strongly indicate that but for a jury having been empanelled for another trial that afternoon, and where delay to the commencement of the Defendant's trial was caused by Mr Towler taking ill and being denied access to the court building, the trial would have proceeded as listed. That was clearly the intention in my view, and but for the substantial case management otherwise achieved on 23 June 2021 the trial would have gone off to be heard on a later date.

53. In all of the circumstances, I conclude a trial fee is payable and the appeal is therefore allowed.

TO:

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COPIES TO:

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The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.

Neutral Citation No. [2022] EWHC 1775 (SCCO)

Case No: T20210174

SCCO Reference: SC-2022-CRI-000034

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 30 June 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
BARZEY

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

Appellant: **Lloyds PR (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors of a graduated fee, as determined under Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The matter in issue is whether payment should be made for a Guilty Plea or for a Cracked Trial.

2. Cracked Trials and Guilty Pleas are defined, for the purposes of the 2013 Regulations, at Schedule 2 Paragraph 1(1):

> "…cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
>
> (ii) either—
>
> (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or
>
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea;
>
> "guilty plea" means a case on indictment which—
>
> (a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and
>
> (b) is not a cracked trial…"

Case History

3. The Appellant represented Demme Barzey ("the Defendant") in the Crown Court at St Albans.

4. The Defendant was charged with offences concerning in the supply of class A drugs. On 1 May 2021 he was produced for a first appearance at St Albans Magistrates Court and his case was sent to the Crown Court.

5. A first Plea and Trial Preparation Hearing ("PTPH") to place on 1 June 2021 was adjourned to 3 June 2021 without any plea being entered. This and further PTPHs on 3 June, 11 June and 14 June 2021 were all adjourned, apparently due to a lack of readiness on the part of the Crown. At the PTPH on 11 June 2021, HHJ Michael Simon fixed a trial for 4 January 2002 with a 3–4 day time estimate.

6. The Defendant did not attend a hearing scheduled for arraignment on 27 July 2021. The court set a further hearing for arraignment on 3 August 2021, the Judge confirming that the matter was still proceeding towards the scheduled trial date to start on 4 January 2022, the Crown being ready to proceed on that date.

7. On 3 August 2021 the Defendant attended court, and having had the opportunity to consider the evidence against him and provide instructions, he entered guilty pleas. The matter was put over for sentencing with the parties to agree a basis of plea.

8. The Appellant claimed the graduated fee appropriate to a cracked trial. The Determining Officer took the view that the Defendant entered a guilty plea at the first hearing at which a plea was taken or at which there had been the opportunity for arraignment. The trial listing had in the Determining Officer's view been put in place as an administrative matter prior to arraignment and prior to the defendant's provision of instructions, and that at that point there had been no active anticipation of or trial preparation. The appropriate fee payable fee was, accordingly, for a guilty plea.

Submissions

9. The Appellant says that the Determining Officer has overlooked subparagraph (b) within the definition of a cracked trial, and in wrongly treating the listing of a trial date as a merely administrative matter, has not correctly applied the provisions of the 2013 Regulations. Those Regulations state that where a case is listed for trial without a plea and case management hearing taking place, a cracked trial fee is due. That is what happened.

10. Further, the Regulations confer a discretion on the Determining Officer to consider all procedural and factual scenarios of the case. The Determining Officer has not properly exercised that discretion so as to assess the claim under the 2013 Regulations in a just and reasonable manner.

11. Both the Crown and the Defence, in what was effectively trial preparation, prepared detailed analyses of the telephone evidence served by the Crown. Gaps in continuity were identified by the Defence and remedied by the Crown. It was this exercise that allowed the Defendant to decide to enter a guilty plea. In those circumstances it is appropriate for a cracked trial fee to be paid.

12. Ms Weisman for the Lord Chancellor submits that he Determining Officer's position is correct and that the correct fee payable is for a guilty plea.

13. This matter cannot be deemed a cracked trial case under paragraph 1(1)(a), which envisages circumstances in which a defendant enters a not guilty plea at the first opportunity to plead, but the matter does not proceed to trial because either he or she

later changes that plea to one of guilty, or the Prosecution indicates an intention not to proceed. This clearly does not apply on the facts of the instant case.

14. Paragraph 1(1)(b), the provision upon which the Appellant relies, envisages circumstances in which the case is listed for trial without a hearing at which the defendant enters a plea ever taking place. It is of course accepted that a trial date was fixed prior to the defendant entering a guilty plea, but paragraph 1(1)(b) provides that a case will be a cracked trial where the matter is listed for trial without a hearing at which the assisted person enters a plea, not where the matter is listed for trial before a hearing at which a plea is entered. The two scenarios are not identical. The former satisfies the definition of the cracked trial while the latter (which is the case here) does not.

15. Ms Weisman in that respect relies upon the judgments of the Senior Costs Judge (then Master Gordon-Saker) in *R v Rahman* (SCCO 198/13, 17 December 2013) in which, considering a similar definition of "cracked trial" in the Criminal Defence Service (Funding) Order 2007, he found that where a plea and case management hearing takes place at which the relevant defendant pleads guilty, "the case is (not) a cracked trial, even if a trial had been listed at an earlier preliminary hearing".

16. I have added the word "not" in brackets to my quotation from Master Gordon-Saker's judgment, because it is evidently missing in the original, in which he dismissed an appeal against a Determining Officer's decision to pay a guilty plea fee rather than a cracked trial fee.

17. Ms Weisman also relies upon the judgment of Costs Judge Brown in *R v Lamin* (SCCO ref: 175/19). She submits that the wording of the regulation is intended to draw a clear distinction between those cases in which the prosecution and/or defence clearly and procedurally demonstrate an intention to proceed to trial, but later change course (a cracked trial); and those cases in which a guilty plea may be entered at a relatively late stage, because disclosure is limited, instructions are unclear, and options are left open (a guilty plea).

18. This matter, she says, clearly falls into the latter category, as demonstrated by the fact that credit for an "early" guilty plea was preserved until a relatively late stage in proceedings when the evidence had been served and considered. Cases where the defendant pleads guilty at the very earliest opportunity, and prior to significant service of evidence, are comparatively rare, and the Respondent submits that the interpretation of "guilty plea" is not intended to be limited in the way contended for by the Appellant.

Conclusions

19. In the course of preparing this judgment, I found that I had in fact addressed the central issue in this case before, in the case of *R v Malik* (SCCO SC-2019-CRI-000136, 5 June 2020). The facts of *R v Malik* were rather different but, as in this case, I had to consider the appropriate interpretation of the words "… the case is listed for trial without a hearing at which the assisted person enters a plea". For ease of reference I will repeat here the conclusions I set out in *R v Malik*:

> "… there are two situations in which a cracked trial fee will be due under Schedule 2 to the 2013 Regulations. The first requires, before any other condition is met, that the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea…
>
> The second is that a case is listed for trial without a hearing at which the assisted person enters a plea. This could be read in one of two ways: that there is no hearing at which the assisted person enters a plea, or that there is such a hearing, but the case is listed for trial before it takes place.
>
> It seems to me that the first interpretation must be the correct one. The word "without" indicates that the provision is meant to apply where there is no such hearing. If the 2013 Regulations were intended to provide for a cracked trial fee where a case is listed for trial before, rather than without, a hearing at which the assisted person enters a plea, they would say so. They do not.
>
> That is in my view consistent with the conclusions of Master Gordon-Saker and with the evident intention behind the cracked trial provisions of the 2013 Regulations and their predecessors, which is to provide for a cracked trial fee where a case proceeds toward (but does not reach) trial either on the basis of a not guilty plea, or without any discrete hearing at which a plea can be entered."

20. I am unable to accept the Appellant's submission to the effect that the 2013 Regulations confer a discretion upon the Determining Officer. On the normal principle that the rules are to be interpreted mechanistically, a cracked trial fee will be paid if the definition of a cracked trial is met, and not otherwise. There is no discretion in that respect. For that reason, whether it is legitimate to describe the listing of the trial as "administrative" seems to me to be beside the point. The question is whether, by reference to the definition in the regulations, there has been a cracked trial.

21. For the reasons I give in *R v Malik* (and in line with the conclusions reached by both the Senior Costs Judge and Costs Judge Brown) it seems to me this case does not meet the definition of a cracked trial. Accordingly, a guilty plea fee is payable and this appeal must be dismissed.

Neutral Citation No.[2022] EWHC 1542 (SCCO)

Case No: T20217078

SCCO Reference: SC-2021-CRI-000139

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 9th June 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
SEAN FITTON

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Lawrence and Co., Solicitors**

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

The appropriate additional payment, to which should be added the sum of £500.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE WHALAN

Introduction

1. Lawrence & Co. ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in respect of a claim submitted under the Litigator's Graduated Fee Scheme ('LGFS'). The issue is whether the Appellants are entitled to a graduated fee based on a 'cracked trial', as claimed, or whether it should be allowed as a 'guilty plea', as assessed by the Respondent.

Background

2. The Appellants represented Mr Sean Fitton ('the Defendant') who appeared at Portsmouth Crown Court charged with conspiracy to supply Class A drugs. The background to this case is complicated and unique.

3. Sometime prior to 2020 the Defendant was arrested, charged, tried and convicted on an allegation of Grievous Bodily Harm. He was sentenced to a term of imprisonment. He was released on licence having served half his sentence.

4. He was then the subject of a new allegation of conspiring to supply Class A drugs. This charge triggered his recall on licence. When the Defendant was notified of his recall by his Probation Officer, he fled to the Republic of Ireland.

5. A European Arrest Warrant ('EAW') was then issued, based apparently on his recall from licence. An EAW is an enabling provision that turns on the existence of a domestic arrest warrant, so it may be that the issue of a EAW was incorrect in this case.

6. Then, in August 2020, the Defendant was arrested by the Garda in Ireland for offences allegedly committed in Ireland. This detention prompted his further arrest in Ireland on the EAW.

7. In February 2021 the Defendant was then extradited to the United Kingdom. He was returned to prison to complete his sentence for the GBH.

8. On 24th May 2021, while the Defendant was still in prison, he was taken to Basingstoke Magistrates' Court to appear on the drugs conspiracy allegation. No

judge was available and no hearing took place. Nonetheless the court sent the Defendant's case to Portsmouth Crown Court for a directions hearing. At no stage was the Defendant arraigned or asked to enter or indicate a plea. As the Defendant had 'special protection' arising from his extradition, it may well be that the process followed by the prosecution was incorrect.

9. The Defendant appeared at Portsmouth Crown Court on 23rd June 2021 for a Plea and Trial Preparation Hearing before HHJ Melville QC. It is clear from the Court Log (14:10) that there was "No arraignment". It seems that by then the prosecution was beginning to grapple with the complex procedural issues raised by the Defendant's case, so he was remanded in custody for a "review hearing in four weeks" (14:23).

10. The Defendant's case was re-listed For Mention on 30th June and 9th July 2021. By this stage, the prosecution, realising that the procedure followed hitherto was incorrect, requested that the case be remitted to the magistrates' court, so that the case could be regularised and "then start again" (30 June 2021, 15:15). At no point on either 30th June or 9th July was the Defendant arraigned or invited to indicate a plea. Indeed, on 30th June HHJ Melville QC indicated that the indictment should be stayed (Court Log, 15:30).

11. On 14th July 2021, the case was re-listed For Mention. By this stage the prosecution and the defence effectively agreed the appropriate procedure. The judge stayed the indictment (CL, 09:49) and the "Case [was] Closed" (09:52).

12. The Defendant was released from prison at the end of his sentence in about August/September 2021. It was evidently the prosecution's intention to return the Defendant's case to the magistrates' court and re-start the drugs conspiracy proceedings. Unfortunately, the case never re-started because the Defendant unexpectedly died on 3rd January 2022.

The Regulations

13. Legal Aid was granted to the Defendant on 20th May 2021 and so The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended in 2018, apply to this appeal.

14. Schedule 2, Litigator's Graduated Fees Scheme, Part 6, contains the following relevant definitions:

> *"Cracked Trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing takes place and –*
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*
> *(ii) either –*
>
> *(aa) in respect of one or more counts to which the assisted person has pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place;*
>
> *"guilty plea" means the case on indictment which –*
>
> *(a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and*
> *(b) is not a cracked trial; …*

Submissions

15. The Respondent's case is set out in Written Reasons dated 4th May 2022. No appearance was made at the appeal hearing on 6th May 2022, but Mr Rimer, a Senior Lawyer at the LAA, filed helpful additional submissions by e-mail on 5th May 2022. The Appellants' case is set out in Grounds of Appeal in the Appellants' Notice and in a separate document entitled 'Note on Costs'. Mr Daoud, a Solicitor Advocate, appeared at the hearing and made oral submissions for the Appellants.

My analysis and conclusions

16. The Appellants and the Respondent agree that this is an unusual – essentially unique – case and that the circumstances do not fit naturally within the regime laid down for the LGFS in the 2013 Regulations. They agree that 'cracked trial' or 'guilty plea' comprise the only realistic options and that neither apply perfectly.

17. Mr Rimer, for the Respondent, submits that the Determining Officer's decision was correct as the requirements for a cracked trial were not met. Ultimately the case was stayed following "technical argument", although it is accepted that this was a complex case involving "a large amount of prosecution evidence".

18. The Appellants, conversely, submit that this could not be a guilty plea, as at no stage at Basingstoke Magistrates' Court or Portsmouth Crown Court did the Defendant actually plead guilty (or enter any plea), notwithstanding five listings or appearances. On the contrary, so far as the claim must be either a cracked trial or a guilty plea, the circumstances favour clearly the former over the latter.

19. This is, as noted, an unusual case. My conclusion is that the submissions of the Appellants should be preferred to those of the Respondent. I agree with Mr Daoud that this could not properly be classed as a 'guilty plea', as at no stage did the Defendant enter a plea, guilty or otherwise. It seems to me that the fact of the guilty plea should be, at the very least, a prerequisite to a classification in the LGFS as a guilty plea. Conversely, in my view, the case does satisfy the technical requirements of a 'cracked trial'. A plea and case management hearing did take place on 23rd June 2021 (although in Portsmouth Crown Court it was termed a 'Plea and Trial Preparation' hearing). The case did not then proceed to trial, in circumstances where the 'for other reasons' category in 1(1)(a) (i) is seemingly satisfied. Ultimately the prosecution offered no evidence, the indictment was stayed and the case was closed, albeit with the intention clearly of re-starting in the magistrates' court in due course. The LGFS, as has been noted in numerous decisions, invokes a 'swings and roundabouts' system of remuneration, the operation of which can lead, in certain cases, to an applicant being either over or underpaid in a particular case. In fact, I do not see that a cracked trial assessment confers any windfall on the Appellants, as this was a complex, technical prosecution, leading to four Crown court appearances, and the submission of a 38-page Skeleton Argument, raising complex arguments in law were accepted ultimately by the prosecution.

20. Accordingly, this appeal is allowed and I direct that the Appellants LGFS claim should be paid as a cracked trial and not a guilty plea.

Costs

21. The Appellant have been successful in this appeal and I award costs of £500+ VAT, along with the £100 paid to lodge his appeal.

TO:

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Neutral Citation No. [2022] EWHC 2231 (SCCO)

Case No: T20217026

SCCO Reference: SC-2022-CRI-000074

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 11 August 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
JARIR

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **M&A Solicitors**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors of a graduated fee, as determined under Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The matter in issue is whether payment should be made for a Guilty Plea or for a Cracked Trial. The Representation Order was made on 10 February 2021, so the 20013 Regulations apply as in force on that date.

2. Cracked Trials and Guilty Pleas are defined, for the purposes of the 2013 Regulations, at Schedule 2 Paragraph 1(1):

> "…cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
>
> (ii) either—
>
> (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or
>
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea;
>
> "guilty plea" means a case on indictment which—
>
> (a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and
>
> (b) is not a cracked trial…"

Case History

3. This appeal has, at the Appellant's option, been disposed of without a hearing. The detail of the case as available to me from the papers filed is limited, but adequate for the purposes of the appeal.

4. The Appellant represented Adam Jarir ("the Defendant") in the Crown Court at Bolton. The Defendant, one of at least five co-defendants, was charged with two counts of Conspiracy to Supply Class A Drugs.

5. A Plea and Trial Preparation Hearing (PTPH) was listed for 10 March 2021 but was not effective, apparently due to problems with video conferencing technology. As a result, none of the defendants were arraigned on 10 March.

6. Both the Appellant solicitors and counsel (who has I understand been paid a cracked trial fee) were however in attendance at court. The Defendant's instructions to the Appellant were that he was not guilty and an indication of his position and that of other Defendants was apparently given to the court. The case was listed for trial on 4 October 2021 with a time estimate of four weeks, on the basis that there would be five Defendants pleading not guilty.

7. The PTPH was adjourned to 4 April 2021, credit for a guilty plea being to the adjourned hearing. The Defendant failed to appear on 14 April but reiterated his "not guilty" instructions to the Appellant. He did however (along, it would appear, with other defendants) plead guilty at a further case management hearing on 13 May 2021, that hearing being described by the Determining Officer as the first formal opportunity for the Defendant to plead. The Appellant had prepared a Defence Statement by that stage and the guilty plea came as something of a surprise to the Appellant.

8. The case was then listed for sentencing and the Defendant was sentenced on 14 February 2022.

The Determining Officer's View

9. The Determining Officer, referring to a number of costs decisions made between 1999 and 2001, took the view that although the Defendant's case was listed for trial before a plea was entered, that was done only for administrative purposes. As soon as an effective PTPH had taken place the Defendant was listed for sentence and trial was not sought by the prosecution.

10. The case had been listed for trial with no pleas entered. If it had had remained listed for trial then a Cracked Trial would be payable. Guilty Pleas were however entered at the adjourned PTPH and in consequence the case was no longer listed for trial. In those circumstances only a Guilty Plea fee, in the Determining Officer's view, was payable.

The Appellant's Submissions

11. The Appellant relies upon the judgment of Costs Judge Rowley in *R v Williams* (SCCO SC-2019-CRI-000118, 30 April 2020).

12. The facts in *Williams* were similar to the facts of this case. The defendant in *Williams* was not formally arraigned at an initial PTPH but indicated that a not guilty plea would be entered, so a trial date was set. Four months later, the defendant pleaded

guilty, so the trial did not go ahead. Costs Judge Rowley decided that the case qualified for a cracked trial fee, saying (at paragraph 8 of his judgment):

> "The Legal Aid Agency's Crown Court Fee Guidance accurately describes the essence of a cracked trial as being that after the PTPH there is still the real possibility of a trial. The express way of this occurring is of course for the defendant to plead not guilty. But the guidance refers to the court setting a trial date as being a way of marking the possibility that a trial will go ahead. That description in itself suggests that a formal plea it the PTPH is not an absolute requirement."

13. The Appellant argues that precisely the same applies here, and that a cracked trial fee must, accordingly, be due.

Conclusions

14. In the light of R v *Williams*, and the payment of a cracked trial fee to the Defendant's counsel, I can quite understand why the Appellant is dissatisfied with the Costs Officer's decision. I regret to say however that I am unable to agree with the conclusions reached by Costs Judge Rowley. These are my reasons.

15. I should first say that I do not think that it matters whether the trial in this case was listed "for administrative purposes." The expression has no meaning for the purposes of the 2013 Regulations. Either a trial is listed or it is not.

16. Nor does this appeal turn upon whether a cracked trial fee was paid to counsel for the Defendant. I cannot comment upon that. The question before me is whether a cracked trial fee is, properly applying the 2013 Regulations, payable to the Appellant.

17. The real question seems to me to be that which I addressed in *R v Malik* (SCCO SC-2019-CRI-000136, 5 June 2020) and *R v Barzey* (SC-2022-CRI-000034, 30 June 2022), and which I shall repeat here for ease of reference.

18. There are two situations in which a cracked trial fee will be due under Schedule 2 to the 2013 Regulations. The first requires, before any other condition is met, that the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea. It has no application to this case.

19. The second is that a case is listed for trial without a hearing at which the assisted person enters a plea. This could be read in one of two ways: that there is no hearing at which the assisted person enters a plea, or that there is such a hearing, but the case is listed for trial before it takes place.

20. If the second interpretation is right, then the Appellant is correct, a cracked trial fee is payable, and the appeal should succeed. If the first interpretation is correct, then the fee appropriate to a guilty plea is payable, and the appeal should fail.

21. In both *R v Malik* and *R v Barzey*, I came to the conclusion that the first interpretation must be the correct one.

22. My reasoning in both cases concurred with that of Costs Judge Brown in *R v Lamin* (SCCO 175/19, 7 April 2020). I note that Costs Judge Rowley does not appear to have been referred to that decision, quite possibly because it was not available at the time. Costs Judge Brown's decision merits reading in full, but I will attempt to summarise it here.

23. In *R v Lamin* Costs Judge Brown undertook a careful and thorough analysis of the development of the 2013 Regulations, and its bearing upon the question I have identified.

24. Until 5 October 2015, the definition of Cracked Trial at paragraph 1 of Schedule 2 to the 2013 Regulations read:

25.

> "cracked trial" means a case on indictment in which—
>
> (a) a plea and case management hearing takes place and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
>
> (ii) either—
>
> (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or
>
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a plea and case management hearing taking place…"

26. It was in relation to that version of the 2013 Regulations that the Senior Costs Judge (then Master Gordon-Saker) in *R v Rahman* (SCCO 198/13, 17 December 2013) found that where a PCMH takes place at which the relevant defendant pleads guilty,

> "…the case is (not) a cracked trial, even if a trial had been listed at an earlier preliminary hearing."

27. I have, as in my previous judgments (and as did Costs Judge Brown in *R v Lamin*) added the word "not" to my quotation from Master Gordon-Saker's judgment, because it is evidently missing in the original, in which he dismissed an appeal against a Determining Officer's decision to pay a guilty plea fee rather than a cracked trial fee.

28. The question addressed by Costs Judge Brown in *R v Lamin* was whether it followed from the October 2015 changes to the 2013 Regulations that *R v Rahman* no longer

applied. He found that *R v Rahman* did still apply, and that to the extent that the LAA's Crown Court Fee guidance at the time indicated otherwise, it was wrong and had not been adequately updated.

29. His conclusions were based primarily upon the fact that the express intent of the amending regulations, (the Civil and Criminal Legal Aid (Amendment) (No.2) Regulations 2015) was, in deleting references to plea and case management hearings which were no longer mandatory, to accommodate procedural changes without changing the fees payable under the 2013 Regulations.

30. I am of the same view as Costs Judge Brown. It seems to me that if the 2013 Regulations had been amended in 2015 to provide that a cracked trial fee would be payable in any case that had been listed for trial before a plea was entered, they would say so, and they do not.

31. I would add that "Trial" is not defined in the 2013 regulations. If the definition of a "cracked trial" covers any case listed for trial before a plea is entered, then applying the 2013 Regulations mechanistically (as one must) the definition would extend all such cases, even those which proceed to a full trial. I do not think that that could be right.

32. For those reasons, this appeal does not succeed.

.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 11/15

13 May 2015

ON APPEAL FROM REDETERMINATION

REGINA v HODA

CENTRAL CRIMINAL CROWN COURT

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20137415

LEGAL AID AGENCY CASE

DATE OF REASONS: 2 JANUARY 2015

DATE OF NOTICE OF APPEAL: 23 JANUARY 2015

APPLICANT: COUNSEL DOMINIC BELL
ONE PAPER BUILDINGS

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

The appropriate additional payment, to which should be added the sum of £350 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Mr Dominic Bell of counsel against the fee allowed by the Legal Aid Agency under the advocate graduated fee scheme.

2. Mr Bell represented Tefik Hoda who, along with others, was indicted in respect of dealing in drugs. Hoda originally pleaded not guilty but changed that plea prior to the case coming on for trial. The prosecution did not accept the basis of the plea and sentencing was adjourned until the end of the trial of Hoda's co-accused.

3. On 29 November 2013 the matter was listed for sentencing and it was indicated that a 'Newton hearing' might be required for some of the convicted defendants. Such a hearing involves the sentencing court being required to make findings, usually following the giving of evidence, in order to determine the correct level of sentence (R v Newton (1983) 77 Cr App Rep 13).

4. The issue on this appeal is whether the hearing involving Hoda amounted to a Newton hearing. If it did, Mr Bell is entitled to be paid on the basis of a 3 day trial. If he is not, he is only entitled to a guilty plea fee.

5. The Determining Officer says that a Newton hearing did not take place. In her written reasons she refers to the events of 19 to 23 December 2013 and says that:

> *"It is very clear from the court logs that, although the possibility of a Newton hearing was canvassed, no such hearing was considered necessary and no such hearing took place. Apart from mitigation and sentence, the issues dealt with at the hearings on 19, 20 and 23 December seem to relate to the making, or otherwise, of SCPOs [serious crime prevention orders], TROs [travel restriction orders] and directions for confiscation proceedings."*

6. The Agency has submitted written representations on this appeal in support of the Determining Officer and these amplify the events at the hearing.

   24 October - *"Trial judge will have to make a decision as to whether there needs to be a newton hearing after the evidence he has already in the trial."*

   19 December - (having been told by the co-accused's counsel that they did not need a Newton hearing) *"Looks like we don't need to hold Newton Hearings now...but when we get to each case the deft will have the opportunity to give evidence."*

   20 December - 10.39 - [Judge] *Highly likely will sentence Monday morning @11.00 but will see how we go today*
   11.10 - *Mitigation* (by Hoda's counsel)

11.41 - *Csl for T Hoda - makes application on the schedules of Money"*
11.44 - [Judge] *Asks Csl to address him on the TRO*
12.02 - *Submissions on the SCPO*
12.07 - [Judge] *Indicates this is an appropriate order but will hear from Csl on Monday.*[Judge also gives provisional indication re: SCPO and directions]
12.10 - [Counsel] *Conts Mitigation...*

23 December - Judge gives his sentencing remarks and sentences all Defendants

7. Mr Rimer for the Agency submits that the court log does not support Mr Bell's assertion that a Newton hearing took place at all. The log also does not support the suggestion that evidence was given. In these circumstances the Determining Officer was correct to have paid this claim as a guilty plea.

8. In his appeal notice, Mr Bell states that the Judge commented on 20 December that "I will be sentencing on Monday". This statement appears to coincide with the entry on the log timed at 10.39 on 20 December.

9. Mr Bell also refers to the sentencing remarks of the Judge and in particular pages 41 to 46. The Judge's remarks include the following extracts:

> *"At the sentencing hearing, no defendants have required any witnesses to be called. No defendants have chosen to give evidence, rather defence counsel have chosen to make submissions on the basis of prosecution evidence which is not challenged. I am invited to resolve factual issues on the papers before me. In doing so, of course, I have applied the criminal burden and standard of proof."*
>
> *"It is conceded on your behalf that you played a leading role. However, in the basis of plea documents submitted on your behalf, which is not accepted by the prosecution, it is contended...*
> *Mr Bell, on your behalf, has repeated these submissions before me in mitigation...*
> *On the evidence before me, in particular the sequence of events schedule, that explanation does not withstand close scrutiny... The explanation for the frequency of contact advanced by your counsel that you were ensuring the deal went through smoothly in an atmosphere where there can be an element of mistrust simply does not fit with the evidence."*
>
> *"In my view there is a clear inference from this [access to cash] combined with the fact that you were one of the controlling minds behind the conspiracy, that you had a financial interest in the drugs. On any view, I am quite satisfied that you stood to gain rich reward from your high level involvement in this conspiracy and I reject those assertions that you have made in your basis of plea."*

"As I indicated during the course of the mitigation, it is clear that you are entitled to full credit for what was in your case an early plea of guilty as you were arrested later than others and your case was fast tracked. Your attempt to diminish your role has led me to review that early indication. However, since you have always accepted a leading role I will allow you full credit of one third."

10. Mr Bell, who appeared before me on this appeal, says that the sentencing remarks clearly show the Judge coming to findings of fact based on the evidence. The fact that the evidence was in writing rather than given live does not matter. Furthermore, the Judge's consideration of reducing the standard one third discount for a guilty plea shows that a Newton hearing took place.

11. In the case of R v Newton, the Court described three kinds of hearing which could constitute a trial of the facts:
    a. The disputed facts could be put before the jury for their decision
    b. The judge could hear the evidence and then come to a conclusion
    c. The judge could hear no live evidence but instead listen to submissions from counsel and then come to a conclusion

12. The purpose of a Newton hearing is to establish the facts so that the correct sentence can be imposed. From this can be gleaned the proposition that only cases where a material difference in the sentence will depend on the Judge's findings will justify a Newton hearing. Consequently, it is unusual for the parties to be content to address the judge on the written evidence as the third option above sets out. But it is just as much a Newton hearing as one where live evidence is called.

13. Mr Bell provided me with a transcript of the proceedings on the second day of the three days involved (December 20th). Mr Bell was unable to attend on the previous day and Hoda had been represented by a Mr Smith. During the proceedings, on the 20th the judge had cause to say to the parties:

    "Now, it seems to me that there is a very wide gulf between the way the Crown put the case and, Mr Bell, the way the case is put on behalf of your client. Yesterday, Mr Smith indicated that you did not wish to cross-examine any prosecution witness…

14. Mr Bell confirmed to the judge that he did not intend to do so. (Mr Bell explained to me that he could have required a prosecution witness to be called in order to refer to the prosecution evidence but that would have been time consuming and cumbersome. He agreed with the prosecution counsel that he would refer directly to the prosecution's timeline document which summarised (albeit at 200 pages) the prosecution evidence and which had been relied upon at the trial.)

15. It seems to me from reading the transcript that the judge was slightly troubled by this approach because there would be no cross-examination of the prosecution's evidence. In the transcript there is the following exchange:

Judge: *"Yes, very well. I just want you to be aware, as I suspect you are, that obviously I am going to have to make certain factual findings in this case….*

Mr Bell: *Of course, yes*

Judge *applying the criminal burden and standard of proof. Your client must have the opportunity, having heard the way the Crown put its case, to give evidence himself if he so wishes."*

16. In fact Hoda did not give evidence and so Mr Bell's submissions were based entirely on the prosecution's case. At the appeal hearing I quizzed Mr Bell about whether there was a difference between submissions at a Newton hearing where the prosecution evidence was unchallenged and submissions of mitigation which necessarily would have to take the case as it was found against the defendant.

17. Mr Bell did not accept the proposition that they were essentially the same exercise. Moreover, he informed me that Hoda was originally going to give evidence but got 'cold feet' and so did not do so.

18. Having had the benefit of Mr Bell's submissions and access to the transcript and sentencing remarks, I have no doubt that the hearing that took place between 19 and 23 December can be properly categorised as a Newton hearing. The judge's comments from the transcript show that he was expecting to resolve factual issues in order to hand down the appropriate sentence. As things transpired, the prosecution evidence was largely unchallenged and so the basis of plea – which I have also seen – was unlikely to be preferred to the prosecution's version. Nevertheless, Hoda put his case forward to the judge via Mr Bell and risked losing the sentencing credit that he would otherwise have expected. The judge considered reducing that credit but decided ultimately not to do so.

19. I have a good deal of sympathy for the Determining Officer here given that she did not have access to many of the documents that I have seen. Based on the court log, the Determining Officer's view was entirely understandable. But it is clear to me that the transcript and the judge's own sentencing remarks are to be preferred to the court log in determining what happened in this case.

20. Accordingly this appeal succeeds and I direct that the graduated fee be recalculated accordingly. Mr Bell is entitled to his costs of the appeal in the sum of £350 plus vat and the appeal fee.

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Case Search

R v Johnson

Year
2017

Citation
[2017] 1 Costs LO 125

legal aid | Costs | LGF | newton hearing | evidence | ago

Summary
1. This is an appeal against a decision of the determining officer under the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant representation order was made on 8 May 2014. The issue I am required to determine is whether an effective Newton hearing was held in the course of the proceedings against Soraya Johnson, the defendant represented by the appellant, Mr Agha of counsel. If a Newton hearing took place, then the appellant is due a trial fee. If not, the appropriate fee is that for a guilty plea.
2. This appeal was slightly delayed whilst the appellant pursued the possibility of a review of the determining officer's decision following the receipt of transcript evidence (which, as I shall explain, demonstrates that the factual basis upon which the determining officer made her decision was incorrect). In consequence the appellant needs a short extension of time for the appeal, which is granted.
3. The defendant was charged, with 14 others, with conspiracy to defraud the Secretary of State for the Department of Work and Pensions. She entered a guilty plea on 10 October 2014. The matter was set down for a Newton hearing on 6 July 2015 in respect of the defendant and four other defendants.
4. The issue to be determined in respect of the defendant related to her role in the overall conspiracy. The point was whether she was properly to be regarded as having had a leading or significant role, in which case she stood to be categorised as a "main

facilitator" and sentenced accordingly.

5. For these purposes the Crown relied upon two key pieces of evidence. The first was a BBM message on the defendant's phone which was characterised by the Crown's expert as an effective advertisement broadcasting an invitation to join the fraud. The second was a photograph on the phone of a co-defendant, showing a young woman surrounded by large bundles of cash. Such photographs were characteristic of the leading conspirators in the case and this example was said by the Crown to be a photograph of the defendant.

6. The appellant prepared a detailed twelve-page note to assist the court for the purposes of the Newton hearing listed for 6 July 2015. The note addressed all of the pertinent evidence but identified the main issues to be addressed as the BBM evidence and the photographic evidence. There was a good deal of correspondence between prosecution and defence and the bundles for the hearing exceeded 500 pages. It is evident that a great deal of work was undertaken by the appellant in preparation for, and on the day of, the hearing.

7. In a two-hour discussion before the start of the hearing on 6 July 2015, the parties (with the court's approval) discussed the BBM evidence with a view to reaching agreement. In the course of those discussions the Crown's expert conceded that the BBM message in question was in fact received by the defendant, not sent by her. That, effectively, disposed of that part of the evidence and the trial judge, HHJ Ainley, was advised to that effect in the course of the hearing.

8. The photographic evidence was addressed during the hearing. Having confirmed the position in relation to the BBM message, the appellant, on behalf of the defendant, drew the attention of HHJ Ainley to the disputed photograph and to accompanying expert evidence. The learned judge reviewed that evidence and asked the defendant to stand up, evidently for the purposes of deciding whether or not the photograph was or was not a photograph of the defendant. This was followed by further submissions about evidential issues which, the judge concluded, were not significant for present purposes. The hearing then moved on to other defendants.

9. A sentencing hearing took place over three days between 28 and 30 October 2015. In the course of the hearing another factual dispute had, for sentencing purposes, to be determined by the trial judge. It concerned the number of occasions in which the defendant was involved in the fraud, and the capacity in which she was involved on each occasion. The Crown argued for a degree of involvement that increased the defendant's personal responsibility to a figure in excess of £60,000 and put her into a higher sentencing bracket, with no alternative to custody.

10. By reference to the evidence before the court, the appellant successfully persuaded the judge to accept a much more limited degree of involvement on the part of the defendant. In due course the defendant was sentenced on the basis that she was not a "main facilitator".

Conclusions

11. The 2013 Regulations define a "Newton Hearing" in this way:

"'Newton Hearing' means a hearing at which evidence is heard for the purpose of

determining the sentence of a convicted person in accordance with the principles of R v Newton (1982) 77 Cr App R 13 ..."

12. On the facts as I have set them out, it seems to me that there was a Newton hearing in this case. Those facts, which are supported by prosecuting counsel and by transcripts of the proceedings on 6 July 2015, were not disputed by Ms Rutherford, representing the LAA on the hearing of this appeal.

13. The determining officer had, in her written reasons, refused to accept that there had been a Newton hearing in respect of the defendant on 6 July 2015 because the court log states that the only advocates to address the court were the prosecution advocate and advocates representing other defendants. I note that, on requesting redetermination, counsel had provided the determining officer with a detailed account of the actual events, supported in its key aspects by an email from prosecuting counsel, but the determining officer preferred to rely upon the court log.

14. To my mind such joint evidence from defence and prosecuting counsel should be accepted, absent some good reason not to do so. If the court log is inconsistent with such evidence, that is likely only to indicate that the court log is incorrect. As the transcripts show, it is indisputably incorrect in this case.

15. Ms Rutherford argued that the determining officer's decision must be understood by reference to the narrow definition of a "Newton Hearing" comprised in the 2013 regulations. Given their reference to the Newton principles, it is not evident to me that the definition necessarily is a narrow one. In any event it seems to me, in this case, to have been met.

16. The learned trial judge had before him on or 6 July 2015 photographic and expert evidence going to the question of whether or not the defendant, for sentencing purposes, was a "main facilitator". He measured that evidence against the appearance of the defendant and came to a conclusion. It must, in my view, be right to say that in the hearing on 6 July 2015 evidence was heard for the purpose of determining the sentence of a convicted person (the defendant) in accordance with the principles of R v Newton. It follows that it was a Newton hearing.

17. Ms Rutherford refers me to the decision of Master Simons in R v Hunt (SCCO 88/15, 23 March 2016). In that case, at a sentencing hearing, the prosecution rejected the defendant's basis of plea as inconsistent with evidence given by him at the trial of another defendant. The trial judge agreed, and sentenced accordingly. Master Simons rejected the submission that the sentencing hearing had been a Newton hearing for two reasons. First, no evidence was heard. Second, there was no trial of factual issues.

18. Neither is true of this case. Whilst I respectfully agree with Master Simons' conclusions on the facts before him, R v Hunt is of no assistance in this particular case.

19. The appellant also asked me to address whether there was a Newton hearing in October 2015, as well as on July 6. This argument was not, it seems, put to the determining officer until after the written reasons of 14 June 2016 had been provided in accordance with reg 28(8) of the 2013 Regulations. One of the complaints made by the appellant is that the determining officer did take account of his further representations made after that point.

20. I do not accept that it was incumbent upon the determining officer, having followed the redetermination procedure and provided written reasons in accordance with reg 28 of the 2013 regulations, to accept further submissions after that set procedure had been completed. She would in my view have been justified in concluding that the appellant's option, at that point, was to appeal under reg 29 (as he has in fact done) and that her role had concluded.
21. As for the point itself, I do not accept that it is appropriate for me to make a finding to the effect that a further Newton hearing took place in October 2015. I say that primarily because the claim for payment was, on the evidence I have seen, put to the Determining Officer on the basis that a Newton hearing was held in July 2015, not in October 2015. Regulation 29 of the 2013 Regulations confers upon the appellant a right of appeal against defined categories of decisions of the determining officer. It does not confer any right of appeal against a decision that the determining officer was not, until after the conclusion of the decision procedure prescribed by reg 28, asked to make.
22. If it were open to me to determine this new point, I would have to decide whether evidence was heard by the court at the sentencing hearing in October 2015. On the information I have it would seem that it was not, but as I have said it is not open to me to make any finding on that.
23. In summary, for the reasons I have given, my conclusion is that the appellant is due a trial fee for a one-day Newton hearing that took place on 6 July 2015.
24. Finally, I should mention that I have made an award of costs on this appeal which is rather higher than I might normally make on this sort of relatively straightforward issue. I have done so because of the burden placed upon counsel by the determining officer's decision to prefer the content of the court log to the clear evidence of both prosecuting and defence counsel as to what actually happened on 6 July 2015.
25. As a result it was necessary for counsel, having obtained (via his instructing solicitors, who are also appealing on the same grounds) a transcript of the relevant hearing, to prepare detailed submissions by reference to those transcripts and extending to the entire history of the case. That obviously entailed a good deal of work. Although I cannot, on applying the usual principles appropriate to the assessment of costs, accept that all of the time claimed by counsel is recoverable, the substantial time he has had to spend has to be recognised and my award of costs reflects that.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2019-CRI-000072

Dated: 6 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v MAKENGELE

WOOLWICH CROWN COURT

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

CASE NO: T20170498

LEGAL AID AGENCY CASE

DATE OF REASONS: 30 MAY 2018

DATE OF NOTICE OF APPEAL: I OCTOBER 2018

APPLICANT: NORTON PESKETT	SOLICITORS	

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. The determination of this appeal, regrettably, has been delayed for a number of reasons. It would appear that the appeal was filed at the SCCO on about 1 October 2018 but that delay ensued from the loss of the file, a matter for which the Appellant is due an apology. Insofar as any extension of time for the appeal is necessary, it is granted.

2. The appeal concerns work undertaken by the Appellant in representing Major Makengele ("the Defendant"). The question is whether on 3 August 2017, the date upon which the Defendant was sentenced for four drugs offences, a "Newton hearing" took place.

3. A Newton hearing involves the sentencing court making findings, usually following the giving of evidence, in order to determine the correct level of sentence. It is common ground that on the authority of *R v Newton* [1983] Crim LR 198 such a hearing can take three forms. The disputed facts may be put before the jury for a decision; the judge may hear evidence and then come to a conclusion; or the judge may hear no live evidence but instead listen to submissions from counsel and then come to a conclusion.

4. The Defendant was charged with three counts of possessing a controlled Class A drug with intent to supply and one count of possession of criminal property. He was granted a representation order on 17 May 2017. He pleaded guilty on all counts and was sentenced on the 3 August 2017.

5. The Defendant had put in a basis of plea at a hearing 27 July 2017, to the effect that he played a relatively minor role in the drug distribution network of which he was a part. He said that he was only a "packager" and that he would plead guilty to possession of cannabis, but not possession with intent to sell. As for the criminal property charge (of holding money from the sale of drugs) he was willing to plead to that on the basis that he was holding it for someone else.

6. The proposed basis of plea was not accepted, and on 3 August counsel for the Crown indicated to the court that the prosecution was of the view that the Defendant had played a much greater role in the drug distribution network than he was prepared to admit. The Defendant entered guilty pleas to each of the counts on the indictment, the count relating to cannabis having been changed to simple possession.

7. An advice on appeal against sentence subsequently prepared by Mr Alex Matthews, counsel for the Defendant at the hearing, describes what happened next:

> "There were then extensive submissions from both myself and the prosecutor as to category/role… I submitted that the case was very much in the lesser role. I indicated there was an incident a few days before the events in these facts (the car crash) and provided details in my submissions as to the threats and pressure the defendant was

under. Discussion was had, and the issue was raised by me that the defendant maintains this basis completely and that we would go to a Newton hearing if necessary… The judge gave the following ruling on category and the basis proffered…

I am not persuaded that the determination of role is an appropriate matter for a trial of issue in this case; it is for me, weighing all of the material before me…"

8. The judge, HHJ Saggerson, went on to make findings, including that the Defendant felt that he had no option but that to cooperate with those managing the drug distribution network, but also that he had played an essential and important role. Sentence was based on those findings.

The Regulations

9. The Appellant's right to remuneration is governed by the provisions of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. If there was indeed a Newton hearing on 3 August 2017, the Appellant will be entitled to a trial fee. If not, the Appellant will be paid a lesser fee. The relevant provisions are to be found at paragraph 2(4) of Schedule 2:

   "Where, following a case on indictment, a Newton hearing takes place—

   (a) for the purposes of this Schedule the case is to be treated as having gone to trial;
   (b) the length of the trial is to be taken to be the combined length of the main hearing and the Newton hearing; and
   (c) the provisions of this Schedule relating to cracked trials and guilty pleas will not apply."

10. A Newton hearing is defined at paragraph 1(1) of Schedule 2:

   "'Newton Hearing'" means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of R v Newton (1982) 77 Cr App R 13…"

Submissions

11. Ms Weisman for the Lord Chancellor submits that the Determining Officer's assessment was based on a review of the court log, and in particular the observation of HHJ Saggerson to the effect that there was no need for a "trial of issue".

12. Ms Weisman submits that the Determining Officer's conclusion was correct. What is at issue here is, she says, whether the court heard evidence, albeit by way of submission rather than witness testimony, which was disputed and which the judge resolved before sentencing. She argues that that did not happen. The court rejected the Defendant's bases of plea, but there was no

question of going to the underlying facts which were at the heart of the dispute. What was at issue was the proper interpretation of those facts, and what inferences might be drawn from them about the seriousness of the Defendant's role.

13. Counsel's advice, says Ms Weisman, itself indicates that the ingredients for a Newton hearing are absent. The guilty pleas entered were to an indictment which the Crown had amended and those pleas were accepted. The judge then considered whether a" trial of issue" would be necessary, and concluded that it would not. The short quote from HHJ Saggerson set out above clearly indicates that there was no factual dispute to be resolved. It was merely a matter of the court weighing the evidence before it, evidence that was not in itself in dispute, and drawing a conclusion regarding the Defendant's role.

14. The Appellant relies upon the judgments of Master Rowley in *R v Morfitt* (SCCO 55/16, 29 July 2016) and *R v Hoda* (SCCO 11/15, 13 May 2015), discussed below.

Conclusions

15. I agree with Ms Weisman that *R v Morfitt*, which concerned the attendance of a defendant at a Newton hearing held for the purposes of sentencing a co-defendant, does not seem to have much bearing on this appeal.

16. I do think however that it has some facts in common with *R v Hoda*, which concerned a Newton hearing at which submissions were made but no evidence heard. Master Rowley took the view that the hearing in question fell into the third category of hearing which, on the authority of *R v Newton*, qualifies as a Newton hearing: one in which the judge hears no live evidence, but having listened to submissions from counsel comes to a conclusion on disputed facts.

17. This case can be distinguished from *R v Hoda* in that a Newton hearing was never listed. The question, however, is whether one actually took place. In that respect I agree with the Appellant that one must have regard to what actually happened.

18. The evidence before me supports the conclusion that HHJ Saggerson came to a conclusion on two factual issues not agreed as between prosecution and defence: the importance of the Defendant's role in the drug distribution network, and the extent to which he played that role under duress. The judge had to come to conclusions on those facts before sentencing, and he did so having heard what appear to have been extensive submissions from counsel for the Crown and for the Defendant.

19. It seems to me that HHJ Saggerson, in referring to a "trial of issue" (or more probably, to a "trial of issues") had in mind a hearing at which evidence would be heard. He did not think that such a hearing was necessary, but it does not follow that there were no factual issues to be determined by him. It seems to me that he simply concluded that he could do so on the basis of the submissions he had already heard and the evidence already before him. There would have

been no good reason for him to give consideration to the question of whether, by reference to the relevant (and here, agreed) criteria, a Newton hearing was already taking place.

20. I note that counsel for the Defendant appeared to take the view that a Newton hearing would not take place unless evidence was heard but if that is what he thought, it is inconsistent with what the parties agree is the correct test.

21. For those reasons, the appeal succeeds. My conclusion is that a Newton hearing did take place, in which HHJ Saggerson heard no live evidence but considered submissions from counsel and then come to conclusions on factual matters essential to determining an appropriate sentence. The Appellant should be remunerated accordingly.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 168/13

Dated: 19 February 2014

ON APPEAL FROM REDETERMINATION

REGINA v SHARIF

HARROW CROWN COURT

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO:

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 30 MAY 2013

DATE OF NOTICE OF APPEAL: 24 JUNE 2013

APPLICANT: COUNSEL

Peter Milnes
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Wembley HA9 8AY

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

The appropriate additional payment, to which should be added the sum of £48 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION

1. The issue which arises in this appeal brought in accordance with the provisions of the Criminal Defence Service (Funding) Order 2007 (as amended) is whether the Legal Aid Agency was correct in its decision to pay the instructed advocates under the Advocates' Graduated Fee Scheme ("the Scheme") a fee for a single count indictment, without at the same time, paying a cracked trial fee in relation to a different indictment. The sum in issue is £3,537.32.

2. The background is set out in the refreshingly detailed written reasons dated 30 May 2013. The Defendants were husband and wife, Mr M Sharif and Mrs F Sharif. Both had been separately indicted under case numbers T20117564 (Mr Sharif) and T20127078 (Mrs Sharif). At a plea and case management conference on 3 May 2012, the indictments had been joined so that the indictment was as follows:

> "Count 1 – conspiracy to defraud – common law – Mr Sharif and Mrs Sharif
>
> Count 2 – fraud by false representation contrary to Sections 1 and 2 of the Fraud Act 2006 – Mrs Sharif alone."

3. Subsequently both Defendants were arraigned when not guilty pleas were taken. Further directions had been given with the case being listed for trial to start on 3 September 2012 with an estimate of five days. Following a further directions hearing on 27 June 2012, the matter was listed for another hearing to take place on 23 July 2013. Thus far is common ground, but as the competing submissions diverge at this point, it is appropriate that I now depart from the written reasons.

4. Mr Smith, who appeared before me on the appeal, informed me that as the original indictment, in the form drafted, had concerned husband and wife, as a matter of law it was ineffective since it had alleged conspiracy between husband and wife. That point having been drawn to the Crown's attention, count 1 was quashed for both Defendants and on count 2, which concerned Mrs Sharif alone, no evidence was offered. However, both Defendants were then arraigned on a new indictment which contained one count of fraud by false representation against both Mr and Mrs Sharif. It is then common ground that directions were given for the trial of the new indictment, including that the trial should still commence on 3 September 2012. In the event, the new single count indictment was eventually heard in January 2013 at the conclusion of which Mr Sharif alone was convicted of fraud and sentenced at a subsequent hearing in February 2013.

5. In accordance with the provisions of the Scheme, Counsel for Mr Sharif submitted a claim for payment in respect of the trial which had concluded in February 2013, which was assessed and paid. However, as I have said at the outset of these reasons, a further claim for a cracked trial in respect of the initial two count indictment was refused on the basis that, in the LAA's view, only one fee was payable as there was only one case.

6. In his submissions, Mr Smith took issue with the LAA's decision. In his submission, the matter fell fairly and squarely within the definition of cracked trial – see paragraph 1 of Schedule 1 of the 2007 Funding Order which provides as follows:

> "Interpretation
>
> 1 – (1) In this Schedule –
>
> "Case" means proceedings in the Crown Court against any one assisted person –
>
> (a) on one or more counts of a single indictment;
>
> "Cracked trial" means "a case" on indictment which –
>
> (a) a plea and case management hearing takes place; and
>
> (i) the case does not proceed to trial (whether by reason of pleas of not guilty or for other reasons) or the prosecution offers no evidence; and
>
> (ii) either –
>
> (aa) in respect of one or more counts to which the assisted person pleaded guilty, he did not so plead at the plea and case management hearing; or
>
> (bb) in respect of one or more counts which did not proceed the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them …"

7. Here, Mr Smith submits, the trial against Mr Sharif in respect of count 1 had cracked because there had been a plea and case management hearing, but the case had not proceeded to trial because the court had been invited to quash the indictment and had done so. For that reason, counsel was entitled to a fee for a cracked trial.

8. As I have said, the claim under the Scheme did not find favour on determination. In her written reasons, the Determining Officer said this:

> "The new single count related to the same alleged criminality as the original count. Many courts will, in similar circumstances, allow one indictment to be quashed and replaced by a new one for the same matter, rather than amending the original indictment by adding a new count and then removing the original one. The intention of the court, in adopting either course of action, is the same – to ensure that the Defendant faces an indictment that is correct in law and appropriate to the evidence presented.

It is the Determining Officer's understanding that the prosecution could not in law have referred a totally new indictment for which the evidence had not been served in the original papers, so in the absence of any further sending or voluntary bill of indictment, the advocate has already considered the evidence and prepared a challenge to each allegation, whether or not it was charged as conspiracy or as the substantive offence.

In all the circumstances of the case it would be bizarre to consider that there were two separate indictments and two separate cases. There was only one case in which the later indictment was substituted for the earlier one.

Whilst this is not a case where the indictment was amended before the plea was taken, it is a case in which the indictment was effectively amended by substituting a new one from an old one. The Determining Officer is of the view that the decision of the Costs Judge in [R v Minister] is persuasive in this instance."

9. I disagree with the Determining Officer's reasons. This was not a case of "house-keeping" in the sense that the original indictment was simply being "tidied up". On the contrary, count 1 which concerned Mr Smith was quashed on 23 July 2012 and therefore ceased to exist. It follows this was not a matter in which the indictment was, or could be, "effectively amended by substituting a new one from an old one". In the present case, upon the quashing of count 1 in the original indictment, there was nothing to amend, nor did the indictment continue to exist so that a new one could be substituted in its place.

10. I derive no assistance from R v Minister. In that case, the issue was whether a cracked trial fee should be paid on the grounds that the indictment was amended *before* pleas were taken. The Lord Chancellor's Department, whose submissions prevailed, had submitted to the Master that the essence of a cracked trial was that *after* the conclusion of the plea and directions hearing, there were still counts on which the prosecution and defence were not agreed so that a trial remained a real possibility. Here it is common ground that pleas had already been taken and, indeed, the date had been fixed for the trial before any decision had been made about whether the first indictment should continue or not, those considerations having taken place on 23 July 2012. It follows in my judgment, that R v Minister is simply not on point. It follows, that I am satisfied that in respect of count 1 of the original indictment, counsel became entitled to a fee for a cracked trial and the appeal must succeed.

11. In respect of costs, Mr Smith made no claim, save for his travel expenses of £48, which I allow.

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DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000146

Dated: 12th January 2021

ON APPEAL FROM REDETERMINATION

REGINA v AYOMANOR

CROWN COURT AT TRURO

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

CASE NO: T20180152

LEGAL AID AGENCY CASE

DATE OF REASONS: 20th May 2020

DATE OF NOTICE OF APPEAL: June 2020

APPLICANT: UK Law, Solicitors

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

The appropriate additional payment, to which should be added the sum of £500.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. UK Law Solicitors ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator Graduated Fees Scheme ('LGFS').

2. There are two disputed issues. First, the Appellants challenge the decision to allow only one graduated fee when, they submit, there were two cases. Second, they challenge the Respondent's decision to reduce the number of pages of prosecution evidence ('PPE') in the claim. The Appellants submitted a claim for 10,000 PPE, including 7840 pages of electronic datum in exhibit KRD/7. The Respondent has allowed 3679 PPE, comprising 199 pages of statements, 2088 pages of exhibits and 1392 pages of electronic evidence. 6321 PPE accordingly remain in dispute.

Background

3. The Appellants represented Mr Akpomiemie Kelvin Ayomanor ('the Defendant') who was one of two co-defendants charged at Truro Crown Court on a number of offences of fraud and money laundering.

4. It was alleged that Elizabeth Sopher, a 75 year old woman had been duped by a man called "Anthony" in Ghana into sending sums of money to him following a long exchange of e-mails, as a result of which Ms Sopher was tricked into believing that "Anthony" cared for her and wanted to support her financially. He said he was wealthy and would transfer a fortune to her if she would help him with his tax bill.

5. The case against both defendants was that whilst they were not the person who sent the e-mails to Ms Sopher, they were involved in receiving the money transferred by her, some of which was paid into the co-defendant's bank account. The co-defendant, Adeleye Martins Kehinde was arrested on 20th February 2018 at Hatfield University Halls. The Defendant was arrested on 6th March 2018 in Middlesbrough.

6. A mobile phone was seized from the co-defendant and electronic datum was downloaded from the handset. This material was exhibited as KRD/7 and the prosecution reled on various texts and other messages referring to money transfers. The prosecution also relied on a number of photographs or images recovered from the phone (depicting cash and other luxury goods), which were alleged to demonstrate the defendants' criminal lifestyle.

7. The defendants were arraigned at Truro Crown Court on 14th September 2018. They entered not guilty pleas on an indictment alleging six counts of fraud and converting criminal property. The trial was listed on 4th February 2019. On that date the prosecution sought to proffer a seventh count of fraud. The court log refers to an 'expanded indictment' and the defendants entered not guilty pleas to the seventh count. Later that day, after some exchange between counsel and the trial judge, HHJ Carr, the trial was adjourned.

8. On 5th August 2019 the trial was re-listed before HHJ Linford. Reference was made to historic changes in the indictment and at 10:43 the judge stated "I will stay the previous versions until the end of the trial when they will be quashed". A jury was sworn in but later that day the trial was stopped when the co-defendant's defence team became professionally embarrassed.

9. The trial was re-listed on 16th March 2020, again before HHJ Linford. Again, the prosecution apparently made changes to the indictment, and the defendants again entered not guilty pleas. It seems clear from the Court Log that the judge's approach was to allow the Crown to proffer a new indictment (which in the proceedings was called the "second indictment"), while staying the original indictment and quashing it at the end of the trial. The hearing continued until 19th March 2020 when the trial was halted following the introduction of the Government's emergency measures in the Covid-19 pandemic. An e-mail exchange between the Appellants and Truro Crown Court suggests that before he adjourned the trial HHJ Linford formally quashed the original indictment.

10. It seems likely, on the best information available to the parties in December 2020, that this matter is still outstanding and that the defendants will ultimately

stand trial again when the Covid-19 response allows the hearing to proceed safely.

The Regulations

11. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply to this appeal. Reference is made to paragraphs 1 and 20 (re PPE and Special Preparation) and 27 (re the definition of a 'case') of Schedule 2 to the 2013 Regulations.

The submissions

12. The Respondent's case is set out in Written Reasons dated 20th May 2020 and in Written Submissions drafted by Mr Michael Rimer and dated 7th December 2020. The Appellants' case is set out in detailed Grounds of Appeal. Mr Singh, a Costs Clerk representing the Appellants and Mr Rimer, representing the Respondent, attended the telephone hearing on 11th December 2020..

My analysis and conclusions

Indictments and graduated fees

13. The Respondent, in summary, relies on the submission that while the indictment "was amended at least twice", each version was, in reality, the same indictment. In other words, "the indictment upon which the matter eventually proceeded to trial was simply an amended version of an existing indictment" (Rimer, para. 47). This was accordingly a case of "house-keeping", whereby the original indictment was changed subsequently to include an additional court. Accordingly, "the facts overwhelmingly point to the fact that whilst it may appear that administratively, there were two (or three) indictments, in reality there was one indictment which was amended by the addition of a new count one" (Rimer, para. 54).

14. The Appellants, in summary, submit that on the mechanistic application of the LGFS, they are entitled to a second fee. It is possible to amend an indictment or join two or more indictments and reach the conclusion that there was still only one indictment, with one graduated fee payable. Where, however, an

indictment is superseded by a second indictment, whereupon the original version is quashed, there are two indictments and so two fees are payable.

15. I am referred by the parties to the cases of R v. Hussain and Others [2011] 4 Costs LR 689, R v Sharif [2014] SCCO Ref: 168/13 and R v. Arbas Khan [2019] SCCO Ref: 219/18.

16. In Hussain, Costs Judge (now Senior Costs Judge) Andrew Gordon-Saker held that where "there were two indictments which were not joined, then there must be two cases and two fees". He recognised that solicitors could thereby obtain "something of a windfall", as in reality there "was really only one case", but acknowledged that "the regulations have to be applied mechanistically" (para. 18).

17. In Sharif, Costs Judge Campbell acknowledged (para. 9) that indictments could be "tidied up" in a process of "house-keeping", but stated that this did not occur when an indictment was "effectively amended by substituting a new one for an old one". In other words, when an original indictment was quashed, it ceased to exist, so that the new indictment would be "substituted in its place". This does not comprise amendment as when the original indictment is quashed, there was nothing to amend.

18. In Khan, Costs Judge Brown acknowledged (para. 19) that two indictments could "be joined without the necessity to create a new indictment". Such a joinder "operated by way of an amendment to an existing indictment".

19. The principles to be taken and applied from these cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable.

20. Since the oral hearing on 11th December 2020, Mr Rimer has drawn my attention to the recent decision of Costs Judge Leonard in R v Nash [2020] 17th December, SC-2020-CRI- 000177, where the disputed issue was similarly whether or not one or two fees were payable. Master Leonard's conclusion, on the facts of that case, was (at para. 28) that there was only one indictment and so only one fee was payable. This case is a good example of the second alternative discussed at paragraph 19 above, that two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. In Nash, the trial judge, HHJ Khokher, had formally ordered a joinder of two indictments, for the purpose of allowing three defendants to be tried together on the same count of causing grievous bodily harm. This is distinguishable from the facts in this case where the court record makes no reference to joinder.

21. This was not, it seems to me, a case where the indictment was either amended or where a second indictment was drafted and then joined to the original version. Although the detailed Court Log and e-mails passing between the Appellants and Truro Crown Court do not combine to form a perfect record of proceedings, it should be acknowledged that this was (and continues to be) a difficult case prosecuted in exceptionally difficult circumstances. I am left nonetheless in no real doubt that the original indictment was, perhaps after some amendment, ultimately stayed and quashed by the trial judge, in favour of another indictment that was produced in substitution for the original version. This was not a case of amendment or joinder, nor can it be described as mere 'house-keeping', but rather a case of two indictments, the latter being a substitute for the former when the former was quashed.

22. It follows that the appeal is allowed on the first issue and that the Appellants are entitled to two fees.

PPE

23. It is common ground that the electronic datum exhibited in KRD/7 was 'served' pursuant to para. 1(2)/(3) of Schedule 2 to the 2013 Regulations.

24. The Respondent, in summary, submits that the Determining Officer exercised the discretion at para. 1(5) correctly. She allowed all the contact, call and message data and, on noting that the prosecution relied on approximately 50 photographs downloaded from the co-defendant's phone, decided to allow 10% of the pages from the image section comprising 460 pages. This percentage constituted a reasonable allowance given that the prosecution rely on a comparatively small extract of the 4500+ pages of images. Mr Rimer submitted that this approach followed that taken and impliedly endorsed in R v. Beckford [2019] SCCO Ref: 204/18, R v. Mucktar Khan [2019] SCCO Ref: 2/18 and R v. Purcell [2019] SCCO Ref: 132/19.

25. The Appellants, in summary, submit that the entire electronic datum on KRD/7 should be included in the PPE count. As the total would then exceed the statutory cap of 10,000, the PPE should be assessed at 10,000. Mr Singh submitted that the approach of the Determining Officer was "wrong both in principle and law". Citing paras. 25 and 26 of the Grounds of Appeal, he stated:

> "25. *Once the evidence has been established as relevant as served by the prosecution, the determining officer is required to apply his discretion to determine whether or not the material should be assessed as pages of prosecution evidence or paid as special preparation. He cannot disallow the material other than to consider it categorisation for remuneration purposes.*
>
> *26. The electronic evidence was served as a report by the prosecution as a section 9 witness statement referencing the exhibit in question. What the determining officer has done is decide incorrectly that only specific parts of the report are PPE and other parts fall under special preparation.*"

26. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

"*(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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the 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.*"

27. I reject the Appellants' contention that the Determining Officer pursued an approach that was wrong in law. As Holroyde J. stated at para. 50(ix) of SVS Solicitors, para. 1(5) of Schedule 2 comprises "an important and valuable control mechanism" pursuant to which the Determining Officer has a discretion as to whether or not he or she considers it appropriate to include it in the PPE count. It is not wrong – and certainly not to the disadvantage of applicants – if electronic datum that is not included in the PPE is considered subsequently for remuneration as special preparation. The issue, in this as in other cases, is whether the Determining Officer exercised correctly that discretion when she decided to exclude 6321 pages of electronic datum from the PPE count and, specifically, whether her approach to the inclusion/ exclusion of images was reasonable.

28. Mr Rimer, at several points in his oral submission on 11th December 2020, pointed out that the 50 or so images relied on by the Crown were included necessarily in the paper statement/exhibit count, so that to include them additionally in the served electronic datum count would constitute a "duplication". But this argument, it seems to me, is incorrect. When, as here, the prosecution extracts images from an electronic download and then exhibits those pictures to a witness statement, it effectively creates a new page or pages, albeit ones depicting the same images. As Nicola Davies J (as she then was) pointed out in Lord Chancellor v. Edward Hayes LLP [2017] EWHC 138 (QB), this does not constitute a "duplication".

29. I find, on the particular facts of this case, that the Determining Officer's approach to the electronic datum exhibiting images was incorrect. The prosecution extracted and relied on 50 or so images of cash and other luxury goods as evidence to support the contention that the defendants were enjoying a criminal lifestyle. It seems to me that this evidential contention can only be

fairly considered and, if appropriate, challenged in the light of the totality of the datum exhibiting photographs. A notional allowance of 10% of the images datum does not, in my conclusion, comprise a reasonable allowance for the purpose of the PPE count. Images cover pages 1582-6184 of the exhibit, a total of 4603 pages, and all this material should be included in the PPE count.

30. I cannot otherwise fault the Determining Officer's exercise of her discretion at para. 1(5). She included properly, as Mr Rimer points out, all the contact, call and message datum. I can see no arguable grounds for including audio or video files, or Thumbnails.

31. On this issue, therefore, the appeal is allowed to the extent that I allow an additional 4143 PPE (4603 – 460 pages already allowed), making a total PPE count of 7822. Mr Rimer has indicated additionally a claim for Special Preparation in respect of the balance of the electronic datum will be considered sympathetically.

Costs

32. This Appellants have been largely successful in a complex appeal and I award costs of £500 (excluding VAT, assuming that it is not payable) plus the £100 lodge on appeal.

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The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.

Neutral Citation No. [2022] EWHC 1659 (SCCO)

Case No: T20197343

SCCO Reference: SC-2022-CRI-000002

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 23 June 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
GARY MOORE

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: Gomer Williams & Co. Ltd

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

COSTS JUDGE WHALAN

Introduction

1. Gomer Williams & Co. Limited ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the Appellants are entitled to be paid two separate fees, as claimed, or one fee, as allowed.

Background

2. The Appellants represented Gary Moore ('the Defendant') who appeared at Swansea Crown Court alongside three co-defendants, his mother Audrey Osbourn and his brothers Ian and Clayton Moore. The prosecution alleged mortgage and investment fraud.

3. On 23rd December 2019, the defendants appeared at a PTH on a 16-count Indictment. The Defendant was charged on counts 1 (conspiracy to commit fraud), 2 (obtaining a money transfer by deception), 3, 4 and 5 (fraud). He pleaded not guilty and a trial was fixed for 15th June 2020. The trial date was later vacated due to the ill-health of a co-defendant and re-fixed for 6th September 2021. Further mention hearings were listed on 25th August, 27th August and 10th September 2021.

4. At the mention hearing on 10th September 2021, the prosecution produced a second 15-count Indictment, which varied some of the counts specified on the first indictment in December 2019. At count 3, the period of relevant offending was changed from 1st-30th September 2007 to 1st January – 24th February 2007. At count 5, the charge against Audrey Osbourn was removed. Count 9 was removed in its entirety.

5. On 10th September 2021 the Defendant pleaded guilty to counts 1-5 in the second indictment. The court stayed the original (first) indictment on 14th October 2021.

The Regulations

6. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended, apply to this appeal. Reference is made by the parties to paragraph 27 (re the definition of a 'case') of Schedule 2 to the 2013 Regulations.

The submissions

7. The Respondents' case is set out in Written Reasons dated 9th December 2021 and in written Submissions drafted by Mr Michael Rimer, a Senior Lawyer at the Government Legal Department, dated 8th June 2022. The Appellants' case is set out in the Grounds of Appeal attached to the Appellants' Notice and in Written Submissions drafted by Mr Colin Wells, Counsel, dated 29th February 2022. Mr Wells and Mr Rimer both attended and made oral submissions at the hearing on 10th June 2022.

8. The Appellants, in summary, submit that two fees should be paid, as there were two indictments which were not joined and, therefore, two cases. When the prosecution produced the second, 15-count indictment, it superseded the original 16-count indictment, which was formally stayed by the court. The changes in the second indictment were not merely cosmetic or reflective of 'housekeeping', but comprised substantive changes to the criminality alleged against the Defendant. Thus, the period of offending cited in count 3 was completely different, meaning that the evidence adduced to prove the case was also different. It was this fundamental change, submits Mr Wells, that led to the Defendant changing his pleas to guilty.

9. Mr Wells cites and relies on the dicta of Senior Costs Judge Gordon-Saker in R v. Hussain & Others [2011] 4 Costs LR 689, the decision of Costs Judge Campbell in R v. Sharif [2014] SCCO Ref: 168/13 and, in particular, my decision in R v. Ayomanor [20201] SC-2020-CRI-000146. The relevant paragraph in Ayomanor is:

> 19. The principles to be taken apply from [the reported] cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, account or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic

application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable.

10. The Respondent, in summary, submits that there were no substantive alterations to the prosecution's case between the first and second indictments, so that this was really a case of administrative amendment, rather than two indictments indicating two cases.

11. Mr Rimer cited and relied on the determination of Costs Judge Brown in R v. Arbas Khan [2019] SCCO Ref: 219/18. CJ Brown acknowledged (para. 19) that two indictments could 'be joined without the necessity to create a new indictment'. Such a joinder 'operated by way of an amendment to an existing indictment'. Mr Rimer also relied specifically on the more recent decision of Costs Judge Rowley in R v. Wharton [2021] SC-2021-CRI-000195. In Wharton CJ Rowley wrote to the trial judge, HHJ Teague QC, to enquire as to the actual procedure adopted (in that case) in the Crown Court. HHJ Teague QC's response is reproduced at paragraph 9:

> 9. What tends to happen is that the prosecuting advocate applies for leave to amend. I then make a quick assessment as to whether I should simply grant the application or stay the original bill. If I think the latter course may be easier, I suggest staying the existing bill of indictment and preferring the amended version in its place and ask whether the prosecuting advocate is happy for the application to be dealt with in that way. They nearly always agree to my suggestion, as does defence counsel. That is very likely to be what happened in this case.

CJ Rowley then applied this practise to his determination:

> 10. The trial judge confirmed to me that there is no practical difference as to which option is taken. His practise depended on how much amendment was required. A typographical error or similar would be amended. A more significant change typographically would render it simpler to stay the indictment and proffer an amended version.
>
> …
>
> 13. The fact that two separate documents had been uploaded rather than annotating the original indictment in some fashion is simply how modern technology is likely to be employed. Ease of practise dictates this approach as was confirmed by the trial judge. It does not enable further claims to be made for fees in respect of what is very much the same work.
>
> 14. This case reveals another instance where the workings of the 2013 Regulations do not walk entirely in step with criminal practice. The only rationale for counsel's argument is that a stayed indictment may mean there are two cases and therefore two fees. There was no prospect of Wharton ever facing

counts of both ABH and GBH. The second superseded the first by what can only be described as an amendment to the indictment faced. Once the amendment had been made, Wharton was never in any danger of being tried for ABH. As such, although there were two indictments in fact produced in order to reflect the change in the offence faced by Wharton, there was, as a matter of law, only one indictment containing offences with which Wharton was being prosecuted. That indictment was amended but this does not mean that there was more than one case as defined in the 2013 Regulations.

My analysis and conclusions

12. It is acknowledged that the 2013 Regulations, as amended, impose a technical regime, the mechanical application of which can produce a 'swings and roundabouts' approach to remuneration. One potential consequence of this mechanical application was recognised by Senior Costs Judge Gordon-Sakar in Hussain (ibid) and in my decision of Ayomanor (ibid).

13. However, I consider that the decision of CJ Rowley in Wharton (ibid) represents an important development in the assessment of costs under the LGFS where two fees are claimed. Senior Costs Judge Gordon-Saker concluded in Hussain that where an original (or previous) indictment was stayed or quashed, in favour of a second (or subsequent) indictment, there would be, on a mechanistic application of the Regulations, two cases and two fees, notwithstanding that in reality there 'was really only one case'. This was also my conclusion in Ayomanor. It is clear from Wharton, however, that judges in the Crown Court often adopt a more pragmatic or flexible approach when the prosecution seeks to change an indictment. As such, whether or not the original (or previous) indictment is to be stayed or quashed, depends very much on the typographical nature and extent of the changes sought by the prosecution and the consequent practice selected (often, it seems to me, quite informally) by the trial judge. In this context, the fact that an indictment was stayed or quashed is not, of itself, an indication that the subsequent indictment represents a second (or new) case.

14. In this appeal, the changes affecting the Defendant were limited essentially to count 3. Mr Wells is quite right that the changes to the case particulars (a complete change in the alleged criminality from September 2019 to January-February 2019), were substantive, rather than a mere tinkering or tidying up of the charge. Yet, the offence was essentially the same and there was never a suggestion that the Defendant would or could face trial on (in the context of count 3) two separate charges of fraud. In other

words, the second count 3 superseded and replaced the original count 3, in circumstances where the Defendant would only be charged on one such count.

15. I must conclude, therefore, that the approach of CJ Rowley in Wharton be preferred to that followed by SCJ Gordon-Saker in Hussain (ibid) and myself in Ayomanor (ibid). I find that in effect the second indictment in this case was merely an amendment of the original indictment. It could not be said that there were two cases and the Appellants are only entitled to one fee. The appeal is accordingly dismissed.

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Neutral Citation No. [2022] EWHC 2842 (SCCO)

Case No: T20207295

SCCO Reference: SC-2021-CRI-000123

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 3 November 2022

Before:

COSTS JUDGE LEONARD

R
v
THOMAS

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Hussain Solicitors**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

REASONS FOR DECISION

1. Hussain Solicitors ("the Appellant") represented Sadique Thomas ("the Defendant") in proceedings before the Crown Court at Bristol. The defence was funded by Criminal Legal Aid under a Representation Order dated 9 December 2020 and the Appellant is entitled to payment from public funds in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013. The Appellant argues that under the 2013 Regulations, two trial fees are payable. The Legal Aid Agency ("LAA")'s Determining Officer has concluded that only one case fee is payable.

Rules and Authorities

2. The appeal turns on whether, for the purposes of the 2013 Regulations, there was (as the Determining Officer found) only one indictment, or (as the Appellant contends) there were two indictments, against the Defendant. The relevant provisions are to be found in the Litigators' Graduated Fee Scheme at Schedule 2, as in effect at the date of the Representation Order.

3. Schedule 2 starts at paragraph 1(1), with this definition:

> "In this Schedule—
> 'case' means proceedings in the Crown Court against any one assisted person-
> (a) on one or more counts of a single indictment…"

4. Schedule 2 incorporates the "graduated fee" scheme for litigants like the Appellant, who conduct criminal litigation on behalf of legally aided defendants. Schedule 1, which incorporates a graduated fee scheme for advocates, includes an identical definition of a "case".

5. The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each "case". For that reason, if an indictment against a defendant is severed into two separate indictments, there may be two "cases" under the regulations and the litigator or advocate representing that defendant may in consequence receive two graduated fees. In contrast, if two separate indictments against a given defendant are joined into one, then there may be only one "case" against that defendant and only one graduated fee payable. It follows, inevitably, that the graduated fee or fees payable to a litigator or advocate in either circumstance may not reflect the amount of work undertaken.

6. This is true not only of the 2013 Regulations, but of identical graduated fee provisions in the Criminal Defence Service (Funding) Order 2007, which preceded them.

7. I have been referred, by Mr McCarthy for the Appellant and Mr Rimer for the Lord Chancellor, to a number of Costs Judge decisions. The decisions of Costs Judges are not binding, but they may set down principles which are incorporated into the LAA's Crown Court Fee Guidance and followed by the LAA's determining officers on assessing graduated fee claims.

8. I do not find it necessary to refer to all of the decisions to which I have been referred. That is partly because they are fact-specific and partly because the principles that they embody are helpfully summarised in some of the cases to which I will refer. I will however be focusing on the consideration given in some recent decisions to practice and procedure with regard to indictments preferred through the Crown Court's Digital Case Management system ("DCS").

9. One of the most frequently quoted Costs Judge decisions on the subject of whether, as a result of multiple indictments, there has been one or more "case", is that of Master Gordon-Saker, now the Senior Costs Judge, in *R v Hussain and Others* [2011] 4 Costs L.R. 689.

10. In *R v Hussain and Others* it appeared that there had been four indictments against the same defendant. Indictments 1 and 2 ("the second indictment") had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 ("the third indictment"), which went to trial and resulted in a conviction.

11. The Senior Costs Judge found that, by reference to the 2007 Order, there had been two cases, for which two graduated fees were payable. A trial fee was payable (and had been paid) for the third indictment. On the facts of that particular case, a cracked trial fee was also payable for the second indictment.

12. At paragraphs 15 and 18 of his judgment, he expressed his conclusions in this way:

> "Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the Crown to elect which will proceed to trial…
>
> It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, there were two indictments which were not joined, then there must be two cases and two fees."

13. In *R v Ayomanor* (SC-2020-CRI-000146, 12 January 2021) Costs Judge Whalan considered a case in which a defendant had entered not guilty pleas on an indictment alleging six counts of fraud and converting criminal property. That indictment was quashed, and at the time of Costs Judge Whalan's judgment the defendant was facing trial on a second indictment. Judge Whalan found that two graduated fees were payable. Having reviewed a series of Costs Judge decisions, at paragraph 19 of his judgment he offered this summary:

> "The principles to be taken and applied from these cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable."

14. In *R v Wharton* (SC-2020-CRI-000195, 1 February 2021), Costs Judge Rowley considered the way in which indictments are managed within the DCS.

15. *R v Wharton* concerned an assault in the course of which the defendant had injured his partner. He first faced two counts of occasioning actual bodily harm and common assault. In the course of a bail hearing, the offences with which he was indicted changed in that his assault on his partner was alleged to have caused grievous bodily harm.

16. The appellant in that case, Mr Turner, claimed two case fees, relying upon DCS entries which indicated that an application was made by the Crown and leave given to prefer a new indictment, the original being stayed. Judge Rowley, in accordance with regulation 29(11) of the Criminal Legal Aid (Remuneration) Regulations 2013, made enquiries of the Trial Judge. He summarised the outcome of those enquiries, and the conclusions he drew from it, at paragraphs 9 to 14 of his judgment:

> "9. Following the hearing… I wrote to the trial judge, HHJ Teague QC to see if he was able to shed any light on the issue here. On 25 November 2020, he responded and the relevant part of that response is as follows:
>
> > 'What tends to happen is that the prosecuting advocate applies for leave to amend. I then make a quick assessment as to whether I should simply grant the application or stay the original bill. If I think the latter course may be easier, I suggest staying the existing bill of indictment and preferring the amended version in its place and ask whether the prosecuting advocate is happy for the application to be dealt with in that way. They nearly always agree to my suggestion, as does defence counsel. That is very likely to be what happened in this case.'
>
> 10. The trial judge confirmed to me that there is no practical difference as to which option is taken. His practice depended on how much amendment was required. A typographical error or similar would be amended. A more significant change typographically would render it simpler to stay the indictment and prefer an amended version.
>
> 11. I was referred to several other cases at the hearing where costs judges have given decisions. But these are fact sensitive questions and the cases to which I was referred could only amount to examples of what occurred in other situations. Nevertheless, I should refer to the case of *R v Abbas Khan*, where Master Brown distinguished whether there were two indictments as a matter of fact from whether there were two indictments as a matter of law.
>
> 12. In this case, Wharton was charged with causing actual bodily harm when the indictment was first produced, but upon consideration by the Crown counsel, a more serious charge was available. Having pointed out that evidence which was already on the DCS, Crown counsel indicated his intention to revise the indictment at the hearing on the following day. Mr Turner's response specifically referred to whether there was a need to amend the indictment if his client pleaded to the lesser charge. It seems to me that this was an accurate description of the change in the case facing Wharton and that there is no room to suggest that the change in the indictment is any more than an amendment in those circumstances.

> 13. The fact that two separate documents have been uploaded rather than annotating the original indictment in some fashion is simply how modern technology is likely to be employed. Ease of practice dictates this approach as was confirmed by the trial judge. It does not enable further claims to be made for fees in respect of what is very much the same work. The case of R v J, on which counsel relied, regarding the uploading of an indictment automatically being preferred does not assist in this situation. That case clearly came to the conclusion that no more was required than uploading to prefer an indictment in the situation where any more formal preferment had been overlooked before the defendant had been tried. It does not add anything to the question of whether there are two operative indictments.
>
> 14. This case reveals another instance where the workings of the 2013 Regulations do not walk entirely in step with criminal practice. The only rationale for counsel's argument is that a stayed indictment may mean there are two cases and therefore two fees. There was no prospect of Wharton ever facing counts of both ABH and GBH. The second superseded the first by what can only be described as an amendment to the indictment faced. Once the amendment had been made, Wharton was never in any danger of being tried for ABH. As such, although there were two indictments in fact produced in order to reflect the change in the offence faced by Wharton, there was, as a matter of law, only one indictment containing offences with which Wharton was being prosecuted. That indictment was amended but this does not mean that there was more than a one case as defined in the 2013 Regulations."

17. In *R v Moore* [2022] EWHC 1659 (SCCO) a defendant pleaded not guilty to counts on a first indictment of conspiracy to commit fraud (count 1), obtaining a money transfer by deception (count 2) and fraud (counts 3-5). He subsequently pleaded guilty to counts on a second indictment in which some of the counts from the first indictment were varied and the period of offending on the fraud count was changed. The first indictment was stayed.

18. The appellants in *R v Moore* submitted that two graduated fees should be paid, as there had been two indictments which were not joined. The second indictment superseded the first, which was formally stayed by the court. The changes in the second indictment were, it was submitted, not merely cosmetic or reflective of "housekeeping", but comprised substantive changes to the criminality alleged against the Defendant. As the period of offending was completely different, the evidence adduced to prove the case was also different. It was this fundamental change that had led to the Defendant changing his pleas to guilty.

19. Costs Judge Whalan revisited the relevant principles in the light of *R v Wharton*. At paragraphs 12-15 of his judgment he set out his analysis and conclusions:

> 12. It is acknowledged that the 2013 Regulations, as amended, impose a technical regime, the mechanical application of which can produce a 'swings and roundabouts' approach to remuneration. One potential consequence of this mechanical application was recognised by Senior Costs Judge Gordon-Sakar in Hussain (ibid) and in my decision of Ayomanor (ibid).

13. However, I consider that the decision of CJ Rowley in Wharton (ibid) represents an important development in the assessment of costs under the LGFS where two fees are claimed. Senior Costs Judge Gordon-Saker concluded in Hussain that where an original (or previous) indictment was stayed or quashed, in favour of a second (or subsequent) indictment, there would be, on a mechanistic application of the Regulations, two cases and two fees, notwithstanding that in reality there 'was really only one case'. This was also my conclusion in Ayomanor. It is clear from Wharton, however, that judges in the Crown Court often adopt a more pragmatic or flexible approach when the Crown seeks to change an indictment. As such, whether or not the original (or previous) indictment is to be stayed or quashed, depends very much on the typographical nature and extent of the changes sought by the Crown and the consequent practice selected (often, it seems to me, quite informally) by the trial judge. In this context, the fact that an indictment was stayed or quashed is not, of itself, an indication that the subsequent indictment represents a second (or new) case.

14. In this appeal, the changes affecting the Defendant were limited essentially to count 3. Mr Wells is quite right that the changes to the case particulars (a complete change in the alleged criminality from September 2019 to January-February 2019), were substantive, rather than a mere tinkering or tidying up of the charge. Yet, the offence was essentially the same and there was never a suggestion that the Defendant would or could face trial on (in the context of count 3) two separate charges of fraud. In other words, the second count 3 superseded and replaced the original count 3, in circumstances where the Defendant would only be charged on one such count.

15. I must conclude, therefore, that the approach of CJ Rowley in Wharton be preferred to that followed by SCJ Gordon-Saker in Hussain (ibid) and myself in Ayomanor (ibid). I find that in effect the second indictment in this case was merely an amendment of the original indictment. It could not be said that there were two cases and the Appellants are only entitled to one fee. The appeal is accordingly dismissed."

20. Mr McCarthy has referred me to *R v Jessemey* [2021] EWCA Crim 175, in which the Court of Appeal provided some useful guidance upon the preferment of indictments through the DCS. The following passages are taken from paragraphs 15-19 of the transcript of the court's judgment, as delivered by Mr Justice William Davis on 5 February 2021:

"15. The preferring of indictments is dealt with in Part 10 of the Criminal Procedure Rules. Part 10.2(5) is in these terms:

'(5) For the purposes of section 2 of the Administration of Justice Miscellaneous Provisions) Act 1933-

(a) a draft indictment constitutes a bill of indictment;

(b) the draft, or bill, is preferred before the Crown Court and becomes the indictment-

(i) where rule 10.3 applies (Draft indictment generated electronically on sending for trial), immediately before the first count (or the only count, if there is only one) is read to or placed before the defendant to take the defendant's plea under rule 3.24(1)(d),

(ii) when the prosecutor serves the draft indictment on the Crown Court officer, where rule 10.4 (Draft indictment served by the prosecutor after sending for trial), rule 10.5 (Draft indictment served by the prosecutor with a High Court judge's permission), rule 10.7 (Draft indictment served by the prosecutor on re-instituting proceedings) or rule 10.8 (Draft indictment served by the prosecutor at the direction of the Court of Appeal) applies, or

(iii) when the Crown Court approves the proposed indictment, where rule 10.6 applies (Draft indictment approved by the Crown Court with deferred Crown agreement)."

16. We are concerned with the position governed by sub-paragraph (b)(ii). The relevant Criminal Practice Direction is CPD Part 10A.8:

"It requires the prosecutor to prepare a draft indictment and serve it on the Crown Court officer, who by CrimPR 10.2(7)(b) then must serve it on the defendant. In most instances service will be by electronic means, usually by making use of the Crown Court digital case system to which the prosecutor will upload the draft (which at once then becomes the indictment, under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 and CrimPR 10.2(5)(b)(ii))."

17. The import of these provisions was summarised by this Court in R v W(P) [2016] 2 Cr App R 27 at [20]:

"An indictment is preferred within the meaning of s.2(1) of the 1933 Act, once it is electronically entered onto the Court digital system at the Crown Court. The consequence is, as s.2(1) provides, that 'it shall thereupon become an indictment and be proceeded with accordingly'."

18. Nowhere in the Criminal Procedure Rules or in the Criminal Practice Direction, is it said that the indictment must be uploaded to a particular part of the DCS. Mr Jarvis's submission was that the uploading must be to the “Indictment” section of the DCS. An indictment uploaded to another part of the DCS will not have been preferred. Were it otherwise confusion and error would be the likely result. If the indictment were not in the right section there would be no reason for anybody to look for it. In our judgment, although nothing is said whether in the rules or the Practice Direction as to the relevant section on the DCS onto which the indictment should be loaded, we agree with Mr Jarvis that in order for it to be preferred the indictment must be loaded into the "Indictment" section. For it to be otherwise would be a recipe for chaos.

19. There can of course be two or more indictments outstanding against a defendant at any one time in the course of proceedings in the Crown Court: see R v MJ [2019] 1 Cr App R 10 at [51]. If two indictments have been uploaded to the "Indictment" section (as will frequently occur in the course of proceedings) both will have been preferred. As was explained in MJ the Crown will be required to elect the indictment in respect of which they intend to proceed…."

The Procedural History of This Case

21. According to the parties' submissions, indictments uploaded to the "indictments" section of the DCS are given a section reference such as "B1", and identified by that reference. That is reflected to some extent in the court log for this case, although not consistently enough to be helpful: other terms such as "indictment 1" are used. It would also appear that some references, such as "B8-B9" may refer to page numbering, so the same indictment may be referred to in different ways or given a different description.

22. The following sequence of events has been pieced together, as best I can, from the court log and the parties' submissions.

23. According to the Appellant, the Defendant was sent from the Magistrates Court on 7 December 2020 and an indictment preferred and uploaded to the Crown Court's digital case system ("DCS") on 8 December 2020. That indictment is referred to in the Appellant's written submissions as indictment B2, although I have found no reference to B2 in the court log, which records counts being added on 7 January 2021 to "indictment 1". Whatever the underlying detail, the position is that the Defendant, jointly with at least one of his co-defendants Jay Campbell and Donnelly McNeil, was charged with attempted murder.

24. The trial began on 21 June 2021. On that date, according to the court log, the Crown mentioned an "indictment issue". An indictment (B5) naming all three defendants (McNeil, Thomas & Campbell), was preferred. That indictment incorporated counts of Attempted Murder, with an additional Assisting an Offender count against Campbell.

25. The court log records, on 24 June, the Crown mentioning the "potential for an amended indictment" and the trial judge, HHJ Lambert, outlining issues arising from amendment and on 28 June, the Crown advising the court that an amended indictment had been uploaded to the DCS.) Mr McCarthy thought that this might have been an error, not followed up, and suggested that there might have been elements of duplication in the uploading to DCS). On 29 June the court log records that "the indictment at B5 is stayed and indictment at B8-B9 with alternative counts is preferred".

26. The indictment preferred on 29 June is referred to by the Appellant as B7. Mr McCarthy indicated that the description B8-B9 in the court log refers to page numbering in the DCS. It incorporated counts of Attempted Murder and alternative counts of (according to the Appellant) Wounding with Intent and also (according to Mr Rimer) Unlawful Wounding. By what appears to have been an oversight, the defendants did not immediately plead to the new counts.

27. On 1 July 2021 the court log records counts 3 and 4 "on indictment 1 added to defendant Sadique Thomas" and the renumbering of counts on "indictment 1", and HHJ Lambert clarifying the position regarding the amended indictment with the jury. The court log for 2 July 2021 records Not Guilty pleas by the Defendant to counts 1 or 2 and 3 on "indictment 1" and the deletion and addition of various counts on that indictment.

28. It would appear from the court log that on 5 July 2021 negotiations were taking place between the Crown and the defendants with a view to agreeing pleas. In the afternoon, the Crown applied for McNeil and the Defendant to be re-arraigned on count 2, which I understand to be the count of Wounding with Intent, and advised the court that if they were to enter guilty pleas to count 2 the Crown would take no further action on count 1, which I understand to be the count of attempted murder. The Crown also formally applied for the amendment of "indictment B10". Mr McCarthy indicated that on this date an indictment, which he referred to as B8, was uploaded to the DCS at pages 10-11. That would seem to be the same indictment. Mr McCarthy suggested that it duplicated B7 (presumably, as the court log indicates, with some amendment). The Defendant and McNeil were duly rearraigned and pleaded guilty to count 2. Not Guilty verdicts were directed on all other counts.

29. The Appellant has produced a screenshot from the DCS which records that an indictment preferred in open court by HHJ Lambert on 29 June 2021 was stayed by HHJ Lambert on 7 July 2021. This would appear to refer to indictment B5.

The Claim for Two Fees

30. The Appellant has been paid for the trial, but has made a separate claim for a second full trial fee in relation to the stayed indictment B5. The Determining Officer refused the claim on the basis that this was an example of an indictment being amended and that the reference to an indictment being stayed was effectively an administrative exercise.

31. The Appellant's case rests on the stay of indictment B5, and its replacement by the indictment referred to as B7 (or one of what may have been several incarnations of that indictment). Mr McCarthy argues that on being stayed, indictment B5 ceased to exist. It was replaced by indictment B7. There were, as against the Defendant, two indictments and in consequence two cases.

32. The Appellant maintains that once the Crown preferred the new indictment at B7, there were two co-existing indictments running in parallel. Importantly, the more serious count which was charged in the earlier, subsequently stayed, indictments (Attempted Murder) was not proceeded with and Not Guilty verdicts were directed. The nature of the criminality referred to in the stayed indictment and the indictment to which the Defendant pleaded guilty, was radically different and the potential penalty for the offence to which a Guilty plea was entered, much less severe. The effect of the preferment of the new indictments and the timing of them supports, says the Appellant, a claim to a separate fee for the stayed indictment at B5 and on the indictment that proceeded at B7. That justifies two full trial fees.

33. The alternative possibility of a full trial fee and a "cracked trial" fee was also mooted, but the basis upon which such a fee might be claimed is not clear to me and in view of my conclusions I do not believe that it is necessary to address the point.

34. Mr McCarthy argues that the logic of *R v Wharton*, having been decided before the Court of Appeal's judgment in *R v Jessemey* on 5 February 2021, needs to be revisited in the light of the guidance given by the Court of Appeal (to which, it would appear, Costs Judge Whalan's attention was not drawn in *R v Moore*). That guidance, he submits, makes it clear that the approach taken by the Senior Costs Judge in *R v Hussain* and by Costs Judge Whalan in *R v Ayomanor* is to be preferred.

35. Mr Rimer refers to the court log for 24 June, 28 June and 1 July 2021. His interpretation of the record is that alternative counts of wounding with intent and unlawful wounding were on 1 July 2021 added to the indictment at B5 and that there was a brief discussion between the judge and the Crown about how the jury would have the additional counts on the indictment explained to them.

36. The intention seems, he says, to have been to add the alternative counts to the indictment at B5 with count 1, attempted murder, to remain and that to that end, an amended (consolidated) indictment showing all three offences was uploaded at B10-11 on the DCS which included the alternative counts. This was followed by the acceptance, on 5 July 2021, of a plea to the offence, as described above.

37. Mr Rimer submits that whilst it may appear that there were, administratively, two indictments, in reality (and in law) there was only one indictment which was amended part of the way through the trial to include lesser, alternative charges, which they could have been directed to consider under section 6(3) of the Criminal Law Act 1967. The Appellant is he says seeking a windfall by taking advantage of the way in which the DCS presents an amendment to an indictment as if a separate indictment had been preferred

38. On the hearing of the appeal Mr Rimer emphasised the change in day to day Crown Court practice following the introduction of the DCS. Paper indictments could easily be amended by hand. The use of the DCS and of indictments stored electronically in PDF format, makes that impracticable. In consequence, what is effectively an amendment to an indictment may have to be achieved by replacing one form of indictment with another. That does not, he submits, provide the Appellant with a pretext for claiming two full trial fees where the criminal conduct for which the Defendant faced trial had never changed and the only real change was, in accordance with common practice, the addition of a less serious offence in respect of that same conduct, to which the Defendant was willing to plead.

Conclusions

39. Since I heard this appeal, Costs Judge Rowley has himself had the opportunity, in *R v Shabir & Khan* [2022] EWHC 2232 (SCCO) to consider the extent to which, if at all, *R v Jessemey* bears upon the logic of his decision in *R v Wharton*. It would be to oversimplify the thorough and careful analysis set out in his judgment to say that he found that *R v Jessemey* does not undermine either the logic or the conclusions set out in *R v Wharton*, but that seems to me to be the essence of it. I respectfully agree with both his reasoning and his conclusions.

40. As I understand it, *R v Jessemey* builds upon the Criminal Procedure Rules and the accompanying Practice Direction so as to clarify what needs to be done in order for indictments to be preferred through the DCS. In its judgment the Court of Appeal also reiterated the established principles, first that (as the Senior Costs Judge put it in *R v Hussain*) if two indictments exist at the same time for the same offence against the same person on the same facts, the court will not permit both to proceed, and second that the indictment that does not proceed must be appropriately disposed of.

41. The Appellant argues that, consistently with the procedure and principles outlined in *R v Jessemey*, on 29 June 2021 indictment B5, which had been preferred on 21 June, was stayed and the indictment referred to by the Appellant as B7 preferred. It follows, says the Appellant, that for the purposes of the 2013 Regulations, there have been two indictments against the Defendant and that two fees are payable.

42. That does not seem to me necessarily to follow. In order to explain that I should start by referring to some of the observations made and the conclusions reached by Costs Judge Rowley in *R v Shabir & Khan*. At paragraphs 6 to 8 of his judgment:

> "Prior to the digital age, it was clear which indictment a defendant faced since it was produced on paper. If it was replaced by another indictment then some action, such as quashing or staying the first indictment had to be taken and this would lead to a fee being payable in respect of that first indictment such as occurred in the case of R v Sharif (168/13). A further fee would be payable in respect of the second indictment when the case concluded. If the paper indictment was simply amended, then the typed or manuscript amendment would be clearly seen on the indictment.
>
> The preferment of the indictment is now usually carried out by the uploading of it onto the Digital Case System. Where the prosecution reviews the counts on the indictment and wishes to change them, then a new document may be uploaded rather than any amendment being made to the original document even where what would traditionally have been described as an amendment, rather than a new indictment, was required.
>
> From the appeals now regularly being received by costs judges, it would appear that this change in practice has resulted in there being numerous iterations of indictments existing on the DCS and which need to be dealt with at the end of the trial. As a result, numerous claims have been brought for more than one fee which was a comparative rarity prior to the use of the DCS..."

43. Judge Rowley pointed out that in *R v J* (the case referred to by the Court of Appeal in *R v Jessemey* as *R v MJ*) the Court of Appeal regarded the substitution of an indictment on the DCS by another containing additional counts was in effect a process of amendment (the issues in that particular case arising from the fact that the application for amendment had never been made). At paragraph 34 to 36 of his judgment he added:

> "… Unless there has been a severing of the indictment so that the defendant has to face two separate trials, or there is something equally distinct about the indictments being faced by a defendant (as in Jessemey), then the process of amendment of the indictment up to and including the trial is only one case which the defendant is facing and entitles the defendant's legal representative to one graduated fee.

> The court is regularly faced with appeals where the advocate or litigator is seeking two trial fees where the first trial has proved ineffective for some reason. The regulations clearly do not provide for this and a reduced fee is payable for one of the trials. This is so, notwithstanding comments made by the first trial judge that the second hearing is a new trial etc. The only way two fees can be sought under the 2013 Regulations is if the two trials involved different offences brought by different indictments.
>
> In a similar way, in this situation, the trial judge may quash earlier iterations of the indictment as a matter of housekeeping as clearly occurred in this case. But that does not necessarily mean that there have been two (or more) cases for the purposes of claims for graduated fees. Where an indictment is quashed in circumstances such as in R v Sharif so that the prosecution has essentially to start again, then two fees may clearly be claimed. But that is, I suspect likely to be a relatively rare event, and is not to be equated with a proliferation of indictments which has grown out of an iterative attempt to be efficient in the use of modern technology. That is the situation here and does not provide the solicitors with the opportunity for claiming more than one fee."

44. As I have already indicated, I agree with all of those observations. I might put the point another way by considering what is meant at paragraph 1, Schedule 2 to the 2013 Regulations by "a single indictment". In a working environment in which even minor changes to an indictment may be (or may have to be) implemented by the preferment of a second form of indictment and the quashing or stay of the first, rather than the physical alteration of an existing one, it would be inconsistent with the purpose of the 2013 Regulations and unworkable in practice to reach the conclusion that two graduated fees are, in consequence, payable. There must be a real distinction between the relevant indictments, sufficient to justify the conclusion that there has been more than one "case". Otherwise there is, for the purposes of the 2013 Regulations, a single indictment.

45. In this case, as the references to "amendment" in the court log make clear, the way in which the case against the Defendant developed was that the indictment of Attempted Murder against the Defendant was amended to add lesser offences of wounding, to which the Defendant was willing to plead guilty. The criminal conduct concerned was precisely the same. In those circumstances, it seems to me that I cannot properly be said that there was more than one "case" for the purposes of the 2013 Regulations.

46. I might add that it is far from clear that the indictments referred to as B5 and B7 were, strictly speaking, the only indictments preferred in this case. It may well be, as Mr McCarthy suggested, that there was an element of duplication in the uploading of some indictments to the indictments section of the DCS. If so, a on strict interpretation of the principles relied upon by the Appellant, arguably each of those indictments should be taken to have been preferred, should have (and might have) been quashed or stayed, and each potentially might give rise to a claim for another fee. That seems to me to illustrate the problematic nature of the approach advocated by the Appellant.

47. For those reasons, this appeal does not succeed and is dismissed.

Neutral Citation No. [2022] EWHC 2926 (SCCO)

SCCO Reference: SC-2022-CRI-000030 SC-2022-CRI-000057 SC-2022-CRI-000063

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 11/11//2022

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Abada

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

CARSON KAYE SOLICITORS (1)
RIA BANERJEE (2)
JAMES MARTIN (3)

Appellants

-and-

THE LORD CHANCELLOR

Respondent

1. This is my decision in all three appeals. The third appeal, brought by Mr. Martin, was lodged out of time. An extension of time sought by him to bring the appeal was not opposed and I grant it. However all three appeals have been unsuccessful for the reasons set out below.

2. The issue arising in all the appeals is whether under the provisions of the Legal Aid (Remuneration) Regulations 2013 ('the AGFS'/the '2013 Regulations') the Appellants are entitled to two separate fees in circumstances where two indictments were joined to form one indictment. The Appellants have been paid a fee on the basis that there was one indictment and one case.

3. At the hearings on 26 October and 9 November 2022, which took place by video link, the First and Second Appellants were represented by the third Appellant, Mr Martin, Counsel. The Respondent was represented by Mr. Orde who is an employed lawyer. There were matters which I thought had not been adequately addressed at the first hearing and I required a further short hearing on 9 November to consider some of the queries that I had following the first.

4. Although there was some debate about the number of representation orders made in this case and the 'T' numbers attributed to them, I have seen in the last bundle[1] (of the three submitted) that a Representation Order was made for the benefit of the Defendant in July 2020 in respect of other solicitors. I understand from a document lodged on Ce-file by the First Appellant that that on 19 April 2021 the First Appellant was substituted for these solicitors and thus had the benefit of the order. That order was amended to authorise the instruction of two junior counsel on 8 September 2021.

5. The background to the matter is complicated and the nature of the case that has been put has changed over time in the course of the appeal (indeed between the two hearings in the appeal).

6. I am told that in the initial stages of the criminal proceedings there were multiple joinders of indictments in relation to different defendants. The important factual position so far as is relevant to this appeal (and as it was put at the final hearing of the appeal) was that the Defendant at one stage faced two indictments: one indictment, 'B3' with case number T2021782, included a court of conspiracy to supply Class A drugs with three defendants; and another separate indictment, 'B6' with case number T20217125, which included a count of conspiracy to commit robbery and various others offences with two other and quite different defendants. This, I understand. to be agreed for current purposes. It is also common ground that the indictments were joined on 8 June 2021.

7. Although I was given no clear history of the matter I understand that the joined indictment went through further amendments. At a later date, two indictments (referred to as 'B11' and 'B12'), were said to have been preferred against the Defendant. The difference between the two was, as I understand it, that in respect of one count of a conspiracy (Count 3, it appears) there were in the later version (B12) the words "*and others unknown*" which were not in B11. Thus, whilst B11 alleged what was referred to as a 'closed' conspiracy, B12 alleged an 'open' conspiracy,

8. The Defendant pleaded guilty on 20 October 2021 and the matter was listed for sentence on 10 and 11 January 2022. There was a dispute as to the amount of Class A drugs which were subject of at least some of the counts. That issue was resolved on submissions from both sides on the evidence of a witness Mark Wright. On the second day of the hearing, after final submissions, the judge, I understand, found in favour of the of the Defendant. The

[1]Labelled 'Full File Solicitors Carson Kaye Updated and Final'

hearing was considered a 'Newton hearing' within the meaning of the relevant provisions of the AGFS such that the Appellants were entitled to a fee calculated on the basis of a trial.

9. I understand that an issue arose as to whether the Defedant was sentenced on the basis of indicment B11 or indicment B12 following which it was confirmed that B11 was the indictment against which the pleas were taken. It appears from the written reasons in the second third appeals, indictement B12 was formally quashed. Mr. Martin's Note suggests other indictments were also quashed at this stage.

10. Initially in this appeal it was said that the two indictments B11 and and B12, were separate indictments and that these two indictments gave rise to two separate cases and it was on this basis that a claim was made for a second fee; alternatively, it was said in the appeal of the second and third appeals, that there were other indictments giving rise to two separate cases and hence, it was said, an entitlement to two fees.

11. Shortly before the appeal hearing on 26 October 2002 what appeared to be the Appellants' primary case (that indictments B11 and B12 gave rise to separate cases) was abandoned and at the first appeal hearing the only case that was argued that the existence of two separate indictments one of the referred to as 'B1' and the other, B3, meant there were two cases. In the final submissions however the material indicments for the contention that there were two separate cases by virtue of there being two indictments were those I have identified above, B3 and B6 and it is in respect of these separate indictments that the arguments were ultimately focussed.

12. According to the Determining Officer in the first appeal the additional fees sought by the First Appellants are £29,664.55. (including VAT). This is on the basis that there was a second case in respect of which a 'cracked fee' is due. I should however say that this figure was not verified to me nor was I told what the fees additional fees claimed were for counsel. Neither party was able to tell me at the hearing the amount of fees at stake in the second and third appeals. In any event I understand that substantial sums are at stake.

13. In their written reasons the Determining Officers allowed only one trial fee for each of the Appellants and it is from these decisions which the Appellants appeal. Both Determining Officers decided that there was only one case for the purposes of the AGFS and refused the claim for a fee in relation to what is said to be a stayed indictment (referring, it appears, to indictment B12). They both addressed the issue as to indictments B11 and B12 gave rise to a separate cases, a point which is not longer pursued. But it is perhaps helpful to look at the reasons given by the Officers

14. The Determining Officer in the first appeal said where defendants are joined to one indictment or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, there was one case and the litigator may claim one fee. He held that this is what appeared to have taken place in this case, and all the indictments were consolidated to form one indictment and form one case. He commented that there appeared to have been no significant changes to the presentation of the case, and that the indictments were stayed in order to make amendments and join co-defendants under one single indictment and add additional counts. Further, he said, that it seemed reasonably clear that the court simply amended the indictment a number of times, and each time this happened, a clean/new version of the amended indictment was uploaded to the DCS resulting in a defence request that the earlier version of the indictment be stayed.

15. The Determining Officer in the second and third appeals said that the indictments were substantially the same, and that in any event she preferred a line of decisions by Costs Judges, which I will refer to below, to the effect that where two indictments are effectively joined, whether the court prefers new indictments and quashes another or formally joins two indictments, there is only one indictment and one case. She held that there was no prospect of the Defendant ever having faced the alternative indictment B12.

16. Both the second and third Appellants had, prior to the written reasons of the Determining Officers, been paid a separate an additional fee (on top of the trial fee) on the authorisation of a Case Worker, so it would appear, on the basis that there were two separate indictments with different charges. If the subsequent decisions of the Determining Officers are correct then these payments were made in error and are subject to recoupment under the 2013 Regulations.

Legislation

17. Schedule 1 and Schedule 2 of the 2013 Regulations applied to the Second and the Third Appellants (as 'advocates') and the first Appellant (as 'litigator') respectively. Both provisions provides the following:

> ***Interpretation***
> ….
> *"case" means proceedings in the Crown Court against any one assisted person—*
> *(a) on one or more counts of a single indictment;*
> *…*

The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each "case".

Guidance

18. I have also been referred to the applicable Crown Fee Court Guidance which provides at para. 2.2. and 2.3 as follows:

> *A case is defined as proceedings against a single person on a single indictment regardless of the number of counts. If counts have been severed so that two or more counts are to be dealt with separately, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees. [2]*
>
> *Conversely where defendants are joined onto one indictment or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, this would be considered to be one case and the litigator may claim one fee. Refer to Costs Judge decision: Eddowes, Perry, and Osbourne (2011) which held that in cases involving multiple defendants represented by the same solicitor one claim should be submitted with the appropriate uplift for the relevant number of defendants. [3]*

19. I remind myself that this is just guidance for those who operate the scheme on a day to day basis and is not a source of law.

Previous decisions

20. It was made clear in *R v Eddowes, Perry, and Osbourne* [2011] EWHC 420 (QB) that where multiple defendants are tried together on the same indictment payment is to be made on the basis that there was one case; this is notwithstanding that the different defendants may allocated different case numbers. The judge in that case. Spencer J, said this:

> *The definition of "case" in para 1(1) of the Schedule cannot possibly lead to the conclusion that if a litigator represents seven defendants charged and tried on the same indictment that litigator is entitled to be paid on the basis of seven separate cases, each calculated identically, producing remuneration totalling seven times the amount the litigator would be paid for representing just one of those defendants. Such an interpretation would not only be nonsensical but would make wholly redundant the concept of and requirement for "defendant uplifts" provided for in the Scheme.*

21. As to the allocation of different case numbers the learned judge went on to say this this:

> *41. Nowhere in the provisions of Schedule 2 (or in the Funding Order generally) is there any mention of case numbers, i.e. the "T" numbers allocated to a case by the CREST case management system at the Crown Court. For the reasons already explained the allocation of case numbers is a purely administrative act which cannot conceivably have any bearing upon the proper interpretation of the Scheme provided for in Schedule 2 . No doubt it has been convenient administratively for fee claims to be processed by reference to case numbers but, as the present appeal demonstrates, the allocation of case numbers can be and often is entirely random, bearing no relation to the realities of the form in which the proceedings on indictment take place or the way in which the litigator prepares for those proceedings.*
>
> *42. It follows that there is no justification whatsoever for treating as the touchstone for the basis of remuneration the case numbers randomly allocated at the Crown Court as a purely administrative function. It appears that it was by pure chance that EPO found themselves representing four of their defendants under one case number, and their other three defendants under three separate case numbers. The proper calculation and payment of substantial public funds cannot be governed by chance.*

22. In respect of earlier Crown Court fees guidance (similar if not the same as that which I have set out above), the judge said that it "*did, at least seem to confirm the principle that where defendants are joined in one indictments, one claim and one claim only should be made by that litigator in respect of the indictment*."

23. Following this decision two different approaches emerged in a series of decisions by Costs Judges in the situation where multiple indictments were preferred, in particular where rather than formally joining two or more indictments in the manner envisaged by the Crown Court Fee Guidance, a judge prefers a fresh indictment and stays the existing indictments and then following trial or sentence the stayed indictments are quashed. Although I have been referred to a large number of decisions on this point, but as appears below I am not at all sure that they provide a complete answer to the issue that now arises in this appeal (as Mr. Orde first appeared to suggest). I will address the decisions briefly.

24. In *R v Hussain & Others* [2011] 4 Costs LR 689, it appears that there had been four indictments against the same defendant. Indictments 1 and 2 ("the second indictment") had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 ("the third indictment"), which went to trial and resulted in a conviction. Costs Judge Gordon-Saker (as he then was, now the Senior Costs Judge) held that where there been had been more than one indictment and no joinder there were two cases and two fees were due. He said this:

> *15. Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the prosecution to elect which will proceed to trial: Practice Direction (Criminal Proceedings: Consolidation), para IV.34.2.*
>
> *……*
>
> *18. It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, <u>there were two indictments which were not joined</u>, then there must be two cases and two fees.*
>
> [my underlining]

25. Costs Judge Whalan took essentially same approach in *R v Ayomanor* SC-2021-CRI-000146 and *R v Mohamed* SC-2020-CRI-000179: In the latter, the judge said this:

> *" Where…. the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable."*

26. However that approach was not followed by others including myself (see by way of examples, *R v Arbas- Khan* [2019] SCCO Ref: 219/18, and the decisions of Costs Judge Rowley in *R v Hall* SC-2020-CRI -000225 and *R v Wharton* [2021] SC-2021-CRI-000195). Whilst it is plain that preferring a new consolidated indictment, staying old indictments and then quashing them might look different from the joinder of indictments there was no difference as a matter of law and fact. As Costs Judge Leonard commented in *R v Nash* [2020] SC-2020-CRI- 000177, agreeing with the approach set out in *Arbas- Khan*, that it may be that the practice of preferring new indictments of what were effectively joined indictments had come about as a matter of prudence and caution, this could not affect the position where as a matter of fact and law, the indictments had been joined.

27. That there was no practical difference in practice between the two processes was, as I I understand it, confirmed by enquiries made by Costs Judge Rowley of the judge in the criminal proceedings who had made an order to stay an indictment and prefer a indictment in *R v Wharton* (see para 10) (see too *R v Hall* at para. 19). This appears to have persuaded Costs Judge Whalan in *R v. Gary Moore* [2022] EWHC 1659 (SCCO) to take a different approach from that which had previously taken.

28. One of the difficulties with the approach set out in *Hussain*, as I see it, it that every time previously separate indictments (with different defendants or with same defendant but

different charges, or variations of this nature) are followed by a new indictment and there was a stay this was liable to create a new case. The amendment of indictments, indeed severance of indictments (on the ground, for instances, there were too many defendants such that a trial was unwieldy) or joinder might be regarded as reasonably commonplace. Indeed joinder or severance could conceivably occur on multiple occasions and this could lead to not just one additional fee but multiple additional fees for was what was, at least in substance, one case (as indicated in *Arbas Khan* see para. 27; see too *R v Hall* para. 18 and SC- *R v Ghafoor* SC-2021-CRI 000132)- a situation which Costs Judge Rowley suggested in *Hall* would be absurd.

The contentions in this appeal

29. As I understand tit, he Appellants do not take issue with this this latter approach ie the one in *Arbas Khan/ Wharton* etc. In any event I see no reason to depart from it. I note however in passing that the other approach, which might be said to attach importance to the form in which orders are made, nevertheless proceeds on the understanding that where there is a formal joinder of two indictments there is then only one indictment and one case (as my underlining of the citation from *R v Hussain*, above, sought to indicate). So, despite the extensive reference to these decisions I am not sure that either line of decisions is particularly helpful to the Appellants in circumstances where it is agreed as I understand it, that there was formal joinder of B3 and B6.

30. As I understand it the Appellants' argument is in effect that whilst joinder gives rise to one indictment the Determining Officer should consider the position before the joinder took place. At that point there were in the circumstances outlined two separate indictments. Alternatively, as I understand it, notwithstanding joinder there were two indictments - one that was amended and on the other was stayed. This situation, they say, is different from the position in *Eddowes* where there were different defendants on different indictments: the Defendant Abada faced both indictments which contained different charges involved different co-conspirators, over different periods of time and relying, he says, on quite different evidence; they were in substance different cases.

31. Mr Martin relied on the following passage in *Arbas Khan* to support his arguments*:*
> *"In my judgement I am required to consider what happened as a matter of law: as to that, I think, for the reasons set out above, that there was only one indictment against the Defendant which was joined with others on 7 April 2017; and thus, as a matter of law, there was only one case against this Defendant."*

It is said what underlies the approach in that case is that whilst joinder did not *create* a new indictment following what is said to be the logic of that decision there was at one stage two indictments, which are said to give rise be two very different sets of proceedings as against one Defendant notwithstanding a later merger. In this instance there were two indictments, B3 and B6, with different case numbers and these were two different cases. Alternatively, as I think it is also put, where one indictment is amended to add the contents of the other, the other remains in existence until it is quashed.

32. I was taken to the detail of the two indictments. In B3 (number 20207125) there was one count against the defendant Abada, a conspiracy to supply a controlled drug Class A, being crack cocaine, with other defendants Bukhaarki, Foster and Merouche between 3 March 2020 and 20 March 2020. B6 (number T20217082) alleged a conspiracy to possess a firearm

with other defendants Hussain and Evans between 6 May 2020 and 25 June 2020 (count 1), a conspiracy to supply a controlled class A drug, heroin, with Hussain and Evans between 28 March 2020 and 26 May 2020 (count 2), conspiracy to supply a controlled Class A drug, cocaine, with Hussain and Evans between 12 March 2020 and 26 May 2020 (Count 3), conspiracy to rob with Hussain on 29 July 2019 and 4 August 2019 (count 4), having a firearm with intent with Hussain (count 5), having an offensive weapon with Hussain (count 6) and doing an act tending to pervert the course of justice on 30 July 2019 (count 7).

33. Mr Martin also sought to draw further support from the passage cited above in *Mohamed* and the following *R v Ayomanor* 2021 SC-2020-CRI-000146:

> *"This was not a case of amendment or joinder, nor can it be described as mere 'house-keeping', but rather a case of two indictments, the latter being a substitute for the former when the former was quashed."*

Decision

34. I think the answer is clear. To my mind it is plain that the 2013 Regulations cannot be read in the way contended for by the Appellants. At the stage where there were two indictments, B3 and B6, the position was inchoate and liable to change. The effect of the joinder was that there was one indictment and one case under the scheme. There was no effective indictment that left stayed as the two indictments were joined to one. It is accepted as I understand I that subsequent amendments leading to B11 did not give rise to further cases. The case following joinder effectively therefore proceeded to a Newton hearing on the joined indictment and the trial fee has been paid on the basis of the joined indictment (not simply on either B3 or B6).

35. It seems to me that it plainly cannot be right for a trial fee to be payable on the basis of joined indictment and further fee to be payable for this same case on the basis that it was a 'cracked trial'. In considering whether there was one case the Determining Officers have to look what happened in the case to determine the fee due. They cannot be expected to divide up or unpick what was joined.

36. I do not think there is any room for the evaluative approach which Mr. Martin asked me to take; that is to consider whether the case in one indictment was substantially different from the allegations that were put in another indictment at some other earlier stage (and the evidence relied upon). Indeed resort to such an approach seems to be inimical to the mechanical nature of the scheme, a matter which would appear to confirm the correctness of the approach taken by the Determining Officers. Accordingly it is not necessary for me to make further enquiries with the trial judge to ascertain the circumstances in which the B3 and B6 were joined and the extent to which indictments B3 and B6 relied on different evidence.

37. Moreover, as was illustrated in argument it is plain that there would be substantial difficulties administering the scheme if one were to take the approach that Mr. Martin was advocating: the Determining Officer might, for instance, have to investigate, in the case of a litigator's claim for payment whether the pages of prosecution evidence ('PPE') (which may well in this case be factor in determining a fee) was attributable to one or other of the cases pre-joinder. Plainly this approach would not fit with the mechanical nature of the scheme.

38. I had some difficulty seeing how the reasoning in my decision in *Arbas Khan* could provide support for the contention that there were more than one case for the purpose of

payment in this case. In that case I had said that the effect of the joinder was that the previous allegations against the different defendants were joined into one indictment. The effect of the joinder might also be said to be subsume previous allegations into one, not that it left open other indictments that have to be stayed.

39. It is true that there is a possible distinction to be made between the joining of indictments against two different defendants and the joining of indictment with different changes against one defendant. But to my mind it makes no difference to the proper approach for current purposes. Moreover if the Appellants were right it is not clear to me why advocates and litigators could not get two fees where they represented two defendants in circumstances where separate indictments against two different defendants were joined, contrary to the guidance in *Eddowes*.

40. Further, it is clear from the passages in *Eddowes* that I have referred to above, that the use of different 'T' numbers for cases does not assist Mr. Martin's arguments (neither in respect of their use on indictments nor representation orders – even assuming that he was right in submitting that there were other such orders I had seen). Nor in my view do the passages which he refer to in *Mohamed* and *Ayomanor*: these cases address a different point, ie the two schools of thought referred to above, whereas in this instance the relevant indictments were formally joined.

41. Even if I were to make the assumption that it was appropriate to look at either B3 or B6 as separate cases it was unclear to me, looking at the rules, how the determination of the second fee due on the additional case could fall to be treated as a 'cracked trial' (in circumstances where the allegation which formed the basis of one of the indictments was joined to an indictment which led to one Newton hearing). Schedules 1 and 2 provide as follows:

> *"cracked trial" means a case on indictment in which--*
> *(a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea] and--*
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*
> *(ii) either--*
> *(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the [first hearing at which he or she entered a plea];*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a hearing at which the assisted person enters a plea;*

42. After I raised this matter, Mr. Martin submitted that rather than a separate 'cracked fee' being payable a separate trial fee was payable. It is, to say the least, difficult to reconcile any entitlement to such a fee with the fact that the Appellants have already received a trial fee for the joined indictment.

43. To my mind there is nothing obviously unfair about the outcome the Determining Officers reached. The legal representatives have been paid for the case on the indictments as joined. As I understand it the fact that indictments had to be joined did not seem to give rise to any extra work that is not ordinarily covered by the graduated fee. As I think others have commented amendments to cases, joinder and severance are an ordinary incidence of case management. I would add that it would seem from the amendment to the Representation Order in September 2021, that in this case at least one of the Appellant advocates was not instructed in the case at a point prior to the relevant joinder.

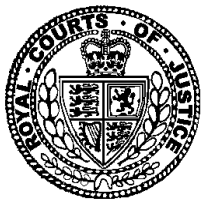
44. Further, it would not, it seems to me, matter that on these particular facts the indictment as joined did not (at least as I was told) justify a higher fee under the Banding Scheme than each indictment would if they gave rise to a separate case following separate Newton hearings: that is an outcome which flows from the nature of the graduated fee scheme. Nor, it seems to me would it matter, as Mr. Martin suggested, if the allegations (on these particulars facts) could not initially have been drafted as one indictment (albeit it is perhaps difficult to see why they could not, at least in principle).

45. If however the Appellants were right it would lead, it seems to me, to the same problem identified above: that multiple fees could be claimed for what in substance was one case.

46. None of this detracts from the position which arises where an indictment is quashed in circumstances such as in *R v Sharif* [2014] SCCO Ref 168/13 where that the prosecution has essentially to start again, and where two fees may clearly be claimed.

47. It follows, I assume, although there has been no argument specifically addressing this issue, that there should be recovery of overpayment under regulation 25 of schedule 1 in respect of the Advocates' claims.

COSTS JUDGE BROWN



Neutral Citation No. [2022] EWHC 2232 (SCCO)

Case No: T20207802 / T20217328

SCCO References: SC-2022-CRI-000043
SC-2022-CRI-000046

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 19 August 2022

Before:

COSTS JUDGE ROWLEY

REGINA
v
SHABIR & KHAN

Judgment on Appeals under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellants: Harris Solicitors & Eldwick Law

The appeals have been dismissed for the reasons set out below.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This decision concerns appeals by Harris Solicitors and Eldwick Law against the decisions of determining officers not to pay cracked trial fees under the Litigators Graduated Fee Scheme in respect of indictments which were quashed by the trial judge.

2. The solicitors were instructed on behalf of Kamran Shabir and Jhazeb Khan, respectively. They were charged with various violent offences along with co-defendants and their trial took place in August 2021. At the beginning of the trial some of the co-defendants, including Khan, pleaded guilty to one of the offences and no evidence was offered against Shabir. The determining officers took the view that the trial had not started and so paid cracked trial fees by way of graduated fees. The solicitors appealed those decisions and I took the view that the trial had begun in a meaningful sense and trial fees were payable.

3. By the time the trial had concluded, the indictment was in its fourth iteration (described as "B4"). After the trial judge had sentenced the various defendants who had pleaded guilty, the Crown prosecutor said to the judge

> "Could we quash all the indictments other than B4 please?"

The judge responded:

> "And verdicts of not guilty in respect of the other counts all to lie on the file."

4. Based upon this interaction, the solicitors have claimed a cracked trial fee in respect of some of those quashed indictments labelled B1 to B3. They do so on the basis that their respective clients pleaded not guilty to the counts in the relevant indictment and the prosecution has subsequently not proceeded with it. As such, the definition of a cracked trial fee in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013 has been satisfied.

5. The determining officer in the case of Shabir rejected the claim on the basis that it was out of time. As such the determining officer did not deal with the merits of the claim itself. However, the determining officer in the case of Khan did reject the claim on the basis of its merits rather than any delay. The determining officer took the view the indictment had been amended rather than that there had been two separate indictments justifying two separate fees.

6. Prior to the digital age, it was clear which indictment a defendant faced since it was produced on paper. If it was replaced by another indictment then some action, such as quashing or staying the first indictment had to be taken and this would lead to a fee being payable in respect of that first indictment such as occurred in the case of R v Sharif (168/13). A further fee would be payable in respect of the second indictment when the case concluded. If the paper indictment was simply amended, then the typed or manuscript amendment would be clearly seen on the indictment.

7. The preferment of the indictment is now usually carried out by the uploading of it onto the Digital Case System. Where the prosecution reviews the counts on the

indictment and wishes to change them, then a new document may be uploaded rather than any amendment being made to the original document even where what would traditionally have been described as an amendment, rather than a new indictment, was required.

8. From the appeals now regularly being received by costs judges, it would appear that this change in practice has resulted in there being numerous iterations of indictments existing on the DCS and which need to be dealt with at the end of the trial. As a result, numerous claims have been brought for more than one fee which was a comparative rarity prior to the use of the DCS.

9. The Court of Appeal has also found itself considering the effect of this change in practice in the case of R v Jessemey [2021] EWCA Crim 175. Martin McCarthy of counsel, who appeared on behalf of the solicitors in these appeals, submitted that the Court of Appeal's approach in Jessemey lent weight to the solicitors' argument.

10. Mr McCarthy's argument was that the 2013 Regulations define a case as involving one or more counts on a single indictment. If there is more than one indictment, then there is more than one case (ignoring the question of joinder) and a fee for each case can be claimed. The preferment of a new indictment on the DCS, in accordance with Criminal Procedure Rule 10 and applying the reasoning in Jessemey, supported the existence of a new indictment and consequently a requirement, at some stage before the case ended, to dispose of earlier, extant indictments.

11. The case of Jessemey contained a number of procedural woes which the Court of Appeal needed to tackle in order to decide the appeal. Jessemey was originally sent a postal requisition containing a single charge of an offence contrary to s15A of the Sexual Offences Act 2003 ("the s15A offence"). When he arrived at the Oxford magistrates court, Jessemey found that the prosecution had decided to prefer a second charge under s8 of the same Act ("the s8 offence"). Both charges concerned either way offences. Jessemey gave no indication of plea regarding the s15A offence but indicated a plea of guilty to the s8 offence.

12. The magistrates committed Jessemey to the Crown Court for sentence but failed to do so in a way which allowed the Crown Court judge to impose a sentence which was any greater than the magistrates could have imposed.

13. Two indictments were uploaded to the DCS. The first indictment was uploaded to the indictment section of the DCS. It contained a single count relating to the s15A offence. The second indictment was uploaded to the applications section of the DCS. It contained two counts. The first count concerned the s15A offence and the second count concerned the s8 offence where Jessemey had been committed for sentence. It is said in the Court of Appeal's judgment that there was some concern that the documentation received from the magistrates court was ambiguous about the manner in which the charge relating to the s8 offence had been sent to the Crown Court.

14. CPR 10 confirms that an indictment is preferred once it is uploaded onto the DCS. The Court of Appeal refined this by indicating that the indictment had to be uploaded to the indictment section rather than any other section of the DCS since otherwise it would be "a recipe for chaos." The Court of Appeal also confirmed that if two indictments were uploaded to the indictment section, both will have been preferred.

The prosecution would then be required to elect the indictment in respect of which they intended to proceed.

15. When Jessemey came before the Crown Court, the prosecution counsel informed the court that the confusion regarding the alleged ambiguity in respect of the s8 offence had been resolved. No attempt was made to move the two count indictment to the indictment section and so there was only one indictment which had been preferred (the single count indictment).

16. One of the many procedural woes identified by the Court of Appeal was that the prosecution only decided at this point that the s8 offence, to which Jessemey had pleaded guilty, fully reflected his criminality. If the same view had been taken before the magistrates court, then none of the subsequent difficulties would have arisen.

17. The prosecution counsel then sought to discontinue the single count indictment so that the sentencing of Jessemey could occur. As the Court of Appeal found, that approach was not only flawed procedurally but also meant that there was no conviction against Jessemey which would have enabled the Crown Court to have sentenced him over and above the limits of the magistrates court's jurisdiction. That particular procedural problem has no relevance to this case. I have set out the rather tortuous history of the Jessemey case in order to make sense of the final paragraph which follows from the conclusion that the single count indictment could not be discontinued as proposed by the prosecution counsel:

> "As we have observed the single count indictment remains extant. It is necessary to take some step to dispose of the indictment. We consider that the appropriate course is to order the indictment to lie on the file on the usual terms. One of us will sit as a judge of the Crown Court in order to achieve that end. We should say that we find it difficult to conceive of any circumstances in which any court would give leave for the prosecution to proceed with that indictment."

18. The need to deal formally with the extant indictment is the crux of Mr McCarthy's submission. As he put it in his written submissions, the result of preferring the final indictment (B4) was that there were various live indictments in the indictment section of the DCS which contained "distinct criminality." The court was therefore required to stay the earlier indictments and as such fees are payable for each of the cases represented by those indictments. Mr Rimer, who appeared on behalf of the Legal Aid Agency, queried why two or even three fees were not claimed on this basis? The answer appears to be that in order to be able to claim a fee, the defendant had to have been in a position to plead not guilty before the indictment was stayed in order to satisfy the definition of a cracked trial. Only one earlier indictment in respect of each of the defendants satisfied that condition.

<u>The indictments</u>

19. The first indictment (B1) was preferred on 17 January 2021. It contained the following counts:

    i) kidnapping

ii) attempting to cause grievous bodily harm with intent

iii) possessing an imitation firearm, with intent to cause fear of violence

iv) blackmail

v) blackmail

vi) intimidation

20. The first five offences were all said to have taken place on 27 December 2020. They were said to be committed by five defendants, one of whom was Jhazeb Khan. The sixth offence took place the day after and involved one of the co-defendants.

21. The second indictment (B2) was preferred on 8 June 2021. The same six offences were set out as counts on this indictment. Kamran Shabir was added as a co-defendant to the first five offences.

22. The third indictment (B3) was preferred on 17 August 2021. This was the first day of trial. The offences remained the same as in the first and second indictments. The defendants to the various offences were the same as in the second indictment (i.e. including Kamran Shabir) save for count three where the number of defendants had been reduced to two of the co-defendants.

23. The final indictment (B4) was preferred on 19 August 2021. A seventh count was added to the indictment regarding the assisting of an offender. It concerned one of the co-defendants allegedly lying in order to impede the apprehension of one of the other co-defendants.

24. Four of the co-defendants, including Jhazeb Khan, pleaded guilty on a written basis of plea to the first count of kidnapping at the trial. The judge sentenced these defendants before being asked to quash the earlier indictments and to leave the other counts to lie on the court file.

25. Mr McCarthy submitted that there were a number of important changes as the various indictments were uploaded to the DCS. He referred to the addition of the extra defendant (i.e. Shabir), and the subsequent reduction of defendants in respect of count three. He did not rely upon the additional count which did not relate to either of these defendants.

26. I have to say that I do not accept Mr McCarthy's submission that important changes were made. The addition of one defendant where there are already five co-defendants does not seem to me to be one which would obviously make a significant difference to the conduct of the defence of one of the existing defendants. Moreover, in respect of Kamran Shabir, there is no such change because he only became involved when the second indictment was preferred. As far as his defence was concerned, the only change between the original indictment for him (B2) and the final indictment was the removal of him from count three along with some of the other co-defendants.

27. It is entirely plain from reading the case of Jessemey and indeed the case of R v J [2018] EWCA Crim 2485 (referred to as MJ in Jessemey) that amendments to the original indictment would be expected to encompass changes of the sort which

occurred here. In R v J, the form of indictment used at the trial differed from the indictment on which the applicant had been arraigned so that there were more counts on the indictment for which the defendant had been convicted (but had not entered a plea). The appeal of J was conjoined with another appeal which involved the same issue. As the Court of Appeal described it:

> "In each case, the prosecution's intention had been to apply to amend the original indictment under s.5 of the Indictments Act 1915 ("the 1915 Act") (and, if necessary, seek to have certain new counts sent to the Crown Court for trial), but by oversight no such application was made and therefore the applicant was not re-arraigned."

28. Having indicated that the proper course of action should have been followed, the Court of Appeal concluded that the convictions could be upheld in any event. As part of its conclusion the Court said at paragraph 54:

> "Indeed, as this case demonstrates, the modern practice of uploading draft indictments onto the DCS, intended to be convenient for all parties and to improve efficiency, is capable of leading to confusion and serious error if care is not taken to ensure that appropriate steps are taken to apply for orders to amend existing indictments and/or to ensure re-arraignment. The risk of multiple versions and uncertainty as to which is the "true bill" is obvious."

29. The reference to various versions potentially being considered to be the "true bill" must, in my view, refer to ones which have been uploaded to the indictments section of the DCS so that they have been preferred rather than remaining as drafts, given the clear guidance in Jessemey.

30. That potential for confusion is clear in this case from the court log where the record of amendments being made appears to refer to the wrong indictment being the one before the court at the time. Nevertheless, the log does demonstrate that the court was attempting to follow the Court of Appeal's comments in R v J in taking care to amend existing indictments and / or ensure re-arraignment.

31. Mr McCarthy contrasted the Court of Appeal's guidance in Jessemey with comments made by a Trial Judge who had been contacted by me in another case on this issue (R v Wharton). Mr McCarthy's argument was that in the light of Jessemey, the need for formality in dealing with extant indictments at the end of the case superseded the earlier comments of the Trial Judge who had taken a pragmatic view about whether a stay or amendment was ordered.

32. I have concluded that Jessemey does not assist the appellants' argument. In Jessemey, both sides thought that the single offence indictment containing the s15A offence had been discontinued. The sentencing took place on the s8 offence without any conviction and that caused the problem of the limited sentence being imposed. Since the single offence indictment had neither been discontinued nor heard, something had to be done at the end of the case. By contrast, in this case, the counts being faced by

the defendants were all before the court on the B4 indictment. The earlier versions contained no separate counts.

33. But even if there remained "distinct criminality" as Mr McCarthy described it, which had not been dealt with, that does not prevent the determining officer – as the Court of Appeal did in R v J – categorising the indictments as an iterative process of amendment rather than there being two "cases" facing the defendant which justified two fees.

34. This it seems to me is the crux of the issue. Unless there has been a severing of the indictment so that the defendant has to face two separate trials, or there is something equally distinct about the indictments being faced by a defendant (as in Jessemey), then the process of amendment of the indictment up to and including the trial is only one case which the defendant is facing and entitles the defendant's legal representative to one graduated fee.

35. The court is regularly faced with appeals where the advocate or litigator is seeking two trial fees where the first trial has proved ineffective for some reason. The regulations clearly do not provide for this and a reduced fee is payable for one of the trials. This is so, notwithstanding comments made by the first trial judge that the second hearing is a new trial etc. The only way two fees can be sought under the 2013 Regulations is if the two trials involved different offences brought by different indictments.

36. In a similar way, in this situation, the trial judge may quash earlier iterations of the indictment as a matter of housekeeping as clearly occurred in this case. But that does not necessarily mean that there have been two (or more) cases for the purposes of claims for graduated fees. Where an indictment is quashed in circumstances such as in R v Sharif so that the prosecution has essentially to start again, then two fees may clearly be claimed. But that is, I suspect likely to be a relatively rare event, and is not to be equated with a proliferation of indictments which has grown out of an iterative attempt to be efficient in the use of modern technology. That is the situation here and does not provide the solicitors with the opportunity for claiming more than one fee.

37. As I have referred to above, the claim in Shabir was rejected by the determining officer on the basis that the claim was made out of time. I do not need to deal with this point having decided that the appeal is unsuccessful on the merits. Nevertheless, in case an appeal takes place, I will deal briefly with the point.

38. The three month period allowed for by the regulations had been exceeded by several months. No request for an extension of time within the three months had been made and so the solicitors would need to show "exceptional circumstances" under the 2013 Regulations to be able to bring their claim. A letter was provided by Harris Solicitors regarding this point on the appeal and Mr McCarthy referred to other situations where courts have taken into account the general difficulties caused by the pandemic.

39. The solicitors have, in my view, caused themselves an insurmountable hurdle by also appealing the determining officer's written reasons regarding when the trial started. There is no explanation given as to why one appeal could be filed with the court in time but the other could not when the time limits for both were running at more or less the same time. I do not need to go into detail, but exceptional circumstances

(rather than good reason which is the test for an "in-time" application) is always going to be a high bar and the solicitors did not come anywhere near it on this occasion.

40. For these reasons, these appeals fail.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 4/16

8 March 2016

ON APPEAL FROM REDETERMINATION

REGINA v TAI

CROWN COURT AT WOLVERHAMPTON

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

CASE NO: T20137463

LEGAL AID AGENCY CASE

DATE OF REASONS: 1 DECEMBER 2015

DATE OF NOTICE OF APPEAL: 18 DECEMBER 2015

APPLICANT: COUNSEL DANIEL OSCROFT

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

The appropriate additional payment, to which should be added the sum of the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Daniel Oscroft of counsel against the fees allowed to him by the determining officer under the Advocates Graduated Fees Scheme.

2. Counsel was instructed on behalf of Ammarrah Tai who, together with one other, was prosecuted for attempting to rob, contrary to section 1(1) of the Criminal Attempts Act 1981. Tai's co-defendant also faced a count of having an offensive weapon contrary to section 1(1) of the Prevention of Crime Act 1953. The weapon in question was a knuckleduster.

3. The circumstances of the offence are that Tai arranged to meet up with her former boyfriend so that he could collect some of the belongings which she had retained. Having provided him with some of his things, Tai followed him to a bus stop where the co-defendant came up behind the victim, grabbed his right arm and held it tight. The co-defendant told the victim that the latter had to remove £50 from his bank account or the co-defendant would stab him. The victim did not see a knife but decided not to take any chances. Consequently, they went to a cashpoint machine outside a bank. But the victim was able to get inside the bank and obtain assistance thereby thwarting the attempted robbery.

4. The Theft Act 1968 defines a robbery as stealing with the use or threat of force. The Serious Crime Act 2007 in schedule 1 describes an armed robbery as a robbery involving a firearm, an imitation firearm or an offensive weapon. In the Criminal Justice Act 1988 (Offensive Weapons) Order 1988 descriptions of offensive weapons are set out including knuckledusters.

5. The determining officer says that there is no evidence in any of the material supplied by counsel that either of the defendants carried a knife or used it to accomplish the robbery. Similarly, there is no evidence to suggest that the knuckleduster was used in any way or that the victim was aware of its existence.

6. The determining officer takes the view that, in these circumstances, the offence amounts to no more than a simple robbery which is classified as a category C offence in the Table of Offences under the regulations and has remunerated counsel based on that classification.

7. Counsel, who appeared before me via telephone on his appeal, says that these circumstances are sufficient to classify the offence as an armed robbery rather than a simple robbery. As such the offence ought to be classified as a category B offence within the Table of Offences.

8. As counsel pointed out, there is no definition of armed robbery as an offence. (The description of an armed robbery in the Serious Crime Act is for the purpose of clarifying Serious Crime Prevention Orders rather than setting out a substantive offence.) Indeed the phrase "armed robbery" is not usually referred to in proceedings and that includes the sentencing of a convicted

robber. Counsel took me to the Sentencing Council Guidelines 2006 which describe three categories of severity for the purposes of sentencing. Additional, aggravating factors are referred to underneath the categories. The final one is possession of a weapon that was not used. That factor is referred to elsewhere in the guidelines as being an aggravating factor, even if the weapon is not used, because it indicates planning.

9. Counsel also referred me by analogy to the definitions of burglary and aggravated burglary in sections 9 and 10 of the Theft Act 1968. An aggravated burglary occurs where a person commits any burglary *"and at the time has with him any firearm or imitation firearm, any weapon of offence…"* The definition of a "weapon of offence" is therefore very similar to the description set out in the Serious Crime Act 2007.

10. The determining officer has referred to the definition of an offensive weapon as described by Master Rogers in R v Stables (1999). He held that for a robbery to be treated as an armed robbery, one of two examples must apply:

- A robbery where a defendant or co-defendant to the offence was armed with a firearm or imitation firearm, or the victim thought that they were so armed, e.g. the defendant purported to be armed with a gun and the victim believed him to be so armed - although it subsequently turned out that he was not - should be classified as an armed robbery.

- A robbery where the defendant or co-defendant to the offence was in possession of an offensive weapon, namely a weapon that had been made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use, should also be classified as an armed robbery. However, where the defendant, or co-defendant, only intimate that they are so armed, the case should not be classified as an armed robbery.

11. Counsel was quite content with this definition of an armed robbery. The threat to use a knife which did not exist formed no part of his appeal. It was common ground that this threat was not sufficient to fall within the second limb of the definition. Instead, counsel relied upon the opening phrase of the second limb which merely required the possession of an offensive weapon and made no reference to its use. In short, counsel's submission was that the possession of the knuckleduster was sufficient to satisfy the definition of an armed robbery for graduated fee purposes even if it had not actually been used in any form.

12. The first limb of the definition makes it clear that mere possession of a firearm or imitation firearm is sufficient. Whilst it may be thought that the firearm had to be brandished in some way to make use of it, it seems to me that a victim could only believe erroneously that the robber was armed if no weapon was produced at any point. It seems to me that similarly the second limb of the definition only requires possession of an offensive weapon. The difference between the two limbs is that a robber who only pretends to have an offensive weapon rather than a firearm or imitation firearm does not commit armed

robbery. Where the robber is in actual possession of a firearm or offensive weapon he is “armed” and so commits an armed robbery for the purposes of the graduated fee scheme when so doing. He is in a different position from the robber who merely intimates that he has an offensive weapon because if the situation demands it, he can produce the offensive weapon and threaten to use it or actually to do so.

13. In my opinion this is clear from the definition in Stables. But even if it were not so, the guidance given on sentencing regarding the possession but not use of an offensive weapon as being an aggravating factor confirms in my view that possession is all that is required to make a robbery into an aggravated form of robbery, namely armed robbery.

14. Accordingly this appeal succeeds and counsel is entitled to his appeal fee in addition to the reassessment of the graduated fee.

TO: DANIEL OSCROFT
NO. 5 CHAMBERS
DX 16075 FOUNTAIN COURT
BIRMINGHAM

COPIES TO: ELISABETH COOPER
LEGAL AID AGENCY
DX 10035 NOTTINGHAM

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 54/18

Dated: 7th August 2018

ON APPEAL FROM REDETERMINATION

REGINA v JEDRAN

CROWN COURT AT ISLEWORTH

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

CASE NO: T20167581

LEGAL AID AGENCY CASE

DATE OF REASONS: 28th January 2018

DATE OF NOTICE OF APPEAL: 28th February 2018

APPLICANT: EBR Attridge LLP, Solicitors

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

The appropriate additional payment, to which should be added the sum of £150 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. EBR Attridge LLP, solicitors ('the Appellant') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in relation to the categorisation of the offence with which Mr Mohammed Jedran ('the Defendant') was charged. The Defendant was charged with robbery under section 8(1) of the Theft Act 1968. The Appellant has claimed the offence as Class B (armed robbery) whereas the Respondent has classified it as Class C (robbery other than armed robbery).

The relevant facts

2. The Defendant was charged on an Indictment alleging three counts of Robbery, Dangerous Driving and Theft. Robbery was alleged contrary to Section 8(1) of the Theft Act 1968 and the Particulars of Offence recorded: "*MOHAMMED JEDRAN on the 16th day of October 2016 robbed Shaimah Buanani of a purse with contents*". The relevant facts, as summarised by the Appellant, appear to be uncontentious:

> "*The charges followed an incident that took place in West London on the afternoon of Sunday 16th October 2016, when it was said that the defendant drove his moped towards the victim, an ex-partner of his, and her child. He mounted the kerb, pinned her against a shopfront and stole her purse.*

The Regulations

3. The relevant legislation is the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), specifically paragraphs 1 and 3 of Schedule 2. The Respondent also cites the judgments in R v. Stables (1999) CJD 38 and R v. Kendrick, SCCO Ref: 259/10.

4. The Theft Act of 1968 contains no separate offence of Armed Robbery. Armed Robbery is, however, defined at Schedule 1, Part 1, paragraph 5 of the Serious Crime Act 2007 as:

"An offence under section 8(1) of the Theft Act 1968...where the use or threat of force involves a firearm, an imitation firearm or an offensive weapon or

An offence at common law of assault with intent to rob where the assault involves a firearm, imitation firearm or an offensive weapon"

5. It is settled law that there are three categories of offensive weapon: articles made for causing injury to a person, and so considered offensive per se; articles adapted for use for causing injury, such as sharpened screwdrivers or deliberately broken bottles; or articles not so specifically made or adapted, but which the court could deem to be offensive if it decided that the defendant intended the item in question to be used for that purpose.

The Respondent's submissions

6. The Respondent's submissions are set out in the Written Reasons dated 28th January 2018 and in Submissions drafted by Ms Weisman, a Senior Legal Adviser at the Respondent, on 4th July 2018. Ms Weisman also attended and made oral submissions at the hearing on 6th July 2018.

7. The Respondent, in summary, states that the Defendant's use of a moped did not, on the facts of this case, constitute an offensive weapon. It was, alternatively, simply the vehicle – "literally and metaphorically" – used to facilitate the robbery by providing a means of transport for the perpetrator. Insofar as the evidence does not suggest that the Defendant tried to use the moped as an instrument of harm, the correct categorisation is Robbery and not Armed Robbery.

The Appellant's submissions

8. The Appellant's submissions are set out in the typed Grounds of Appeal dated 28th February 2018 and in written Submissions drafted by Mr Brazier on 5th July 2018. Mr Brazier also attended and made oral submissions at the hearing on 6th July 2018.

9. The Appellant, in summary, submits that, on the particular facts of this case, the moped was used in a way that could be deemed offensive and that, in turn, the correct classification is Armed Robbery. Mr Brazier points out that the

Defendant deliberately drove the moped at the victim, an ex-partner, with their child. This would not only have intimidated and scared the victim, but made her think he was going to run her and their child over. The moped was then used to immobilise the victim as it mounted the kerb and pinned her to the wall. This restraint comprised an integral part of the robbery. The moped, as such, was not simply the vehicle used to facilitate the robbery by providing a means of transport for the perpetrator, but rather a weapon utilised in the commission of the offence. Mr Brazier quotes specifically from the witness statement of Ms Buanani, the victim:

> "*He came towards me on his moped. I tried to run as I believe he would try to hurt me. He tried to run me over with his moped as I tried to run across the road. He pinned me with his moped to the door of 275. The whole time I had my three year old daughter holding my hand, she was put in danger as well, she was trapped by his moped and he grabbed my purse*".

Mr Brazier also quotes from the prosecution Case Summary:

> "*The moped accelerated towards her as she held her daughter's hand dragging her onto the pavement. He mounted the kerb with moped and pinned her against the shopfront trapped to prevent escape. Buanani said that she was held against the fence (and) Mohammed snatched her Dune purse from her hand*"

My analysis and conclusions

10. It is common ground that the moped was not an offensive weapon per se or an article adapted for use for causing injury. At best, therefore, it was an article which the court could deem to be offensive if it decided that the defendant intended the item to be used for this purpose. It is clear to me that ordinarily the method of transport adopted in a robbery would not be deemed an offensive weapon. This would obviously be the case for the classic "get away" vehicle but would extend also, in my view, to the increasingly common, modern offence of robbery, whereby the perpetrator uses a moped to snatch a bag or mobile phone from an unsuspecting pedestrian. I find, however, that the particular facts of this case are not only different, but atypical. Here the Defendant used the moped to drive at the victim, putting her in fear that he was trying to run her over, before he used the moped to trap and restrain her as he snatched her

purse. Not only, therefore, was the use of the moped integral to the commission of the offence, it was, in my view, used effectively as a weapon to terrify and then physically restrain the victim. My conclusion, therefore, is that on the particular facts of this case, the correct categorisation is Armed Robbery and not Robbery. I allow the appeal.

TO:

Mr Warren Brazier
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COPIES TO:

Ms Francesca Weisman
Legal Aid Agency
DX10035 Nottingham

Neutral Citation Number: **[2023] EWHC 54 (KB)**

Case No: QA-2021-000269

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM R v Atkinson and Khan
SCCO Refs: 2019-CRI-000063 and 2019-CRI-000135

Royal Courts of Justice,
London, WC2A 2LL

Date: 18/01/2023

Before :

MR JUSTICE CHOUDHURY
sitting with
SENIOR COSTS JUDGE GORDON-SAKER
ALEXANDRA HEALY KC

- -

Between :

SIMON CSOKA KC	**Appellant**
- and -	
THE LORD CHANCELLOR	**Respondent**

- -
- -

Simon Csoka KC (in person) for the **Claimant**
Florence Iveson (instructed by Government Legal department) for the **Respondent**

Hearing dates: 10/10/2022
- -

Judgment Approved by the court for handing down

MR JUSTICE CHOUDHURY :

Introduction and Factual Background

1. I have been assisted in this matter by Senior Costs Judge Gordon-Saker and Ms Healy KC, although the decision is mine alone.

2. The Appellant, Mr Csoka KC, represents himself. He appeals under Regulation 30 of the *Criminal Legal Aid (Remuneration) Regulations* 2013 ("the 2013 Regulations") against the decision of Costs Judge Jennifer James in the cases of *R v Atkinson* and *R v Khan*. The issue is whether the claims for fees were assessed correctly, and, in particular, whether the correct banding under the Advocates' Graduated Fee Scheme ("AGFS") was applied.

3. The factual background in the cases of *R v Atkinson* and *R v Khan* may be briefly summarised as follows. The Appellant represented Mr Jordan Charles Atkinson in Manchester Crown Court in an 8-handed trial for murder and attempted murder. Atkinson was accused of involvement in the shooting of two victims, one of whom was killed and the second was injured. Atkinson was acquitted of the offences of murder and attempted murder, but was convicted of other offences.

4. The Appellant also represented Mr Mohammed Nisar Khan in Bradford Crown Court in a trial for one count of murder and one count of attempted murder. Mr Khan had driven a car deliberately at two pedestrians, one of whom was killed and the other seriously injured. Mr Khan was convicted on both counts.

5. The Appellant sought payment in both cases under Band 1.1 of the AGFS Banding Document ("the Banding Document") for the "killing of two or more persons", Band 1.1 being one of four bands (1.1 to 1.4) applicable to offences of "Murder/Manslaughter". The Determining Officer in each case rejected that claim and instead assigned them to the lower Band 1.3: "All other cases of murder". It is not in dispute that, irrespective of whether or not the Determining Officer erred in not assigning the cases to Band 1.1, Atkinson's offence should, on any view, have been assigned to Band 1.2 for "killing done with a firearm".

6. The Appellant appealed against both decisions under Regulation 29 of the 2013 Regulations. The cases were considered together on appeal as they both raised the same issue as to the correct band to be applied in cases where the charges included both murder and attempted murder. The Appellant argued that the Banding Document is *ultra vires* in that, contrary to the 2013 Regulations, it wrongly categorises attempted murder in a separate lower band than murder. It was further argued that, in any event, whether the banding was *ultra vires* or not, as a matter of logic and to avoid absurdities and anomalies, an indictment which charged murder and attempted murder in respect of two or more victims should be remunerated at the higher Band 1.1 rate.

7. By a written decision issued on 15 June 2021, Costs Judge James rejected the appeals and upheld the banding decisions applied by the Determining Officer in each case. Upon the Appellant's application, Costs Judge James certified the following question for this Court:

> "Does the proper interpretation of paragraph 3(1)(b) of the [2013 Regulations] mean that, on an indictment charging a count of murder and a count of attempted murder, counsel's fee should be assessed as band 1.1 "killing of two persons" or by reference to the banding of the count of murder alone (band 1.2 or band 1.3)?"

The Legal Framework

8. Section 2 of the **Legal Aid, Sentencing and Punishment of Offenders Act 2012** ('LASPO'), so far as relevant, provides:

> "2 Arrangements
>
> …
>
> (3) The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part.
>
> (4) If the Lord Chancellor makes arrangements for the purposes of this Part that provide for a court, tribunal or other person to assess remuneration payable by the Lord Chancellor, the court, tribunal or person must assess the remuneration in accordance with the arrangements and, if relevant, with regulations under subsection (3).
>
> …"

9. The regulations made pursuant to the power under s.2(3), LASPO are the 2013 Regulations.

10. Regulation 4(1) of the 2013 Regulations provides:

> "Claims for fees by a trial advocate in proceedings in the Crown Court must be made and determined in accordance with the provisions of Schedule 1 to these Regulations." [1]

11. This makes it clear that the making and determination of any claim for fees is governed by Schedule 1 to the 2013 Regulations. The key paragraph of that Schedule for present purposes is paragraph 3. In its original form, upon enactment, it provided as follows:

> "(1) For the purposes of this Schedule—
>
> (a) every indictable offence falls within the Class under which it is listed in the **Table of Offences** and, subject to sub-

[1] This is the wording since amendments made in 2015. The original wording of Regulation 4(1) referred to 'an instructed advocate' rather than 'a trial advocate'

paragraph (2), indictable offences not specifically so listed are deemed to fall within Class H;

(b) conspiracy to commit an indictable offence contrary to section 1 of the Criminal Law Act 1977 (the offence of conspiracy), incitement to commit an indictable offence and **attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same Class as the substantive offence** to which they relate;' [Emphasis added]

12. The class of the offence determined the fee payable in relation thereto. The table of offences was provided at Paragraph 1 of Part 7. The most serious offences were classified as Class A:

Offence	***Contrary to***	***Year and Chapter***
Class A: Homicide and related grave offences		
Murder	Common law	
Manslaughter	Common law	
Soliciting to commit murder	Offences against the Person Act 1861, s.4	1861 c. 100
Child destruction	Infant Life (Preservation) Act 1929, s.1(1)	1929 c. 34
Infanticide	Infanticide Act 1938, s.1(1)	1938 c. 36
Causing explosion likely to endanger life or property	Explosive Substances Act 1883, s.2	1883 c. 3
Attempt to cause explosion, making or keeping explosives etc.	Explosive Substances Act 1883, s.3	As above

13. Paragraph 1 of Part 7 has been amended on various occasions, including most recently on 1 April 2018 by way of the *Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018/220* ('the 2018 Regulations'), pursuant to which Paragraph 1 of Part 7 was moved to Schedule 2, part 7.

14. The 2018 Regulations also amended Paragraphs 3(1)(a) and (b) of Schedule 1, such that they now refer to the "AGFS Banding Document" rather than the "Table of Offences":

"(1) For the purposes of this Schedule—

(a) every indictable offence **falls within the band of that offence set out in the AGFS Banding Document** and, subject

> to sub-paragraph (2), indictable offences not specifically so listed are deemed to fall within [band 17.1];
>
> (b) conspiracy to commit an indictable offence contrary to section 1 of the Criminal Law Act 1977 (the offence of conspiracy), incitement to commit an indictable offence and **attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981** (attempting to commit an offence) fall within the same band as the substantive offence to which they relate;" [Emphasis added]

15. As with the previous system, the fee payable in relation to representation at trial for a particular offence is determined by the band into which it is placed. Paragraph 1 of Schedule 1 to the 2013 Regulations defines "band" for these purposes as follows:

> "(7) A reference in this Schedule to a "band" is to the band of the offence concerned set out in Table B in the AFGS Banding Document, as read in conjunction with Table A in that document.
>
> (8) Where the band within which an offence described in Table B in the AGFS Banding Document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A in that document."

16. Thus, one must first identify the "band of the offence" as set out in Table B of the Banding Document. Where, as is the case for the Band 1 offence of "Murder/Manslaughter", there is more than one potential band specified in Table B, the reader is directed to Table A to determine which particular band is applicable. For Murder/Manslaughter, there are four potential bands – 1.1 to 1.4 – and the relevant part of Table A of the Banding Document provides:

Category	**Description**	**Bands**
1	Murder/Manslaughter	**Band 1.1**: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing. **Band 1.2**: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally), or destroyed by fire or other means by the offender; the defendant is a child (16 or under). **Band 1.3**: All other cases of murder. **Band 1.4**: All other cases of manslaughter.

17. Band 3 Offences in Table B are those of "Serious Violence". The offence of "Attempted Murder" can be either band 3.1 or 3.2, and the reader is once again directed to Table A, which, so far as relevant, provides:

Category	**Description**	**Bands**
3	Serious Violence	**Band 3.1**: Attempted murder of a child, two or more persons, police officer, nursing/medical contact or any violent offence committed with a live firearm. **Band 3.2**: All other attempted murder. **Band 3.3**: S18. **Band 3.4**: s20 Offences Against the Persons Act cases and other serious violence offences specified in Table B

18. The basic fees corresponding to these bands are set out in a table at paragraph 5 of Schedule 1 to the Regulations. The relevant entries provide:

(1) Band of offence	***Amount of basic fee per category of trial advocate***		
	(2) Junior Alone or Led Junior	***(3) Leading Junior***	***(4) Queen's Counsel***

1.1	£9,873	£14,812	£19,746
1.2	£4,939	£7,412	£9,879
1.3	£2,961	£4,445	£5,923
1.4	£2,467	£3,703	£4,934
2.1	£9,873	£14,812	£19,746
2.2	£2,961	£4,445	£5,923
3.1	£4,065	£6,101	£8,131
3.2	£2,323	£3,485	£4,646

19. Pursuant to Paragraph 27 of Schedule 1 to the 2013 Regulations, where the defendant has been charged with more than one offence, the trial advocate can select the offence upon which they rely for the purposes of claiming a fee.

Grounds of Appeal

20. The two grounds of appeal are that:

    i) The Banding Document is *ultra vires* in that it wrongly categorises attempted murder as a separate band to murder; and

    ii) In any event, on a proper interpretation of the Regulations and the Banding Document, an indictment which charges murder and attempted murder in respect of two or more victims should be classed as Band 1.1 ("killing of two or more persons") and remunerated accordingly.

Submissions

21. Mr Csoka submits that, as Paragraph 3(1)(b) of Schedule 1 to the 2013 Regulations clearly stipulates that "attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same band as the substantive offence to which they relate", it was not open to the Lord Chancellor to place the offence of attempted murder in a separate lower band to the substantive offence of murder to which it relates. The banding for attempted murder is therefore *ultra vires* the 2013 Regulations and should not be applied. To do otherwise leads to serious anomalies and absurdities in the scheme for remuneration in that, for example, a higher fee would have been payable had both victims survived, thus entitling the Advocate to payment at Band 3.1 (Attempted murder of two or more persons), rather than the rate for Band 1.3 (All other cases of murder).

22. Ms Iveson, who appears for the Lord Chancellor, submits that the Banding Document cannot be said to be *ultra vires* because nothing in it purports to cut down or negate

any rights established by primary legislation. Section 2(3) of LASPO confers a broad discretion on the Lord Chancellor to make provision for the payment of remuneration to trial advocates. What Mr Csoka identifies as being *ultra vires* is in fact, at most, an internal inconsistency within the 2013 Regulations between two provisions as to payment, both of which are within the scope of the broad discretion afforded to the Lord Chancellor and permissible. Ms Iveson further submits that the different approach taken in respect of attempted murder, as opposed to that in respect of attempts in respect of other offences, is not arbitrary but the result of "detailed discussion between the Ministry of Justice and the Bar and two public consultations".

Ground 1 - Discussion

23. The starting point in the determination of the *ultra vires* argument is the legislation under which the impugned provision was made. That provision is s.2(3), LASPO. As Ms Iveson submits, this confers on the Lord Chancellor a very broad discretion as to the provisions for payment of remuneration. There is nothing in s.2(3) that requires any specific level of remuneration or approach to the hierarchy between different offences, such matters being left entirely to the Lord Chancellor's discretion.

24. Paragraph 3(1)(a) of Schedule 1 to the 2013 Regulations (as amended) provides that "every indictable offence falls within the band of that offence set out in the [Banding Document], and … indicatable offences not specifically so listed are deemed to fall within band 17.1". The Banding Document, incorporated by reference into the 2013 Regulations, is thereby determinative of the band into which every listed indictable offence falls. In respect of attempted murder, the Banding Document stipulates that such offences fall into Band 3. The Banding Document is extensive and identifies bands (in Table B) for no fewer than 915 offences in 17 categories; it is clearly intended to be as comprehensive as it can be in respect of indictable offences.

25. Paragraph 3(1)(b) of Schedule 1 to the 2013 Regulations does state that "conspiracy to commit an indictable offence ..., incitement to commit an indictable offence and attempts to commit an indictable offence … fall within the same band as the substantive offence to which they relate" ("the inchoate offences"). However, given the comprehensive nature of the Banding Document, which is intended to relate to "every indictable offence", it is reasonable to construe paragraph 3(1)(b) as to the banding of inchoate offences as being intended to apply only insofar as no other specific provision has been made for a particular inchoate offence in the Banding Document. That reading of the provisions is consistent with the principle of statutory interpretation that the provisions of the relevant instrument (including those incorporated by reference) are to be construed as a whole and, if possible, in a way which renders consistent its various provisions (see *Lord Chancellor v Woodhall* [2013] EWHC 764 at [14]). In the case of attempted murder, express provision *is* made in the Banding Document by placing it in Band 3, and the provisions of paragraph 3(1)(b) do not override that express provision. On this reading of the 2013 Regulations and the Banding Document, there is no inconsistency at all between that paragraph and the Banding Document, and certainly nothing that would suggest that anything in the Banding Document is *ultra vires*.

26. Even if I am wrong about that approach to the interpretation of paragraphs 3(1)(a) and (b) of Schedule 1 to the 2013 Regulations, and there is an inconsistency between paragraph 3(1)(b) and the Banding Document, the banding of attempted murder

would not be *ultra vires*. As discussed above, s.2(3), LASPO does not confer a right to any particular level of remuneration at all or as to remuneration levels based on any particular hierarchy of offence. As such, the Lord Chancellor's broad discretion under that section entitles him to set remuneration levels differently as between murder and attempted murder. In doing so, he has not cut down or negated any particular right established by the legislation: see *R (on the application of Al-Enein) v Secretary of State for the Home Department* [2020] 1 W.L.R. 1349, where Singh LJ stated (at [28]) that subsidiary legislation will be *ultra vires* where:

> "…it seeks to cut down or negate rights which have been created by primary legislation. The same would also apply to a governmental policy, which does not have the force of legislation. This is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament."

27. Although the Banding Document is not a policy document as was the subject matter in *R (Al-Enein)*, the same principle would apply here.

28. Given that, on this analysis, the banding of attempted murder is not *ultra vires*, the apparent inconsistency with Paragraph 3(1)(b), which stipulates that the inchoate offence falls in the same band as the substantive offence to which it relates, amounts to little more than a drafting oversight in that the words "save in respect of attempted murder" (or some such exception) were not included in the 2018 amendment of that paragraph.

29. Moreover, it cannot be said that this exception in respect of attempted murder is arbitrary or the result of any obvious error. I am told (as was the Judge) that the Banding Document was the "product of detailed discussions between the Ministry of Justice and the Bar and two public consultations" and that the distinction between murder and attempted murder was agreed upon in the course of those discussions. There is evidence before me (which was not adduced below) as to the Bar Council's proposals for the Banding Document, which are contained within a document entitled "Bar Council's Advocates' Graduated Fee Scheme (AGFS) Working Group Proposal for a new Scheme". This document contains the following statement:

> "All inchoate offences are to be included and paid at the rate for the substantive offence. The exception to this rule is in cases of attempted murder that fall into Category C 'Serious Violence.'" [Appendix 1, p16, §a]

30. The distinction between attempted murder and murder for fee purposes was therefore something that was expressly considered and apparently endorsed by the profession's representative body, albeit that the distinction was not one that had universal support.

31. I should also mention here that part of the reasoning below in concluding that the Banding Document was not *ultra vires* was that "it fulfils a logical aim in differentiating between cases of murder where the starting point for sentencing is 15 years, 30 years or whole life." Ms Iveson, in her oral submissions at least, did not seek to uphold that aspect of the Judge's reasoning. She was right not to do so. There is no material before me to suggest that the sentencing regime for murder and attempted

murder played any part in the different approach to banding for these offences. In any event, as Mr Csoka correctly points out, any comparison with the sentencing regime is likely to throw up as many differences of approach between the two schemes as similarities such that no meaningful comparison can be drawn. One example, set out in Mr Csoka's skeleton argument, is that of taking a knife to the scene; that would attract a higher starting point for the purposes of determining the minimum term of a life sentence, but, under the Banding Document, it would fall into Band 1.3 (All other cases of Murder) unless one of the features for a Band 1.1 offence were present.

32. As to Mr Csoka's argument that the exception for Attempted Murder leads to anomalies when applying the Banding Document, that may well be right, but it does not mean that the exception is *ultra vires*. Any scheme for remuneration based on determinative bands is likely to result in at least some anomalous outcomes, some of which might be more or less favourable to the Advocate than the strict application of logic might suggest. That is the price that must be paid for a comprehensive scheme that can be applied by Determining Officers quickly and easily. As Leggatt J (as he then was) stated in *Lord Chancellor v Woodhall* [2013] EWHC 764 in dealing with an apparently unfair remuneration outcome under an earlier scheme:

> "18. I am sorry to have reached that conclusion, as my understanding is that Mr Woodhall had to undertake a substantial amount of work in preparing for trial in this case, for which the fee for a guilty plea may be sparse remuneration. However, as Mr Woodhall pointed out in his submissions, the principle on which the scheme is based is not one of providing fair remuneration by reference to the amount of work done, but is a rule-based system. In words that he quoted from the case of R v Grigoropolou [2012] 5 Costs LR 982 , and as the judge observed in that case, "there is no equity in a scheme which would permit the court to put right perceived injustices, because its modus operandi is one of roundabouts and swings".

33. Costs Judge James considered that case and said as follows:

> "51. It is in the nature of the AGFS that it will produce anomalies; there is inevitably a 'price' to be paid for the certainty that comes with such a scheme and that includes the possibility of cases which will attract a lower fee than a less serious and onerous case. Atkinson and Khan, where the Appellant will receive less money because one victim in each case died, than he would if both had survived, are prime examples of this phenomenon but, as Leggatt J put it these are swings and roundabouts and part of the way that the AGFS operates."

34. I agree.

35. For these reasons, Costs Judge James was not wrong to conclude that the Banding Document was not *ultra vires*. Ground 1 of the appeal therefore fails and is dismissed.

Ground 2

Submissions

36. Mr Csoka's alternative submission is that, on a correct interpretation of the Banding Document, the cases of *Atkinson* and *Khan* should fall within Band 1.1. He notes that a defendant charged with the murder of two people would face two counts of murder, it being the practice to charge a separate count of murder for each person killed. He submits that, as such, the assessment of whether a murder falls into Band 1.1 would necessitate looking at the other count even though the latter might not have been the one selected by Counsel pursuant to paragraph 27 of Schedule 1 for the purposes of claiming a fee. In looking at the other offence, there is no requirement, he submits, for the second count to be a "completed murder" in order to amount to the "killing" of a person within the meaning of Band 1.1: it is sufficient that the second count involves an offence that "represents the killing" (including the attempted killing) of at least one other person. Failure to take that approach, and insisting upon there being at least a second death, is misconceived, as demonstrated by the fact that a conspiracy to kill more than one person where there was only one death would then have to fall into Band 1.3 as there was no second death. If it is accepted that "killing" can include situations where there is no murder and/or no death results then the attempted murder of a second victim should count as representing the "killing" of that victim.

37. Mr Csoka further submits that taking this approach would mean that a murder and a manslaughter would qualify as a Band 1.1 matter involving the killing of two persons, as would a murder and a death by dangerous driving, provided that there are at least two victims.

38. Ms Iveson accepts that it is the practice to charge the murder of two people as two separate counts on the indictment and that it would therefore be necessary to look at more than the selected count to determine whether there had indeed been the "killing of two or more persons" to satisfy Band 1.1. However, Ms Iveson maintains that, save for the inchoate offences in respect of which the deeming provision under paragraph 3(1)(b) of Schedule 1 applies, there clearly would need to be a second victim who had died. That, she submits, is the plain and ordinary meaning of the word "killing". There is no warrant for Mr Csoka's contention that "killing" could include an act, such as attempted murder, that did not result in death.

Ground 2 - Discussion

39. The starting point when applying the Banding Document is to identify the category and band of the offence in Table B; one only gets to Table A if it is necessary to determine the precise band by considering the facts of the case. Here, the Table B Category is "Category 1: Murder/Manslaughter" and the corresponding band is described as "1.1 or 1.2 or 1.3 (See Table A)". Table A provides that the offence will fall into Band 1.1 if the murder involves (amongst other things), the "killing of two or more persons".

40. It is correct, as both Counsel agreed, that the Determining Officer might have to look at counts on the indictment other than the one selected in order to determine whether

Band 1.1 was satisfied. That is because, e.g. a double murder would invariably be charged under two separate counts, one for each victim. However, the statutory basis for considering other counts is not obvious. Pursuant to paragraph 27 of Schedule 1, the fee payable must be based on the offence selected by the trial advocate. That would appear to preclude consideration of other offences on the same indictment for the purposes of determining the band. However, paragraph 3(1)(d) of Schedule 1 provides:

> "where more than one count of the indictment is for an offence in relation to which the band depends on the value, amount or weight involved, that value must be taken to be the total value, amount or weight involved in those offences…"

41. This provision would appear to be directed mainly at offences such as dishonesty offences (where the banding depends on the amount of money or the number of pages involved) or drugs offences (where the banding can depend on the weight or number of drugs or pages of evidence involved). However, whilst it is somewhat jarring to refer to the number of victims in a charge of murder and/or manslaughter as an "amount" for these purposes, it seems to me that in this case, where the precise banding does depend on whether there were two or more persons killed, one could invoke this provision as the statutory basis for taking into account a second count of murder on the same indictment notwithstanding the fact that it is not the offence 'selected' for the purposes of paragraph 27 of Schedule 1.

42. Here, there is no second count of murder (or manslaughter) on the indictment in either case. Instead, the second offence is the different one of attempted murder, which has its own band under the Category 3 heading of "Serious Violence". The question is whether one can take that second offence into account for the purpose of determining the band into which the selected offence (i.e. murder) falls. In my judgment, that is not a permissible course of action, not only because attempted murder is a separate offence within the Banding Document, but also because it does not involve a "killing".

43. The natural and ordinary meaning of the term "killing" in this provision is that death has resulted. That meaning is supported by the fact that the relevant offence category here is that of "Murder/Manslaughter", neither of which would arise in the absence of a death.

44. Mr Csoka's submission, however, is that a conspiracy to murder could fall within Band 1.1 even though there is no death and that, as such, "killing" must fall to be construed more broadly. That submission is misconceived: the only reason that a conspiracy to commit the murder of two or more persons would fall within Band 1.1 is the operation of the deeming provision in paragraph 3(1)(b) of Schedule 1, which states that a "conspiracy to commit an indictable offence… fall[s] within the same band as the substantive offence to which [it] relate[s]". The substantive offence here is that of murder, which necessarily involves causing death. The effect of the deeming provision is to place a conspiracy to commit that offence in the same band. Thus, if there is a conspiracy to murder two or more persons, it would, pursuant to that provision, fall within Band 1.1 notwithstanding the absence of any deaths. However, that does not have any bearing on the interpretation of the term "killing" as it relates to the substantive offence of murder.

45. Manslaughter does involve the killing of a person. Moreover, manslaughter falls within the same offence category as murder in Table A and is subject to the same banding (save for Band 1.3) as for that offence. Thus, where a defendant is charged with the murder of one victim and the manslaughter of another, the appropriate band would be Band 1.1, as the offences (both falling within the same Band 1 offence category of Murder/Manslaughter) involve the killing of two or more persons. It is the fact that manslaughter offences also fall within Band 1 that explains the use of the word "killing" in Bands 1.1 and 1.2: the use of the term, "murder" in these bands would have excluded manslaughter.

46. Attempted murder does not involve killing a person. Furthermore, for reasons already discussed, the deeming provision for inchoate offences does not apply to attempted murder even though it applies to other attempts. Accordingly, a count of attempted murder would not fall to be taken into account in determining whether Band 1.1 is to apply.

47. Mr Csoka also submits that if the second offence on the indictment were Causing Death By Dangerous Driving then that too could result in a Band 1.1 fee as two deaths were involved. The relevance of this submission is not entirely clear; it appears to have been made in support of the general proposition that "killing" should be construed as encompassing more than just "murder", although it was no part of the Lord Chancellor's case, as I understood it, that "killing" could refer only to death resulting from "murder".

48. Ms Iveson was not able to enlighten the Court as to what would occur if a Determining Officer were faced with an indictment (perhaps arising out of a scenario where a defendant flees the scene of a murder in a car and in doing so runs over and kills a pedestrian) containing a count of murder and a count of causing death by dangerous driving. In my judgment, however, it would not be open to the Determining Officer to apply Band 1.1 in such a case. That is because the gateway to the Band 1.1 fee is that the offence is one of Murder or Manslaughter. Causing Death by Dangerous Driving appears in Table B under "Category 10: Driving Offences", and falls into Band 10.1. Indeed, the same banding applies for all types of driving offences in Table B, and there is no warrant for considering any of those offences under Table A at all. Thus, in the scenario described above, whereby the indictment contains both a count of murder and a count of causing death by dangerous driving, the Advocate would be likely to select the former for the purposes of claiming a fee, and the latter offence would not affect the resulting band (1.3) notwithstanding the fact that it also involved killing someone.

49. For these reasons, Ground 2 of the Appeal also fails and is dismissed. Whilst Costs Judge James did not expressly address some of Mr Csoka's arguments, her ultimate conclusion that the banding decision was correct was not wrong.

Conclusion and Answer to Certified Question

50. The certified question was:

> "Does the proper interpretation of paragraph 3(1)(b) of the [2013 Regulations] mean that, on an indictment charging a count of murder and a count of attempted murder, counsel's fee

> should be assessed as band 1.1 "killing of two persons" or by reference to the banding of the count of murder alone (band 1.2 or band 1.3)?"

51. The answer, for the reasons set out above, is, "*by reference to the banding of the count of murder alone*". The appeal is dismissed.

SENIOR COURTS COSTS OFFICE

SCCO Ref:

SC-2019-CRI-000099
SC-2020-CRI-000143

Dated: 25 November 2020

ON APPEAL FROM REDETERMINATION

REGINA v POWNALL

MANCHESTER CROWN COURT

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

CASE NO: T20197192

LEGAL AID AGENCY CASE

DATE OF REASONS: 21 October 2019

DATE OF NOTICES OF APPEAL: Not Known

APPLICANTS: NIGEL EDWARDS QC JAMES BOURNE-ARTON	COUNSEL	

The appeals have been successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. I am sorry to note that due to an administrative error at the SCCO the determination of these two effectively identical appeals has been substantially delayed. As I result of the error I do not know exactly when the appeals were filed. Insofar as an extension of time is needed for either appeal, it is granted.

2. These appeals are brought under the Criminal Legal Aid (Remuneration) Regulations 2013 (the "2013 Regulations") as amended by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 ("the 2018 Regulations").

3. The Graduated fee scheme at Schedule 1 to the 2013 regulations provides for payment to be made to the advocates representing an assisted defendant by reference to a number of criteria, including the nature of the offence concerned. The 2018 Regulations replaced the original offence classification provisions of Schedule 1 with the "AGFS Banding Document".

4. Paragraphs 1(7) and 1(8) of Schedule 1, as amended, read:

> "(7) A reference in this Schedule to a "band" is to the band of the offence concerned set out in Table B in the AGFS Banding Document, as read in conjunction with Table A in that document.
>
> (8) Where the band within which an offence described in Table B in the AGFS Banding Document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A in that document."

5. Table A of the Banding Document sets out the way in which cases of murder and manslaughter are to be classified for payment purposes.

    i. *Band 1.1: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing.*

    ii. *Band 1.2: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally), or destroyed by fire or other means by the offender; the defendant is a child (16 or under).*

    iii. *Band 1.3: All other cases of murder.*

    iv. *Band 1.4: All other cases of manslaughter.*

6. The matter in issue on these appeals is whether each Appellant is due the graduated fee payable for a band 1.1 offence or for a band 1.4 offence.

Background

7. The Appellants represented Joseph Pownall ("the Defendant") at Manchester Crown Court. Count 1 on the indictment against the Defendant was manslaughter. Count 2 was Causing Death by Dangerous Driving, contrary to section 1 of the Road Traffic Act 1988. Counts 3 and 4 were counts of Causing Serious Injury by Dangerous Driving contrary to section 1A of the Road Traffic Act 1988. Count 5 was kidnapping and Count 6 was conspiracy to pervert the course of justice.

8. All of the charges concerned the actions of the Defendant on 20 April 2019. On that date the Defendant was in a public house with his VW Amaroc parked outside. A member of the public saw an individual throw a brick through the Defendant's car window. The individual who threw the brick was seen to get into a nearby Mercedes motor vehicle. The member of the public told the Defendant what had happened. The Defendant left the pub, saw the damage to his car and drove it in pursuit of the Mercedes.

9. The Defendant caught up with the Mercedes in a built up residential area with a 30mph speed limit. Both vehicles were being driven at over twice that limit. The chase continued for over a mile. At times the Defendant was less than a car length behind the Mercedes and still travelling in excess of 70mph.

10. Both vehicles were travelling in excess of 70mph and a car length distance apart when they came to a left hand bend and lost control, moving to the wrong side of the road. The Mercedes collided with a VW Polo, occupied by four people and coming in the opposite direction. The Amaroc was so close to the Mercedes that after the impact with the Polo the Amaroc unavoidably collided with the Mercedes.

11. The VW Polo's driver, Joanne Collinge, a married mother of five, died as a result of the collision. Her three passengers, her husband and two of her children, were seriously injured. That accounted for the first four counts on the indictment.

12. Counts 5 and 6 related to the Defendant's conduct after the collision. He was accused of forcing another party to drive him from the scene in order to escape, and later to have reported his own vehicle as stolen, in an attempt to evade prosecution.

13. Ultimately the Crown accepted a plea from the Defendant to the charge of Causing Death by Dangerous Driving, and dropped the manslaughter charge. The Defendant was sentenced to twelve years' imprisonment.

The Determination

14. The Appellant submitted a claim for payment based on a Band 1.1 offence. The Determining Officer considered a number of authorities, including CPS legal guidance which indicates that although the circumstances which might lead to a charge of gross negligence manslaughter are infinitely variable, there are

three main areas most likely to give rise to it. They are death in the course of medical treatment, death in the workplace and death in custody, none of which apply to this case. Nor do the other criteria specified within Bands 1.1 - 1.3 apply. Having reviewed the authorities he concluded that this case falls within Band 1.4.

The Appellant's Submissions

15. Mr Bourne-Arton for the Appellants argues that count 1 on the indictment should be correctly categorised as an offence of gross negligence manslaughter within band 1.1. Count 2 (Causing Death by Dangerous Driving) was an alternative to Count 1. If the jury could not be sure that the Defendant's driving was so bad that it amounted to gross negligence, they could still conclude that the driving was dangerous and caused the death of Joanne Collinge.

16. That decision to indict the Defendant with a Count of Manslaughter was based on the premise that the Defendant's driving was so dangerous as to amount to gross negligence manslaughter is evident from paragraph 12 of the Prosecution case summary prepared by Leading Counsel for the Crown. The wording "They proceeded with a total disregard for the safety of others and the dangerous manner of their driving created a clear and obvious risk to other road users" is in line with the test to be applied for gross negligence manslaughter. In this respect the Appellants rely upon *R v Dobby* [2017] EWCA Crim 775, to which I will refer in my conclusions.

17. CPS charging standards outline the criteria for gross negligence manslaughter arising from dangerous driving. It is clear that the facts of this offence fall within that category. It was not alleged that the Defendant used his vehicle as a weapon, which would, in accordance with the CPS charging standards, found a charge of Unlawful Act Manslaughter. His intention was clearly to pursue the Mercedes.

The Lord Chancellor's Submissions

18. Ms Weisman for the Lord Chancellor submits that the Determining Officer's conclusion is correct. There are a number of variations of the offence of manslaughter. In the first instance, it falls into two broad categories, voluntary and involuntary. Where manslaughter is charged as a more serious alternative to causing death by dangerous driving, it would fall within the category of involuntary manslaughter, which is itself sub-divided into "unlawful act" manslaughter, or "gross negligence" manslaughter.

19. "Unlawful act" manslaughter is, she submits, the more commonly charged. It arises where the commission of a criminal offence, itself deliberate and intended, causes death, unintentionally and inadvertently. In the context of driving offences which result in fatal injury, CPS guidelines set out that for this offence to be made out, it is insufficient that the standard of driving is equivalent to that for a statutory driving offence. Instead, there might be evidence of an intention to cause injury, or recklessness as to whether injury may be caused. In the circumstances here, where death occurred as a result of a high speed

car chase, the clear and obvious risk to other road users supports the presence of such recklessness.

20. “Gross negligence” manslaughter, by contrast, is premised on the notion that between suspect and victim there is a pre-existing duty of care, and that in the commission of the offence the suspect is in breach of that duty. The manner of driving will equate to a conduct of negligence, as recognized by common law. Available CPS guidance on the different types of manslaughter is not straightforward. Included in the guidance is the observation that “there is no general duty of care from one citizen to another”. There are also however authorities which suggest there is a general duty of care to all road users. The Respondent accepts that where death results from dangerous driving, in some instances gross negligence manslaughter may be charged because the manner of driving is so dangerous there is a high risk of death.

21. There is nothing on the face of the papers to set out which form of manslaughter was envisaged here, and no information to demonstrate the precise focus and intention of the prosecutor. Given that the manslaughter charge never went to trial, there is no opening note. Where a custodial sentence is imposed, its length would not necessarily resolve the issue, and in any event in these proceedings imprisonment followed a plea to a statutory driving offence. On the facts here, either offence could be made out, and the excerpt from the case summary quoted by the Appellants could support either scenario. Any argument to resolve the question must be based on analysis and inference.

22. Taking all this into account, Ms Weisman submits that for costs purposes it is essential to consider this issue in the context of the Banding Document itself, and what might have been intended by it. It is of note that of the many variations of the offence of manslaughter, only two – corporate and gross negligence – are specifically listed for enhancement and distinguished from “all other cases of manslaughter”. Corporate manslaughter, like gross negligence manslaughter, is more rarely charged than other types. There is a logical inference that particular factors such as unusualness or complexity might merit a higher fee.

23. The Determining Officer’s consideration of the CPS legal guidance is of some value, referencing as it does the three main areas likely to be charged as gross negligence manslaughter, namely death in a medical context, or in the workplace, or in custody. Common to all three is an obvious and clearly definable duty of care, whether personal or professional, individual or collective. Such prosecutions might overlap with or run alongside parallel civil proceedings, as might take place in cases of corporate manslaughter. They might feature novel areas of law or technical complexities which do not automatically occur in the broader generality of homicides. An uplift in case preparation could clearly be merited. This is not to detract from the obvious gravity of the case in point, but there is nothing to suggest that, on its facts, it would fall within such a category.

24. The Appellants contend that this case could not be a case of unlawful act manslaughter, as the vehicle was not used as a weapon. However, for the reasons already given, it is submitted that an examination of the case's fine factual detail in isolation does not conclusively resolve the question. Similarly *Dobby*, while providing authority for the fact that cases not dissimilar to this one may be gross negligence manslaughter, does not significantly assist here, and provides no direct authority in the context of costs.

Conclusions

25. I do not find the Determining Officer's wide-ranging review of the law relating to manslaughter particularly helpful, and in my view he has over-relied on the CPS legal guidance.

26. I make those observations because one authority in particular, *R v Dobby*, is very much on point on this appeal. As a judgment of the Court of Appeal it must be given greater weight than CPS guidance which is not in itself a source of legal authority. The fact that *R v Dobby* is not specifically about costs is to my mind beside the point: it identifies the circumstances in which it is appropriate to charge a driver with gross negligence manslaughter, and so goes to the heart of this appeal.

27. In *R v Dobby* Lord Justice Davis considered a case in which an offender's very dangerous driving, in his attempts to evade police pursuit, had caused him to lose control of his vehicle. The vehicle had crossed to the wrong side of the road, risen into the air and landed on the pavement, causing the death of a mother and a young boy and seriously injuring another child. At paragraph 27 of his judgment Davis LJ summarised the relevant charging standards:

> "In cases where death has occurred as a result of the manner of the driving and it is clear from the available evidence that the standard of driving has been grossly negligent on the part of the driver, a charge of gross negligence manslaughter will be the correct charge. Gross negligence manslaughter will not be charged unless there is something to set the case apart from those cases where a statutory offence such as causing death by dangerous driving or causing death by careless driving could be proved. There will normally be evidence to show a very high risk of death making the case one of the utmost gravity."

28. Davis LJ concluded that *R v Dobby* was such a case. The offender had not deliberately targeted the family, but he had deliberately driven in an appalling manner, carrying a significant risk of death which justified charges of gross negligence manslaughter. He evidently agreed with the charging standard.

29. The "Utmost Gravity" criterion seems to me to meet Ms Weisman's point about the intention behind the banding document. Gross negligence manslaughter is a common law offence. I see no reason to conclude, as Ms Weisman suggests, that the AGFS Banding Document intends to adopt a narrower definition of "gross negligence manslaughter" than the courts apply under common law. On

the contrary, it would seem perfectly logical to suppose that the 1.1 banding recognises the gravity of the offence.

30. Like *R v Dobby*, this case involved grossly negligent driving, involving a high risk of death, which had fatal and tragic consequences. There is little to choose between the facts of *R v Dobby* and of this case.

31. Ms Weisman accepts that in principle count 1 on the indictment could have been a count of gross negligence manslaughter. I appreciate that there is limited evidence as to whether that was the offence intended to be represented by count 1 on the indictment, but this case meets the criteria and such evidence as is available indicates that such was the intention. Counsel's explanation of the reasoning behind counts 1 and 2 is logical and persuasive.

32. For those reasons, both these appeals succeed. Payment is due to the Appellants by reference to a Band 1.1 offence.

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SENIOR COURTS COSTS OFFICE

SCCO Refs:
See below

1 February 2021

ON APPEAL FROM REDETERMINATION

REGINA v SYMONS	**SC-2020-CRI-000149**
REGINA v THOMPSON	**SC-2020-CRI-000147**
REGINA v DELAFONTAINE	**SC-2020-CRI-000148**
REGINA v MCCARTHY	**SC-2020-CRI-000156/163**
REGINA v CLIFFORD	**SC-2020-CRI-000154/160**

CROWN COURT AT NEWPORT

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

CASE NO: T20197442

DATE OF REASONS: VARIOUS

DATE OF NOTICE OF APPEAL: VARIOUS

APPLICANTS: COUNSEL

JONATHAN REES QC (149) (Symons)
CAROLINE REES QC (160) (Clifford)
MARK COTTER QC (156) (McCarthy)
LUCY CROWTHER (147) (Thompson)
SUSAN FERRIER (148) (Delafontaine)
PETER DONNISON (154) (Clifford)
STEPHEN THOMAS (163) (McCarthy)

The appeal has been successful for the reasons set out below. The appropriate additional payments, to which should be added the sum of £1,500 (exclusive of VAT) for costs (payable to Jonathan Rees QC) and the £100 paid on appeal to each applicant, should accordingly be made.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by seven counsel against the decision of various determining officers as to the correct calculation of the fee payable to counsel under the Advocates Graduated Fee Scheme.

2. Jonathan Rees, Caroline Rees and Mark Cotter, all of Her Majesty's counsel together with Lucy Crowther, Susan Ferrier, Peter Donnison and Stephen Thomas, all challenge the categorisation of the case as being a murder falling within band 1.3 rather than, as they argue, band 1.2.

3. Siobhan Grey QC has not lodged an appeal but I understand from Mr Rees, who represented all counsel at the appeal hearing before me, that the Legal Aid Agency has agreed to treat her in the same way as the seven appellants.

4. Counsel were instructed by the various defendants who, on 22 November 2019, were charged and arraigned on an indictment containing the following single count of murder:

> "Leon Clifford, Ryan Palmer, Leon Colin Symons, Peter Francis McCarthy, ["B"], Lewis John Evans, Raymond Thompson and Nathan Joseph Delafontaine on the 28th day of August 2019 murdered Harry Paul Baker."

5. The original trial took place at the beginning of 2020 but the jury was discharged after three days when Nathan Delafontaine pleaded guilty to a lesser charge. A new jury was sworn in and the trial had been going for approximately three weeks when the Covid 19 outbreak caused the trial to come to an end prematurely. A further date in early 2021 has been earmarked for a third attempt at the trial in this case.

6. Given that the case is still on foot, I have followed Mr Rees' example and anonymised one of the defendants to whom I shall refer simply as 'B'. In fact, B is at the heart of counsel's challenge to the determination of the determining officers because he is under 16 years of age.

7. Counsel for B are not part of this appeal. There is no dispute that their fees would be calculated by reference to band 1.2 on the basis that their client is a child of 16 or under. The appellants here all say that on a correct reading of the banding document as it applies to the graduated fee scheme, they should also be paid by reference to band 1.2.

8. The fee calculation is governed by the Criminal Legal Aid (Remuneration) Regulations 2013 as amended. Regulation 7 of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 amended the Table of Offences in Schedule 1 of the 2013 Regulations by replacing it with the AGFS Banding Document. Paragraphs 1(7) and 1(8) of Schedule 1 now read:

"(7) A reference in this Schedule to a "band" is to the band of the offence concerned set out in Table B in the AGFS Banding Document, as read in conjunction with Table A in that document.

(8) Where the band within which an offence described in Table B in the AGFS Banding Document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A in that document."

9. Table A of the AGFS Banding Document sets out the way in which cases of murder are to be classified for payment purposes.

Category	Description	Bands
1	Murder / Manslaughter	Band 1.1: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing. Band 1.2: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally); or destroyed by fire or other means by the offender; the defendant is a child (16 or under). Band 1.3: all other cases of murder.

10. The classification of an offence is determined by the nature of that offence and the severity of it. There are 16 categories of offence in the full table. As above, the numbers for each category are set out in the left-hand column. There is then a general description of the nature of each category of offence before the bands are set out in the right-hand column.

11. The crux of Mr Rees' argument is that the entries in the "Bands" column are features of the offence rather than features of the accused. Mr Rees sought to draw a distinction between an "assisted person" as used in the 2013 Regulations and defendant (or offender). The former is a narrower term by definition. Whilst I am sure that Mr Rees is correct on this, it did not seem to me to be material in terms of the issue which I have to decide. The purpose of seeking to use a term other than defendant was presumably to show that the use of the word defendant did not need to apply to the person actually represented by the advocate. But in the absence of the use of the phrase assisted person at any point, it does not seem to me that this distinction casts any light upon the issue.

12. In any event, I do not think all of the entries set out in the banding column can be described as a feature of the offence. As Ms Weisman, who appeared on behalf of the Agency at the appeal hearing pointed out, previous convictions could not be part of the offence but were entirely to do with the defendant.

13. In my view, Ms Weisman was right to say that the issue really boils down to whether or not the phrase "the defendant is a child" really did mean the defendant represented by the advocate and not simply any of the defendants. In Ms Weisman's submission, the trigger for the classification as a band 1.2 offence was the relationship between the child defendant and their legal team.

14. Defined in this way, the central issue is different from other cases which have been decided in respect of the new banding arrangements. They have largely centred on the question of whether or not more than one offence can be taken into consideration when calculating the correct banding, most notably where there is a need for two separate counts of murder to enable a category 1.1 offence to take place. I do not think that the other cases on the new banding tables assist me here.

15. Mr Rees relied upon the case of R v Stables (1999) which, in one of the appendices to the Crown Court Fee Guidance, is reported as follows:

> "A robbery where a defendant or co-defendant was armed with a firearm or the victim thought that they were so armed or where the defendant or co-defendant was in possession of an offensive weapon, made or adapted for causing injury or incapacitating, should be classified as an armed robbery."

16. As Mr Rees pointed out, it did not matter which defendant was armed et cetera, both defendants would face a count under section 8 of the Theft Act 1967 and which, for the purposes of the graduated fee scheme, would be considered to be armed robbery. The relevance of this guidance, notwithstanding its vintage, is the fact that the graduated fee scheme has always made a distinction between armed robbery and simple robbery even though the same statutory provision appears on the indictment in either case. Where there is a dispute between the determining officer and the advocate or litigator, a costs judge has to consider the facts of the case in order to conclude whether the robbery was armed or not for the purposes of calculating the fee.

17. It seems to me that we are in similar territory here. I do not think that much weight can be placed on the fact that the definite article is used in the phrase "the defendant is a child" where, not three lines above, the word defendant is used without either a definite or indefinite article. It appears to be a piece of lax drafting and the reference to a defendant at all is only to be found in category 1 since the drafters of the banding document do not appear to have felt it necessary to include similar matters in the other categories.

18. The Government's response to the consultation paper on the revision to the graduated fee scheme represented by the banding document contains a conclusion to split sexual offences between adult and children offences,

contrary to the original proposal. It seems to me that this recognition of a distinction between such offences contains an echo of the banding in category 1. The killing of a child (1.1) and the situation where a child is alleged to have committed a murder (1.2) are specifically noted as features of the case which attract a greater fee.

19. Whilst the features generally in category 1.1 suggest exacerbations in the nature of the crime committed, in my view the features in category 1.2 are at least partly in respect of the alleged perpetrator of the crime. As with most things in the banding document, there is no rigid line to be drawn.

20. Mr Rees set out at some length the practical and logistical difficulties in dealing with a co-defendant who is a child. In particular the nature of the questions that can be put and the manner in which that occurs clearly impact upon the co-defendants. The very nature of the defence to be put forward would also seem to vary where cutthroat defences and allegations of abuse by an adult co-defendant are said to be common (with the child regarded as being vulnerable even if charged with a crime as serious as murder). Professional obligations on the co-defendants' counsel are clearly onerous as exemplified by the fact that advocates need to have undertaken specific training in order to be able to represent not only a young defendant (or to prosecute them) but also in representing an adult co-defendant. As Lord Thomas, the then Lord Chief Justice, said in the case of R v Grant-Murray and Another [2017] EWCA Crim 1228 at paragraph 226:

> "We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in *R v Rashid (Yahya)* (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory."

21. This obligation is reinforced by the Criminal Practice Directions 2015, at Division I, which refers to the court and to advocates considering numerous matters involving vulnerable defendants (the definition of which includes defendants under 18). For example, whether they should be tried with other defendants or separately (3G.1) and, in particular, whether modifications described in the practice direction would enable a joint trial to take place. Those modifications are described at some length and include the questioning of the vulnerable witness (3E). Reference is made to the use of "toolkits" by advocates to assist them in their preparation. Mr Rees provided me with a number of these toolkit documents.

22. For the reasons largely given by Mr Rees, it seems to me that the juvenile nature of one or more defendants will also affect all of the co-defendants in their defence. This is partly the potential nature of the defences which may be run by a child defendant against adult co-defendants but inevitably the running of the trial is going to be affected by needing to modify it to allow the child defendant to take a full part.

23. Where, as here, all of the defendants are charged with the same single offence, there seems to me to be no reason in principle why this feature should not be recognised when categorising the offence for the purposes of the graduated fee. The facts of the case must include features of the defendants in my view.

24. For this reason, I consider that the circumstances of this case mean that it should be placed in band 1.2 for the purposes of calculating the graduated fee.

25. Accordingly these appeals succeed and the appellants are entitled to costs in respect of the appeal in addition to the return of the court fee that each appellant has paid. Mr Rees appeared on behalf of all the appellants and he has produced a fee note which I presume is intended to cover the costs of all the appellants. I do not consider that the sum claimed is reasonable for a single appellant to pursue this appeal. Divided between all seven appellants it would not be unreasonable but as the arguments were general in nature rather than defendant specific, I do not think I should allow it and instead have allowed £1,500 to reflect the work done and the weight of the case overall.

TO: COPIES TO:

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 33/14

Dated: 19th March 2014

ON APPEAL FROM REDETERMINATION

REGINA v WORTLEY

CROYDON CROWN COURT

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20127471

LEGAL AID AGENCY CASE

DATE OF REASONS: 10 JANUARY 2014

DATE OF NOTICE OF APPEAL: 21 JANUARY 2014

APPLICANT: COUNSEL Tim Bass
Farringdon Chambers
DX 80707
Bermondsey

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

The appropriate additional payment, to which should be added the sum of £400 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

J. SIMONS
COSTS JUDGE
REASONS FOR DECISION

1. These four appeals relate to decisions made by different Determining Officers dealing with Advocates and Litigators Graduated Fee Claims, not to remunerate 8,734 pages of evidence served on disc as pages of prosecution evidence ("PPE")

2. Jean Wortley, Sharlene Handley and Linda Green were three of five defendants facing a six count indictment relating to conspiracy to contravene Section 170 of the Customs and Excise Management Act 1979 and other related offences. Messrs Blackfords were the solicitors representing Wortley and Handley, and C R Burton & Co were the solicitors representing Green. At the conclusion of the case, both firms of solicitors submitted Litigator Graduated Fee claims in which they claimed for 9,765 pages of prosecution evidence. The Legal Aid Agency rejected the claims in respect of 8,734 pages of exhibits containing raw data/telephone data that had been served on disc on the grounds that evidence that would only ever have existed in digital format and was served in digital format fell to be remunerated as special preparation.

3. Mr Jonathan Simpson was counsel for Handley, and Mr Tim Bass was counsel for Wortley. Both submitted Advocate Graduated Fee claims following the conclusion of the case, and both claimed 9,765 PPE. Mr Simpson's claim in respect of 8,734 pages were rejected by the Determining Officer, who in written reasons gave much more detailed Grounds than those given by the Determining Officer in respect of the Litigator Graduated Fee claims. Mr Bass's claim for 9,765 PPE was initially accepted but the Legal Aid Agency is now seeking to recoup the remuneration in respect of the 8,734 PPE. The representation orders relating to Wortley and Handley were dated 25 September 2012, and the representation order relating to Green was dated 27 September 2012.

Criminal Defence Service (Funding) Order 2007 (as amended)

Schedule 1

Advocates Graduated Fee Scheme

1. Interpretation

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court should be determined in accordance with paragraphs (2A) to (2C).

(2A) The number of pages of prosecution evidence includes all –

(a) witness statements;

(b) documentary and pictorial exhibits;

(c) records of interviews with the assisted person; and

(d) records of interviews with other defendants,

which form part of the committal or served prosecution documents or which are included in any Notice of Additional Evidence.

(2B) Subject to paragraph (2C), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(2C) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence, taking into account the nature of the document and any other relevant circumstances.

4. The definition of pages of prosecution evidence in Schedule 2 of the Criminal Defence Services (Funding) Order 2007 which relates to the Litigator Fee Scheme is the same as above.

5. Each of the Appellant's rely on a two page note from the trial judge, His Honour Judge Peter Gower QC, dated 9 July 2013, which was prepared at the conclusion of the trial. In his note the Judge states:

"The prosecution has relied to a very significant extent in this case on telephone evidence which, it has been argued, demonstrates the involvement of all defendants in the alleged conspiracy to smuggle large quantities of Class A drugs into this country.

That evidence, so I am told, was served as evidence in the form of a disc containing material running to 8,734 pages. The prosecution has reduced to the form of a schedule running to 17 pages those calls and texts upon which it particularly places reliance. The schedule is a distillation of the evidence contained on the disc. Without the schedule, the evidence would be very difficult for the jury to understand, and the significance which the prosecution seeks to attribute to it, diluted to vanishing point. Indeed, so unmanageable would the evidence have been if presented to a jury in its original format (whether electronically or by printing out the pages captured on the disc) that I would not have allowed the evidence to go before that jury in the absence of the schedule. As it happens, it was necessary for Counsel to refer to only a relatively small part of the source material in order to put the calls set out in the schedule in their proper context. The way this aspect of the evidence has been dealt with is a credit to all Counsel.

At an early stage in the trial it was drawn to my attention that the CPS were, at that stage, declining to include, as part of the relevant prosecution page count, the pages of telephone evidence served on the disc from which the information contained in the schedule has been drawn, and without which the schedule would have no evidential basis. At the time I expressed in strong terms my view that the evidence should be served in a way that includes the telephone evidence as part of the page count and, in so doing, recognises the reality of the situation, namely that this evidence is part of the prosecution case, indeed an important part.

I had assumed that the CPS would do this. I am told that it has not.

I have been shown the decision of Costs Judge, D Simons in the case of R v Jackson dated 8/4/13, Senior Court Costs Office ref no 36/13, case number T12/7508. That case appears to me to be clear authority for the proposition that the pages captured on the disc should be included as part of the pages of prosecution evidence.

Accordingly, I order the CPS formally to recognise that the pages captured on the disc shall be included in the page count. This can, as I understand it, be done by serving an NAE which specifies the number of pages on the disc. It is not necessary for the pages themselves to be copied. I can see no reason why my order cannot be complied with within 24 hours, so that is the time frame".

6. In the written reasons supplied by the Determining Officer at the Litigator Fee Team to Messrs Blackfords and C R Burton & Co, no mention is made of the letter from the Trial Judge. The reason given for rejecting the 8,734 exhibits served on disc is that the CPS had confirmed to the Legal Aid Agency that the telephone evidence only ever existed in electronic format.

7. Different Determining Officers at the Advocate Fee Team at the Legal Aid Agency provided identical reasons to Mr Simpson and to Mr Bass which did refer to the note from the Trial Judge, and stated:-

" ... the Determining Officer is of the opinion that the comments support the fact that the electronic data should not have been printed out for two reasons, the first being it was not fit for purpose, and the second that the schedule was the key data to be relied upon. This second point is highlighted by another of the comments made by the Judge that it was necessary for Counsel to refer to only a relatively small part of the source material in order to put the calls set out in the schedule in their proper context.

Having regard to the fact that the prosecution did extract the relevant materials from the disc, the comments made by the Judge, and the supporting papers provided by Counsel, it is considered that the remainder electronic evidence was intended to be raw data only, and as such, would not have been printed out prior to 1 April 2012. Time

spent considering the material should be claimed by way of special preparation".

8. I was attended at the hearing of this appeal by Mr Ian Henderson of Counsel representing Mr Bass, Mr Simpson who was representing himself and Messrs Blackfords, and by Mr Burton who was representing his firm. Both Mr Henderson and Mr Simpson submitted that the Determining Officers had paid insufficient regard to the comments of the Trial Judge. Mr Henderson referred me to *R v Henery* [2011] EWHC 3246 (QB) where the High Court made it clear that when deciding upon the question of whether a trial had started in a meaningful sense, it was appropriate to place reliance on the Trial Judge's view. It follows, Mr Henderson submitted, that the Trial Judge in this case was best placed to make an objective assessment of the position at the time the issues were unfolding and that he had made it clear that in his view these 8,734 pages of exhibits should be regarded as PPE.

9. Mr Simpson informed me that constant reference had to be made to the contents of the disc, both during the trial and during the period of trial preparation.

10. Mr Henderson referred me to the guidance issued by the Legal Aid Agency in April 2012 that indicated that if the relevant data would previously have been served in paper form, then it should be included in the page count. In his submission it was clear that this data would previously have been served in paper form.

11. Mr Henderson, Mr Simpson and Mr Burton all endorsed each other's submissions.

12. In all cases where there are differences of opinion between advocates or litigators as to whether a document or pictorial exhibit which has been served in electronic form and has never existed in paper form should be included in the page count, the Determining Officer must take into account the nature of the documentation and other relevant circumstances. In the appeals of Messrs Blackfords and C R Burton & Co, there is no indication from the Determining Officer's reasons that the Determining Officer has carried out this function. In the case of the advocates' appeals, the Determining Officers have considered the nature of the documentation and have taken into account the circumstances, but in my judgment, they have placed too little weight upon the note from the Trial Judge. The Trial Judge has no authority to bind the Determining Officer, but there is no doubt that considerable weight must be given to his views. In this case the Judge had stressed the importance of this material to the whole trial. The Determining Officers seemed to have based their decisions solely upon whether the material would have previously been printed rather than taking into account the importance and nature of the documents and all the relevant circumstances. In my judgment, taking into account the note from the Trial judge, the nature of the documentation and all the relevant circumstances, it is appropriate that the 8734 pages of exhibits contained on disc are included in the PPE.

13. Accordingly, each of these four appeals succeed and in respect of the claims by Messrs Blackfords, C R Burton & Co and Mr Simpson, I direct the Legal Aid Agency to process their claims on the basis that 8,734 pages on disc are included as PPE. In the case of Mr Bass, I direct that the Legal Aid Agency withdraws its decision to make a recoupment from Mr Bass.

TO: Tim Bass
Farringdon Chambers
DX 80707
Bermondsey

COPIES TO: Legal Aid Agency
DX 10035
Nottingham 1

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL. DX 44454 Strand. Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 56/14

Dated: 19th March 2014

ON APPEAL FROM REDETERMINATION

REGINA v HANDLEY

CROYDON CROWN COURT

APPEAL PURSUANT ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20127471

LEGAL AID AGENCY CASE

DATE OF REASONS: 1 FEBRUARY 2013

DATE OF NOTICE OF APPEAL: 12 FEBRUARY 2013

APPLICANT: COUNSEL Jonathan Simpson
Charter Chambers
DX 429
London/Chancery Lane

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

The appropriate additional payment, to which should be added the sum of £400 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

J. SIMONS
COSTS JUDGE
REASONS FOR DECISION

1. These four appeals relate to decisions made by different Determining Officers dealing with Advocates and Litigators Graduated Fee Claims, not to remunerate 8,734 pages of evidence served on disc as pages of prosecution evidence ("PPE")

2. Jean Wortley, Sharlene Handley and Linda Green were three of five defendants facing a six count indictment relating to conspiracy to contravene Section 170 of the Customs and Excise Management Act 1979 and other related offences. Messrs Blackfords were the solicitors representing Wortley and Handley, and C R Burton & Co were the solicitors representing Green. At the conclusion of the case, both firms of solicitors submitted Litigator Graduated Fee claims in which they claimed for 9,765 pages of prosecution evidence. The Legal Aid Agency rejected the claims in respect of 8,734 pages of exhibits containing raw data/telephone data that had been served on disc on the grounds that evidence that would only ever have existed in digital format and was served in digital format fell to be remunerated as special preparation.

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"The prosecution has relied to a very significant extent in this case on telephone evidence which, it has been argued, demonstrates the involvement of all defendants in the alleged conspiracy to smuggle large quantities of Class A drugs into this country.

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13. Accordingly, each of these four appeals succeed and in respect of the claims by Messrs Blackfords, C R Burton & Co and Mr Simpson, I direct the Legal Aid Agency to process their claims on the basis that 8,734 pages on disc are included as PPE. In the case of Mr Bass, I direct that the Legal Aid Agency withdraws its decision to make a recoupment from Mr Bass.

TO: Tim Bass
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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 27/14

Dated: 19th March 2014

ON APPEAL FROM REDETERMINATION

REGINA v GREEN

CROYDON CROWN COURT

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20127471

LEGAL AID AGENCY CASE

DATE OF REASONS: 2 FEBRUARY 2014

DATE OF NOTICE OF APPEAL: 16 JANUARY 2014

APPLICANT: COUNSEL

C R Burton & Co
DX 34852
Penge

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

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

J. SIMONS
COSTS JUDGE
REASONS FOR DECISION

1. These four appeals relate to decisions made by different Determining Officers dealing with Advocates and Litigators Graduated Fee Claims, not to remunerate 8,734 pages of evidence served on disc as pages of prosecution evidence ("PPE")

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6. In the written reasons supplied by the Determining Officer at the Litigator Fee Team to Messrs Blackfords and C R Burton & Co, no mention is made of the letter from the Trial Judge. The reason given for rejecting the 8,734 exhibits served on disc is that the CPS had confirmed to the Legal Aid Agency that the telephone evidence only ever existed in electronic format.

7. Different Determining Officers at the Advocate Fee Team at the Legal Aid Agency provided identical reasons to Mr Simpson and to Mr Bass which did refer to the note from the Trial Judge, and stated:-

" ... the Determining Officer is of the opinion that the comments support the fact that the electronic data should not have been printed out for two reasons, the first being it was not fit for purpose, and the second that the schedule was the key data to be relied upon. This second point is highlighted by another of the comments made by the Judge that it was necessary for Counsel to refer to only a relatively small part of the source material in order to put the calls set out in the schedule in their proper context.

Having regard to the fact that the prosecution did extract the relevant materials from the disc, the comments made by the Judge, and the supporting papers provided by Counsel, it is considered that the remainder electronic evidence was intended to be raw data only, and as such, would not have been printed out prior to 1 April 2012. Time

spent considering the material should be claimed by way of special preparation".

8. I was attended at the hearing of this appeal by Mr Ian Henderson of Counsel representing Mr Bass, Mr Simpson who was representing himself and Messrs Blackfords, and by Mr Burton who was representing his firm. Both Mr Henderson and Mr Simpson submitted that the Determining Officers had paid insufficient regard to the comments of the Trial Judge. Mr Henderson referred me to *R v Henery* [2011] EWHC 3246 (QB) where the High Court made it clear that when deciding upon the question of whether a trial had started in a meaningful sense, it was appropriate to place reliance on the Trial Judge's view. It follows, Mr Henderson submitted, that the Trial Judge in this case was best placed to make an objective assessment of the position at the time the issues were unfolding and that he had made it clear that in his view these 8,734 pages of exhibits should be regarded as PPE.

9. Mr Simpson informed me that constant reference had to be made to the contents of the disc, both during the trial and during the period of trial preparation.

10. Mr Henderson referred me to the guidance issued by the Legal Aid Agency in April 2012 that indicated that if the relevant data would previously have been served in paper form, then it should be included in the page count. In his submission it was clear that this data would previously have been served in paper form.

11. Mr Henderson, Mr Simpson and Mr Burton all endorsed each other's submissions.

12. In all cases where there are differences of opinion between advocates or litigators as to whether a document or pictorial exhibit which has been served in electronic form and has never existed in paper form should be included in the page count, the Determining Officer must take into account the nature of the documentation and other relevant circumstances. In the appeals of Messrs Blackfords and C R Burton & Co, there is no indication from the Determining Officer's reasons that the Determining Officer has carried out this function. In the case of the advocates' appeals, the Determining Officers have considered the nature of the documentation and have taken into account the circumstances, but in my judgment, they have placed too little weight upon the note from the Trial Judge. The Trial Judge has no authority to bind the Determining Officer, but there is no doubt that considerable weight must be given to his views. In this case the Judge had stressed the importance of this material to the whole trial. The Determining Officers seemed to have based their decisions solely upon whether the material would have previously been printed rather than taking into account the importance and nature of the documents and all the relevant circumstances. In my judgment, taking into account the note from the Trial judge, the nature of the documentation and all the relevant circumstances, it is appropriate that the 8734 pages of exhibits contained on disc are included in the PPE.

13. Accordingly, each of these four appeals succeed and in respect of the claims by Messrs Blackfords, C R Burton & Co and Mr Simpson, I direct the Legal Aid Agency to process their claims on the basis that 8,734 pages on disc are included as PPE. In the case of Mr Bass, I direct that the Legal Aid Agency withdraws its decision to make a recoupment from Mr Bass.

TO: Tim Bass
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Bermondsey

COPIES TO: Legal Aid Agency
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Neutral Citation Number: [2017] EWHC 138 (QB)

Case No: QB/2016/0232

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2017

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE
MASTER WHALAN (Sitting as an Assessor)

- -

Between:

LORD CHANCELLOR	**Appellant**
- and -	
(1) EDWARD HAYES LLP	
(2) NICK WRACK	**Respondents**

- -
- -

David Bedenham (instructed by **Government Legal Department**) for the **Appellant**
Anthony Montgomery (instructed by **Edward Hayes LLP**) for the **Respondents**

Hearing date: 25 January 2017

- -

Judgment Approved

Mrs Justice Nicola Davies:

1. The appellant brings this appeal pursuant to Regulation 30(5) of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the 2013 Regulations") against a decision of Costs Judge Rowley dated 25 April 2016. The first and second respondents were instructed in the case of *R v Khandaker* as solicitor and counsel respectively. The second respondent did not represent the defendant at trial but, as counsel initially instructed, was the person to whom the legal aid fees were paid pursuant to the 2013 Regulations.

2. The defendant was charged with conspiracy to assist unlawful immigration and offences of fraud. The prosecution Case Summary states that the defendant, Mr Khandaker, conspired with others:

> "2. ...(in particular those as identified by the 68 persons in the telephone text schedules) to arrange for hard copy/false/forged/counterfeit documents to be custom made for individuals, such documents purporting to evidence past, current or proposed attendance and/or performance at UK educational institutions, and doing so to illicitly assist such individuals to obtain or prolong their leave to remain in the UK on the basis of purported past, ongoing or future education.

> 3. The enormous scale of the operation organised by Mr Khandaker can be gleaned from:
>
> a. The wealth of communications found on a mobile phone attributed to Mr Khandaker, such communication being with agents for such individuals or indeed with those individuals themselves (the incriminating text messages say the Crown relating to some 68 agents or individuals)."

3. At the conclusion of the criminal trial the respondents submitted their claims for graduated fees on the basis that the number of pages of prosecution evidence ("PPE") included the pages served on a disc by the prosecution which consisted of downloads from the mobile phone of the defendant which had been seized by the police. The claim of each respondent was determined by a different Determining Officer of the Legal Aid Agency ("LAA"), each calculated the graduated fees on the basis that the 4,325 pages served on disc should not be included. The respondents requested redetermination but the Determining Officers concluded that the 4,325 pages were not PPE being, unused material. Pursuant to Regulation 29 of the 2013 Regulations the respondents appealed the redetermination decision which was heard by Costs Judge Rowley. By his decision dated 25 April 2016, the Costs Judge allowed the appeals. The relevant paragraphs of the judge's Reasons for Decision are set out as follows:

> "6. In relation to counsel's appeal, a point is taken as to the fact that the disc was provided directly by the prosecution counsel to the defendant counsel without going via the CPS. It does not seem to me that this is a point which should be taken by the determining officer. The provision of the information by the Crown's advocate seems to me to be just as properly served as if it had been served by the Crown's lawyers. Whilst such an approach may not be ideal administratively, where, as here, there was time pressure on the disclosure the Crown's advocate took a sensible and pragmatic step. There is certainly no reason for the defence advocate to be penalised for that approach.
>
> 7. Neither determining officer considered the well-known decision of Haddon-Cave J in *R v Furniss* to be persuasive in this case. One determining officer has, rather boldly, simply stated that 'Furniss is not considered'. The other determining officer has, in a more measured fashion, referred to the fact that every claim must be assessed on its own particular facts. Telephone, text and cell site material may be relevant to one case, or defendant within that case, and not to another defendant or case as a whole.
>
> 8. In the case of *Furniss*, Haddon-Cave J was clear in stating that the information served on disc needed to be considered just as carefully by the defence lawyers as it had been by the prosecution lawyers before its disclosure. He concluded, at paragraph 56 in these terms:

> '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.'

9. It has been said that this description of the manner in which PPE from electronic evidence should be dealt with, is a step further than had previously been set out in various costs judge decisions. In those decisions, the importance of the particular documents had been held to be a factor of some weight when considering whether the electronic evidence should be considered as part of the served PPE rather than, for example, essentially unused material."

10. Both the solicitors and counsel refer to a comment of the trial judge in this case, HHJ Shanks, where he apparently said that the material extracted from the telephone was 'central to the prosecution case'. Mr French and Mr House, who appeared before me on behalf of the solicitors and counsel respectively, pressed home this point regarding the importance of the information taken from the telephone in order to make the prosecution's case.

11. It seems to me that this is a case where the electronic evidence is clearly central to the matters in issue and easily satisfies the importance test put forward in other cost judge's decisions. As such, there is no need for me to consider whether the decision in *Furniss* needs to be applied since the test applied in cases such as ***R v Jalibaghodelehzi*** [2014] 4 Costs LR 781 are satisfied in any event.

12. The 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."

Grounds of Appeal

Ground 1

4. The learned Costs Judge erred in not applying the definition of "pages of prosecution evidence" contained in paragraph 1 of Schedule 1 and paragraph 1 of Schedule 2 to the 2013 Regulations. Had the learned Costs Judge applied the statutory definition he would have concluded that the 4,325 pages of downloaded data on the disc was not PPE because:

   i) It did not form part of the committal or served prosecution documents and nor was it included in any Notice of Additional Evidence ("NAE") and was provided to the defence as "unused" material.

   ii) In any event, it 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.

Ground 2

5. 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.

Statutory Provisions

Criminal Legal Aid (Remuneration) Regulations 2013

6. Paragraph 1 of Schedule 1 to the 2013 Regulations provides in relevant part:

> "(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of prosecution evidence includes all—
>
> (a) witness statements;
>
> (b) documentary and pictorial exhibits;
>
> (c) records of interviews with the assisted person; and
>
> (d) records of interviews with other defendants,
>
> which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the prosecution in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

Paragraph 1 of Schedule 2 to the 2013 Regulations contains the same definition of "pages of prosecution evidence".

Background of the Criminal Case

7. The Crown's case at trial was that Mr Khandaker had an industrial operation to provide false and counterfeit educational documents, linked to some 500 or so applicants or beneficiaries and their applications for leave to remain in the UK. He had the potential (based on several thousand blank hardcopy completed educational documents) to provide counterfeit documentation for several thousand more potential applicants applying for leave to remain in the UK with such broad documentation. During the course of their investigation the police seized mobile telephones, one of which was attributed to Mr Khandaker, documents found at three separate premises connected to Mr Khandaker and computers which were connected to Mr Khandaker.

8. In its Case Summary concerning the seizure of the mobile phone allegedly owned by Mr Khandaker the Crown state:

> "21. From these premises of 20 Robinson House, 2 x phones were seized, they being OS/2/SEL/a and OS/12/SEL/a, they being sent off for examination by a forensic computer analyst at Zentek (see below).
>
> a. It is the Crown's case that the mobile phone OS/2/SEL/a is Mr Khandaker's phone.
>
> b. The disks OS/2/SEL/a and OS/12/SEL/a contain the data downloaded from these phones (*a copy was given to defence counsel at the hearing on 16.3.15*)."

Beneath the final words in italics and in brackets is a handwritten annotation which reads "OF DISC NOT PRINTOUTS". The Case Summary continues:

> "40. Zentek were provided with and then examined a mobile phone (iphone 4S) part of exhibit OS/2-SEL P1, a mobile phone seized from the home address of Mr Khandaker. Mr Pearce produces the evidential reports from the examination of this phone as 58448/CAP/001.

> 41. An intelligence analyst later examined the data downloads from this iPhone 4S (exhibit OS/2 SEL P1) and produced schedules by way of Excel spreadsheets of some of the data on this phone, that being produced in a number of batches for ease of use, those being exhibits NG1A and NG1B and NG1C (at e692 to e930).
>
> 42. These schedules have been created so that text messages to/from one recipient/sender are kept in one batch together. There are in total some 68 batches or conversations with 68 such individuals."

It is of note that there are further handwritten additions to the Case Summary document. After paragraph 40 and on the same line as the last sentence are the handwritten words "not served" which are then scribbled over, to the right of those words, is written "served on disc". At paragraph 41, to the right of the third line, is handwritten "selected items only".

9. From this document it would seem and it is now clarified that the mobile phone was given the exhibit number OS/2-SEL P1. The initials in the exhibit would appear to refer to PC Onkar Sandhu, a police officer who provided a number of witness statements, which were served on the court. The police officer was a witness to be called at trial. The evidential reports produced by a Mr Pearce (paragraph 40) emanate from Carl Alan William Pearce whose witness statement dated 29 September 2014 was served on the court, he was a witness to be called at trial. The intelligence analyst who produced the schedules from some of the data download from the phone being the exhibits NG1A, NG1B and NG1C was Natalie George. She made a statement dated 10 October 2014 which was served on the court and was a witness to be called at trial. In it she stated:

> "On 10 September 2014 I was requested by DC Sandhu to analyse a number of telephone downloads that had been seized as part of a fraud investigation with the Operation Dixie.
>
> In order to conduct this analysis I was provided with data downloads in spreadsheet and PDF form which related to records held within:
>
> - iPhone 4S mobile phone recovered from the home address of Mohammed Shamiul Hasan KHANDAKER. This is exhibit reference OS2 SEL P1."

It was from the analysis of Ms George that the schedules of data comprising exhibits NG1A and NG1B were prepared.

10. The text messages contained in NG1A and NG1B extracted from the downloaded data from the mobile phone of Mr Khandaker formed a significant part of the Crown's case.

11. At the hearing of the appeal the understanding was that the disc was given by prosecuting counsel to the original defence counsel at court on 16 March 2015. It was

clear that a second handover of the disc had taken place. In refusing to include the contents of the disc in the PPE the original Determining Officer in his Decision Reasons stated:

> "No evidence provided of when the disc was served. There is no evidence on the NAEs or the Paginated list to show a disc was served."

In response, Michael House, of counsel, stated:

> "2. We sent you a copy of the disc. It is hard to see how we could have done so without the disc being served.
>
> 3. This case was returned to me at very short notice. It was returned on 4 April 2015 to begin on 15 April 2015. The disc was not with the papers, although the Crown claims to have served it earlier.
>
> 4. To avoid delay, it was agreed with prosecuting counsel, Richard Milne, that the CPS should be bypassed, and the disc sent directly to my chambers by the police. Hence no reference to service in the NAEs.
>
> 5. The police arranged for the disc to be sent by TNT Express and it arrived at my chambers on 9 April.
>
> 6. In support of this explanation I append copies of the following:
>
> a) 2 email exchanges between myself and Richard Milne on 9 April 2015.
>
> b) a record of delivery of the package to my chambers."

12. In the original request for redetermination which is dated 12 August 2015 Michael House states that "The CPS failed to fill in the final NAE document properly." In the Determining Officer's reasons on the redetermination it is stated:

> "In this case, there is no evidence that the disc was served with the initial bundle of served evidence (there being no committal bundle in this case, which was sent to the Crown Court) nor that it was served under a Notice of Additional Evidence. If it was not so served, it cannot, therefore, be PPE within the definition. The fact that the disc was supplied directly by the police, or even that the prosecution had provided it previously, does not necessarily mean that the Regulatory requirements have been met."

The Appellant's Case

13. The appellant contends that the disc and its contents was not "served on the court" as required by Schedule 1 paragraph 1(2) of the 2013 Regulations nor did it form part of

the "served prosecution documents" as required by Schedule 1 paragraph 1(3). The pages of downloaded data on the disc were provided to the defence as "unused" material. It is conceded that in the Schedule of unused material there is no reference to the downloaded data on the disc. Reliance is placed on the fact that there is no mention of the disc and its contents in the exhibit list. During the course of the appeal hearing the Court sought information from those who act on behalf of the appellant as to the process of the criminal trial and as to documents for example the witness statements of PC Sandhu and Carl Pearce, which were served on the court at the original trial. At the hearing the appellant was unable to provide the statements, it informed the Court it would be difficult to obtain the same. Counsel on behalf of the appellant told the Court that it was for those contesting the reasons of the Determining Officer to produce the documents. I do not agree. It is for those who bring the appeal to ensure that they have all relevant documents for its proper determination. The appellant did not. The contention by the appellant's counsel that it was easier for the respondents to obtain trial documents was a curious one given the identity of the appellant.

The Respondents' Case

14. It has always been the respondents' case that the downloaded data were served prosecution documents, as such the pages of data form part of the PPE.

Post-hearing disclosure of further evidence/information

15. On the second day following the conclusion of the hearing, the appellant produced three witness statements from PC Onkar Sandhu and an email sent by the original prosecution counsel to a CPS caseworker dated 26 July 2016. The email was a response to a request for information prompted by this appeal. Counsel was asked to recall events at trial insofar as they related to the decision of the Costs Judge in April 2016. In his email the relevant paragraphs state:

> "4. I have seen and read the judgement of the costs judge dated 25th April 2016, which I take it is the judgement being ruled upon (copy attached).
>
> 5. I have attached the index to the papers as sent from the Magistrates Court (ie indices to the statements and to the exhibits) and the NAE backsheets that I believe were served in this case, though Shanty you will have to assist that they were in fact so served in that format please?
>
> 6. The text messages in this case (as taken from the mobile phone OS/2/SEL P1, as prepared from an electronic analysis of the electronic contents of this mobile phone) produced by the analyst Natalie George (statement pates 94 and pages 187 as attached) were extensive in number and particularly probative in this case, they being served in hard copy at exhibit pages e692 to e930 as exhibits NG1A and NG1B; it was these schedules of text messages both received and sent that formed the very core of the Crown's case against this defendant (see attached amended case summary dated 14.4.15 at paragraph 51

> to 65), they being incorporated into a number of further schedules which cross referenced particular texts to particular documents found at the defendant's premises (see further schedules created by oic DC Sandhu as summarised in case summary at paragraphs 66 to 67).
>
> 7. My recollection is that at the outset of the trial, the defence were not prepared to agree the admission into evidence of the text messages in NG1A and NG1B, nor indeed were they prepared to agree the subsequent schedules produced by DC Sandhu, as and until they were provided with and had available to them the underlying electronic source material as taken from the mobile phone OS/2 SEL P1, that being to enable the defence to check that all such data being relied on by the Crown was in fact present on the mobile phone. Faced by such a refusal, I as prosecution counsel was obliged to provide to defence counsel the discs containing such electronic information (that is the complete electronic download of mobile OS/2 SEL P1), this having been ventilated with the trial judge at the outset of the trial, he having approved and indeed endorsed such a course of action.
>
> 8. To that end, I do not disagree with the account summarised in the costs judge ruling at paragraphs 5 and 6 as to how the material was provided to the defence by myself as prosecution counsel.
>
> 9. It is a matter of interpretation for the High Court as to whether such source electronic material handed over by myself to the defence as contained on the discs is evidence that was served (ie to be included in the PPE) or was unused material (not to be included in the PPE).
>
> 10. All I can say is that it was not possible just to hand over discs containing solely the material in NG1A and NG1B, the electronic material for which exhibits was contained within the entirety of the download of the mobile phone OS/2 SEL P1."

16. The email from prosecution counsel is a document which should have been disclosed in advance of the appeal hearing. It was not. No satisfactory explanation has been provided for this failure.

17. Further, the post-hearing disclosed documentation included the witness statement of PC Onkar Sandhu dated 24 September 2014. The statement reads:

> "On 27/06/2014, police attended Flat 20 Robinson House, Selsey Street, E14 7AZ to conduct arrest enquiries for Mohammad Shamiul Hassan KHANDAKER. Whilst at the address two mobile phones were seized and exhibited as OS/2/SEL and OS/12/SEL. These phones were sent to Zentek for download.

> The discs containing the data from the phones have been returned and copies have been created for the defence and CPS, the working copies and originals have been retained at Lunar House, Croydon in the property store.
>
> The discs have been exhibited as OS/2/SEL/a and OS/12/SEL/a.
>
> These copies have been exhibited and handed to CPS. They contain the data extracted from the phones along with a report."

18. During the course of the appeal hearing 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 point taken by the appellant was that if the respondents had concerns that the entirety of the downloaded data was not included in the list of exhibits by the conclusion of the trial this should have been raised. It was. Present at the appeal hearing was trial defence counsel. He informed the Court that the matter had been raised with the judge, the point had been contested by the Crown, and the judge declined to engage with the point. This directly contradicted the assertion in the appellant's Grounds of Appeal that the judge refused to include this data as part of the PPE.

19. The disc containing the downloaded data was provided on two separate occasions to defence counsel. On the first occasion by prosecuting counsel at court, on the second occasion, as a matter of urgency, by the police using a courier service to the chambers of defence counsel. Given the circumstances of the transmission it is not difficult to understand the point made by original defence counsel in his written request for redetermination when he states that the CPS failed to fill in the final NAE document properly. The Crown seeks to rely on the absence of this evidence within the category of exhibits in the case, however, its difficulty is that this evidence is nowhere identified in the unused material.

20. The disc of downloaded data is not listed as an exhibit, its service was not accompanied by a NAE, it is not listed in the schedule of unused material. Given the absence of such formal identification the Court will make its own determination of the evidential nature of the data. It is undisputed that the text messages extracted from the downloaded data of the defendant's mobile phone were an important part of the Crown's case. I note that in his email at paragraph 15 above prosecution counsel describes the schedules of text messages as being at the "very core of the Crown's case". Given the importance of the evidence it is unsurprising that the defence refused to agree to admission of the extracted data until it was able to examine all the data on the download. This was the defence application to the trial judge which he granted. The request was not only reasonable it enabled the defendant's legal team to properly fulfil its duty to the defendant. It enabled the defendant's legal representatives to satisfy themselves of the veracity of the extracted data and to place the same in a context having examined and considered the surrounding and/or underlying data. It also enabled the defendant's legal team to extract any communications which they deemed to be relevant. Given the importance of the extracted material to the Crown's case and resultant duty upon the defendant's team to satisfy itself of the veracity and context of the same I am satisfied that this was

additional evidence which should have been accompanied by a Notice in the prescribed form. It is not difficult to understand why this did not occur. The service of the disc at court, directly to counsel and subsequently by the police to counsel's chambers was done for pragmatic reasons of time and efficiency. Overlooked in the process was the need to serve a formal Notice. The role of the trial judge in this disclosure process and his approval of the serving of the evidence is at one with the evidential importance of all of the data. This was not unused material. It formed part of the prosecution evidence which was served on the court. As such it falls within the definition of PPE for the purpose of the 2013 Regulations.

21. It is contended on behalf of the appellant that on the part of the respondents there has been double-counting of pages. The extracted data, 238 pages, is included in the total number of pages for which remuneration is sought, namely 4,325. This is disputed by the respondents. The point taken is that the 238 pages comprising the extracted data in exhibits NG1A and NG1B are not exact copies of pages in the original download. There is no mirror image of the two schedules on the disc, no carbon copy. 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. I accept the respondents' submission. I note the description of prosecution counsel in his email at paragraph 15 above where he explains that the electronic material comprising exhibits NG1A and NG1B was "contained within the entirety of the download of the mobile phone OS/2 SEL P1."

22. As to the Reasons for Decision of the Costs Judge the point is taken by the appellant that the judge did not consider the specific provisions of Schedule 1 paragraphs 1(2) and 1(3) of the 2013 Regulations as to whether the evidence had been "served on the court" or was part of the "served prosecution documents". It is right that in his Reasons the Costs Judge did not refer specifically to these provisions but at paragraph 6 he clearly directed his mind to the issue of service and found that the information had been "properly served" as if it had been served by the Crown's lawyers. He also noted that such an approach may not be ideal administratively but given pressures of time the Crown took a sensible and pragmatic step. In my view the judge did direct his mind to the issue of service, he acknowledged the administrative difficulties occasioned by the approach but recognised the pragmatism of the steps taken. This Court has done the same. The Court has identified the specific provisions within the 2013 Regulations and found that the less than ideal administrative arrangements led to a failure to produce a NAE. Notwithstanding this failure the entirety of the download was in fact additional evidence and was served both on defence counsel and the court. Accordingly it falls within Schedule 1 paragraphs 1(2) and 1(3) of the 2013 Regulations.

23. The second limb of Ground 1 relates to Schedule 1 paragraph 1(5) as the evidence was served in electronic form. Evidence served in electronic form can only be included in the PPE if it is deemed appropriate to do so (taking into account the nature of the document and any other relevant circumstances). The essence of the appellant's case is that the material on the disc, save for the separate extract contained in the schedules provided by Ms George, was not material relied upon by the Crown to prove its case. It is not disputed that the trial judge regarded the text messaging evidence as being "central to the prosecution case". It was conceded by counsel on behalf of the appellant that in order to assess the evidence of the extracted text

messages it would be necessary to look at the material on the disc. That point was then refined in that it was said that there would be photographs on the disc which would not require much by way of examination and it would be inappropriate for any legal aid monies to cover such an examination. Further it was contended that if work was required to examine such material an application for special preparation pursuant to Schedule 2 paragraph 20 could have been made. The immediate point taken by the respondents was that this provision applies only to solicitors and relates to issues of uniqueness, no-one would suggest the same applied to this data. There was no index to the volume of data on this disc.

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.

25. The reasoning of the Costs Judge is criticised in that it is said he failed to carry out an analysis of the data which would permit him to conclude that the importance test was satisfied. In paragraphs 10 to 12 of his Reasons the Costs Judge identified the importance of the material extracted from the telephone and the requirement for those acting on behalf of the defendant to scrutinise the underlying evidence which surrounded the text messages. The assessment of the Costs Judge demonstrated an understanding of the duty on those who represented the defendant at trial which on occasion appeared to be absent from the presentation on behalf of the appellant. In my view the second limb of Ground 1 is devoid of merit.

26. As to Ground 2 this was not pursued in oral submissions before the Court. It is not difficult to understand why. Schedule 1 paragraph 1(5) clearly envisages an exercise of discretion by the person making the determination, a power which counsel on behalf of the appellant conceded was available to the Costs Judge and which he exercised.

27. For the reasons given this appeal is dismissed.

Case No: QB/2016/0280

Neutral Citation Number: [2017] EWHC 1045 (QB)
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 THE LORD CHANCELLOR	**Appellant**
	- 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

- -

Judgment**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—
>
> (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—
>
> (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.
>
> (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.

(9) The appellant must be permitted a reasonable opportunity to make representations in reply.

(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;
>
> (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.

The proceedings in the Crown Court:

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.
>
> 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.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 67/16

Dated: 9 September 2016

ON APPEAL FROM REDETERMINATION

REGINA v PARKE

WOOD GREEN CROWN COURT

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

CASE NO: T20150634

LEGAL AID AGENCY CASE

DATE OF REASONS: 22 MARCH 2016

DATE OF NOTICE OF APPEAL:

APPLICANT: SOLICITORS

Traymans LLP
DX 58053
Stoke Newington 1

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

The appropriate additional payment, to which should be added the sum of £600 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

J. SIMONS
COSTS JUDGE
REASONS FOR DECISION

1. Messrs Traymans LLP Solicitors appeal against the decision made by the Determining Officer of the Graduated Fee Team at the Legal Aid Agency to reduce the solicitors' Litigator Graduated Fee Claim relating to pages of prosecution evidence ("PPE") from 9,300 pages to 86 pages.

2. The solicitors represented David Parke who faced a ten count indictment at the Blackfriars Crown Court of making indecent photographs of a child. At the conclusion of the case, the solicitors submitted their Graduated Fee Claim in which they claimed 20 pages of statements, 66 pages of exhibits and 9,240 pages of electronic evidence. The Determining Officer assessed PPE at 86 on the grounds that the 9,240 pages of electronic evidence were not served under a Notice of Additional Evidence ("NAE").

3. The solicitors sought a redetermination on the grounds that the disputed PPE consisted of photographic images which, in view of their content, the prosecution were not prepared to formally serve but required the solicitors to inspect the images in person at Holborn Police Station by appointment. The solicitors stated that the PPE formed part of the served prosecution documents. Furthermore, because of the sensitivity of the material, the NAE served by the CPS was left blank. The solicitors further submitted that not only were the PPE part of the committal or served prosecution documents, but they were made available for inspection and were therefore "served" and the invitation to inspect the material at the appropriate police station did in effect amount to service.

4. These submissions were rejected by the Legal Aid Agency in their written reasons dated 22 March 2016. The Determining Officer stated that the Legal Aid Agency had contacted the CPS to confirm whether or not the exhibit had been formally served and the CPS had confirmed that their system did not show that the material was formally served.

5. The solicitors now appeal.

6. Mr Owen from the solicitors attended before me at the hearing of this appeal and confirmed the submissions that were made in the Grounds of Appeal.

7. The relevant regulations are the Civil Legal Aid (Remuneration) Regulations 2013 which state:

> ***"Schedule 2***
>
> *1. Interpretation*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*

(d) records of interviews with other Defendants,

which form part of the served prosecution documents or which are included in any Notice of Additional Evidence.

(4) Subject to subparagraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence, taking into account the nature of the document and any other relevant circumstances".

8. I agree with the solicitors' submissions. The only method by which these pictorial exhibits could be served was by way of an invitation to the solicitors for them to be inspected at the appropriate police station. The regulations have to be interpreted purposively. Service of documents means that they must be delivered to or brought to the attention of the recipient. The content of these documents was such that, the only way in which they could be brought to the attention of the recipients was for them to be inspected. The regulations require that the material must form part of the served prosecution documents and I am satisfied that there has been deemed service in this particular case. The fact that there was no Notice of Additional Evidence attached to the material is not fatal as the service of a Notice of Additional Evidence is an alternative to served prosecution documents.

9. This appeal succeeds in full and I direct the Legal Aid Agency to remunerate the solicitors on the basis of their original claim.

10. It is important for me to state that I have made this decision specifically on the facts of this particular case.

TO: Traymans LLP
DX 58053
Stoke Newington 1

COPIES TO: Ms Siobhan O'Hanlon
Legal Aid Agency
DX 10035
Nottingham

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL. DX 44454 Strand. Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.

SENIOR COURTS COSTS OFFICE

SCCO Ref: 118/19

Dated: 26th September 2019

ON APPEAL FROM REDETERMINATION

REGINA v RIDWAN

CROWN COURT AT PRESTON

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

CASE NO: T20170893

LEGAL AID AGENCY CASE

DATE OF REASONS: 13th March 2019

DATE OF NOTICE OF APPEAL: 12th April 2019

APPLICANT: Mr Jonathon Turner, Counsel

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Mr Jonathan Turner, Counsel ('the Appellant') appeals against the decision of the Determining Officer of the Legal Aid Agency ('the Respondent') in a claim under the Advocates Graduated Fee Scheme ('AGFS'). The two issues for determination are whether the fees allowed for attendance at Preston Crown Court on 8th and 9th October 2018 should be paid as a trial or a "cracked trial", and the decision to reduce the number of pages of prosecution evidence ('PPE') claimed by the Appellant. The claim was originally for 10,000 PPE, reduced on appeal to 3938 pages. The Respondent allowed 2348 PPE. 1140 pages remain in dispute and comprise the second issue in this appeal.

Background

2. The Appellant represented Mr Ridwan Mohammed ('the Defendant') who was charged at Preston Crown Court with two co-defendants on an indictment alleging two counts of possessing Class A drugs (crack cocaine and diamorphine) with intent to supply. He pleaded not guilty and the trial was listed on 8th October 2018. On that day, the case was called late in the afternoon and the judge, HHJ Dodd, adjourned until the following day. On 9th October 2018, the Defendant entered a guilty plea and was remanded in custody to await sentence.

3. Four mobile telephones were seized from the defendants and the contents downloaded onto a disc exhibited as LSH/11589/1911. This disc was served on the defence under a Notice of Additional Evidence. The dispute concerns the exercise of the Determining Officer's discretion and his decision to allow some but not all of the electronic datum as PPE.

The Regulations

4. The Representation Order is dated 1st November 2017 and so The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply.

5. Trial is not defined specifically in the Regulations. Reference is made to paragraph 1(1)(a) of Schedule 2 which states:

> ""*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places and –*
>
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*
>
> *(ii) either –*
>
> *(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place…"*

6. Paragraph 1 of Schedule 2 provides additionally (where relevant) as follows:

> *"1. Interpretation*
>
> …
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*

which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

7. On the issue of trial/cracked trial, both the Appellants and the Respondent refer to the guidance in guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB), where Mr Justice Spencer stated (at para. 96) that:

"96. I would summarise the relevant principles as follows:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by the defendant, or a decision by the prosecution not to continue (R v. Maynard, R v. Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v. Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge

of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (the present appeal)).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v. Dean Smith, R v. Bullingham, R v. Wembo).

(6) If, in accordance with modern practise in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J. did in R v. Dean Smith, in the light of the relevant principles explained in this judgment".

8. On the issue of PPE, authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

"*(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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.*

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

The submissions

9. The Respondent's submissions are set out in Written Reasons dated 13th March 2019 and in Written Submissions drafted by Mr Rimer, a senior Lawyer at the Legal Aid Agency, on 6th September 2019, which exhibits a Schedule. The Appellant's submissions are set out in Grounds of Appeal lodged on 12th April 2019. No request was made for an oral hearing and I am asked to determine this appeal on the papers. I will, where relevant, summarise the parties' arguments in the course of my determination.

My analysis and conclusions

Trial or "cracked trial"

10. The Respondent, in summary, notes that the hearing on 8th October 2018 lasted just 16 minutes, between 15:17 and 15:33 hours. No jury was empanelled or sworn. HHJ Dodd undertook no "substantial matters of case management"; she simply dealt with the Defendant's bail and adjourned the case to the next day. When the case was called again, in the afternoon of 9th October 2018, the Defendant changed his pleas to guilty. This is, argues the Respondent, a "cracked trial".

11. The Appellant, in summary, produces a transcript of the hearing on 8th October 2018 and relies on the following comment from the learned judge:

> "*JUDGE DODD: All right. Well, gentlemen, given that the trial has started I do not see the need really for reporting conditions. Both have now attended for the first day of trial*".

He relies, therefore, on the guidance of paragraph 96(8) of the guidance in Henery (ibid).

12. This was, in my conclusion, a "cracked trial" and not a trial. As the Respondent points out, no jury was empanelled or sworn and the learned judge undertook no "substantial matters of case management". Her comment that "the trial has started" must be construed in context, namely the question of continuing the Defendant's conditional bail. As Mr Justice Spencer noted in Henery (ibid), any indication or view by the trial judge should be given "in the light of the relevant

principles explained in this judgment". For a trial, these principles require that the trial judge engages in "substantial matters of case management" in circumstances where no jury is sworn the trial is not open. HHJ Dodd neither heard nor determined any disputed submissions; she simply called the case on and adjourned it to the next day. The appeal on this issue must be dismissed.

PPE

13. I note from the outset that the Respondent concedes the appeal to the extent that an additional 441 pages should be added to the PPE.

14. The Respondent, in summary, disputes the Appellant's calculation of the paper PPE. The Appellant argues the Determining Officer failed to include 37 pages; Mr Rimer now concedes an additional 16 pages. It is argued also that the Determining Officer exercised correctly the discretion under paragraph 1(5) of Schedule 2 to the 2013 Regulations. Thus, in construing the electronic datum, the pages relating to contacts, SMS messages, call logs, chats and e-mails were allowed, while the remaining material was excluded.

15. The Appellant, in summary, challenges the calculation of the paper PPE and argues that an additional 1561 pages of electronic datum should be included. Mr Rimer, having looked at the disc again, agrees that an additional 425 pages (i.e. the 441 pages conceded – the 16 paper pages) should be included in the PPE. The Appellant's submissions, supported by an Appendix, argues that his calculation "is not duplicitous", in the sense that discounts duplicated material at all relevant tabs.

16. I see no grounds for discounting pages such as "cover sheets" so the Appellant's calculation of an additional 37 pages should be preferred to the Respondent's concession of 16 pages. Accordingly, an additional 21 PPE is added to the Respondent's concession of 441 pages. Mr Rimer has otherwise carried out a very detailed analysis of the electronic datum which concedes the inclusion of contacts, SMS messages, call logs, chats and e-mails, along with an additional Excel file overlooked apparently by the Determining Officer. It was reasonable to exclude technical data, metadata and Timeline sections, along with some apparent duplication. I am satisfied ultimately that the

Respondent exercised its discretion reasonably and appropriately, so that this part of the appeal succeeds only to the extent conceded by Mr Rimer, with aditionally my decision to add an additional 21 pages of paper PPE. I direct, therefore, that the PPE in this case is 2810 (2348 + 441 + 21).

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000044

Dated: 3rd September 2020

ON APPEAL FROM REDETERMINATION

REGINA v DAFALLAH

CENTRAL CRIMINAL COURT

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

CASE NO: T20197180

LEGAL AID AGENCY CASE

DATE OF REASONS: 12th February 2020

DATE OF NOTICE OF APPEAL: 24th February 2020

APPLICANT: Carson Kaye Solicitors

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Carson Kaye Solicitors ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of its Litigator Graduated Fee Scheme ('LGFS') claim.

2. The Appellants initially submitted a claim for 10,000 PPE and the Determining Officer allowed 3248 pages. The parties now agree that the PPE count should be increased to 7893 pages. There is one outstanding dispute, namely the appropriate page count for exhibit J0048; the Appellants claim 1256 pages while the Respondent's count is 628 pages. The issue on appeal, in other words, is whether the total PPE count should be 9149 (7893 + 1256) as claimed by the Appellants or 8521 (7893 + 628) as submitted by the Respondent.

Background

3. The Appellants represented Mr Mohamed Dafallah ('the Defendant') who appeared at the Central Criminal Court charged with murder. The incident occurred in June 2019 in London SW18 and was alleged to have resulted from an argument over selling drugs.

4. The police seized the Defendant's mobile telephone and the datum downloaded from this phone was uploaded to the Digital Case System ('DCS') as exhibit J0048. This is a schedule produced in Excel format.

The Regulations

5. The provisions of The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply to this case.

6. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*

…

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of prosecution evidence includes all –

(a) witness statements;

(b) documentary and pictorial exhibits;

(c) records of interviews with the assisted person; and

(d) records of interviews with other defendants,

which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

7. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

"*(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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.*

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

The submissions

8. The Respondent's case is set out in Written Reasons dated 12th February 2020 and in written Submissions on Behalf of The Lord Chancellor drafted by Mr Rimer on 20th July 2020. The Appellants' case is set out in the Notice of Appeal and in written Submissions dated 22nd July 2020. Mr Kaye, representing the Appellants and Mr Rimer, for the Respondent appeared and made oral submissions at the hearing on 30th July 2020.

My analysis and conclusions

9. The issue, as noted, is the appropriate page count for exhibit J0048, an Excel schedule prepared by the prosecution and uploaded to the Digital Case System. As such, it is common ground that the material was served in accordance with the Regulations and that its relevance is such as to permit inclusion in the PPE count. Mr Kaye submitted that exhibit J0048 was not actually "electronic evidence" and as such the page count should be included automatically PPE. This interpretation of the Regulations is, in my view, incorrect. Exhibit J0048 was undoubtedly a "documentary and pictorial exhibit" pursuant to reg. 1(3)(b) but, insofar as it was served (by being uploaded to the DCS) in electronic form and never existed in paper form, the discretion at reg. 1(5) is invoked.

10. None of this, in my view, is controversial. The issue is, on the exercise of this discretion, the method of producing an accurate page count of the Excel document.

11. Mr Kaye points out that the exhibits page count recorded in the DCS was 1256. This is recorded on the system and not simply a product of activating the 'print preview' function, as argued by Mr Rimer. As such, "the document is 1256 pages long and should be considered as such".

12. Mr Rimer has looked at the Excel schedule carefully and argues that while the exhibit may be recorded as 1256 pages, only 628 pages contain any form of substantive material. The page count of 1256 is simply a quirk of the 'print

preview' function. As the Excel document is too large for an A4 print, one column is reproduced exclusively in a way that effectively doubles the substantive page count from 628 to 1256. The additional 628 'pages' contain no substantive or relevant information and should not therefore be pleaded in the PPE count. Mr Rimer, in other words, argues that it is necessary to look at the substance of the disputed document and only include appropriately the relevant or substantive pages in the PPE count. He cites the approach of Costs Judge Brown in R v. Stafford-McPherson [2020] SCCO Ref: SC-2019-CRI-000041 as guidance.

13. It is noted that documents produced in Excel format often provoke difficulties in establishing an accurate PPE count for the purposes of the LGFS. It is often necessary, on the correct application of the discretion at reg. 1(5) of paragraph 1 of Schedule 2 to the 2013 Regulations and in order to exercise the 'valuable control mechanism' cited by Mr Justice Holroyde in SVS Solicitors (ibid), to look critically at the substantive content of a disputed electronic document in order to arrive at an accurate page count. I have some sympathy and respect for Mr Rimer's detailed consideration of the evidence in this case and, specifically, exhibit J0048, not least because it is this analysis that has allowed an initial, agreed page count of 7893, increased from the 3248 pages allowed by the Determining Officer. On the particular facts of this case, however, I find that the submissions of Mr Kaye should be preferred. Ultimately this Excel exhibit, as produced by the prosecution, was uploaded to the Digital Case System, recording thereby a formal page count of 1256. I accept Mr Kaye's submission that it is not simply a product of the print preview function but rather a page count recorded formally in the DCS. Mr Rimer's submission, namely that not every one of the 1256 pages included substantive or relevant datum, may or may not be correct – it seems likely that the additional pages reproduced one column of the Excel document, although this column may not have included much in the way of substantive datum. It seems to me, however, that when exercising the formal (often quite technical) requirements of the LGFS, the only fair and equitable way of reaching a total PPE count - and in this regard the inclusion of an exhibit of undoubted general relevance - is to adopt the count recorded in the DCS.

14. For these reasons, I allow this element of the Appellants' appeal, and direct that the total PPE count in this case should be 9149 (i.e. 7893, as agreed, + 1255 pages for exhibit J0048).

Costs

15. The appeal is allowed and the Appellants are entitled to the return of the £100 paid to lodge the appeal. No other application for costs is proffered by Mr Kaye.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2020-CRI-000254
SC-2021-CRI-000001

22 October 2021

ON APPEAL FROM REDETERMINATION

REGINA v CAMPBELL

CROWN COURT AT WORCESTER

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

CASE NO: T20190513

DATE OF REASONS: 18 OCTOBER 2021

DATE OF NOTICE OF APPEAL: 22 DECEMBER 2020/ 4JANUARY 2021

APPLICANT:	COUNSEL	IONA NEDELCU
	SOLICITORS	FARRINGDON LAW

The appeals have been successful (in part) for the reasons set out below.

The appropriate additional payments for each appellant, to which should be added the appeal fee of £100 paid on each appeal and costs in the sums of £750 (advocate) and £1,000 (litigator), should accordingly be made to the Applicants.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is a combined appeal by Iona Nedelcu of counsel as advocate and Farringdon Law as litigators against the sums allowed by the determining officers in respect of their claims under the Advocates and Litigators Graduated Fee Schemes respectively.

2. The appellants were instructed on behalf of Jonathan Campbell who was arrested while sitting in a BMW motor car along with the driver of that vehicle. The vehicle was searched and whilst that occurred Campbell ran away but was apprehended soon after. The driver of the vehicle was not caught. As part of the search, four mobile phones were seized. The two which are relevant for the purposes of this appeal are an iPhone in Campbell's possession and a Huawei phone which was in the glove compartment next to the passenger seat occupied by Campbell.

3. Campbell was charged with possession with intent to supply both heroin and cocaine. The prosecution served 81 pages of paper evidence. They were unable to interrogate the seized mobile phones and, after an application for release of those phones, the defence obtained a report on them. That report was served with the defence case statement. The iPhone was said to contain no incriminating messages regarding drug dealing. The Huawei phone however did contain such messages but it was the defence case that the phone did not belong to Campbell.

4. The downloads were provided to the prosecution and a police officer analysed them and produced evidence on behalf of the Crown. The case went to trial during which the defence made an application to the judge for an order that the two telephone downloads were to be treated as served prosecution evidence. The application quoted the case of R v SVS where guidance was given that the trial judge may determine issues of service of evidence at least partly for the benefit of subsequent assessment of fees. The trial judge ordered that the downloads should be counted as served evidence.

5. Although the determining officers' quantification of the allowable pages of prosecution evidence ("PPE") vary slightly, there is no real difference for the purposes of this appeal. As was amply demonstrated at the appeal hearing itself, where the evidence has been served as an Excel spreadsheet, the precise number of pages may well depend upon the computer being used to view the relevant spreadsheet. In round terms, the determining officers allowed approximate 3,000 pages of the electronic evidence as being sufficiently important or pivotal to come within the test in the Criminal Legal Aid (Remuneration) Regulations 2013 as PPE. As is very well known, unlike paper pages of PPE, electronic pages have also to pass a test of importance in order to be considered as counting towards the PPE by the determining officer having taken into account all the circumstances.

6. Both determining officers have taken what I would describe as a relatively standard approach to the downloads. They have allowed the categories of calls, contacts and communications via various platforms but have disallowed the remaining elements as being peripheral to the case. In terms of the litigator claim, the time spent in considering the remaining elements could be claimed by way of special preparation. But that is not an option open to the advocate since the recasting of the various offences has included a need for there to be 15,000 PPE before a claim can be made and the amount of pages on the download are just over 10,000.

7. The appellants do not challenge the determination in respect of the iPhone. The determining officers have taken the approach described above and, although a little over 4,000 pages were claimed, the allowance of 1,952 pages is not challenged by them. It might be thought therefore that that download would have no real relevance in this appeal. However the submissions, both written and oral, of Mr Michael Rimer on behalf of the Legal Aid Agency challenge whether 1,952 pages is in fact appropriate in any event. In Mr Rimer's view, the allowance of the contacts section, for example, was unduly generous by the determining officer since it was clearly irrelevant to the case. As such, Mr Rimer invites me to exercise the power that I undoubtedly have to redetermine the claim at a lower figure than has been allowed to date.

8. Martin McCarthy of counsel, who appeared on behalf of the appellants, took some exception to this approach. He pointed out that the determining officers had both determined and then redetermined these figures as well as then producing written reasons without taking the approach contended for by Mr Rimer. Those determinations were not challenged by the appellant who put forward arguments in relation to other aspects of the determinations by the determining officers. The appellants' only indication that the sums already allowed were at risk were the written submissions by Mr Rimer and his oral submissions to me at the hearing. Mr McCarthy accepted that I had the power to make the redetermination sought by Mr Rimer, but disputed the appropriateness of me doing so.

9. To the extent that he had to deal with the merits of the argument, he pointed out that the contact section needed to be considered to cross check communications from the Huawei phone. He also made submissions regarding the locations data which was also challenged by Mr Rimer. Mr McCarthy told me that the location data demonstrated that Campbell was not in the same place as the Huawei phone at the relevant time regarding the offences.

10. There has been, in my experience, in recent times an attempt by the Legal Aid Agency to challenge some arguments raised on appeal by various appellants on the basis that those arguments were not placed before the determining officer and therefore should not be allowed on the appeal.

11. That argument flows from the regulations and it has always been the case that if an argument could have, but was not, raised before the determining officer then one option would be to return the case to the determining officer for further consideration. Now it is regularly suggested that the submissions put forward on appeal should be treated as formal pleadings requiring formal amendment. If no permission is given on the appeal then the argument should be dismissed, not merely remitted to the determining officer.

12. It is not an argument which strikes me as being particularly attractive. The challenges are a request for a review of fees paid to the lawyers under the regulations / scheme and there is a limit to the extent of the formality that is helpful in that context. But it is surprising in such circumstances that the Agency has taken the view that it should make challenges to fees that were not otherwise part of the appeal simply by written submissions and oral submissions at any hearing. The effect of such submissions, if successful, would lead to a recoupment of fees already paid and would understandably be of no little concern to the appellants. If such a practice was to become widespread, it would inevitably deter would-be appellants who might be concerned about fees seemingly already banked which might become vulnerable to challenge simply because of some other, potentially meritorious, challenge they wished to make to a determining officer's assessment.

13. In my view therefore I should be slow to accede to any such application and I certainly do not see that it is made out in this case. As Mr Rimer informed me at the appeal hearing, the determining officers have allowed the elements of downloads which they usually allow and, having done so, it seems to me to be inappropriate to revisit that approach simply on a different reconstruction of the events of the case on the appeal without some compelling evidence to do so. It would certainly need more than an argument based solely upon a view of what had transpired.

14. Mr Rimer also invited me to consider that the application made by counsel to the trial judge for a determination regarding the service of the downloads was a relevant circumstance for the determining officer to take into account as to whether to allow some or all of that download as PPE. It was clearly the case, in Mr Rimer's view, that this was a point that ought to be taken against the appellant. In this case, the downloads were considered first by the defence and only then provided to the prosecution. It was obvious that this would not have occurred if there had been anything incriminating upon either download. In the circumstances, it was Mr Rimer's submission that to require a decision by the trial judge as to whether the documents had effectively been served by the prosecution once they had been analysed and reported upon by the police officer was to accede to a "self-serving attempt to inflate the PPE."

15. It seems to me that this submission is even less attractive than the submission made regarding the recoupment. Holroyde J (as he then was) in R v SVS, clearly indicated that if the defence and prosecution could not agree as to the extent of the served evidence in a case, then the trial judge should be asked for a view. Holroyde J thought that that would be a rare circumstance but it was a step that was to be expected of the parties. It is certainly a regularly made argument on the part of the respondent when issues of service of evidence is concerned that the trial judge could have been asked to express a view but the appellant had not done so. In those circumstances, Holroyde J indicated that the prosecution's view of events was likely to hold sway. Where, as here, the defence has taken the entirely sensible step of checking with the trial judge as to the status of the evidence, it is regrettable that the respondent considers it appropriate to describe that approach in offensive terms to a professional. I think that I can take it as read that the application was only made to the trial judge on the basis that agreement could not be reached with the prosecution that the evidence had in fact been served.

16. The fact that evidence is served does not mean that it is necessarily PPE. Indeed, that point is clearly made in counsel's application to the trial judge. Nevertheless, it seems to me to be a persuasive indication that the trial judge considered the evidence to be important for a ruling to be given that the evidence had been served in the knowledge that an application would almost certainly follow for it to be claimed as PPE on a later assessment.

17. I have described the determining officers' approach to considering the downloads as taking a fairly standard course in which documents on the download were to be allowed. It is incontrovertible that messages and communications between phones are going to be of prime importance in almost every case to establish the facts of offences, association between defendants et cetera. Most of the time the meta data and other encrypted information is going to be of little or no relevance and is rightly excluded by the determining officers.

18. The appellants say that where the attribution of the phone is in dispute, then the net ought to be cast wider as to the contents of the download. The personalisation of phones may well occur in parts which would not usually be allowed and it seems clear from the examples given by Mr McCarthy that the likely owner of the phone, a Cameron McCarthy, could be established from various, different locations. Mr Rimer suggested that there was sufficient information in the parts that were allowed for this to occur and as such there was no need to look in the more unusual places.

19. The parties were considerably apart in respect of the appropriateness of looking at the images section. Since the download was on a spreadsheet there were no images as such but simply links. Usually they would be of no assistance in themselves but the appellants here say that it was the links rather than the images which would be of assistance in seeking to find information about ownership of the phone.

20. It seems to me that the images section is a good example of why attribution of the phone may involve a different search from searches regarding matters of association et cetera. The latter would usually not be assisted by links rather than images but here, attribution could be assisted by the quotation of an email address or username in a video image link as was demonstrated by one of Mr McCarthy's examples.

21. In my view it is no answer to suggest that either it is only to be found in very small amounts given the number of pages or that it could be found on otherwise allowed sections of the download as Mr Rimer sought to argue. If the email address to which I have just referred was that of the defendant's in this location, then I have no doubt that the prosecution would have argued vehemently that this demonstrated that the phone could be attributed to him. The same must be true of only "snippets" of information that were exculpatory rather than inculpatory. If an incriminating email address had been found in the video link as here, that could have gainsaid information in other areas (i.e. the ones that have been allowed) and therefore it seems to me that all of the download essentially had to be viewed to make sure that it did not provide conflicting information.

22. Nor do I accept Mr Rimer's description of the prosecution as being very weak in the absence of this information. Such submissions are either speculative or an attempt to relitigate the case – neither of which is appropriate on an appeal about the defendant's lawyers' costs. The prosecution team, notwithstanding agreement of facts which did not appear to aid the prosecution – must have thought that there were still reasonable prospects of bringing the case since it ultimately went to the jury. The question of whether or not there was some joint enterprise between Campbell and the other occupant of the car would only be affected to some extent by the precise ownership of the phone with incriminating information upon it.

23. For these reasons, I take the view that both determining officers have fallen into error in simply following the usual approach of what is to be allowed in such cases and not considering the potential relevance of wider categories. The determining officers have suggested that the appellants have not put forward any justification of why the other elements of the download should be considered but I do not accept that to be the case. The note regarding the application made to the judge and the clear comments regarding the fact that attribution of the Huawei phone, but not the iPhone, was in issue was in my view sufficient to alert the determining officers to the point being made.

24. Since the recasting of the offences table in 2018, the schemes involving the advocates and litigators now vary regarding PPE.

25. In relation to the advocate, the crucial threshold is 5,000 pages which would cause the fee to be calculated based on an offence under band 9.1 rather than band 9.4, as has been allowed. No precise determination of the number of pages needs to be made. In my view, given that 3,000 pages were allowed for certain elements of the disc and that there are roughly 10,000 pages on the disc as a whole, there is no doubt in my mind that the 5,000 page threshold is exceeded so that counsel's fee should be recalculated as a 9.1 offence.

26. In relation to the litigator scheme, the precise number of pages is required notwithstanding the difficulty that that entails as indicated above. Indeed, things are made more complicated by the fact that the determining officer has attempted to manipulate the pages on the spreadsheet so as to exclude the blank or almost blank pages which inevitably arise from a print preview calculation. The amount of manipulation is a matter of degree and I do not criticise the determining officer for attempting to reach an appropriate figure based on the spreadsheet. I do not think attempting to turn it into a PDF tends to be a successful method since it often simply encapsulates many blank pages as part of the PDF.

27. However, I would caution determining officers against being too rigorous in removing blank columns since, as Mr McCarthy pointed out, where paper PPE or PDF PPE is concerned, not every page is full of text in any event. This problem is highlighted by the determining officer's redetermination of the Huawei phone in the litigators claim. It is not clear to me at all how numbers of pages which were allowed on the original redetermination have been reduced by significant percentages on the second determination without any explanation of how that difference arose. I think Mr McCarthy was entirely justified in querying how that could be so.

28. I note that the allowance by the determining officer is not challenged by the litigator in respect of the iPhone and that as such the assessment has been considered to be a fair one in respect of that phone. Assuming that a similar manipulation of the data on each spreadsheet occurred on the original determination, then it would be reasonable to assume that the reductions in respect of the sections allowed on the Huawei phone are also fair. Indeed, I note that none of the elements actually allowed for is challenged in terms of the quantum.

29. I have come to the conclusion that in respect of the litigator's claim, the PPE should be calculated in the following manner. First I would use the page numbers claimed and allowed on the determination rather than the unexplained alterations on the redetermination. In the sections where pages have been allowed I have calculated that 994 pages of the total number claimed of 1,566 have been allowed. This amounts to a 64% allowance on average. If that percentage is then applied to the other elements of the download (other than the timeline) then this would result in a further 4,826 pages being allowed of the 7,541 pages claimed.

30. By taking the average percentage of the sections allowed and then applying that percentage to the other sections which I consider ought to have been allowed, I have reached a figure which it seems to me approximates to the amount that would have been allowed by the determining officer if the broader approach to the contents of the download had been taken in the manner that I have described.

31. The only element of the download which it seems to me cannot properly be allowed is that of the timeline. As I understand it, the timeline simply gathers together information from the other elements of the phone and on that basis any references to, for example, Cameron McCarthy which can be found in the timeline must emanate from other elements of the download. In the circumstances, I do not think that the timeline should be allowed in addition to a search of the other areas.

32. Consequently, I have allowed a further 4,826 electronic pages to go towards the PPE which, together with the 3,027 originally determined, by my calculation now makes a total of 7,853 pages and which is the amount that needs to be used in respect of calculating the litigator's claim for costs in this case.

33. Both these appeals have been at least partially successful and as such the appellants are entitled to their costs of the appeals.

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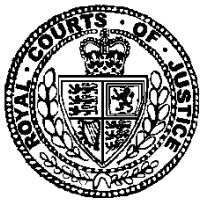

Neutral Citation No. [2022] EWHC 1785 (SCCO)

Case No: T20200236

SCCO Reference: SC-2021-CRI-000147

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 7th July 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
SPENCE

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: Lam & Meerabux Solicitors

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

The appropriate additional payment, to which should be added the sum of £1000.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

Costs Judge Whalan

Introduction

1. Lamb & Meerabux Solicitor ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of its Litigator's Graduated Fee Scheme ('LGFS') claim. The issue on appeal is whether the total PPE count should be 9756, as claimed, or 3798, as allowed.

Background

2. The Appellants represented Mr Philip Spence ('the Defendant') who appeared with a number of co-defendants at Woolwich Crown Court on an indictment alleging money laundering arising from a drug supply operation. He was convicted following trial.

3. The prosecution relied on electronic datum downloaded from mobile phones recovered from the defendants. This digital material was uploaded by the CPS to the Digital Case System ('the CDCS system'). The relevant datum appears at J(g), (h) and (i) [MAE7]. It seems to be common ground between the parties that the page count recorded by the CDCS totals 9756. It is also common ground that all the digital datum is considered relevant to the PPE count. The limited but important issue on this appeal is whether the Determining Officer should in these circumstances simply accept the CDCS count, or whether he/she was entitled to reduce the count having identified pages which are apparently 'blank' or 'duplicates'.

The Regulations

4. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*

(a) witness statements;

(b) documentary and pictorial exhibits;

(c) records of interviews with the assisted person; and

(d) records of interviews with other defendants,

which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

5. Authoritative guidance was given in PPE cases by Mr Justices Holroyde in Lord Chancellor v. SVS Solicitors]2017] EWHC 1045 (QB). The parties refer specifically to para. 50(i) to (xi).

The submissions

6. The Respondents' case is set out in Written Reasons dated 26th October 2021 and in Submissions drafted by Mr Jonathan Orde, a Barrister employed at the Government Legal Department, dated 27th April and 5th May 2022. The Appellants' case is set out in Grounds of Appeal appended to the Appellants' Notice and in Submissions drafted by Mr Martin McCarthy, Counsel, dated 22nd November 2021 and 3rd May 2022. Mr Orde and Mr McCarthy attended the oral hearing on 24th April 2022. The parties' second written submissions were filed (with the permission of the court) after the hearing.

My analysis and conclusions

7. The Respondent, in summary, submits that it is incumbent on the Determining Officer, when exercising the discretion at para. 1(5) of Schedule 2 to the 2013 Regulations, to identify and exclude from the PPE count pages which are blank or which appear to duplicate other pages in the relevant datum. As such, the issue is not so much relevance, but whether blank or duplicate pages properly exist as a 'page of prosecution evidence'. Mr Orde refers to various cases (para. 20-27 of his first written submission), but essentially reliance is placed on the guidance at para. 50(ix) of Lord Chancellor v. SVS (ibid), where Holroyde J emphasised the importance of the Determining Officer's discretionary consideration as "*an important and valuable control mechanism which ensures that public funds are not expended inappropriately*". Mr Orde's analysis suggests that file J(i) contains about 2,279 blank pages. This corresponds to a smaller reduction than was applied by the DO. With regard to 'duplicate' pages, Mr Orde submits that solicitors should only be paid for reviewing electronic evidence as PPE once.

8. The Appellants, in summary, submit that where relevance is conceded, the Determining Officer should accept and endorse the page count recorded formally by the prosecution on the CDCS system. Mr McCarthy refers to the decision of Costs Judge Rowley in R v. Jankis [2020] SC-2020-CRI-000107. The relevant part of his determination is set out at paras. 20-23:

> *20. The issue is whether it is appropriate for the determining officer to reduce the PDF by the number of blank pages that he found. It is not a course of action that, it seems to me, is one that should be widely adopted. The repeated phrase that the calculation of the graduated fee is meant to be mechanistic does not militate towards individual PDFs being scrutinised page by page. I can understand why the determining officer took that approach in this case having decided that the PDF had been created from an Excel spreadsheet which is known for producing blank pages. But it seems to me an approach that could only be adopted in extremist.*
>
> *21. Mr McCarthy challenged the appropriateness of the determining officer's approach given that it was impossible for solicitors to challenge which pages had been disallowed in the absence of any information. I think there is a good deal of force in Mr McCarthy's point albeit that it is not which, as a matter of practicality, will be difficult to deal with in any proportionate fashion.*
>
> *22. Ultimately, I have concluded that I should not take the PDF as my starting point, although the determining officer had little choice but to use that*

> *document. It is a document (whoever created it) which would appear to be unsatisfactory for the purpose of calculating PPE. The difficulty in challenging the subsequent manipulation of that document by the determining officer only highlights that this is not satisfactory.*
>
> *23. I prefer to take the view that the document on the DCS is the one which ought to be contemplated, at least in this case. The move towards evidence being produced on the DCS is clear and if there is a reliable page count on that platform, it seems to me to be inevitable that that is the one on which reliance will be placed in due course. Whilst there are practical difficulties in the determining officer not being able to see the document, for the purpose of this case alone, I am prepared to accept Mr McCarthy's information of the page count on the DCS that it contains few if any blank pages as would be expected from the print preview to Excel document.*

CJ Rowley went on to "*stress that this is a decision made on the specific facts of this case*" (24).

9. Mr McCarthy also relies on my decision in R v. Dafallah [2020] SC-2020-CRI-000044. In that case, where the relevant datum comprised an Excel schedule uploaded to the Digital Case System, recording thereby a formal page count. Recognising, inevitably, that not every one of the pages counted might necessarily include substantive to relevant datum, I concluded (at para. 13) that:

> *It seems to me, however, that when exercising the formal (often quite technical) requirements of the LGFS, the only fair and equitable way of reaching a total PPE count – and in this regard the inclusion of an exhibit of undoubted general relevance – is to adopt the count recorded in the DCS.*

10. Mr Orde, for the Respondent, submits that this reason is incorrect, "because if applied generally it would have the effect of trumping the determining officer's statutory duty under para 1(5) to assess electronic evidence".

11. Turning to the question of duplicate pages, Mr McCarthy relies on my decision in R v. Everett & Others [2019] SC-2019-CRI-000038. In that case, I concluded that any duplication was only apparent after "*relatively detailed analysis*" of the datum, I concluded (at para. 14) that "*it is only fair to concede this analysis in the PPE count (i.e. the number recorded on the DCS system), notwithstanding the fact (albeit with hindsight) of some considerable duplication*".

12. The discretionary power of the DO to include to exclude datum from the PPE count at para. 1(5) of Schedule 2 is, as Holroyde J stated, an important and valuable control

mechanism which ensures that public funds are not expended inappropriately. This function, it seems to me, is carried out properly by a (sometimes broad) consideration of the substantive relevance and importance of the electronic datum to the prosecution's case. I do not see that this function extends to an (often ad hoc) assessment of whether a page is technically 'blank' or constitutes a 'duplicate' of another page. Varied use of the Excel and/or PDF format, in circumstances where material is often converted from the former to the latter, does not lend itself easily to an accurate assessment of blank pages. The process is never "blindingly obvious", as was submitted by the Respondent's advocate in R v. Everett (ibid), and it almost invariably produces contradictory conclusions, notwithstanding the amount of time and effort expended on the process. This is illustrated vividly in this case, where Mr Orde's calculations differ markedly from those of the Determining Officer. As such, the issue is whether, when substantive relevance is conceded, the PPE count should be based on the total recorded formally by the prosecution in the CDS system, or whether it should be subject to further reduction on the basis of an analysis of blank and/or duplicate pages, a process which seems to me to be invariably inconsistent and subject to variation or dispute, notwithstanding the time expended on the process. It is quite clear to me as the court has found consistently in Jankis, Dafallah and Everett (ibid), that the preferable course is for the PPE count to rely on the total recorded in the CDCS system. The prosecution ultimately control the upload of digital datum to this system and can edit out any pages, blank, duplicate or otherwise, if they consider it reasonable and proportionate to do so. The DO still performs the core function, the important safeguard of assessment by reference to relevance and substantive importance to the prosecution case, so the function of para. 1(5) is in no way compromised by this approach. Again, however, where substantive relevance is either conceded or assessed by this criteria, so that all digital datum is considered relevant for inclusion in the PPE count, there should not be a further deduction for what the DO considers to be either 'blank' or 'duplicate' pages. To entertain this process would be to invite repeated streams of inconsistency and dispute in cases assessed under the LGFS. It is in no way unreasonable or unjust to adopt the formal page count in the CDCS system for the purposes of counting the PPE in LGFS claims.

13. This appeal is allowed and I direct that the Appellants' LGFS claim should be paid by reference to 9756 PPE.

Costs

14. The Appellants' appeal has succeeded and I award costs of £1000 (+ VAT) in addition to the £100 paid to lodge the appeal.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC – 2019- CRI- 000038, 224/19, SC – 2019- CRI – 000003, SC – 2019 – 000017 and 157/19.

Dated: 4th November 2019

ON APPEAL FROM REDETERMINATION
REGINA v EVERETT, PAYNE, AHMED, HUSSAIN and KHALID

CROWN COURT AT SNARESBROOK

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

CASE NO: T20187348, T20180406, T20180319, T20180318 and T20187252

LEGAL AID AGENCY CASE

DATE OF REASONS: 13TH June 2019, 18th July 2019, 3rd June 2019, 20th August 2019 and 14th May 2019.

DATE OF NOTICES OF APPEAL: June to September 2019 (x5)

APPLICANTS: McLartys Solicitors, Edwards Duthie Shamash Solicitors, G.T. Stewart Solicitors, Stephensons & Duncan Lewis, solicitors.

The appeals have been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sums of £1250.00 (exclusive of VAT) for each applicant for costs and the £100 paid on appeal (x5), should accordingly be made to the Applicants.

MARK WHALAN
COSTS JUDGE

R/EASONS FOR DECISION

Introduction

1. McLartys Solicitors, Edwards Duthie Shamash Solicitors, G.T. Stewart Solicitors, Stephensons & Duncan Lewis ('the First, Second, Third, Fourth and Fifth Appellants') appeal against the decisions of the Determining Officers at the Legal Aid Agency ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of their Litigator Graduated Fees Scheme ('LGFS') claims.

2. The Appellants submitted claims based on PPE counts in excess of 20,000 pages, comprising about 1876 pages of paper statements and exhibits, and the balance comprising electronic datum downloaded from mobile telephones seized from the defendants. The claims were all limited to the 10,000 page cap imposed by the regulations. The Determining Officers assessed the PPE at 4337 pages in respect of the First Appellant and 4466 pages in respect of the Second, Third, Fourth and Fifth Appellants. On appeal, Mr Rimer, a Senior Lawyer at the Respondent, concedes a slightly amended total of 4533 pages, which includes 2657 pages of electronic evidence. 5467 PPE remain accordingly in dispute and comprise the main issue in respect of all five appeals.

3. There is a secondary issue relating to the First Appellants only, namely that of time. Written Reasons in that case are dated 13th June 2019 yet the appeal was not lodged until about 17th September 2019. Mr Rimer submits that in the absence of explanation this appeal ought to be dismissed on the grounds that it is out of time. I propose to deal with this discreet issue briefly and from the outset. The issue and arguments on PPE pertinent to the First Appellant are essentially identical to those I must hear and determine in respect of the Second, Third, Fourth and Fifth Appellants. No explanation for delay is provided by the First Appellant but, similarly, no prejudice accords to either the other Appellants, the Respondent or the court if I continue to hear this appeal. I accordingly extend time in respect of the First Appellants' appeal and dismiss the Respondent's request that the appeal be dismissed as out of time.

Background

4. The prosecution arose from two stabbing incidents in London in April 2018. On 1st April, Saleh Ahmed was stabbed in a chicken shop in St. Leonard's Street, London E1. It was alleged that this attack was perpetrated by James Everett, Josh Payne, Azhar Ahmed, Minhaj Hussain and Khalid Osman (represented by the First, Second, Third, Fourth and Fifth Appellants), and another co-defendant, Abdul Hoque. The indictment alleged attempted murder, wounding with intent, violent disorder and having an article with a blade or point. On 27th April, Priam Ahmed, was stabbed in a London park. It was alleged that the attack was perpetrated by Josh Payne (represented by the Second Appellants) and Abdul Hoque. The indictment alleged attempted murder, wounding with intent and having an article with a blade or point.

5. The various defendants were arrested in several locations near the scenes of the incident and in other residential premises shortly after the attacks. Upon their arrests, seven mobile telephones were seized from the defendants; the individual telephone numbers are tabulated at para. 26 of the prosecution's Case Summary. Electronic datum from these phones was downloaded and recorded on two discs. It is not disputed that this material was served by the prosecution on the defence. I note at this stage that a detailed analysis of the relevant datum is included in two Scott Schedules drafted by the parties. The first schedule, which is not paginated formally, amounts to almost 50 pages of (fairly detailed) technical analysis, claim and counter-claim. The second schedule, paginated 1-3, was filed on the day of the oral hearing and relates exclusively to the second disc. Fortunately, the determining issue in these appeals is not a re-assessment of the Respondent's discretion to include or exclude various categories of datum, but rather the relevant page count. It is conceded, in other words, that (in broad terms) all the pages on the discs should be included in the PPE; in these cases, the dispute concerns the actual count, in circumstances where there appears to be some considerable duplication of material, and not the decision to include or exclude. It is to the Appellants' case, in distilled summary, that while the disc exhibited some considerable duplication of material, this should nonetheless be included (or allowed) in the page count

as, on the facts of this particular case, any duplication was not readily apparent initially and could only have been identified following scrutiny of the material itself. The Respondent, in turn, rejects this interpretation on the grounds that the duplication was, to quote the words of Mr Rimer, "blindingly obvious".

The Regulations

6. The Representation Orders all date from 2018 and so applicable regulation is The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations').

7. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*
>
> *(b) has never existed in paper form,*
>
> *is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to*

include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case Guidance

8. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

> "*(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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the 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.*"

9. The Appellants have also cited the judgment of Costs Judge Rogers in R v. El Treki [2001] SCCO Ref: 431/2000.

The Submissions

10. The Respondent's case is set out in Written Reasons dated 13th June, 19th July, 3rd June, 20th August and 14th May 2019. I have also read the written submissions of Mr Rimer in respect of the Fifth Appellant (11 pages, 2nd September 2019) and the Second, Third and Fourth Appellants (10 pages, 19th September 2019). Mr Rimer attended and made oral submissions at the hearing on 27th September 2019.

11. The Appellants' submissions are set out in the Grounds of Appeal lodged on 12th September, 8th August, 28th August, 4th September and 7th June 2019. I have also read a Note to accompany Fees Claim (undated) and submitted on behalf of the Fourth Appellant and a written Reply on behalf of the Appellants drafted by Mr Daniel Cohen, counsel, dated 15th September 2019. Mr Cohen attended and made oral representations at the hearing on 27th September 2019.

My analysis and conclusions

12. It seems to me that these appeals turn – at least in the first instance – on a consideration of the 'duplication' issue and a determination of the parties' rival submissions on this point. The Appellants assert that the duplication was not readily apparent initially and only identifiable after a more detailed scrutiny of the datum. It is acknowledged that the material was reproduced in PDF and Excel format but whereas the former set it out 'in a more aesthetically pleasing way', it required analysis of the latter to determine the existence, nature and extent of any duplication. Mr Cohen analyses this issue in more detail at paragraphs 6-10 of his Reply. Essentially he states that 'duplication between files in different formats is not apparent until each document is opened, read and compared alongside each other'. The file names or titles are insufficiently instructive of their contents and accordingly more detailed scrutiny was required to ensure the material was considered adequately. The precise extent of this complex exercise is set out, argues the Appellants, in the long and detailed Scott Schedules prepared by the parties. If the court considers that the Appellants, as a matter of fact, had reasonably to analyse the documents in order to identify any relevant duplication, then the extent of this analysis should be allowed for in the PPE count. This conclusion arises from the line of reasoning following R v. El Treki (ibid). Specifically, argues Mr Cohen, 'where duplication is only detected after the work has been completed, it is submitted that including all documents in the PPE is the only fair mechanism by which the LGFS regime can properly remunerate litigators'.

13. Mr Rimer for the Respondent, adopts a more robust interpretation. He argues that, on an analysis of the electronic datum in this case, any duplication was 'blindingly obvious'. He accepts that the PDF format is more 'presentable and readily accessible' than Excel, but argues that, nonetheless, any duplication is 'still readily apparent from initial observation'. Any argument to the contrary – i.e. the submissions advanced by the Appellants – is 'fanciful'.

14. I have considered these competing (indeed, radically divergent) submissions carefully in the light of the complex and detailed Scott Schedules prepared by the parties. I am also provided with copies of the relevant discs. My conclusion

is that, on the facts and circumstances of this case, the Appellants' interpretation is to be preferred to that of the Respondent. It is clear to me that the files on the Excel format do not stand an immediate or readily accessible comparison with the PDF format. Mr Cohen is, in my view, right to submit that any duplication is, to a very considerable extent, only apparent following a fairly detailed analysis and comparison of the files. Should this conclusion be demonstrated as being overly pessimistic – as a consequence, perhaps, of my own comparative inexperience in the analysis of electronic datum - I am still quite satisfied that the duplication is not, as Mr Rimer argues, 'blindingly obvious'. In turn, I agree with Mr Cohen that insofar as the relatively detailed analysis was required of the Appellants, it is only fair to concede this analysis in the PPE count, notwithstanding the fact (albeit with hindsight) of some considerable duplication.

15. Insofar as the page count for the electronic datum is concerned, therefore, I am satisfied that the relevant total exceeds comfortably the 10,000 cap permitted by the regulations. I note that a secondary issue applied to the material on the second disc. On this discreet question, I have more sympathy with some of the submissions advanced by the Respondent. This material, it seems to me, is really only relevant to the defendant Payne and, in turn, the Second Appellants. I was not persuaded by the Appellants' argument that there was a comparative relevance to the other defendants. Ultimately, however, it makes no real difference to my overall conclusion, as I am satisfied that a proper count of the electronic datum on the first disc, when added to the (essentially undisputed) count for the paper statements and exhibits, comfortably exceed the 10,000 page cap in the regulations. There was no separate claim for special preparation over and above the 10,000 page cap.

16. In conclusion, therefore, the appeals of the First, Second, Third, Fourth and Fifth Appellants are allowed, and I direct that the PPE count should be 10,000 in respect of each Appellant.

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SENIOR COURTS COSTS OFFICE

SCCO Ref: 155/18, 197/18, 243/18, 275/18

Dated: 18 November 2019

ON APPEAL FROM REDETERMINATION

REGINA v ZIGARAS, REGINA v NIKONTAS

LINCOLN CROWN COURT

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

CASE NO: T20177019

LEGAL AID AGENCY CASE

DATES OF REASONS: 31 AUGUST 2018, 28 SEPTEMBER 2018, 3 OCTOBER 2018, 4 DECEMBER 2018

DATE OF NOTICES OF APPEAL: 4 SEPTEMBER 2018, 8 OCTOBER 2018, 22 NOVEMBER 2018, 17 DECEMBER 2018

APPLICANTS:		
MANN & CO, LAM & MEERABUX	SOLICITORS	
PETER CORRIGAN, GRAHAM ARNOLD	COUNSEL	

The appeal has been successful for the reasons set out below.
The appropriate additional payment, to which should be added a sum (to be determined) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.
.

COLUM LEONARD
COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence counsel and solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 (as applicable before 1 April 2018) under the provisions of the Advocates' and Litigators' Graduated Fee Schemes set out, respectively, at Schedules 1 and 2 to the 2013 Regulations.

2. Graduated fees are calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"), subject to an overall "cap" of 10,000 pages. The issue on this appeal is the appropriate PPE count.

3. The four appeals addressed by this judgment are brought by Lam & Meerabux and Peter Corrigan, solicitors and counsel respectively for defendant Rimantas Zigaras, and by Mann & Co and Graham Arnold, solicitors and counsel respectively for his co-defendant Ignas Nikontas. I shall refer to them collectively as "the Appellants".

4. Mr Arnold, before me, represented himself and Mann & Co. Mr Martin McCarthy attended to represent Lam & Meerabux and Peter Corrigan. Mr Michael Rimer, counsel employed by the Legal Aid Agency, represented the Lord Chancellor.

5. The relevant provisions of Schedules 1 and 2 for calculating the PPE count are the same. Paragraphs 1, (2)-(5) of both schedules explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown evidence includes all—
>
> (a) witness statements;
>
> (b) documentary and pictorial exhibits;
>
> (c) records of interviews with the assisted person; and
>
> (d) records of interviews with other defendants,
>
> which form part of the committal or served Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—

(a) has been served by the Crown in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

The Background

6. The four appeals before me are closely connected with three appeals heard by Master Brown in *R v Daugintis & Cvetkovas* (SCCO 154/17, 155/17 and 177/17, 8 January 2018). All seven appeals arise from two criminal trials for the import and supply of drugs, following police investigation "Operation Rancour".

7. That investigation initially led to the prosecution of three defendants for the conspiracy to import and supply Class A drugs. Those defendants pleaded guilty to an offence of importing, and were found guilty after a jury trial of conspiracy to supply.

8. In the course their enquiries it became clear to the police that those involved in the supply were also importing synthetic drugs from China. This led to additional charges against the three original defendants and a single charge of importing Class B drugs against three new defendants, including Rimantas Zigaras and Ignas Nikontas.

9. An application to adjourn the first set of proceedings for conspiracy to supply, so that all of the supply and the petition charges could be heard together, was refused. As a result, the conspiracy to supply trial took place in February 2017 and the importation trial in January 2018, both before the Crown Court at Lincoln.

10. The appeal heard by Master Brown in *R v Daugintis* concerned the appropriate PPE count for a body of electronic evidence, in particular telephone data, served for the purposes of the February 2017 trial.

11. The evidence in question had been served in both Portable Document Format (PDF or pdf) and Excel (spreadsheet) format. The appellants in *R v Daugintis* argued that it was appropriate to measure PPE by reference to the Excel versions, from which they derived a PPE count of over 10,000, rather than by reference to the PDF format, by reference to which the agreed page count was, I am advised by the Appellants, 2,910.

12. In fact, going by paragraph 6 of Master Brown's judgment the PDF-based PPE count looks to have been conceded by the Lord Chancellor at 2,987 pages, but the point is that in *R v Daugintis* no issue was taken with the accuracy of the Lord Chancellor's PDF-based page count. The issue before Master Brown was rather whether that was the right format to adopt for the purposes of the PPE

count, given that the Excel-based count preferred by the appellants in that case brought the total to over 10,000 pages. He found that it was appropriate to base the count on the PDF format.

13. The appeal before me concerns the January 2018 trial, and the same issue arises: where the same body of electronic data was provided to the defence in both PDF and Excel formats, upon which format should the PPE count be based?

14. There was, as one might expect, a significant degree of overlap in the evidence served for the purposes of the February 2017 and the January 2018 trials. In particular, it seems clear from the fact that the served discs bear the same references (CB1310051017 and CB1315211016) that the electronic evidence with which this appeal is concerned is precisely the same evidence already considered by Master Brown.

15. The first question is, then, why I would come to any different conclusion from that already reached by Master Brown. That is not least because (for reasons I will explain) I have on several occasions come to the same conclusion: that where the same data is served in PDF and Excel formats, the PPE count should be based on the PDF version.

16. The Appellants have given me two key reasons. The first is that, they say, the relevant evidence for the purposes of the January 2018 trial was served only in Excel format. The second is a point not taken before Master Brown in *R v Daugintis*. That point is that the PDF page count is misleading: or to put it another way, properly measured, the PPE count based upon the PDF format does in fact come to over 10,000 pages.

The Evidence

17. Discs CB1310051017 and CB1315211016 were served under cover of a Notice of Additional evidence on 15 January 2018. A covering letter from the Crown Prosecution Service read:

> "We write in advance of the hearing next week and in response to representations made concerning the service of the underlying raw data that supports the attribution exhibits and other analytical material served in evidence.
>
> Please find in duplicate a CD-Rom disc confirming all the raw telecommunications data (subscriber, call data logs etc). The "pdf" documents are served as evidence. The excel documents (which duplicates the data in a more useful format for the purposes of analysis etc) are all served as unused material (in that they assist the defence case in reviewing the available data). The excel documents will not form part of the PPE…"

18. On 19 January 2018 Mr Arnold sent an email to Mr Isaacs, prosecution counsel, explaining that he and his instructing solicitor were having difficulty in accessing the data on disc and adding:

> "If all the relevant material is on there, I will still not be in a position to agree any phone attributions or usages until all the relevant material is served as used evidence, including the excels. I note the declaration in a covering letter that this material is served unused. Unfortunately, in light of that extraordinary declaration I must stand firm and seek agreement as to the served material before any admissions can be made. I will draft any further relevant arguments that upload for consideration on Monday…"

19. On 25 January 2018 Mr Arnold sent another email to Mr Isaacs indicating that promises been made for a further NAE to cover served data, suggesting wording to the effect that any previous indication that PDFs had been served as used evidence should be disregarded:

> "There is then no need to agree any page number to be included in PPE. It is then a matter for us as with the LAA as to what we can claim…"

20. On 7 February 2018 a further NAE was served. It included, under the heading "For LAA determination":

> "*CB1310051017, CB1315211016*…The Excel documents are the served documents rather than the PDF documents in this case… any previous indication that the PDFs are used evidence should be disregarded."

21. The Appellants' primary submission is that, as the electronic evidence was not served in PDF format, the PPE count must be based upon Excel, the format upon which (by agreement) it was served as used material. The correspondence referred to above, and the agreement reached, is a fair reflection of the fact that, of necessity, defence solicitors and counsel were working from the Excel version of the data which provides the search and analysis tools needed to deal with such a large body of evidence. I am referred to *R v O'Rourke*, in which the Appellants submit that Master James, in very similar circumstances, took the view that the PPE count should be based upon Excel.

22. The Appellants' second argument is this. Much of the telephone data served in PDF format came in A1 size pages containing large bodies of data in tabular form. The most common paper size is A4, and an A1 page is the size of eight sheets of A4. A fair measure, suggest the Appellants, would be to treat each page of A1 as the equivalent of four standard pages of A3, which is the largest

format acceptable to a court. On that basis, even if based on PDF format the true PPE count, say the Appellants, comes to over 10,000.

23. I have reviewed some of the served PDF documents on screen. A “properties” menu is available in PDF which includes “page size”. That shows, for example, that what looks on screen like a standard A4 page of served attribution data (an analysis of telephone use, extracted from the underlying data by the Crown for presentation to the jury) is size 8.27” x 11.69”, which is indeed standard A4 paper size. The telephone data sheet pages, however, are shown as measuring 33.10” x 23.38”, which is paper size A1. Again, that is exactly how it appears on screen.

24. At the hearing, Mr Rimer produced a printed A4 version of one of those A! pages which he insisted incorporated readable entries, albeit (he admitted with some reluctance) possibly at ultimate risk to one’s eyesight. I agree with the second observation, but not the first. The detail is so small as to be, for all practical purposes, unreadable. In an A3 version produced (I believe) by the Appellants to illustrate the appearance of the data on the largest paper size that would be accepted by a court, the entries can be read, but are still very small, and would I think be quite difficult to work with for an extended period.

Conclusions

25. Mr Rimer criticises the approach taken by the Appellants (and the CPS) in the run-up to the January 2018 trial as an artificial response to the conclusions drawn by Master Brown in *R v Daugintis*. He argues that it is not possible to “un-serve” evidence. It is not for the CPS to determine whether the PPE count should be based upon the PDF or Excel versions of what is, in reality, served data. Whilst it is not in dispute that the “raw data” should be included within the PPE count, the proper approach, for the reasons given by Master Brown, is to eliminate duplication and to base the PPE count on the PDF version.

26. I accept that the final agreed position as to service was rather artificial, but in my view no more so than the stance originally taken by the CPS, which was clearly taken with a view to limiting the PPE count. The artificiality lies in treating the same data as “served” in one format and “unused” in another, but service is not, in my view, really the determinative issue in this case.

27. Since the key PPE judgments of *Lord Chancellor v Edward Hayes LLP and Another* [2017] 1 Costs LR 147 and *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB), PPE appeals have tended not to turn on arguments about whether evidence has been served, by but upon whether it is appropriate for a determining officer, exercising the discretion conferred by paragraph 1(5) of Schedule 1 and 2, to include a given body of the served evidence within the PPE count and, if so, how that body of evidence is to be counted.

28. On the question of whether the appropriate format upon which to base the PPE count is PDF or Excel, there have been two schools of thought, one embodied by the decision of Master James in *R v O’Rourke* and the other by, for example, the judgments of Master Brown in *R v Daugintis* and *R v Ladic* (SCCO 73/17,

28 February 2018), and of Master Rowley in *R v Simpson* (SCCO 148/17, 16 April 2018).

29. Like Masters Brown and Rowley, I have concluded in previous costs appeals that where the same data has been served in PDF and Excel formats, one should include within the PPE count only the data in PDF format. I refer here, for example, to *R v Muiyoro* (SCCO 70/18, 1 November 2018) *R v Simpson* (SCCO 44/18, 26 November 2018), and *R v Khadir* (SCCO 85/18, 10 January 2019.

30. This is the reasoning behind those decisions. I accept that a defence advocate or litigator, undertaking the necessary checking and cross-referencing of telephone data, is not expected to work from the data in PDF format. On the contrary, defence teams will normally work with telephone and billing data in Excel format. They have to do so, to search and manage the data in the way they are expected to do.

31. The question however is not whether PDF or Excel is the best format in which to work. The question is whether PDF or Excel gives the most realistic and representative page count. In that context, one must keep in mind that the calculation of fees by reference to a PPE count dates from a time when all evidence was served on paper and that the 2013 Regulations, like their predecessors, are designed to make similar provision for documents served electronically.

32. The PDF format mimics presentation on paper. Excel does not, and can offer different page counts depending upon the way in which the information is managed, used or presented. 50 pages of legible data on paper will, if reproduced in PDF format, remain 50 pages of legible data with much the same appearance. In Excel format, depending on how the same data is managed or presented, the page count could run into hundreds.

33. The Appellants have made it clear that they seek only a realistic page count, not an inflated one, but whilst working that out is not impossible in Excel, the format does not lend itself readily to the exercise. I have accepted that it should be done where, for example, key data was never provided in PDF format. That is the Appellants' position in this case, but that brings me back to the matter of artificiality.

34. Formal service seems to me to be rather beside the point where the Appellants have been supplied with a version of the relevant data in a format which reasonably approximates to its paper form. In those circumstances, it seems to me perfectly appropriate to look to the PDF format for the purposes of a realistic and fair PPE count.

35. I would suggest that the PPE count is not in any event to be determined by what I have heard referred to, rather aptly, as "format shopping". If, for example, using a particular format produces an artificially inflated page count it would in my view be an appropriate exercise of the discretion conferred upon a

determining officer by paragraph 1(5) of Schedules 1 and 2 to reduce the page count to something more realistic.

36. In summary I remain of the view, for the purposes of this decision, that the PDF format is the right format upon which to base the PPE count. Where I differ from Mr Rimer is in his counting an A1 page as a single page of PPE.

37. If one is to adopt (as I have) the principle of looking to a standard paper-style format upon which to base the electronic PPE count, then one has to bear in mind that A4 is the standard page size, at least in the UK. In my view, it follows that the page count should reflect the number of A4 pages in which the relevant data can be presented in a properly legible, manageable size. The Appellants' suggestion that one A1 page be counted as four A3 pages seems eminently reasonable to me, though the underlying logic is for me slightly different. The basis of my approach is that the data which fills each of the A1 PDF pages can be rendered realistically legible and workable if presented in A2 size, which is the equivalent of four A4 pages.

38. If taking that approach brings the PPE count to over 10,000 pages, then that is a fair and proper result. If that point had been taken before Master Brown, then *R v Daugintis* might well have had a different outcome.

39. At the hearing before me Mr Rimer did not actually agree that a PDF page count on the basis suggested by the Appellant would come to over 10,000. Post-hearing, Mr Arnold has produced and copied to Mr Rimer a helpful analysis which indicates that it does. Hopefully that can be agreed, but if not the matter of the exact page count may have to come back to me for determination.

40. I believe that I have not heard from the parties on the cost of this appeal, and I shall reserve the position in that respect until the final page count has been determined. It seems clear, however, that the final page count will be significantly higher than that conceded to date by the Lord Chancellor, so it is right to regard this appeal as successful. I will deal with separate submissions on the costs of the appeal if that cannot be agreed.

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SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2020-CRI-000004

16 July 2020

ON APPEAL FROM REDETERMINATION

REGINA v FRANCIS

CROWN COURT AT READING

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

CASE NO: T20187131

DATE OF REASONS: 16 OCTOBER 2019

DATE OF NOTICE OF APPEAL: 9 JANUARY 2020

APPLICANT: SOLICITORS LLOYDS PR

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

The appropriate additional payment, to which should be added the sum of £1,000 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Lloyds PR solicitors against the number of pages of prosecution evidence ("PPE") allowed by the determining officer when calculating the graduated fee payable under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Davarn Francis who had been extradited from the island of St Vincent to stand trial for the murder of Wa'ays Shaye. He was alleged to have carried out the attack on 31 August 2015 together with three others. They had been tried for offences of murder and manslaughter whilst Francis was out of the jurisdiction. Family members of Francis, including his father Wesley Barker, had also stood trial for perverting the course of justice in aiding Francis' escape following the attack.

3. The purpose of including a description of the earlier trials is that the state of play following the first trial was relevant to the submissions of Michael Rimer, who appeared on behalf of the Legal Aid Agency at the hearing of this appeal. The case against Barker has also been the subject of an appeal against the determining officer's determination. Mr Rimer relied upon the decision of Master Leonard in that case (R v Barker (221/19).

4. I do not propose to set out the details of the claim for fees and the written reasons of the determining officer in any detail. First, they are not particularly illuminating as they set out various communications between the solicitors and the determining officer but there is not a great deal of reasoning given as to the extent of the PPE allowed by the determining officer. Secondly, via the efforts of both Mr Rimer and Mr McCarthy, who appeared on behalf of the solicitors on this appeal, in producing written and oral submissions, they have both clarified and simplified the matters outstanding.

5. There is no issue regarding the fact that the disk was served and that, as such, all of the electronic evidence fell to be considered by the determining officer under paragraph 1(5) of schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013 to establish whether or not it was appropriate for that evidence to be treated as PPE taking into account the nature of the document and any other relevant circumstances. Subject to the matters which remain outstanding, it is agreed that the PPE in this case amounts to 5,848 pages which is made up of 1,914 paper pages and 3,934 pages of electronic evidence.

6. This appeal concerns part of the contents of a disk served by the prosecution. Within that disk was exhibit MK/1 which contained electronic information regarding Francis' telephone and the telephone of one of the other defendants from the first trial (Antwon Clarke).

7. As far as the Clarke telephone download is concerned, it was agreed that the information contained on the various formats was not identical. The issue between the parties was the relevance of the information that could be gleaned from the spreadsheet options. It was in relation to this evidence that both

advocates went into some of the facts in relation to the charge with which Francis was faced.

8. The difference in information related to cell site locations and cell site towers. Mr McCarthy said that the location information was based upon postcodes and as such could vary over a number of streets or even a borough. The location of the towers by comparison could be located to within a metre or two. Consequently, they were much more accurate in establishing where the user of a mobile phone was located. In answer to Mr Rimer's point that the tower locations can only be ascertained when the phone was being used, Mr McCarthy said that general Internet usage by the phone would trigger the recording of the tower information and not just when a phone call or text message was made or received. In response, Mr Rimer also did not accept that the use of postcodes was as vague in terms of location as Mr McCarthy suggested.

9. Mr McCarthy gave two examples of why the precise location of Francis was relevant in this case. The prime example was in respect of supporting Francis' case regarding the events leading up to the stabbing. Mr McCarthy told me that the prosecution alleged that Francis had attended upon his father on the way in order to arm himself with a knife. Francis' case was that his father was not at home at the time of the visit and so he carried on with the journey he was on but did not have any knife upon him.

10. Mr McCarthy also indicated that the solicitors considered there to be some suggestion in the prosecution case that there was going to be an allegation of association in the manner of a gang between the accused in the days before the attack to explain the motivation for the killing as being one of retribution. Consequently, the co-location (or absence of it) between Francis and the others prior to the attack formed an important part of the preparation of the case.

11. Mr McCarthy did not push that second example particularly hard and Mr Rimer concentrated his response on the prime example set out above. His main argument was that the cell site evidence was of rather less importance than the solicitors suggested. The same evidence had been used at the trial of the other three accused. They had all been found guilty and consequently there was no doubt that they were present at the site of the attack. Since Francis was present with the others, it could not really be argued that he was not also present at the time of the attack. Questions of where his telephone (and therefore himself) were at any particular point were of no more than peripheral relevance. This was confirmed, in Mr Rimer's submission, by the fact that Francis changed his defence to one of admitting that he was present at the attack but that he had had nothing to do with it. He had fled the jurisdiction simply because he considered that he was in the wrong place at the wrong time.

12. In respect of Clarke's telephone evidence, Mr Rimer indicated that he was baffled as to why it had even been served by the prosecution given the issues that were involved. This led him, when making submissions regarding the formatting of the PDF document, to suggest that it was less important than Francis' own telephone download

13. In Mr Rimer's submission, therefore, the electronic evidence was less important than it had been in the first trial stop. Consequently, the determining officer's allowance of the various items, as adjusted by Mr Rimer, was a reasonable exercise of discretion and the additional elements in the spreadsheet format which were not encompassed by the PDF versions were not sufficiently important to amount to PPE. Although he did not make any submission to this effect, the implication was that the consideration of this less important but nonetheless served evidence, might be claimed by way of special preparation.

14. Having heard the submissions, I have come to the conclusion that the evidence regarding the cell site towers as well as the cell site locations ought to be included within the PPE. Whether or not Francis' presence at the scene of the crime was admitted, the question of whether he went armed to that location seems to me to be a crucial aspect of defending the case of murder. Any evidence which condemned or exonerated Francis regarding his visit to his father's premises seems to me to be a key piece of evidence regarding the case as a whole and not simply the defendant's case. Even if there were no other reason for checking this evidence, and Mr McCarthy gave at least one other example which may have been relevant, it seems to me that such evidence should be treated as PPE.

15. In respect of Francis' own telephone, there are 44 pages of PPE based upon the PDF document. There is no dispute that the evidence also served on other formats contains the same information and as such is not additionally included in the page count. The only dispute relates to whether or not the page count should be increased to reflect the fact that the pages appear to have been created in an A1 format rather than A3 or A4. The dispute regarding the size of the pages is subject to a preliminary point raised by Mr Rimer about the appropriateness of this point being taken at all.

16. Regulation 29(11) of the 2013 Regulations says that, unless the costs judge otherwise directs, no further evidence may be received on the hearing of the appeal and no grounds of objection may be raised which were not raised before the determining officer. The question of the format of the PDF documents was not raised before the determining officer and Mr Rimer objected to this point being raised in the appeal. Mr McCarthy informed me that there had been discussion for at least the last week by email correspondence about the case of R v Zigaras (155/18) which was the authority on which he relied to make his point.

17. I do not have to decide exactly when the parties began to discuss this issue since it seems to me to be clear that I should allow this ground of objection to be raised. The case of Zigaras is dated 18 November 2019 and the date of the written reasons is 16 October 2019. Self-evidently an argument based upon Zigaras could not have been raised with the determining officer given this chronology. There is nothing in the regulations to suggest that further communication is required with the determining officer. Whether the new argument is allowed is a matter for the costs judge on appeal. In this case, the solicitors could not have raised the argument with the determining officer and

in those circumstances, it seems to me to be clear that I should allow it to be made on the appeal.

18. The only issue then was whether the Agency was in a position to deal with the argument. Even if it is accepted that Mr Rimer was unaware that the argument would be raised until Mr McCarthy's written submissions (which were rapidly produced but still only served shortly before the hearing), there is no doubt in my mind that he was well able to deal with it. The case of Zigaras was argued by Mr McCarthy and Mr Rimer and so the issues involved were well known to both of them. Mr Rimer did not seek an adjournment in order to have time to put forward submissions on the point and, in my view, his oral submissions clearly demonstrated that he was entirely au fait with the issues from the Agency's point of view.

19. This leads me on to the question of what was described as "upscaling" as a shorthand by the advocates. The issue, in my view, is a relatively simple one and was dealt with comprehensively by Master Leonard in the case of Zigaras. He set out the rationale for why costs judges as a whole usually allow the PDF version of documents to be used for the calculation of PPE rather than other formats. He then went on to consider the novel point that the PDF document had been constructed so that one page represented an A1 size page rather than an A3 or A4 in his judgment. He set out his conclusion as follows:

> "37. If one is to adopt (as I have) the principle of looking to a standard paper-style format on which to base the electronic PPE count, then one has to bear in mind that A4 is the standard page size, at least in the UK. In my view, it follows that the page count should reflect the number of A4 pages in which the relevant data can be presented in a properly legible, manageable size. The appellant's suggestion that one A1 page be counted as four A3 pages seems eminently reasonable to me, though the underlying logic is for me slightly different. The basis of my approach is that the data which fills each of the A1 PDF pages can be rendered realistically legible and workable if presented in A2 size, which is the equivalent of four A4 pages."

20. I respectfully agree with Master Leonard that in an appropriate case, the equivalent number of A4 pages should be calculated in order to determine the correct number of PPE. The question addressed by the advocates before me was, at least in part, whether this was an appropriate case to upscale the A1 pages to either A3 or A4 (in other words multiply the A1 pages by four or eight times).

21. Mr McCarthy's written submissions were clear that I ought to multiply the A1 pages but was ambiguous as to whether four or eight was the correct multiplier. The test, as explained in Zigaras was to ensure that the pages were realistically legible. In his oral submissions, it seemed to me that he was keen to leave open the broader option of making an allowance as Master Nagalingam did in R v Ahmed (182/19).

22. Mr Rimer informed me that the facts of the Zigaras case was very different from this one. It involved a drugs conspiracy and the case relied entirely on the call data set out on spreadsheets which had been served. Those spreadsheets, as I understood it, contained many more columns of information than are set out in this case. Consequently, the legibility of the information was much more affected than might occur here.

23. He also put forward the argument that since Clarke's evidence was only peripherally relevant, it would not be appropriate to upscale that evidence in any event.

24. It does not seem to me that Mr Rimer's second argument is attractive at all. The idea that the evidence only needs to become more legible if it is important is to bring yet a further "importance" test into the provisions concerning electronic PPE and to take matters further away from the mechanistic approach that was the original intention of it.

25. The question of legibility is raised by Master Leonard when describing the need to enlarge the information onto more pages in order to make it capable of being read. Mr Rimer's submissions sought to follow Master Leonard's comments on legibility when contrasting the number of columns involved in this case with those in Zigaras. It certainly seems as if Master Leonard took the trouble to convert the A1 page to an A2 size in order to state that it was realistically legible and workable if presented in that size.

26. Here, I have to say that I depart somewhat from Master Leonard's approach. Fundamentally, the method of considering the electronic PPE is to equate it to paper pages as if the electronic evidence had actually been produced on paper in the first place. This is the essence of the various comments made about moving into the digital age. There is nothing in respect of paper PPE which suggests that legibility is relevant. It would be possible for the paper evidence to be reduced from A4 size for example to A5 size in the manner that is sometimes seen in other spheres such as in transactional work where bound documents colloquially known as "Bibles" are produced for future reference in a space saving fashion. But that has never been done when lawyers exchange documents, for example witness statements or disclosed documents. The prosecution evidence has traditionally been provided on A4 paper save for the odd use of A3 for diagrams etc where necessary.

27. In my view, whatever size document has been created electronically, for the purposes of PPE, it ought to be treated as the equivalent number of A4 pages. Therefore, if the document is A1 size, each page represents eight A4 pages for the purposes of PPE. I do not think there is any need to consider whether the information can be viewed with a lesser amount of magnification. There is no reason for the calculation to be subject to some ophthalmic measurement.

28. The use of the PDF version for calculating PPE is essentially a theoretical approach since the evidence is usually looked at in another format. That other format is usually a spreadsheet version and it is not generally used to calculate PPE because it artificially inflates the number of pages where "print preview" is

used. In my view, producing PDFs in A1 size is equally inappropriate as a calculation method for PPE. It is simply artificially deflating the number of pages to be counted.

29. To date, where PDF documents have been provided in A4 size, they have been paid based on the page count. If the telephone providers, or indeed the prosecution, determine that they wish to produce PDFs in a different size, then there may be very good reasons for doing so in the same way that there are very good reasons for using spreadsheets when preparing the case. But I do not see that any such reasons can impinge upon the appropriate quantification of the PPE.

30. Therefore, I direct the evidence in exhibit MK/1 relating to both telephone downloads to be recalculated at eight times the PPE currently allowed. It is not clear to me if this will take the PPE to the 10,000 page maximum or not. Mr McCarthy's written submissions put forward as alternatives (a) quantification by multiplication of the PDF pages or (b) to allow a calculation based on the Excel pages. I have taken the former approach, but it seems to me that the solicitors ought not to be precluded from bringing a claim in respect of the Excel data not covered by a PDF version. It may therefore be, that when the determining officer comes to recalculate the appropriate graduated fee in this case, the PDF pages will reach the threshold. But if not, some allowance in respect of the evidence which is only in Excel may be sufficient to reach that threshold. If neither is the case, it seems to me that the determining officer needs to include an appropriate further figure for PPE in respect of the Excel pages taking into account this decision.

31. Finally, for the sake of completeness, I confirm that I have looked at the PDF document provided to me after the hearing notwithstanding that it has not actually proved necessary for me to do so in order to reach my conclusions.

TO: LLOYDS PR SOLICITORS
DX 57654 HARLESDEN

COPIES TO: HELEN GARTON
LEGAL AID AGENCY
DX 10035 NOTTINGHAM

Neutral Citation No. [2022] EWHC 3355 (SCCO)

Case No: T20197407

SCCO Reference: SC-2022-CRI-000067

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 8/12/2022

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Lawrence
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

MACKRELL MARSH & Co SOLICITORS

Appellant

-and-

THE LORD CHANCELLOR

Respondent

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

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. At the hearing on 2 December 2022 the Appellant was represented by Mr. Mackrell, solicitor for the Appellant, and the Legal Aid Agency ('the LAA') were represented by Mr. Orde, an employed barrister.

3. The Appellant acted under a Representation Order dated 15 October 2019.

4. The Defendant was charged on a 15-count indictment with various firearms offences (including in particular the possession of disguised Tasers) and drugs offences including possession with the intent to supply various classes and types of controlled drug. As I understand it an issue arose as to whether the Defendant intended to supply drugs. In the Determining Officer's written reasons it is said that the Defendant was found guilty following trial on 21 and 22 March 2022 (it appears that the Appellants were in the event entitled to a 'trial fee' there also appears to have an issue to whether a 'cracked fee' was payable - which suggests to me that the Defendant did at some late stage plead guilty – albeit, as I understand it nothing turns on this in this appeal).

5. As part of the investigation into this allegation two mobile telephones were seized. Their contents were downloaded into two 'handset' reports in PDF format.

6. The Determining Officer considered the reports had been served and allowed 3,529 pages of PPE consisting of 435 pages of paper evidence and the balance (3,094) being electronic evidence ('ePPE'). This included a substantial amount of communication data (call logs, contacts, social groups, SMS messages, MMS messages & chats). She allowed *"5% on a broad brush"* basis of the images in the Images section; this equates to 307 pages. The Appellant's sole ground of appeal relates to the Determining Officer's refusal to allow the Images Sections in full, or in a greater amount, as PPE. The Appellant's claim is for 6,164 pages in respect of these sections. The sums at stake are substantial: if entitled to the extra pages, the full amount would be £89,975.11 against a fee as it currently stands, of £37,523.38 (with the option of also claiming a Special Preparation fee).

7. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all —*
> *(a) witness statements.*
> *(b) documentary and pictorial exhibits.*

(c) records of interviews with the assisted person; and
(d) records of interviews with other Defendants,

which form part of the served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which —

(a) has been served by the prosecution in electronic form.
and
(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

8. As Holroyde J makes clear in *SVS*, material which is, as he put it, only disclosed as unused material cannot be PPE. However, it is clear from the judgment that 'service' for the purposes of the regulations may be informal. 'Serve' means served as part of the evidence and exhibits in the case and evidence may be served even though the prosecution does not specifically rely on every part of it.

9. It is clear however from the terms of Regulation 1(5) and the guidance set out above that it is not of itself enough for the material to count as PPE that it be 'served' (as it was in this case). When dealing with the issue as to whether served material should count as PPE, Holroyde J, said this:

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

If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".

10. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

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

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e., those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*
>
> "*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' <u>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</u>*." [my underlining]

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

> "*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.
>
> *Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g., it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement*.
>
> *Raw phone data where the case is a conspiracy, and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact*.

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

> *"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. <u>It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper.</u> So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count*." [my underlining]

14. In *R v Sereika (2018) SCCO Ref 168/1* which, as here, concerned the allowances to be made for images on telephone downloads, Senior Costs Judge Gordon- Saker said as follows:

> *"In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the other hand, it is unlikely that the vast majority of those photographs will have been relevant to that task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less.*
>
> *In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However, much of the evidence on the phone would not require consideration.*
>
> *It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in In re Eastwood [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs".*

15. Turning back to this case, it is clear that the Determining Officer directed herself in accordance with the decision in *Sereika*. Mr. Mackrell did not in the event take issue with that approach. It seems to me in any event that that approach is clearly correct on a proper interpretation of the regulations. The alternative is that a very large amount of time would be spent by those concerned with the administration of this scheme going through material such as this in great detail with the potential for detailed argument about possible relevance. It means however, inevitably- as the Senior Costs Judge pointed out, that there is the potential for some rough justice.

16. It is clear that the police relied heavily on the content of the downloads from the telephones to show that the Appellant's client was drug dealing. A significant amount of material taken from the telephone was exhibited to witness statements. To show that the phones were used by the Defendant, the Prosecution relied on an image of him asleep, which image is found in one of the exhibited photographs. It appears that the telephones were used to market the drugs by taking photographs of them and showing them to clients. The drugs were sent by post and photographs were taken of the bags and address labels, as appears from the exhibits.

17. The Appellant asserts in the grounds of appeal that the material was (at least on one telephone) "littered" with images exhibited and referred to by the Crown including images of drugs, envelopes, address labels, receipts for delivery, weapons such a Taser, cash, a picture of the Defendant himself (which was relevant to an issue of attribution) all being relevant to the case against the Defendant. However, the Appellant has already been compensated for the material insofar as at least some of it had been extracted and exhibited to statements which had already been allowed in the 'paper' PPE.

18. In any event, Mr. Mackrell took me to certain pages of the relevant sections which he identified as material. This included images of what appeared to be images of drugs (including cannabis and packets of diazepam), envelopes and labelling suggesting the posting of such drugs as well as quite a number of images of the Defendant (as I was told). I have no difficulty accepting that many, if not all, of these images were of relevance and that evidence of the type identified was on the phones and was central to the case. The difficulty was that the pages on which this material appeared, amounted to only about 1-2% of the material in these sections at most: on the LAA's calculation less than 1%, I think.

19. The Determining Officer held that the majority of the material appear to consist of pre-installed images, thumbnails, personal photos, and screenshots. She said that it was not clear how these would be considered relevant to the case, and they appear to have little or no evidential value. She considered that 5% of the total images from each of the phone downloads gave what she said was a fair reflection of the relevant material in the two Sections.

20. Mr. Mackrell asserted that the pages he took me to (which were from the whole of the sections of both reports, not just a selected part) were only a sample. I raised with him my concern that the LAA did not dispute that there was some relevant material; it was the extent of the material that was in dispute and my difficulty was in seeing how I could determine this issue on the basis of mere assertion in circumstances where it was open to him to demonstrate how much of the material required consideration (without necessarily taking me through to each page of it).

21. In my view Mr. Orde is right to say that there is a burden on the Appellant when seeking to assert that a higher assessment should be made, to establish that the material was relevant and needed to be considered closely. The Appellant was instructed in the criminal proceedings and will know what issues arose. The Appellant will know what evidence was relied upon by the prosecution and what evidence amongst the material served was relevant. The difficulty with assessing the pages of electronic material is that it tends to include a large amount of irrelevant material. That was the case here. The premise of the claim to include the material as PPE is that it is material that required some consideration as opposed to being material that only required a glance. In the absence of Mr. Mackrell taking me to any further relevant material I think I am entitled to assume that if there was a substantial amount of any further material which was relevant and had not been included in the allowance for 'paper' PPE then he would have been able to identify it (not least because one might assume that it was material specifically flagged up and noted as relevant when the solicitors considered it following service).

22. In any event having looked at the material and indeed sampled sections of it, I am not satisfied that I should increase the allowance made in respect of this material provided to me. The Determining Officer's allowance appears to come within the bounds of a reasonable and sensible approximation even accepting that that there are probably some other images which are or may be relevant and were not caught by those which Mr. Mackrell specifically took me to.

23. Even accepting that the bulk of the material was irrelevant I quite accept that the material needed to be considered and checked generally but I think a special preparation fee would be appropriate for this work and I will leave it to the parties to agree a timetable for an application for such a fee, along with the option of submitting a claim for special preparation for the remaining material served electronically.

COSTS JUDGE BROWN

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 154/17, 155/17 and 177/17

Dated: 8 January 2018

ON APPEAL FROM REDETERMINATION

REGINA v DAUGINTIS

LINCOLN CROWN COURT

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

CASE NO: T 20167519

LEGAL AID AGENCY CASE

DATE OF REASONS: 16 August 2017

DATE OF NOTICE OF APPEAL: 18 September 2017

APPLICANT: Counsel

REGINA v CVETKOVAS

LINCOLN CROWN COURT

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

CASE NO: T20167159

LEGAL AID AGENCY CASE

DATE OF REASONS: 24 August 2017

DATE OF NOTICE OF APPEAL: 20 September 2017

APPLICANT: Counsel

REGINA v LIUMAS

LINCOLN CROWN COURT

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

CASE NO: T20167159

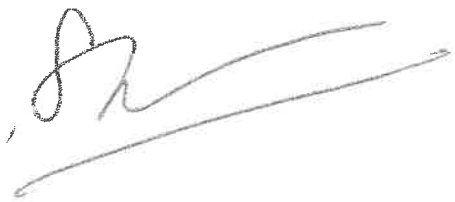
LEGAL AID AGENCY CASE

DATE OF REASONS: 16 November 2017

DATE OF NOTICE OF APPEAL: 28 November 2017

APPLICANT: Counsel

These appeals have been dismissed



COSTS JUDGE
SIMON BROWN

REASONS FOR DECISION

1. The issue arising in these appeals is whether the Determining Officer was correct in her decision as to the the extent to which certain served electronic evidence should count for the purposes of determining the Pages of Prosecution Evidence ('PPE') in an assessment of the fees due under the Graduated Fee Scheme. As is well known, and explained in more detailed in the decision of Holroyde J in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the Criminal Legal Aid (Remuneration) Regulations 2013, and the length of the trial. Since the same point arises in respect of all three appeals it is agreed that all the appeals should be heard together.

2. The Appellants represented three defendants in criminal proceedings before the Lincoln Crown Court. The Defendants were charged with a conspiracy to import and to supply Class A drugs. The Defendants pleaded guilty to the offence of importing the drugs, and were found guilty after a jury trial of conspiracy to supply.

3. Mr. McCarthy, counsel, appears on his own behalf in respect of one of the appeals and on both of the other Appellants. Mr. Rimer, an employed lawyer, appears on behalf of the Legal Aid Authority (the LAA).

4. As part of the police investigation, the police obtained raw telephone data from the Defendants' mobile telephone companies which showed the call data for a period covering the conspiracy period. The information obtained was provided to the defence in both Portable Document Format (PDF) and Excel format. There is no dispute that the telephone data was served as evidence in the case. The principal issue that arises in this appeal is whether the Determining Officer's decision was correct to assess the PPE only on the basis of the PDF versions of the data rather than the page count which would be indicated on application of the 'Print Preview' function of the spreadsheets in the Excel versions, or indeed by adding together the indicated page count in respect of the material provided in both formats.

5. As I understand it graduated fees have been allowed to the Appellants on the basis of PPE of 5574 pages, of which 2910 derived from the electronic material and 2664 were physical (paper) pages. In this appeal, a PPE allowance of over 10,000 is sought in respect of all three appeals.

6. I was also asked to make a further allowance for a special preparation fee under paragraphs 17 (1) (b) of Schedule 1 of the 2013 Regulations on the grounds that the page count, on the Appellants' cases, would exceed 10,000.

7. Paragraph 17 (1) (c) of Schedule 1 of the 2013 Regulations provides that where a documentary exhibit is served in electronic format but did not exist in

paper the appropriate officer, where satisfied that it is reasonable to do so, allow a fee for work done where the material has not been counted as part of the PPE. Mr. McCarthy however made it clear that no such fee would be claimed in these appeals if I were to accept that the Determining Officer was correct only to count the pages of PDF material as PPE.

8. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

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

9. Guidance as to these provisions has been given by Holroyde J in *SVS*. He said as follows:

> *"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.*
>
> *If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".*

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

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e. those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*
>
> "*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the defendant.*"

10. 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.*"

11. In *Lord Chancellor v Edward Hayes* LLP [2017] EWHC 138 (QB) 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 para 20:

> *"Given the importance of the evidence it is unsurprising that the defence refused to agree to admission of the extracted data until it was able to examine all the data on the download. This was the defence application to the trial judge which he granted. The request was not only reasonable, it enabled the Defendant's legal team to properly fulfil its duty to the Defendant. It enabled the Defendant's legal representatives to satisfy themselves of the veracity of the extracted data and to place the same in 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."*

10. This passage is cited in *SVS* by Holroyde J, who went on to say:

> "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 lawyer 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. In so far 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".

11. The issue arising in *SVS* and in *Edward Hayes* was whether electronic material in that case should be regarded as "served" for the purposes of the provisions not the issue that arises here. Nevertheless in his decision Holroyde J also cited part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

> *"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. 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 anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining]*

12. As is well known Excel is a spreadsheet which is designed to be read and used electronically. Pressing the 'Print Preview' function will divide up the spreadsheet across rows and columns which will not necessarily reflect the manner in which the information should be read. As I understand the indicative page count which would appear on using the Print Preview' function may also vary according to the settings for the file or page formattingand the use of this function may produce a different page counts depending on the version of Excel used by the viewer.

13. PDF, by contrast, is a file format used to present documents which are to be read in a manner independent of the application software, hardware, and operating systems. It is formatted in a way which permits the information to be read and then printed in page format so that the printed page will reflect the page as it appears on the screen.

14. It is common ground that the material served in this case, save for one exception, was identical in both formats. I understand from what I was told in the hearing (which reinforced my own understanding) that not infrequently electronic evidence is served by the prosecution in both formats. Mr. Rimer says that the PDF form is for printing but that the information is also provided in Excel format in order to assist the representatives as it can be more easily manipulated and analysed in this format: it is easier, for instance, to locate all calls received from one particular telephone by using the 'find' function.

15. I do not accept, as the Appellants contend, that the Determining Officer was required to count the material in both formats for the purposes of determining the PPE. In considering whether to allow material to count as PPE the Determining Officer has a discretion which is to be exercised *"taking into account the nature of the document and any other relevant circumstances".* In my judgement, the fact that the material in this was duplicated (save for the exception I deal with below) seems to me to be a relevant consideration. Further it seems to me clear that in this case the material plainly did not require separate consideration in both formats and to count the same material twice would give rise to a fee which would be disproportionate to the work reasonably required.

16. In *R v El Treki* (SCCO Ref 431/2000) Costs Judge Rogers held that where the same material is served in different formats only one version should be included in the page count (in that case a handwritten and typed version of the same statement). Moreover that payment should be made on the basis of one, but not both, electronic formats was conceded in the *SVS* case (paragraphs 32(vi) and 52) and in *R v O'Rourke* (ref 10/17). Mr McCarthy relies on the decision in *R v McCarthy* (ref 36/17) which he says is the opposite effect but it it is not clear to me that that the material in excel and pdf form in that case was necessarily identical or that it did not require separate consideration.

17. As to the exception referred to above, this concerned a file called 'Louth' where pdf page count was 77 pages and the indicative page count in respect of the Excel format was said by the Appellants to amount to 8829 (the LAA version of Excel appears to have indicated a page count of 4837 on application of the 'Print Preview' function). I was shown this file in the course of the appeal hearing and understand that there was a substantial amount of additional background technical material in the Excel version but not the PDF version; the spreadsheet was said by the Determining Officer to contain 256 columns of technical date which on application of the 'Print Preview' function were distributed amongst various different pages, many of the cells being blank. I do not however consider, applying the relevant guidance, that this additional background technical material required any consideration of the sort that would justify its inclusion as PPE. It would have been readily apparent that it was not evidence relied upon the prosecution and the Determining Officer was correct to determine that compensation for work done considering this material and work done in respect of other duplicated material was by way of special preparation fee. However, as indicated above, no claim was made by Mr. McCarthy for a special preparation fee in respect of this material.

18. As to whether the material should be considered PDF or Excel format for PPE purposes, the Appellants contend that is open to them to choose to determine which format is appropriate. However, as I have indicated above, the relevant provisions give the Determining Officer a discretion to determine which material is to be include for the purpose of assessing the PPE having regard to *"the nature of the document and any other relevant circumstances".* Where material is served in two electronic forms, one for ease of manipulation and analysis but the other more representative of the material if set out in printed page format, that seems to me to be a highly relevant consideration for determining the extent to which the material should count for PPE purposes.

19. The difficulties with applying the 'Print Preview' function in Excel in respect of the material in this case was readily apparent: it might divide up the columns or rows such that one column or row appears in one page and one in another; and the material would or may be distorted and incomprehensible if it were printed out. It also tended to produce a potentially significant number of empty pages. These matters were demonstrated to me by Mr. Rimer with reference to one particular file (the 'Louth' file).

20. In his written submissions Mr. Rimer gave further examples of these difficulties. In particular he said that the call data relating to Mr Daugintis' phone comprised 6 pages in PDF but that same information would generate 36 pages in Excel, using the 'Print Preview' function. A printed version of this material from Excel would, he says, be unusable or unintelligible because only two columns of information are shown on each page and on pages 31-36 on the Print Preview for the Excel version are two narrow columns of figures. In respect of a file relating to another of Mr Daugintis' telephones the PDF document is 120 pages; the Excel version generated applying 'Print Preview' is 265 pages of which pages 213 -261 consist of three or so columns which, he says, state "N/A 1200 ON NET" in, as he puts it, various repetitions; the final pages are simply two columns of numbers. It was not necessary for these two examples to be demonstrated in the course of the appeal hearing because the substance of what Mr. Rimer said was not in dispute.

21. These examples demonstrate however how the page count indicated by a Print Preview may (subject to the specify settings on the file in question) indicate a very different page count from that indicated by the PDF format and, further, how the former approach might not properly reflect the actual time required to consider the data; indeed the information divided up in page form may, as the Determining Officer found, bear little of nor resemblance to the information as it appeared in spreadsheet form on the screen. Mr. McCarthy appeared to recognise at least part of the problem with using the pages indicated by a Print Preview of an Excel spreadsheet because he accepted that the blank pages should not count for PPE purposes (whilst maintaining that any page indicated by a Print Preview which contained any material at all would count).

22. The Determining Officer followed the guidance in *R v Jalibaghodelezhi*, which, as I understand it, was cited with approval by Holroyde J in *SVS*. In my judgment she was correct to do so.

23. It seems to me that in this case the Determining Officer was also correct to take the page count on the PDF format as a more accurate approximation of pages of paper evidence and an accurate and reliable indication of the degree of consideration which would have been required if the relevant material had been served on paper.

24. In contrast, as the Determining Officer found, the page count indicated by a Print Preview of an Excel spreadsheet appears to produce an artificial figure not properly reflective of the underlying material or the work reasonably required to consider it. Moreover the method of ascertaining the page count from the Print Preview seems to me unreliable as it is dependent on the settings on the file in question and the version of Excel on which it is viewed. Further, it seems to me, as a matter of generality, that the effect of considering the page count in the way contended for by the Appellants would also, as the Determining Officer has found, be to include material which has little or no bearing on the case, including personal or technical data which could in any event be the basis of a claim for special preparation fee.

25. There is no dispute that (save for the background technical material in the 'Louth' file that I have referred to) the material in question required careful consideration. This was a case of conspiracy where the prosecution relied upon the communications which are evidenced by the electronic material. But that does not of itself address the question which I am required to consider. Nor was it apparent to me that there was any basis for concluding that the decision of the Determining Officer would disrupt the economic balance which is said to underlie the scheme; as the Officer found in this case the effect of taking the Appellants' approach would be to produce a fee disproportionate to the work reasonably require.

26. The Determining Officer found that the proper method of remunerating the advocates for the time spent considering and manipulating the Excel spreadsheet was by a way of a special preparation fee, a fee which is based on actual time reasonably spent. But, as I have indicated above, the Appellants did not seek to make any such claim.

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The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.

SENIOR COURTS COSTS OFFICE

SCCO Ref: 170/19

15 November 2019

ON APPEAL FROM REDETERMINATION

REGINA v KING

SOUTHWARK CROWN COURT

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

CASE NO: T20187097

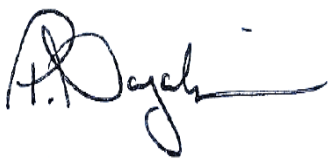
DATE OF REASONS: 18 JUNE 2019

DATE OF NOTICE OF APPEAL: 21 JUNE 2019

APPLICANT: NELSON GUEST & PARTNERS

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.



MASTER NAGALINGAM
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Nelson Guest & Partners solicitors of Sidcup against the sums allowed by the Determining Officer under the Litigators Graduated Fee Scheme. In particular, the solicitors challenge the number of Pages of Prosecution Evidence ("PPE") allowed by the Determining Officer when calculating the graduated fee.

2. The solicitors were instructed on behalf of Peter King who, together with two others, was charged with conspiracy to commit fraud by false representation and enter into a money laundering arrangement. The relevant events took place between 24 March 2015 and 10 February 2017 when the defendants defrauded a number of elderly and vulnerable homeowners by stating that their properties required remedial building works when in fact they did not and, having carried out the unnecessary work, grossly overcharged the victims for the work done. One of the co-defendants (a Mr Eastwood) pleaded guilty to the offence of fraud by false representation before trial. Mr King accepted working on a number of the properties in question and receiving payments into his bank account. However, he denied any knowledge of a conspiracy and claimed to have been unaware of any conspiracy until after his arrest. From the mobile telephones recovered from all three defendants the prosecution sought to demonstrate contact between the defendants during the relevant period and evidence of fraud by false representation.

3. The solicitors subsequently claimed a graduated fee based on 10,000 PPE including the mobile telephone data that had been served electronically. On determination, the Determining Officer allowed 2,261 pages including 510 pages of electronic data. By the time of the hearing before me, that figure had increased to 3,159 pages allowed by the Legal Aid Agency, of which 1,408 are pages of electronic data.

4. The solicitors contend that a figure of 10,000 pages as the maximum PPE allowable is justified. The solicitors rely upon digital exhibits CPN-01, GPC-01 and SAR-1, being the handsets and sim card reports of each of the three defendants. Amongst the reasons for considering this information, according to the solicitors, was to establish ownership, consider contacts within the conspiracy, consider potential relevant calendar entries, consider the call logs, consider text/image files of building works, message logs, phonebooks and the timeline.

5. In their original claim, the solicitors relied upon roughly 14,000 pages of electronic evidence to support the claim for 10,000 pages to count towards the graduated fee. The Notice of Additional Evidence sets out the digital exhibits as above and states that "for the purposes of the remuneration of

defence counsel the notional page count for evidence held and served electronically would be 14,703." That is effectively the totality of the handset reports for all three defendants and excludes the sim card extraction report of each phone.

6. At the hearing of this appeal, a Scott Schedule running to 26 landscape-oriented pages was produced of information contained in the digital exhibits. Within the schedule the Respondent sets out various categories of documents found within the electronic evidence together with the comments of the Respondent and, in relation to exhibit CPN-01, the comments of the solicitors. The schedule indicates how many pages the Respondent submits are applicable to each category, whether any are agreed and how many pages are therefore in dispute.

7. The relevance or importance of the electronic PPE has to be considered by the Determining Officer in order to establish whether it is truly PPE or is simply evidence which can be remunerated through the special preparation provisions for reading the evidence served by the prosecution. This is so, even where, as here, it has been served along with the paper evidence.

8. The regulations, and the High Court decisions which have interpreted those regulations, do not suggest that the Determining Officer is required to contemplate on literally a page by page basis the electronic PPE contained within a disc in order to establish whether each page is important enough to count as PPE in itself. The regulations (at paragraph 1(5) to Schedule 2) refer to the "nature of the document" and whether to include "it" in the PPE. A document may run to many pages but there is nothing to say that each page needs to be considered individually for all of the pages to be allowed as PPE.

9. In his oral submissions Mr Rimer for the Respondent referred to the phone handset reports as not a single exhibit but instead sub-divided into clear sections. In considering the USB stick of data provided in support of this appeal I could see no sub-division of the data at all and certainly no "clear sub-division". Instead, the data on each phone appears as a string of pages in PDF format. Whilst, as demonstrated by the Respondent's Scott Schedule, it was ultimately possible to create a sub-division list of different sections of electronic data I cannot see how this task could have been undertaken without close inspection of those pages. I accept that in certain instances there are long runs of pages containing the same category of data but to simply attempt to scroll to the first and last page of a deemed category would require a presumption that none of the intervening pages formed part of another category of documents or were relevant to the case.

10. I have also had regard for the "OPENING NOTE – DRAFT 3" of the Prosecution. That in part relies on a presumption of a conspiracy based on the guilty plea of Mr Eastwood and therefore invites a focus on the question of whether or not the Defendant was a party to the conspiracy. The alleged conspiracy spanned nearly 2 years and involved a number of victims across the South East of England. The Prosecution acknowledged that the Defendant's likely starting point was acceptance that he visited the properties in question, carried out building works, accepted payments into his bank account and on occasions drove victims to their own banks so they could make withdrawals of cash for payment.

11. In relation to the Defendant's phone the Respondent agrees that it was reasonable for the solicitor to look at 1,124 pages out of a total of 12,683. Within that allowance, for example, is an allowance of 50 pages of "aggregated contacts" which is in fact the totality of contact numbers held on the phone. However, conversely and by way of further example, no allowance has been made for the 18 pages of calendar entries on the Defendant's phone because, upon consideration by the Respondent, it contains only generic UK holiday data. However, in order to arrive at that conclusion the pages of calendar entries had to be considered first.

12. In determining what was a reasonable course of action, the use of hindsight must be guarded against. Against a backdrop of electronic evidence which was served as used and phone handset reports which were not sub-divided into categories of data I consider it reasonable to ask how the solicitors could reasonably be expected to know which documents could reasonably be studied for the purposes of PPE and which only merited reading time for a claim for special preparation? By the time a litigator has considered each document, time has been spent reasonably on those documents which ultimately may appear to be less relevant with the benefit of hindsight than others. I also take into account that, on the evidence presented, the electronic data was not served in a readily searchable format. Further, I do not consider any adequate argument is made out with regards to duplication within the single PDF document (for each phone handset report).

13. I have considered the digital exhibits in question. There is no dispute that each of the three defendants' phones were served as used evidence. When the USB stick is opened, each digital phone exhibit is sub-divided into folders - one folder for the handset report and one folder for the sim card report. There is no further sub-division meaning that the phone handset report for the Defendant's phone, for example, is presented as a single 12,683 page document. The page count is accurate, being in PDF format. The Notice of Additional Evidence sets out a page count of 14,073 which is based on the totality of the three phone handset reports and to the exclusion of the sim card reports. Given the length of the conspiracy, the reliance on establishing

contact with both co-conspirators and victims, the fact of image data showing properties and/or building works, the basis of the prosecution case, and the manner in which the served used electronic evidence was provided being thousands of pages in PDF absent explanation or sub-division, I consider remuneration on the basis of PPE up to the 10,000 page cap to be appropriate.

14. Accordingly, this appeal succeeds.

TO:	NELSON GUEST & PARTNERS SOLICITORS DX 31723 SIDCUP 1	COPIES TO:	HELEN GARTON LEGAL AID AGENCY DX 10035 NOTTINGHAM

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 168/13

Dated: 12th December 2018

ON APPEAL FROM REDETERMINATION

REGINA v LAURYNAS SEREIKA

CROWN COURT AT BURNLEY

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

CASE NO: T2017 7086

LEGAL AID AGENCY CASE

DATE OF REASONS: 29th August 2018

DATE OF NOTICE OF APPEAL: 10th September 2018

APPLICANT: SOLICITORS Harris Solicitors
DX 11721 Bradford

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

ANDREW GORDON-SAKER
SENIOR COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Harris Solicitors of Bradford against the calculation of a litigator graduated fee.

2. The solicitors were instructed to represent Laurynas Sereika who was charged with one count of conspiracy to produce a controlled drug. The prosecution case was that Sereika and two others were involved in the cultivation of cannabis plants at a number of houses in Nelson, Lancashire.

3. The evidence against Sereika derived from surveillance which showed that he had visited two of the houses in the company of one of the co-defendants. When he was arrested he had the key to one of those houses and his mobile phone was seized. The phone contained six messages and a number of photographs which the prosecution stated related to the growing of cannabis. The prosecution opening indicated the importance that they attributed to the evidence taken from the phone:

> *The prosecution say from that material that the owner of that phone is clearly involved in the production of cannabis and that is Mr Sereika.*

4. Mr Sereika's defence was that he was not involved in the cultivation of cannabis. The co-defendant with whom he visited the houses was an employee in his bodyshop business and he had simply been giving him a lift. The phone was used by other people and the photographs and messages were not his.

5. The solicitors submitted their claim for a graduated fee on the basis that there were in excess of 10,000 pages of prosecution evidence. The Legal Aid Agency assessed it on the basis that there were 644 pages of prosecution evidence, made up of 61 pages of statements, 191 pages of exhibits and 392 pages of evidence on disc.

6. There is no issue as to the numbers of pages of statements and paper exhibits. The issue is as to the treatment of the pages of evidence served on disc, that evidence being the data downloaded from the mobile phone. According to the written reasons, the 392 pages allowed by the Determining Officer comprised 305 pages of activity analytics, call logs, locations, MMS and SMS messages and the time line, together with a further 87 pages of exhibits. The Determining Officer explained that he had not allowed the images served on disc as they did not appear to be relevant to the case. Many of the images would not have required detailed consideration.

7. The representation order was granted on 1st November 2017 and so the solicitors' claim is governed by the Criminal Legal Aid (Remuneration) Regulations 2013.

8. Paragraph 1 of Schedule 2 provides:

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of prosecution evidence includes all—
(a) witness statements;
(b) documentary and pictorial exhibits;
(c) records of interviews with the assisted person; and
(d) records of interviews with other defendants,
which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which—
(a) has been served by the prosecution in electronic form; and
(b) has never existed in paper form,
is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances.

9. The issue on the appeal is whether the Determining Officer should have decided that it was appropriate to include the number of pages served electronically contended for by the solicitors.

10. The solicitors rely on a breakdown of those pages (tab 6 in the bundle) which Mr McCarthy, who represented them at the hearing of the appeal, told me had been provided to the Agency with the request for redetermination. That breakdown conceded that not everything on the discs was claimed. On disc 1 they claimed 30 pages of documents such as flight tickets and car receipt payments which went to the defence that others used the phone. 5,762 pages of images were claimed on the same basis. These included photographs of driving licences and personal pictures of other people. 515 pages of files and applications were claimed on the basis that this could identify the other users of the phone. On disc 2, 14,846 pages of images and 465 pages of data and applications were claimed on the same basis. Although the breakdown sought 37,845 pages of reports on disc 3 in excel format, at the hearing of the appeal Mr McCarthy conceded that they were not now claimed.

11. On behalf of the solicitors, Mr McCarthy relied on paragraph 15 of Appendix D to the Agency's Crown Court Fee Guidance (v1.9) which gives as examples of documentary or pictorial exhibits that will ordinarily be counted as PPE prosecution analysis carried out on phone data, 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 and raw phone data if it is served without a schedule having been created by the prosecution, but the

evidence nevertheless remains important to the prosecution case and is relevant to the defendant's case e.g. it can be shown that a careful analysis had to be carried out on the data in order to dispute the extent of the defendant's involvement.

12. Mr McCarthy submitted that the phone evidence was central to the case against Sereika, for it associated him with the cultivation of cannabis. It was therefore crucial to the defence to show that the phone had been used by others and that the messages and photographs relating to cannabis were not necessarily his. It was as a result of that analysis that the prosecution accepted that Sereika's role was limited, the charge of conspiracy was dropped and he pleaded to a lesser charge on the basis of his visits to the properties on one day.

13. Finally the solicitors produced a bundle of 120 photographs taken from the phone. These, they stressed, were simply examples of relevant photographs. It would be unreasonable, they said, to require them to identify every relevant photograph. The photographs show damaged cars, driving licences and identity cards of people other than Sereika, images of people other than Sereika, documents such as receipts, passports and so on. They also include the photographs relied on by the prosecution showing the apparatus and chemicals used in growing cannabis.

14. On behalf of the Lord Chancellor, Mr Rimer submitted that the Determining Officer had correctly allowed those documents served electronically which were central to the case and disallowed those which were not. It would not have been necessary to review thousands of images to try to identify some which cast doubt on whether Sereika had been the sole user of the phone. It would have been very easy quickly to discount many of the images such as icons, logos, pre-installed graphics for games and advertisements and images of public figures.

15. There is no issue that the pages served electronically fall within the discretion allowed to the Determining Officer by sub-paragraph 1(5). They may be included in the page count only if the appropriate officer decides that it would be appropriate to include them taking into account the nature of the documents and any other relevant circumstances.

16. In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the other hand it is unlikely that the vast majority of those photographs will have been relevant to that task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less.

17. In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central

to his defence. The solicitors were required to consider the phone evidence carefully. However much of the evidence on the phone would not require consideration.

18. It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in *In re Eastwood* [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs.

19. The solicitors have produced 120 examples of images that may have been of relevance. The impression I have gained is that the vast majority of the images would not have been of relevance and would not have required any consideration. Doing the best that I can it seems to me that it would be appropriate to allow no more than 1,000 pages of images. That is approximately 5 per cent of the total. I would also allow the 30 pages of documents and 515 pages of files on disc 1 and the 465 pages of text on disc 2. That is a total of 2,010 pages of evidence served electronically, as opposed to 392 pages allowed. I believe that results in an additional 1,618 pages and the graduated fee should be recalculated accordingly.

TO: Mr Scott Smith
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SENIOR COURTS
COSTS OFFICE

SCCO Ref: 164/19

Dated: 4th November 2019

ON APPEAL FROM REDETERMINATION

REGINA v FIGUEREDU

CROWN COURT AT WOOD GREEN

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

CASE NO: T20180183

LEGAL AID AGENCY CASE

DATE OF REASONS: 21st May 2019

DATE OF NOTICE OF APPEAL: 12th June 2019

APPLICANT: Hodge Jones & Allen Solicitors

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £ 2500.00 (no VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Hodge Jones & Allen ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of its Litigator Graduated Fees Scheme ('LGFS') claim.

2. The Appellants submitted a claim for 12082 PPE, capped at the 10,000 page maximum allowed in the regulations. The Respondent allowed initially 3224 PPE. On appeal, both sides have varied their positions slightly, so that the Respondent now concedes 3297 PPE, while the Appellants' claim is now approximately 11,200 pages, but still subject to the 10,000 page cap. Accordingly, 6703 pages remain in dispute and comprise the issue in this appeal.

Background

3. The Appellants represented Mr Felipe Figueiredo ('the Defendant') who was charged at Wood Green Crown Court on an indictment alleging two counts of causing grievous bodily harm with intent and inflicting grievous bodily harm.

4. The alleged assaults occurred in January 2018 when the Defendant attended a multiple occupancy building managed by his employer. The prosecution claimed that he went with a view to collect rent from the complainant and, when the money was not forthcoming, assaulted him by knocking him to the ground and kicking or stamping on him. The Defendant claimed that he was a genuine maintenance worker who attended the premises on the instruction his employer to carry out various works at the property. He denied that any assault had taken place.

5. The police seized an Apple iPhone 6 mobile telephone from the Defendant. The contents were downloaded by DC Buckley and exhibited in a statement dated 1st May 2015 as RAB/1. Another officer , TDC Tucker, subsequently extracted four messages from the phone which appeared to relate to the

collection of rent in December 2017 from four other individuals. The officer also relied on four images from the phone, comprising two photographs of rent cards which were similar to the one in the complainant's possession, a screenshot of a saved voicemail from the complainant to the Defendant and two photographs of the Defendant at the gym showing "his strong muscular physique". The statements of both officers and the exhibited electronic download were uploaded by the prosecution for the Digital Case File.

The Regulations

6. The Representation Order is dated 29th March 2018 and so applicable regulation is The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations').

7. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> *"1. Interpretation*
>
> *...*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

8. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

> *"(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 dispense 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 pre-condition 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 could 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 served 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 would 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 Office (or, on appeal, the Costs Judge) will have to determine it in the light of 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) will 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) will 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 the public funds are not expended inappropriately.

(x) If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.

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

The Respondent's Submissions

9. The Respondent's case is set out in Written Reasons dated 21st May 2019 and in Written Submissions (with an accompanying Schedule) drafted by Mr Reimer, a Senior Lawyer at the Respondent, dated 3rd September 2019. Mr Reimer also attended and made oral submissions at the hearing on 27th September 2019.

10. The Respondent accepts that the electronic datum from the Defendant's phone exhibited as RAB/1 was served in compliance with para. 1(2) of Schedule 2 to the 2013 Regulations. The issue, therefore, is the exercise of the discretion at para. 1(5).

11. Mr Reimer submits that the Appellants' first argument – namely that all the electronic datum should be included in the PPE automatically insofar as it was served evidence – is incorrect. Further, or alternatively, he submits that the Determining Officer exercised correctly the discretion at para. 1(5). It is

accepted that all communications datum – i.e. the call data, call logs, contacts, e-mails and messages – should be included within the PPE. On appeal, the Respondent also concedes that the calendar section should be included. The Determining Officer correctly excluded the 4580 pages of images as the vast majority comprised "the usual social and personal images that one would expect to find on a modern smartphone", namely selfies, photos of friends/family, internet jokes, memes, icons and logos. He also argued that "locations" and "history" were also excluded properly as having no relevance to the substantive prosecution.

The Appellants' submissions

12. The Appellants' case is set out in the Notice of Appeal lodged on 12th June 2019, in a Skeleton Argument dated 2nd October 2018 and in a further Appellant's Skeleton Argument drafted by Mr Bedenham, counsel on 15th September 2019. Mr Bedenham also attended and made oral submissions at the hearing on 27th September 2019.

13. The Appellants' first submission is that all the electronic datum should be included in the PPE as it comprised served evidence uploaded to the Digital Case File. It argues that prior to 1st April 2012, this material would have been printed by the prosecution and served in paper form and that, pursuant to the published guidance of the Lord Chancellor, such material should now be included automatically in the PPE. In this regard, the Appellants rely additionally on a witness statement of Mr Kiran Mehta dated 18th October 2018 and on a Note of a Ruling given by HHJ Perrin at the conclusion of the trial. This material, in summary, confirmed the view of HHJ Perrin, namely that if something had been served as an exhibit, "the defence were perfectly entitled to proceed upon the basis that" it should be included in the PPE.

14. Further, or alternatively, the Appellants argue that the Determining Officer exercised incorrectly the discretion at para. 1(50) of Schedule 2 to the 2013 Regulations. In its replies to the schedule drafted by Mr Reimer, the Appellants argue that a further 7949 pages of electronic datum should be added to the PPE, which would take the total above the 10,000 page cap. The Appellants

concede, inter alia, that network information, installed applications, system log, security accounts, audio and video files, along with other matter data, are irrelevant and excluded properly from the PPE. They argue nonetheless for inclusion of pages from the Events Log (265), Locations (11), Web Data (752), pictures (4480) and unrecognised files (2441). The Appellants point out that a key issue in the trial was whether the Defendant was employed as a rent collector/ . enforcer (as the prosecution alleged) or whether he was a maintenance contractor (as the Defendant maintained). In support of its case, the prosecution relied on photographs downloaded from the phone to demonstrate that he was a rent collector with a capacity for violence. The images used were small in number but varied in content, comprising one saved voicemail from the complainant, a number of photographs of rent cards which were similar to one in the complainant's possession, and several photographs of the Defendant exercising at the gym. Given the way in which the images were organised on the electronic download (in an essentially random fashion), it was necessary for the defence to look through all the images to construct a context for the prosecution's pejorative interpretation, not least because, apparently, many of the photographs depicted the Defendant undertaking legitimate work as a maintenance contractor.

My analysis and conclusions

15. It is clear – indeed it is common ground between the parties – that the electronic datum downloaded from the Defendant's mobile phone was "served" in accordance with para. 1(2) of Schedule 2 to the 2013 Regulations.

16. I reject the Appellants' contention that, as such, the electronic datum should be included automatically in the PPE. The argument that prior to 1st April 2012 such material would have been printed and served was rejected (in my view correctly) by Costs Judge Simons in R v Napper [2014] 5 Costs LR 947. The argument, moreover, is not consistent with the wording of para. 1 of Schedule 2 and specifically para. 1(5) which, as Mr Justice Holroyde stated (at para. 50(ix) of Lord Chancellor v. SVS Solicitors (ibid)), constitutes "an important and valuable control mechanism which ensures that public funds are not expended inappropriately". It is both necessary and appropriate, therefore, for the

Determining Officer to consider whether to include or exclude each category of material in the electronic datum..

17. I agree with the Determining Officer that most of the categories he omitted were excluded properly from the PPE. However, the Determining Officer was, in my conclusion, incorrect to exclude the images. The prosecution had extracted and relied specifically on four varied photographs which were allegedly of direct probative relevance to the main disputed fact in the case, namely whether the Defendant was a rent collector/enforcer or a genuine maintenance operative. As such, the images comprised a central role in the prosecution evidence and, given both this importance and the manner in which the images were arranged from the download, it was reasonable for all the pages of images to be included in the PPE. The submissions advanced by the parties entertained a further, tiny dispute, namely whether the images count was 4479 or 4480 pages. The most consistent estimate supports 4479, which I add to the 3297 pages conceded by the Respondent, making a total PPE of 7776.

18. Finally, for the sake of completeness, I note some historical dispute concerning the count for the paper statements and exhibits; the Appellants claimed 139 (54 + 85) while the Respondent's count was 123 (48 + 75), making a disputed difference of 16 pages. Mr Bedenham was understandably unable to assist with this dispute on submissions at the oral hearing, so I prefer the account of the Respondent on this small point.

19. The appeal is allowed to the extent that I direct that the PPE count should be 7776.

Costs

20. The Appellants have filed a Statement of Costs (M260) claiming a total of £4790 (no VAT), which includes the court fee of £100. The solicitor's hourly rate is unreasonably high and the appeal has been only partly successful. Accordingly I award costs on the appeal of £2500 (no VAT) plus the court fee of £100.

TO:

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SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000100

Dated: 3 December 2020

ON APPEAL FROM REDETERMINATION

REGINA v CARTER

IN THE DERBY CROWN COURT

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

CASE NO: T20190293

LEGAL AID AGENCY CASE

DATE OF REASONS: 29 April 2020

DATE OF NOTICE OF APPEAL: 1 May 2020

APPELLANT: Adam Law Solicitors

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

The appropriate additional payment, to which should be added the sum of £1,000 for costs and the £100 paid on appeal, should accordingly be made to the Appellant.

MASTER NAGALINGAM
COSTS JUDGE

REASONS FOR DECISION

Background

1. The Defendant was indicted on a charge of converting criminal property contrary to section 327(1)(c) of the Proceeds of Crime Act 2002, namely that between 1 January 2015 and 31 December 2017 she, along with one other, converted bank credit amounting to no less than £100,000, which she knew or suspected constituted or represented others' benefit from criminal conduct.

2. The Defendant pleaded guilty but her basis of plea was not accepted by the Crown and so a Newton Hearing was listed, the basis of which was to determine the extent of the Defendant's benefit from her criminal conduct.

3. The Claimants' plea was on the basis that her benefit from her criminal conduct did not exceed £3,855.36, which was not accepted by the Crown. At the Newton Hearing it was determined that that Defendant would be sentenced on the basis that her personal benefit from her criminal conduct did not exceed £3,855.36.

4. The Defendant had been charged along with her former partner (and father to her youngest child). The Defendant pleaded that she had been a victim of coercive control by her former partner, which the court took into account. The Defendant received a suspended sentence rather than being remanded into immediate custody.

5. The Appellant submitted a claim for consideration of 9,267 electronic pages of prosecution evidence (PPE) served on a disc (exhibit NTB/1). The disc included 6,495 pages of images. On initial assessment, the Determining Officer awarded 2,283 PPE which included an allowance of 348 pages of images, calculated by allowing 5% of the claimed pages of images, and 846 pages of messages / chats.

6. Following the lodging of this appeal, the Respondent increased the award for messages / chats to 1,232 pages and concedes that the appeal has been successful to that extent. However, the allowance for images has not been altered and as a result this appeal has required a hearing.

7. It is common ground the single remaining issue between the parties is the reasonableness of awarding 348 pages (5%) of the claimed pages of images.

The Parties' Submissions

8. The Appellant relies on their taxation note dated 5 December 2019, grounds of appeal dated 17 April 2020, submissions of instructed counsel dated 22 November 2020 and the oral submissions of Mr McCarthy made at the hearing.

9. The Respondent relies on their written reasons dated 29 April 2020, written submissions dated 19 November 2020 and the oral submissions of Mr Orde made at the hearing.

Relevant Legislation

10. The applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), and in particular paragraph 1 of Schedule 2 to the 2013 Regulations which provides (where relevant) as follows:

> "1. Interpretation
> …
> (2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of prosecution evidence includes all –
> (a) witness statements;
> (b) documentary and pictorial exhibits;
> (c) records of interviews with the assisted person; and
> (d) records of interviews with other defendants,
> which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.
>
> (5) A documentary or pictorial exhibit which –
> (a) has been served by the prosecution in electronic form; and
> (b) has never existed in paper form,
> is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Analysis

11. Whilst I have been taken to a number of case law decisions, a common feature of the submissions heard was an acceptance that each case must be taken on its own facts.

12. It is common ground that this appeal now centres on the images on the Defendant's mobile phone. It is common ground that those images fall under the category of a documentary or pictorial exhibit that has never existed in paper form.

13. It is also common ground that whilst the crown may not have relied on the images in exhibit NTB/1, those images did form part of the served evidence and the Respondent has concluded that it would be appropriate to include 5% of the pages of images as PPE.

14. Exhibit NTB/1 is a download of the Defendant's mobile phone device. However, the Appellant has not sought to include as PPE the entire contents of the device. Instead, a claim is made for images and messages only, on the basis that they were of central importance in the Newton Hearing.

15. Exhibit NTB/1 does not present as a typical download report. The message data appears on a standalone two-tab Excel spreadsheet, and the image data (that is the images and information about those images) appears in a 6,945 page PDF document.

16. In relation to the pages of images claimed, the Respondent in their written reasons stated:

> "In this case whilst an element of coercion is mentioned that's not the actual substantive basis of the offence. Rather the defendant is suggesting she was in part manipulated/controlled by the co-defendant. It would be for her to provide instructions of this and point to any evidence that supports her claim. I don't see that images could prove one way or another whether she was under undue influence when allowing her accounts to be used for money laundering and so would not be part of the prosecution case.
>
> However, in an attempt to resolve this issue an allowance was made for 5% of the images, with the option of submitting a claim under the special circumstances provisions."

17. Thus whilst one would ordinarily assume that where an allowance has been made for any PPE of images taken from a mobile phone device, there must have been some acceptance that the images and/or image data must have been of central importance to the case, the reality is that the Respondent has drawn no such conclusion. Notwithstanding that apparent stance, 5% of the pages bearing images has been allowed "in an attempt to resolve this issue".

18. The Appellant brings the balance of this appeal on two limbs. The Appellant's primary submission invites an approach consistent with the decisions in *R v Mooney* (SCCO Ref: 99/18), *R v Mehmetaj* (SCCO Ref: 188/18), *R v Figueredu* (SCCO Ref: 164/19) and *R v King* (SCCO Ref 170/19). Thus, the Appellant submits that if it was relevant to consider some of the images / image data then all of the pages of image and image data ought to be allowed as PPE.

19. If I am against the Appellant on their first limb, then I am invited to observe the approach adopted in *R v Sereika* (SCCO Ref: 168/13) in adopting a "broad approach". The Appellant has provided case law examples which demonstrate a broad spectrum of awards ranging from 5% to 74% of pages of images / image data adopting 'broad approach'.

Decision

20. I accept the Appellant's submission that the telephone material was important to the broad outcome for the Defendant. I have considered the note of trial counsel and note the importance of the Defendant making out her case for coercive control in seeking to diminish her culpability and role in the accepted offence of money laundering.

21. The fact that despite pleading guilty to involvement in what later proved to be money laundering in the amount of £132,000, the Defendant received a suspended sentence and the telephone material played an important part in that regard.

22. Whilst the Respondent has already accepted that the pages of messaging evidence was of central importance, I do not agree it is then artificial of the Respondent to then seek to exclude images or to only allow 5% as per *R v Sereika*. Images are a category of document and the Determining Officer was entitled to take into account the nature of that category of document and the relevant circumstances.

23. Whilst I understand why the Appellant has referenced my decision in *R v King*, the circumstances in terms of the presentation of evidence are not analogous. *R v King* concerned a form of downloaded mobile phone evidence which the Legal Aid Agency acknowledged was unusual in that there was no, or no obvious means, of separating the categories of documents such that entire sections could be dismissed for their relevance.

24. In the index case that is not a feature. The images had already been sectioned off into a separate document at the point at which they were served, and were served as unused evidence. In contrast, the mobile phone evidence in *R v King* was served in its entirety (as a single, indivisible by section, PDF) as used evidence.

25. The importance of the message data in establishing a pattern of coercive control is obvious. The importance of the image data is not immediately obvious. The Appellant's case is they wished to show that despite anything the co-defendant might say as to being in a healthy relationship with the Defendant, or any argument the Crown may have that she was not a victim of coercive control, the absence of a single image on her mobile phone of the co-defendant was demonstrative of a lack of any form of meaningful relationship with him. The intention was to show that there was nothing in the image data which contradicted the basis of her mitigation plea.

26. In the circumstances, and given that the evidence considered does not go to the central offence of money laundering but instead in mitigation of sentencing, I do not consider it appropriate to allow the entirety of the pages of images and image data.

27. However, I am entitled to take a broad approach. The broad approach in the cases cited demonstrate allowances of between 5% and 74%. The Respondent has concluded that an allowance of 5% is reasonable whereas the Appellant contends for a greater allowance.

28. Whilst I accept that the absence of photographs of the co-defendant on the Defendant's phone is capable of demonstrating a lack of any meaningful relationship, and thereby not contradicting the messaging evidence, the image data alone does not in my view carry sufficient importance to justify the allowance of any significant percentage of the same.

29. The manner in which the image and image data was served is unhelpful in terms of presentation. The Appellant has been frank in their intention to focus on the images only and not the surrounding metadata. However, having been served in a PDF document which permitted no means of manipulation to isolate the images only, the Appellant was left with a large, unwieldly document which could only be viewed by being scrolled through.

30. Having had regard for the nature of the document containing the images and its relevance in the context of the underlying offence, the absence of reliance by the prosecution, reliance in relation to sentencing only, and relating the image evidence with the messaging evidence, I am satisfied that the adoption of a broad approach is appropriate.

31. In applying a broad approach, I consider an allowance of 10% which I approximate to 650 pages of images for the purposes of PPE remuneration to be appropriate. I observe that the written reasons reference "the option of submitting a claim under the special preparations provisions" (for the balance).

32. The appeal is therefore allowed.

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When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 354/13

Dated: 2nd April 2014

ON APPEAL FROM REDETERMINATION

REGINA v JALIBAGHODELEHZI

CROWN COURT AT MANCHESTER

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T2012 7632

LEGAL AID AGENCY CASE

DATE OF REASONS: 27th November 2013

DATE OF NOTICE OF APPEAL: 13th December 2013

APPLICANT: SOLICITORS CLIFFORD JOHNSTON & CO
DX 23167 Didsbury
Ref: NH/JALI0002-1

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

The appropriate additional payment, to which should be added the sum of £2,078.70 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

ANDREW GORDON-SAKER
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Clifford Johnston & Co, a firm of solicitors in Manchester, against the calculation of a litigator graduated fee by the Legal Aid Agency.

2. The solicitors were instructed to represent Rozhan Jalibaghodelehzi who was charged with conspiring to evade the prohibition on the importation of opium. The solicitors submitted their claim for a graduated fee on the basis that there were 123 pages of statements and 1,135 pages of exhibits served by the prosecution. The Agency calculated the fee on the basis that there were 474 pages of prosecution evidence "as it was not clear if CDs amounted to PPE or should have been claimed as special preparation".

3. In their letter accompanying the request for redetermination the solicitors explained that they had printed out all of the pages served on disc as that was necessary for the proper preparation of the case. The material largely consisted of downloads from mobile phones and was crucial evidence in the case, as was clear from the prosecution case summary.

4. By its written reasons dated 27th November 2013 the Legal Aid Agency accepted that the evidence on the discs had been served by the prosecution under a notice of additional evidence dated 21st February 2013. However the Agency had been in contact with the Crown Prosecution Service who had confirmed that the evidence had only ever existed in electronic format. It was explained that:

> Therefore, the electronic evidence cannot be remunerated as PPE. In accordance with Appendix D listed above, documentary and pictorial exhibits that have only ever existed in digital format must be claimed as Special Preparation.

5. The reference to Appendix D is to the Crown Court Fee Guidance published by the Agency on 26th April 2013 which suggests that "documentary and pictorial exhibits that have only ever existed in digital format" should be remunerated as "special preparation unless the appropriate [officer] decides that it would be appropriate to include it in the pages of prosecution evidence, ie because it would previously have been served in paper format".

6. The representation order in this case was granted on 22nd September 2012 and accordingly the definition of pages of prosecution evidence provided by paragraph 1 of schedule 1 to the Criminal Defence Service (Funding) Order 2007 is that substituted by SI 2012/750 (which applies in respect of proceedings in which a representation order was granted on or after 1st April 2012):

> (2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court shall be determined in accordance with paragraphs (2A) to (2C).

(2A) The number of pages of prosecution evidence includes all—
(a) witness statements;
(b) documentary and pictorial exhibits;
(c) records of interviews with the assisted person; and
(d) records of interviews with other defendants,
which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(2B) Subject to paragraph (2C), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(2C) A documentary or pictorial exhibit which—
(a) has been served by the prosecution in electronic form; and
(b) has never existed in paper form,
is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances.

7. Ms Hall, on behalf of the solicitors, fairly submits that the Agency has not followed its own guidance. It is clear from the wording of both the Funding Order and the guidance that there is a discretion to include in the pages of prosecution evidence exhibits which have never existed in paper form. The guidance suggests that the discretion should be exercised if the evidence would previously have been served in paper format.

8. The material on the discs consisted largely of the telephone evidence used by the prosecution to connect the defendant to the imported drugs. This was the evidence exhibited by the forensic investigator instructed by the prosecution.

9. Ms Hall submitted that this was crucial evidence which would previously have been served on paper. The prosecution printed some of it for the jury and the defence printed all of it so that the client's instructions could be obtained.

10. Clearly this evidence was served by the prosecution. The discs were exhibited to the statements of Mr Jennings. In my view this is the sort of evidence which would previously have been served in paper format. Following the Agency's own guidance it should have been included in the page count.

11. While that is enough to decide this appeal in the solicitors' favour, I would add this, as appeals on this issue are now numerous. 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 anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count.

12. Accordingly the appeal is allowed and the graduated fee recalculated.

TO: Litigator Fee Team
Legal Aid Agency
DX 10035 Nottingham 1

COPIES TO: CLIFFORD JOHNSTON & CO
DX 23167 Didsbury
Ref: NH/JALI0002-1

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 58/13

Dated: 28 February 2014

ON APPEAL FROM REDETERMINATION

REGINA v JOHNSON

NEWCASTLE CROWN COURT

APPEAL PURSUANT ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007 (AS AMENDED)

CASE NO: T2010 7028

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 21 JANUARY 2013

DATE OF NOTICE OF APPEAL: 12 FEBRUARY 2013

APPLICANT:	SOLICITORS	Abbey Solicitors DX 28612 Withington

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

The appropriate additional payment, to which should be added the costs (to be assessed) of the appeal and the £100 paid on appeal, should accordingly be made to the Applicant.

C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION

1. For the reasons given in the annexed General Observations the appeal against the decision of the Legal Aid Agency to recoup fees in this case is allowed. It follows that the Appellant has received the correct fees due for its work in this case, so no sum falls to be repaid, save that the Legal Aid Agency must pay the Appellant the £100 court fee on the appeal, together with costs to be assessed if not agreed.

TO: Wanda Hall
Legal Aid Agency
Nottingham Office
DX 10035
Nottingham 1

COPIES TO: Abbey Solicitors
DX 28612
Withington

The Senior Courts Costs Office, Royal Courts of Justice, Thomas More Building, London, WC2A 2LL.
DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

REGINA v NETTLETON
JOHNSON
GRAHAM
LEE

APPEAL TO A COSTS JUDGE

Advocates: Mr Edwards for Graham
Mr Rode for Nettleton and Lee
Mr Wells for Johnson

GENERAL OBSERVATIONS

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1. Of several issues in dispute in these four appeals, one matter common to all Appellants is whether there was only one trial in the Crown Court at Newcastle (as the Legal Services Commission ("LSC") contends) (now called the Legal Aid Agency) ("LAA") or two trials (as Mr Edwards for the Defendant Graham submits) or three trials (the position contended for by Mr Rode for the Defendants Nettleton and

Lee and by Mr Wells on behalf of the Defendant Johnson) in this multi-hander. For that reason it is appropriate to deal with the question of "trial" by way of General Observations. Where the points under appeal are not common to the Appellants, they will be dealt with in individual written reasons. For convenience, I shall refer to the LAA as the LSC throughout.

2. Upon my decision on the issue of "trial" will turn the crux of these appeals, namely whether the LSC was correct to exercise its powers under paragraph 26 of the Criminal Defence Service (Funding) Order 2007 (as amended) ("the Funding Order") to recoup payments it had previously paid to the solicitors who had acted for Messrs. Nettleton, Johnson and Lee for their work on behalf of those Defendants under the Litigator Graduated Fee Scheme ("the Scheme") which was implemented via the Funding Order.

3. That is the position so far as the Solicitors for the Defendants Nettleton, Lee and Johnson are concerned. Mr Graham's solicitors situation is different for reasons which I shall explain (see paragraph 8 post).

4. Paragraph 26 of the Funding Order provides as follows:

> *"Recovery of Over Payments*
>
> (1) This Article applies where a representative is entitled to be paid a certain sum ("the amount due") by virtue of the provisions of Schedules 1, 2 or 4 and, for whatever reason, he is paid an amount greater than that sum.

(2) Where this Article applies, the appropriate officer may –

(a) require immediate payment of the amount in excess of the amount due ("the excess amount") and the representative must repay the excess amount to the appropriate officer; or

(b) deduct the excess amount from any other sum which is or becomes payable to the representative by virtue of the provisions of Schedules 1, 2 or 4.

(3) The appropriate officer may proceed under paragraph (2)(b) without first proceeding under paragraph (2)(a)."

5. ABR Solicitors (formerly Clarion Advocates) acted for the Defendant Lee. Against the firm, the LSC seeks to recoup £49,306.10 under Regulation 26.

6. JGT Solicitors (now called Steele Ford & Newton) acted for the Defendant Nettleton. Against the firm, the LSC seeks to recoup £49,306.10 under Regulation 26.

7. Abbey Solicitors acted for the Defendant Johnson. Against the firm, the LSC seeks to recoup £24,653.05 under Regulation 26.

8. The fourth firm involved is Appleby Hope and Matthews, who acted for the Defendant Graham. At the conclusion of the proceedings, the firm submitted four

LF1 claim forms, representing claims for a five day trial, a six day re-trial, a three day re-trial and a 39 day re-trial. Those claims were paid, but on the basis that there was only one trial, so that the question of recoupment, so far as that firm is concerned, does not arise. However, if the outcome of the appeal is that the LSC was wrong to determine the claim as a trial, *per se*, an additional amount will be due to Appleby Hope and Matthews under the Scheme. It follows, as I have said, that the issue common to all Appellants in this multi-hander is whether there was (i) one trial or (ii) one trial with one re-trial or (iii) one trial and two or even three re-trials.

BACKGROUND

9. The background is uncontroversial but needs to be set out in order to understand why the LAA served its recoupment notices.

- 1 November 2010: the trial of all Defendants listed before Her Honour Judge Bolton at the Crown Court at Newcastle on an indictment alleging conspiracy to supply class A drugs. No jury sworn but Judge stated that this is to be the first day of trial.

- 2 November 2010: jury sworn.

- 3 November 2010: trial day.

- 4 November 2010: jury discharged.

- 5 November 2010: trial day

- 8 November 2010: matter listed for trial.

- 9 November 2010: new jury sworn.

- 10, 11, 12 and 15 November 2010: trial days.

- 16 November 2010: jury discharged. Arrest of Her Honour Judge Bolton (subsequently the Judge was convicted of an offence under the Dangerous Dogs Act and retired from the Circuit Bench with effect from 1 January 2012).

- 7 March 2011: matter listed before His Honour Judge Whitburn QC. No jury sworn.

- 9 March 2011: jury sworn and discharged.

- 10 March 2011: jury brought into court, asked questions but not sworn.

- 14 March to 23 May 2011: trial days (excluding 18 March 2011, 15 April 2011 and 17 May 2011).

THE DETERMINATIONS

(a) Mr Lee

10. On 9 January 2011, Clarion Advocates lodged claim form LF1 seeking fees for a five day trial before Her Honour Judge Bolton, followed by a re-trial. Both claims were determined by the LSC. On 10 June 2011, the firm lodged a further LF1 for a second re-trial lasting 39 days. That claim was also assessed. In the result, Clarion Advocates claimed and were paid, respectively, £24,653.05 for a class B re-trial lasting seven days, a fee of £24,653.05 for a class B re-trial lasting 39 days, plus £98,612.18 for a class B trial lasting seven days.

11. On 14 September 2012, the senior case worker at the LSC Nottingham Office wrote to Clarion Advocates in the following terms:

> "A review of the data held on CCLF and information provided to us by the Crown Court at Newcastle and fees paid to other litigators in this matter shows that the correct claim should have been for only one trial class B 54 days.
>
> Amount paid including VAT x 3 claims = £147,918.28.
>
> Amount allowable (including VAT) £98,614.18.
>
> Over payment (including VAT) £49,306.10.
>
> Recovery of over payments.

We believe that you have received £49,306.10 in excess of what should have been paid for this case and therefore propose to recoup this amount in accordance with paragraphs 26(1) and 26(2)(a) of the … [Funding Order]."

12. On 3 October 2012, Clarion Advocates submitted Form LF2 to the LSC objecting to the notification of the intention to recoup. Annex A said this:

"We made three claims, two of which were submitted in January 2011 and the third was submitted in June 2011. The claims were made in good faith in accordance with LSC Guidance (we refer to paragraph 3.15 of the LSC Guidance and to Schedule 2, Part B, paragraph N of the Criminal Defence Service (Funding Order) 2011 as amended). These claims were then assessed by senior case workers at the LSC and paid. The LSC initially disallowed some of the disbursements on one of the claims but at no point was any issue raised in relation to the litigator fees.

The amount that the LSC is seeking to recoup £49,306.10 is a significant sum … All of our fees in this case were paid between March and September 2011. To seek recoupment of such a large sum now would take away profitability from this practice …"

13. On 4 February 2013, the LSC provided reasons for its decision to recoup as follows:

"Thank you for re-submitting your claim for a determination.

Points in Issue

The matter to be determined is whether the litigator is entitled to claim additional trial fees.

Legislation and Guidance

I enclose a copy of the Cost Judge decision in *Regina v Cato*. I refer you to Section 6 and 7.

The relevant legislation is the … [Funding Order] …

Facts of the Case

You submitted and have been paid for 1 x trial and 2 x re-trials for the above named client.

Redetermination

The LSC makes the following submissions.

A copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision.

You are entitled to written reasons from us explaining our assessment of your claim. We intend this letter to be our full written reasons under Article 29(8) of the Funding Order ... You are entitled to appeal this matter to a Costs Judge. Should you wish to appeal the decision you may do so within 21 days of receipt of this letter by giving notice in writing to the Senior Costs Judge."

14. Notice of appeal was duly given and the appeal was referred to me.

(b) Mr Craig Nettleton

15. JGT acted for Mr Nettleton. In its LF1, the firm claimed a class B six day trial relating to the period between 1 November and 4 November 2010, totalling £96,557.76. For the period between 8 to 16 November 2010, the firm lodged a second LF1 claiming a class B six day re-trial in the sum of £24,693.04. Following the conclusion of the proceedings before His Honour Judge Whitburn QC, a third LF1 was submitted for a class B 40 day retrial in the sum of £24,653.04.

16. According to the Notice of Appeal, all these claims were checked, approved and paid by the LSC.

17. On 3 October 2011, the firm received a letter from the LSC in the following terms:

"As you will be aware, the [LSC] took responsibility for the administration of payments made to providers under the Crown Court Litigator Graduated Fee Scheme ("LGFS") for representation orders granted or after 14 January 2008.

A review of payments made under LGFS is currently underway to provide assurance that we operate sufficient financial control and that all claims paid fall within the rules of the Scheme.

As a result, during routine internal review we have found one case dealt with by your firm where we believe there has been a potential mis-claim and corresponding overpayment.

You represented Craig Nettleton in this case ... in the Crown Court at Newcastle. You have claimed (and been paid) fees of £96,557.76 (class B six day trial, before trial transfer (...) £24,653.04 (class B six day re-trial ...) and £24,653.04 (class B, forty day re-trial ...) a total of £145,863.84.

A review of the court record in respect of one of the co-defendants shows that after the discharge of the first jury on 4 November 2010, the following remarks/order by the Judge "... arrangements being able to be made for Monday. We can call in sufficient jurors to resume the trial" and "although jury discharged, the trial still continues as a single trial from today. The Judge declares that Monday was the first day of trial." It is, almost certain that this was only one trial followed by one re-trial and should have been billed as such.

This means there has been a potential overpayment of £24,653.04 ...

Recovery of overpayments

We believe that you have received £24,653.04 in excess of what you should have been paid for this case and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) …"

18. On 18 December 2011, Steele Ford and Newton submitted Form LF2 challenging the recoupment but, according to the Notice of Appeal, did not receive any response.

19. In August 2012, the firm then received the following letter dated 17 August 2012 from a senior case worker at the LSC as follows:

"During the review of claims that have been made, and paid, under the Litigator Graduated Fee Scheme, we have found a case dealt with by your firm where we believe there has been a potential overpayment.

You represented one defendant, Craig Nettleton, in this case … in the Crown Court at Newcastle. You have claimed (and been paid) a fee of £24,653.05 (class B, re-trial 40 days), a fee of £24,653.05 (class B, re-trial six days) plus a fee of £96,557.76 (class B before trial transfer six days).

A review of data held on CCLF and information provided to us by the Crown Court at Newcastle and fees paid to other litigators on this matter, shows that the correct claim should have been for one trial class B, 52 days …

Amount paid (including VAT) x 3 claims = £145,863.85.

Allowable amount (including VAT) £96,557.76.

Overpayment (including VAT) £49,306.10.

Recovery of overpayments.

We believe that you have received £49,306.10 in excess of what should have been paid for this claim and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) …"

20. JGT requested re-determination. In reasons given by letter dated 22 January 2013, the LSC repeated *seriatim* the wording used in the letter to ABR following redetermination and then continued as follows:

"Litigator/Advocate Submissions

In your LF2, you say

you claimed there was only one trial and two subsequence (*sic*) re-trials.

Redetermination

The LSC makes the following submissions: a copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision."

21. It is against this decision that the Appellant now appeals.

(c) Mr David Johnson

22. On 17 December 2010, Abbey Solicitors submitted its LF1 to the LSC which sought one trial fee for the firm's work before Her Honour Judge Bolton. That claim was determined and paid. Subsequently on 18 August 2011, Abbey Solicitors submitted a second bill claiming 25% uplift for a litigator's fee for a re-trial in respect of the proceedings before His Honour Judge Whitburn. That claim was also accepted by the LSC and paid in full.

23. On 19 September 2012, the firm received a letter from the LSC in terms similar to those written to the Solicitors for Messrs Lee and Nettleton. The salient points said this:

"You represented one defendant, David Johnson, in this case … in the Crown Court at Newcastle. You have claimed (and been paid) a fee of £24,653.05 (class B, re-trial 51 days), a fee of plus a fee of (sic) £96,557.76 (class B trial six days) … a review of the data … shows that the correct claim should have been for only one trial, class B 48 days.

The amount paid (including VAT) x 2 claims = £121,210.81.

Allowable amount (including VAT) £96,557.76.

Overpayment (including VAT) £24,653.05.

We believe that you have received £49,306.10 in excess of what should have been paid in this case and therefore propose to recoup this amount in accordance with paragraph 26(1) and 26(2)(a) of the … [Funding Order]."

24. According to Mr Wells' skeleton argument (the supporting material was not deployed in support of the appeal) the LSC have accepted that the figure of £49,306.10 was an error and that the amount which the LSC proposes to recoup is £24,653.05 (class B re-trial 51 days). It is from that decision that the Solicitors now appeal.

(d) Mr Ian Graham

25. Appleby Hope and Matthews represented Mr Graham. According to the Notice of Appeal, the firm:

"claimed four bills for the four trials that took place on the following dates:

Bill 1: trial 1 November 2010 – 5 November 2010

Bill 2: re-trial 9 November 2010 – 16 November 2010

Bill 3: re-trial to 7 March 2011 – 9 March 2011

Re-trial 3: 14 March 2011 – 23 May 2011.

26. The Notice of Appeal continues :

"The LSC rejected our four bills arguing that this was one trial, albeit with significant gaps.

They have paid the following:

hardship payment	£42,445.97
LF1 paid us only one 59 day trial	£56,166.21
Total litigator fee paid	£98,612.18
Plus special preparation payment	£4,892.40
	£103,504.58"

27. Dissatisfied with the determination, Appleby Hope and Matthews sought redetermination. This did not lead to a change of heart by the LSC. Written reasons dated 21 August 2012 said this:

"Redetermination

The LSC makes the following submissions. A copy of the court log was obtained and this confirmed one continuous trial. *Regina v Cato* enclosed justifies this decision.

You are entitled to written reasons from us explaining our assessment of your claim. We intend this letter to be our full written reasons under Article 29(8) of the Funding Order ..."

28. It is from that decision that the Solicitors now appeal.

FURTHER FACTORS

29. The following further points need to be made.

30. First, Counsel for Mr Nettleton, Mr Gerard Doran submitted a claim under the Advocates' Graduated Fee Scheme (see Part 1 of Schedule 1 of the Funding Order) for a trial and re-trial in respect of the hearings which took place between respectively 1 November and 4 November 2010 and 9 November to 16 November 2010 before Her Honour Judge Bolton. That claim was refused on the basis that, according to information provided by the Court, the Judge had ordered that the period 1 November to 16 November 2010 be considered "as a single trial despite the discharge of only one jury and the swearing of a second one".

31. Mr Doran's appeal against that determination failed before Master Gordon-Saker. In written reasons dated 14 November 2012, the Master said this:

> "I am afraid that I cannot conclude that this was a trial and retrial. The timescales are identical to those in *Seivwright*, save that in that case there was a mention hearing on the Friday. I concluded in that case that there would not be a new trial if it was part of the same procedural and temporal matrix as the first trial and that, on the facts of that case, there had been only one process.
>
> ...
>
> 14. I am not persuaded that "an order [was] made for a new trial". Secondly because it seems to me that the trial which started on 8th November was part of the same process that started on 1st November."

For those reasons the appeal failed.

32. Second, it will be observed that the LSC dealt with these claims inconsistently. Those in respect of the Defendants Johnson, Nettleton and Lee were initially all determined on the basis that there was a trial and two re-trials. In respect of Graham, however, the LSC's position has been that there was one trial. It follows if that be right, that Appleby Hope and Matthews will have received the correct amount due under the Scheme, but that the litigators for the other Defendants will have been overpaid, so that the sums sought to be recouped by the LSC must be returned.

THE LAW

33. In order to decide whether the LSC was correct in its decision to recoup fees in these cases I need to set out the law (such as it is), there having been no appeal yet on this point to a Judge of the High Court on the question of trial, re-trial and recoupment.

34. Paragraph 2 of Schedule 1 to the Funding Order provides as follows:

> "(3) Sub paragraphs (4) and (4A) apply where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where—
>
> (i) the defendant is an assisted person at both trials; or
>
> (ii) the defendant is an assisted person at the new trial only; or
>
> (iii) the new trial is a cracked trial or guilty plea.
>
> (4) Subject to sub-paragraph (4A) in respect of a new trial, or if he so elects, in respect of the first trial, the trial advocate will receive a graduated fee calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee will be reduced by—

(d) 25 percent where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial."

35. The Litigator Graduated Fee Scheme Guidance published by the LSC provides practical guidance to litigators about the how Scheme is intended to work, for example by directing litigators to the correct forms to use when submitting claims. It is updated regularly, but is not a rule of law.

36. At one time, before later amendment, paragraph 3.15 said this:

> "If a trial is aborted and another jury is sworn in either on the same day or the following working day, then the case is considered to be one trial. If there is a gap of more than one working day then it is normally considered to be a re-trial ..."

37. I did not agree with that guidance when I wrote reasons in *R v Cato* (SCCO Ref: 155/12). I preferred submissions that had been made on behalf of the Lord Chancellor in *R v Bunga* (84/10) as follows:

> "We submit that in the common situation where a jury is discharged for reasons such as a juror knowing someone involved in the case, or some other issue arising, that means the whole jury is discharged, but the trial resumes with a fresh jury, it is wholly artificial to say that this has occurred "following a trial" or that "an order has been made for a re-trial". Rather, we submit that this situation has arisen during the course of the trial and that no order is needed for a re-trial, because the empanelment of a fresh jury is a logical

consequence of the discharge of the original panel during the course of the trial. This can be distinguished from the situation where the trial has run its course and the jury have failed to reach verdicts, when it is by no means inevitable that there will be a re-trial, as the prosecution usually wish to consider their position in the light of the evidence in the original trial ..."

38. Having considered these submissions, I then said this:-

"To my mind, these passages explain succinctly why the appeal must be allowed in this case. It is common ground that the original trial did not "run its course" leading to the discharge of the jury and an order for a re-trial. No order was needed for a re-trial because a fresh jury could be empanelled simply as a logical consequence of the discharge of the original panel during the June trial. Had that empanelment taken place within a day or two of 17 June 2010, I doubt that the LSC would have taken the stance that it has done upon receipt of the LF1. The problem that has arisen is the lengthy gap between 17 June 2010 and 27 September 2010. The LSC contends that the hiatus means that the hearing on 27 September 2010 must have been a re-trial. I disagree. There may have been many reasons why the second jury was not empanelled immediately – availability, or lack of it, of witnesses comes immediately to mind, or perhaps a dearth of available jurors in the middle of the week. Added to that is the fact that the Guidance contains the word "normally" which I have emphasised. In so far as it is necessary for me to do so, I would hold that this is a situation which is not "normal" and that it does not follow that because there has been a long gap, the September hearing must have been a re-trial. In the result, the appeal must be allowed. I agree with the submissions of the Appellant and with those of the Lord Chancellor albeit cited not in this appeal, but in *R v Bunga*"

39. It follows, in my judgment, that the fact that a trial commences but is not concluded on consecutive court days because, for example, the jury is discharged, does not mean that it cannot be "a trial". On the contrary, even if there is a long gap between the end of the first stage and the resumption (as was the case in *R v Cato*) that can still constitute a trial, if it is a continuous process. I respectfully agree, in this context, with Master Gordon-Saker's reasons in *Nettleton* that there would not be a new trial if, on resumption, matters were part of the same procedural and temporal matrix as the first trial so that there was only one process.

THE PARTIES SUBMISSIONS

(a) For Mr Graham

40. Mr Edwards accepts, following Master Gordon-Saker's decision in *R v Nettleton* that the proceedings before Her Honour Judge Bolton constituted one trial and not a trial and a re-trial as previously argued. However, so far as the proceedings before His Honour Judge Whitburn were concerned, Mr Edwards contends that this was a re-trial. Whilst he accepts that for there to be a re-trial, the original trial must have run its course and come to an end, for example, where the jury cannot agree on a verdict and the Judge makes an order for a re-trial, in the present case there *had* to be an order for a re-trial because the original Judge was unable to complete the case owing to her arrest. For that reason the temporal and procedural matrix was broken. Here, there had been a five month hiatus between the removal of the first Judge and the case beginning again before His Honour Judge Whitburn, and in the interim, the Crown had served a further 2718 pages of evidence, in addition to which had been a new

witness who had subsequently given evidence over a period of about two weeks. For these reasons what had occurred before before Her Honour Judge Bolton had been a trial and there had then been a re-trial before His Honour Judge Whitburn. It followed that, subject to the concession that the November proceedings were a trial, the appeal against the decision to recoup should be allowed.

(b) Mr Lee and Mr Nettleton

41. Mr Rode does not accept the concession made on behalf of Mr Graham that the proceedings before Her Honour Judge Bolton constituted a single trial. On the contrary, he argues that the trial days until the discharge of the first jury amounted to a trial and that the proceedings thereafter until the arrest of the Judge constituted a re-trial. In addition, for the reasons given by Mr Edwards, when matters resumed before His Honour Judge Whitburn, Mr Rode that that had been a further re-trial.

42. In Mr Rode's submission, the Solicitors had lodged their claims in accordance with paragraph 14(4) of the Standard Criminal Contract 2010. A commercial decision had been taken not to make a claim for "special preparation" under paragraph 15 of Schedule 2 of the Funding Order because the claims had been accepted and paid on the basis of a trial and re-trial. Now, however, the firms had been served with notices of recoupment some two years after those claims had been approved and paid, and upon which tax and VAT had then been accounted for to Her Majesty's Revenue and Customs. In addition, the effect of the recoupment notices was to apply *R v Cato* retrospectively. That was grossly unfair and a breach of natural justice.

(b) Mr Johnson

43. For Johnson, Mr Wells adopts Mr Edwards' submissions that the temporal and procedural matrix changed. Within four weeks of the conclusion of the proceedings before Her Honour Judge Bolton, Abbey Solicitors had submitted their LF1 claim for payment. There was then a five month gap before matters resumed before a different Judge, HH Judge Whitburn, which resulted, two months later, in a jury verdict. Within three months thereafter, Abbey had sent a second bill to the LSC for payment seeking a 25% uplift for a re-trial. Both claims had been accepted, assessed and paid in full. Now, however, the LSC was attempting to recoup payments it had previously approved. No written reason or explanation had been given for doing so. The actions of the LSC had created great economic uncertainty and offended against the principle of finality of payment and put at risk the financial planning of firms of solicitors conducting defence work. Recoupment would be appropriate in cases of fraud or miscalculation but not where, as here, the LSC had determined the claims themselves. *R v Cato* should not be permitted to have retrospective effect.

DECISION

44. In my view Mr Wells is rightly critical of the written reasons which have been provided in these cases. Whilst it is correct that paragraph 26 does not oblige the Appropriate Officer to provide written reasons, as would be required following a

request for a determination under paragraph 29(8) of the Funding Order, it is implicit, in my view, that he should do so when exercising powers under paragraph 26. I say this because in the present case, all four litigators submitted their claims in accordance with paragraph 14(4) of the Standard Criminal Contract 2010. That provides that "in making a claim, you [the litigator] must have regard to the content of the relevant Costs Assessment Manuel".

45. That has been done in all cases and due regard has also been given to the Guidance whereby the claims were all submitted within the time limits set out in the Regulations and in circumstances where they were processed and approved by the LSC's very own staff. Here, the reasons given for the recoupment are terse in the extreme, still less have any written submissions been lodged on behalf of the Lord Chancellor which might have assisted the parties and the Court on these appeal, nor was there any representation on his behalf at hearing. Little wonder that the litigators have complained. I also have every sympathy with them about the unsatisfactory way in which paragraph 26 has been deployed in these cases, many months, years even, after the firms have been paid, have accounted to HMRC for tax and have closed their files, in circumstances where the LSC's own staff approved the claims in the first place and there is no suggestion whatsoever of any fraud.

46. It is accepted that the Graduated Fee Schemes are rigid (see, for example *Meeke v Secretary of State for Constitutional Affairs* [2006] 5 Costs LR 808). However, Mr Edwards submits that there is still some flexibility, see for example the guidance given by Spencer J in *Lord Chancellor v Ian Henery Solicitors Ltd* [2009] 1 Costs LR 205 about "when does a trial begin?" I agree. Where, as here, the applicable parts of the Regulations to which the Court must have regard, do not provide a

definition of "trial", it is likely that each case will be fact sensitive. This one certainly is; it may well be, both with regard to the appeals in point and for the future, unique that the trial collapsed because the Judge herself was placed under arrest. In my judgment, that factor of itself, was sufficient to alter the temporal and procedural matrix. In the first place, I would hold and agree with Master-Gordon-Saker that there was one trial before Her Honour Judge Bolton for the reasons he gave in *R v Nettleton*. Second, I consider that there must have been a re-trial because the original trial Judge was unable to complete the case. This was not a situation such as that which occurred in *R v Cato* where it was possible, expressed colloquially, to say "we will pick up from where we left off because the first trial did not run its course". On the contrary, that could not be the position here because from March 2011, the trial was taking place before a different Judge who had not listened to the many days of argument and evidence that Her Honour Judge Bolton had heard four months earlier. Thus, it was not a case of picking up from the position reached on the last occasion as part of a continuous process, but, on the contrary, was one of starting again with a new Judge, new jury and for some, new counsel. When that factor is added to the temporal position, specifically that the resumption was nearly four months after the proceedings before Her Honour Judge Bolton had concluded, I am satisfied that the LSC is mistaken in its view that there was one trial in this case.

47. I reject the submission that such an outcome is unfair because it applies *R v Cato* retrospectively. In fact, that appeal merely followed the reasons given in *R v Bunga* which was decided on 13 September 2010, also by Master-Gordon-Saker. It follows that I am unable to accept the contention advanced on behalf of Mr Graham that there were two re-trials before His Honour Judge Whitburn. In my judgment, the hearing days that took place before the learned Judge were all part of one continuous

process as was the case in *Bunga* and *Cato*. For that reason, Mr Wells' submission on that point fails.

48. Having reached these conclusions, I would add that I do not agree with Mr Edwards that the mere fact that the Crown served additional evidence and relied on a new witness, meant that the March trial *must* have been a re-trial. I would not go so far as to say that such an eventuality could never be sufficient to alter the procedural and temporal matrix, but on the facts here, I do not agree with him. There is nothing unusual in the Crown relying on further evidence not contained in the committal bundle. Indeed, it is common place for additional material to be served after committal, up to, and even during the trial with a notice of additional evidence, so that the page count can be updated. It follows, in my judgment, that I do not consider the fact that the Crown may serve more evidence during the hiatus (if I may so describe the gap between the end of the initial trial days and the resumption) is sufficient to categorise the original trial days as "the trial" and the succeeding trial days as "the re-trial". As was the case in *Cato,* it may all be part of a continuous process so that there is, in reality, only one trial but for the reasons I have given, that was not the situation here.

49. In the result, I agree with the LSC case worker's decision as set out in her letter of 3 October 2011 to Steele Ford and Newton that there was a trial followed by a re-trial and that the litigators' claims should have been billed as such. She expressed it that "It is *almost* [emphasis added] certain that this was only one trial followed by one re-trial" but for the reasons set out above, I would go further than that. However, I consider that the case worker was wrong to have asserted in the subsequent letter of

17 August 2012 that the claim should have been for "one class B trial for 52 days", an assertion repeated in the letters of 14 September 2012 to Clarion Advocates, 19 September 2012 to Abbey and 21 August 2012 to Appleby Hope and Matthews, albeit that the actual number of trial days differ. It follows that the outcomes of the appeals are as follows:

(i) Mr Lee- claimed and paid for one trial and a re-trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn : adjustment by way of recoupment to be made so that the firm is paid for one trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn.

(ii) Mr Nettleton- claimed and paid for one trial and a re-trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn: adjustment by way of recoupment as for R v Lee.

(iii) Mr Johnson- claimed and paid for a trial before Her Honour Bolton and a re-trial before His Honour Judge Whitburn : the position is correct so the appeal is allowed against the decision to recoup.

(iv) Mr Graham- claimed for a trial and re-trial before Her Honour Judge Bolton and two re-trials before His Honour Judge Whitburn : paid for one trial. The appeal is allowed to the extent that the firm should be paid for a trial before Her Honour Judge Bolton and a re-trial before His Honour Judge Whitburn.

50. So far as Messrs. Lee and Nettleton are concerned, the appeals have been unsuccessful save to the extent that the recoupment will be for sums less that the LSC is contending for. At the conclusion of argument I was asked (should the appeals

fail), whether I would be willing to certify a point of principle of general importance. Given, as I have said, that there is no guidance on appeal to a High Court Judge on this point, I would be willing so to certify.

51. Costs. Messrs Johnson and Graham will have their costs of the appeal. I suggest that schedules are lodged at this Court within 14 days of the date of these reasons and I shall decide the amounts on paper. So far as Messrs. Lee and Nettleton are concerned, although the recoupments will stand, there has been success in so far as the amounts to be recouped will be less than those contended for by the LSC. In these circumstances, I would be minded also to order that the LSC should bear the costs of the appeals but if a contrary view is taken, the LSC should notify the Court and the Appellants within 14 days of the date of these reasons and I shall decide the point on paper.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 316/13

Dated: 19 August 2014

ON APPEAL FROM REDETERMINATION

REGINA v ADIL KHAN

LIVERPOOL CROWN COURT

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T2011 7540

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 6 SEPTEMBER 2013

DATE OF NOTICE OF APPEAL: 13 NOVEMBER 2013

APPLICANT: COUNSEL

Abdul Iqbal
No.6 Barristers Chambers
DX 26402
Park Square East

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

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION

1. This appeal concerns the decision of the Legal Aid Agency when determining fees under the Criminal Defence Service (Funding) Order 2007 to disallow the claim of the Appellant, Mr Abdul Iqbal of Counsel, in the sum of £10,996.22 brief and £558 refreshers for his work on behalf of the Defendant Adil Khan in the Crown Court at Liverpool. Counsel had represented this Defendant on an indictment consisting of several counts involving sexual assaults, the details of which are set out in the attached General Observations. For the reasons I have given therein, I am satisfied that there were two trials, the first lasting from 6 to 14 February 2012. Sofaras Mr Iqbal is concerned, he had represented Adil Khan before the Judge on those dates but had been obliged to withdraw owing to concerns for his safety following racial abuse and assault outside the Crown Court building.

2. At the conclusion of the case, Mr Iqbal lodged his claim for payment in Form AF1 for a trial, but this was rejected by the Determining Officer for reasons given electronically on 15 October 2013, on the basis that there had been one trial not two. Accordingly, Mr Iqbal was not entitled to a trial fee for the period 6 – 8 February 2012. For the reasons I have given in the General Observations, I disagree with the LAA that Counsel's fees are limited to payment for only one trial, rather than for a trial and retrial. In my judgment, the events in Court from 6 February until Counsel withdrew for professional reasons constituted a trial and in these circumstances Mr Iqbal must be paid the appropriate graduated fee under the Scheme for his work on behalf of the Defendant.

3. So far as costs are concerned, Mr Iqbal was represented by Mr Nichol of Counsel who also appeared on his own behalf. The costs I have allowed reflect this factor.

4. For the reasons given the appeal is allowed.

TO: Legal Aid Agency
DX 10035
Nottingham 1

COPIES TO: Abdul Iqbal
No.6 Barristers Chambers
DX 26402
Park Square East

The Senior Courts Costs Office, Royal Courts of Justice, Thomas More Building, London, WC2A 2LL.
DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.

SENIOR COURTS
COSTS OFFICE

ON APPEAL FROM REDETERMINATION

IN THE LIVERPOOL CROWN COURT NO.T2011/7540

REGINA v ADIL KHAN
SHABIR AHMED
KABEER HUSSAIN
ABDUL AZIZ
ABDUL RAUF
MOHAMMED IKHLAQ
MOHAMMED SAJID
ABDUL QUYYUM
MOHAMMED AMIN
QAMAR SHAHZAD
LIAQAT SHAH
HAMID SAFI

MASTER CAMPBELL, COSTS JUDGE

GENERAL OBSERVATIONS

These General Observations address a discrete issue which arises on appeal from a decision of the Determining Officer when determining claims in accordance with the Criminal Defence Service (Funding) Order 2007 (as amended) in this multi-hander. All Appellants had acted for various of the Defendants in proceedings at the Crown Court at Liverpool. Upon submitting claims for their work, the Appellants sought payment for a trial which had lasted (on their case) from 6 to 14 February 2012 (four days) and for a re-trial (52 days) which had commenced on 21 February 2012. In relation to these Appellants, the Legal Aid Agency ("LAA") (formerly the Legal Services Commission) limited payment to one trial which had lasted 56 days. If the Appellants be right, the amount they will receive in payment in accordance with the terms of the Funding Order will be significantly higher than if the decisions of the LAA on determination are upheld.

The background is that the Defendants (ten in all) appeared at Liverpool Crown Court for trial on an indictment consisting of a number of counts of very serious sexual assaults. All had previously been arraigned and had entered not guilty pleas. The prosecution case had arisen from the investigation by Greater Manchester Police into the sexual exploitation of a number of vulnerable girls in the Rochdale area by a group of adult men. Following investigation, a pattern of abuse had emerged: the girls had been given alcohol, food and money in return for sex. The victims had also been subjected to violence to secure their co-operation and there had also been occasions on which they had been so incapacitated by alcohol or drugs that they were incapable of having any control over whether or with whom they had had sexual intercourse. The prosecution case was called "Operation Span" and had originally been appointed for trial at Bolton Crown Court, but in view of concerns about racist demonstrations, the cases were transferred to Liverpool Crown Court for trial.

That trial began on 6 February 2012 when the jury was selected, although the day itself was taken up with legal argument. Nonetheless, the Judge, HHJ Clifton expressed the view that this date should be regarded as the first day of trial. The jury was then sworn the following day when further legal argument took place. Regrettably some counsel and instructing solicitors were subject to racial abuse and assault outside the court building, as a result of which two counsel were obliged to withdraw from the trial. The Court did not sit on 9 February, but the following day 10 February, HHJ Clifton heard argument about whether the two Defendants whose counsel had withdrawn, should be severed from the indictment. The case was then adjourned until 14 February 2012 to allow fresh counsel to be briefed. On that date, those counsel indicated to the Judge that their preparations were not yet complete. In these circumstances the jury was discharged with the direction given by the Judge that proceedings should resume on 20 February 2012. On that date, a new jury was selected. The following day it was sworn and the trial proceeded for a further 52 days. The issue which now arises, as I have said, is whether the hearings between 6 February 2012 and the conclusion of the case amounted to only one trial lasting 56 days (the LAA's case) or whether the proceedings between 6 February 2012 and 14 February 2012 constituted a trial, with there having been a re-trial which started on 20 February 2012 and ended 52 days later.

Not all advocates and litigators who acted for the ten Defendants have appealed. In order to avoid confusion, it is necessary to set out those who have done so and the Defendants who they represented.

Defendant	**Appellant**	**Advocate on Appeal**
Adil Khan	Mr John King Mr Ibdul Iqbal	Mr John King (counsel) Mr Simon Nichol (counsel)
Shabir Ahmed	Mr Simon Nichol Ms Naila Akhter Platt Halpern Solicitors	Mr Simon Nichol (counsel) Ms Naila Akhter (solicitor) Ms Naila Akhter (solicitor)
Abdul Quyyum	Molesworths Bright Clegg	Ms Naila Akhter (solicitor)

Mohamed Sajid	Mr Imran Shafi Stokoe Partnership Solicitors	Mr Zarif Khan (counsel) Mr Zarif Khan (counsel)
Mohamed Amin	Mr Simeon Evans	Appeal withdrawn 17 February 2014

Mr Shafi withdrew and was replaced by Mr Gerrard Doran of counsel who lead Mr Dino Chalalambous of the Stokoe Partnership as his in-house junior. Mr Doran was paid for one trial and Mr Chalalambous nothing at all. Mr King was originally instructed as counsel for Mr Adil Khan. Mr Ibdul Iqbal was his junior and Ms Tina Langdale the third advocate. No one appeared for her at the appeal.

The Law

Under the Funding order, litigators and advocates have separate graduated fee schemes under which the are remunerated. Under the Litigator Graduated Fee Scheme ("LGFS"), the relevant article is this:-

> "Retrials and Transfers
>
> 10.— (1) Where following a trial an order is made for a retrial and the same litigator acts for the assisted person at both trials that litigator will receive —
>
> (a) in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and
>
> (b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances and timing of the retrial, in accordance with the provisions of this Schedule.
>
> (2) Where —
>
> (a) a case is transferred to a new litigator;
>
> Or (b) a retrial is ordered and a new litigator acts for the assisted person at the retrial, the original litigator and the new litigator must receive a percentage of the total fee, in accordance with the table following this paragraph, as appropriate to the circumstances and timing of the retrial, transfer or withdrawal of the representation order".

Under the Advocates' Graduated Fee Scheme ("AGFS"), Schedule 1 provides as follows:-

> "(3) Sub-paragraph (4) applies where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where—
>
> (i) the defendant is an assisted person at both trials; or
>
> (ii) the defendant is an assisted person at the new trial only; or

(iii) the new trial is a cracked trial or guilty plea.

(4) In respect of a new trial, or if he so elects, in respect of the first trial, the trial advocate will receive a graduated fee calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee will be reduced by—

(a) 30 percent, where the new trial started within one month of the conclusion of the first trial;

(b) 20 percent, where the new trial did not start within one month of the conclusion of the first trial;

(c) 40 percent where the new trial becomes a cracked trial or guilty plea within one month of the conclusion of the first trial; or

(d) 25 percent where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial.

(5) Where a different trial advocate appears for the assisted person at each trial then, in respect of each trial, the trial advocate will receive a graduated fee calculated in accordance with Part 2 or Part 3, as appropriate."

For the purposes of these reasons , none of the advocates suggested that there is any difference between "re-trial" and "new trial" so far as the issue I have to decide on these appeals is concerned. For convenience, I shall use the term "re-trial".

The Determining Officer's Written Reasons

As I have said, these General Observations address the discrete issue whether there was a trial, followed by a second trial rather than one trial lasting 56 days. Other matters which arise for decision on appeal, and are not common to all Appellants, I have dealt with separately in individual written reasons.

Adil Khan

The Determining Officer's reasons are dated 4 June 2013 for Mr King and 6 September 2013 for Mr Iqbal. In those reasons, the Determining Officer first addressed the points in issue as follows:

> "Was this a trial which concluded and then followed by a new trial ordered by the court so that payment can be made on the basis of a trial, at which Mr Iqbal was the trial advocate and re-trial at which Ms Lansdale was the trial advocate?"

Having set out the facts of the case which, as I have said, are uncontroversial, the Determining Officer then recited the events of 14 February 2012 as follows:

> "... Counsel for two of the Defendants asked that the jury be discharged and a new jury sworn so that the issue of a change in counsel does not influence

them in any way. The Judge discharges the original jury, for whom the case was never opened, advising them that he had been persuaded to start the trial with a new jury, starting the following week and running for approximately 11 weeks.

Jury selection for the new trial started on 20 February 2012 and the jury was sworn on 21 February and the case continued on ..."

The Determining Officer expressed the view that paragraph 2(3) to Schedule 1 of the Funding Order makes it clear that the trial/retrial provisions and specifically the retrial reductions, apply in cases where "following a trial, an order is made for a new trial". In the opinion of the Determining Officer, the court records showed that the jury had been discharged and the trial adjourned to enable a new jury to be empanelled and in these circumstances "it cannot be that an order has been made for a new trial following a trial".

The Determining Officer then relied on decisions in *R v Cato, R v Khan, R v Seivwright, R v Ali, R v Forsyth* and *R v Nettleton* as supporting the proposition that there had only been one trial and that, accordingly, only one fee was payable.

The Determining Officer then noted that neither of the counsel who had attended for the period 6-8 February and had then withdrawn had been paid a separate trial fee for that period. She then said "all counsel who have been paid a trial and retrial fee are subject to a redetermination and recovery exercise" – this is a reference to recoupment under Article 26. The Determining Officer concluded her reasons as follows:

> "The issue of whether or not one trial has concluded and the court ordered a new trial is a matter of fact and the Commission is bound by the facts of the specific case. There is no discretion that the Determining Officer can apply in determining whether one fee or two fees are payable."

For these reasons the Determining Officer concluded that there had been only one trial and accordingly, counsel was not entitled to recover a fee for a trial and retrial under the Scheme.

R v Shabir Ahmed

As set out above, Shabir Ahmed was represented by Platt Halpern Solicitors under the Litigator Graduated Fee Scheme and the firm instructed Mr Nichol of counsel to represent this Defendant under the Advocates' Graduated Fee Scheme. Both submitted claims for a trial and retrial but were paid a litigator and advocate fee respectively for a 56 day trial.

For Platt Halpern the Determining Officer's reasons are dated 11 September 2012 and say this:

> "It is noted that the majority of firms involved in the case of Operation Span have submitted claims ... based on a four day trial, 6 to 14 February 2012, however it has been confirmed by Liverpool Crown Court that these four days

were PII hearings and as per Section 3.7 Litigator Graduated Fee Scheme Guidance:

> *If the court considered other matters for days or parts of days before a trial is sworn such as disclosure, admissibility, abuse of process or public interest immunity (PII) hearings, then these whole days are not treated as part of the trial.*

I have looked at an email from Helen Neill [Court Associate of Her Majesty's Courts Service] at Liverpool Crown Court in respect of this case which confirms that a jury was sworn and that the case was part heard and that the jury had to be discharged on 14 February. The case was then relisted for trial on 21 February and a new jury was sworn in.

Liverpool Crown Court have confirmed that this case did go to trial and that the jury was sworn on 20 February 2012 and discharged when verdicts were reached on 9 May 2012. Therefore a 52 day jury trial took place.

In the circumstances, all of the firms who represented the Defendants during this case were initially allowed a 52 day trial. There is no difference in the litigator fee payment in respect of this case for a four day, 52 day or 56 day trial.

In this matter the initial four days were not paid as a trial as on the court record they were classed as PII hearings which, as outlined above, are not remunerable as trial days.

Information supplied by Helen Neill at Liverpool Crown Court indicates that this matter was listed for trial and then in effect this trial was halted and had to be relisted due to external problems. Taking into account paragraph 3.15 of the Litigator Graduated Fee Scheme Guidance, this situation would be payable as a trial and a retrial.

However, taking into account the High Court decision of *Lord Chancellor v Ian Henery Solicitors* which has ruled this section of the Guidance to be incorrect, the fact that a jury has been sworn is not the determining factor of a trial and retrial and if it is deemed that the trial has not "run its course" then the scenario payable under the Litigator Fee Scheme is dependent upon the facts of the case, as the definition of trial and retrial are dependent on multiple factors not just the swearing and discharging of the jury.

It is clear from the information supplied by Helen Neill that the jury were sworn on 6 February and that the Judge deemed that it would be the first day of trial, however, the case was never opened to the jury and it was only on 20 February that the case was actually opened to the jury, this being the second jury and not the first. From the information provided in Ms Neill's email it is clear that the case had not run its course and it could be argued that although the trial Judge indicated on 6 February that this was the first day of trial, that due to events that took place subsequently, and following the judgment in the *Ian Henery* case that the 6, 7, 8 and 14 February were not trial days as the

case was not open, no evidence was called and no legal arguments took place. In effect, the jury was selected and the case was adjourned before being relisted for trial on 21 February.

In the circumstances and following on from the judgment made in *Lord Chancellor v Ian Henery Solicitors*, it is the litigator fee team's view that as the trial Judge stated that 6 February was the first day of trial that these days between 6 and 14 February were a trial that had not run its course and that these days should be added to the 52 day trial which took place on 20 February. In effect, all firms who represented the Defendants in this case would be paid a litigator fee based on a 56 day trial which does not actually affect the remuneration that you have already received."

In respect of Mr Nichol, the written reasons are dated 2 January 2013. Having set out the legislation and guidance under the AGFS, and having referred to the various Costs Judges' decisions mentioned above, she gave her reasons for refusing the claim for a trial and retrial as follows:

"• paragraph 2(3) to Schedule 1 of the Funding Order makes it clear that the trial/retrial provisions and specifically the retrial reductions, apply in cases were "*following a trial an order is made for a new trial*";

• the corresponding provision in the Litigator Graduated Fee Scheme uses the term "retrial" instead of "new trial" but the requirements are otherwise virtually identical, in each case stating that the new trial/retrial provisions come into play if, following a trial, an order is made for a new trial/retrial."

The Determining Officer then noted that in several of the decisions to which she had referred, the Court had determined that a gap of more than one working day did not prevent a determination that there had only been one trial. Indeed, in *R v Cato*, the Court had considered the circumstances in which the Judge could discharge one jury and swear another and start the trial again without this amounting to a retrial. In her submission, this had been precisely what had happened in *R v Ahmed*. It followed that whilst the hearings on 6, 7, 8 and 14 February 2012 were capable of constituting trial days, there had not been a trial in their own right. Moreover the lack of any provision for counsel to be paid for days when he could not work had no proper bearing on the determination of whether or not the trial concluded and a new trial had been ordered or indeed, whether or not a trial had taken place. Finally, it was the conclusion of the Determining Officer that the fact that two of the Defendants had required a change in representation and that there was a delay to accommodate this was, again, not relevant to the determination of the correct fee. For those reasons the Determining Officer concluded that there was one trial, rather than a trial and retrial.

R v Abdul Quyyum

Molesworth Bright & Clegg acted for this Defendant and the Determining Officer's reasons were written on 16 August 2012. Those reasons under the LGFS are in identical form to those provided at the request of Platt Halpern, so I will not repeat them here.

R v Mohamed Sajid

The Stokoe Partnership acted for this Defendant and the written reasons were written on 9 August 2012 in identical terms to those provided at the request of Molesworth Bright & Clegg and Platt Halpern Solicitors under the LGFS. As they are set out above, I shall not repeat them.

So far as counsel is concerned, the Determining Officer provided written reasons to Mr G Doran of Counsel on 5 September 2013. Those reasons address other issues which I have dealt with in the accompanying written reasons, but in so far as they address the question of trial and/or re-trial, the written reasons are in identical terms to those provided to Ms Landale/Mr Iqbal dated 6 September 2013 under the AGFS and it is unnecessary to repeat them.

The Appellants' Submissions

On behalf of Adil Khan and Shabir Ahmed, Mr Nichol submitted that there had been a trial which began on 6 February and ended on 14 February which had lasted four days. The trial Judge had declared that 6 February was "the first day of trial", a fact now conceded by the LAA. Two days later, two counsel had withdrawn before the case had been opened to the jury. Remaining counsel, including Mr Nichol, had submitted to the Judge that the trial should continue and that the two Defendants whose counsel had withdrawn, would not be prejudiced if replacement counsel were brought in and the case adjourned until 14 February when it would continue. That submission had found favour with the Judge. Accordingly, on 14 February 2012 the jury had returned, but replacement counsel then informed the Judge that they would need more time in order to be ready. Additional argument then ensued about how any further adjournment was to be approached. It was Mr Nichol's submission that the jury should be asked to come back a week later in order to continue the trial.

That view had not prevailed, because the Judge had taken a different view. Having heard the arguments, he had discharged the jury and ordered that a new trial take place commencing on 20 February. That had been confirmed in the email sent by Helen Neill to Ms Akhtar on 22 May 2012 that:

> "The Judge and all parties discussed the matter of holding the jury over for a week and decided that it was best at this stage to discharge the jury and start the trial again on 21 February with a new jury. The jury were therefore discharged on 14 February 2012.
>
> Trial 2 – the cases were then listed for a new trial on 20 February 2012 when the process of jury selection commenced for a second time."

In Mr Nichol's submission "starting the trial again" was the same as ordering a retrial; the Regulations stating that "order made for a new trial" was synonymous with the trial starting again. In this context, Mr Nichol emphasised that the submissions by counsel to continue the same trial had been rejected by the Judge, including his own.

Mr Nichol recognised that *R v Cato* came down against his submissions that there had been a trial and retrial, but that case, he argued, could be distinguished because the same counsel had been involved in both hearings. Indeed, there had been nothing to suggest in *R v Cato* that there had been any difference in the evidence which was relied on at the start to that which was before the court when the new jury was empanelled.

The position here was different. Counsel had changed and in these circumstances it was difficult to see how there could be any continuation of the same trial. What was more, different evidence had been deployed against Ahmed when the proceedings had resumed on 20 February. The prosecution had served additional expert evidence at Court just before the trial started on 6 February 2012. The Judge had heard argument on the point and ultimately, the Crown had withdrawn its reliance on that evidence as it was not prepared to alter the order of the witnesses. However, following the delay caused by the withdrawal of counsel, the evidence was re-served, as a result of which further discussions took place about it before the second trial and Mr Nichol was obliged to consider whether the defence should seek an expert's report in response. In Mr Nichol's submission, the fact that on 20 February, there was a fresh jury, different counsel and minds had needed to address whether different evidence would be deployed, combined in order to lead to an inescapable conclusion that the 20th February was an entirely different trial. For that reason, the LAA had erred in paying a fee for only one trial.

Mr Khan on behalf of the Stokoe Partnership and Mr Shafi submitted that there had been an inconsistent approach adopted by the LAA, namely that there had been recoupment of Mr Shafi's fees which was a strong point in his favour. As Mr Nichol had explained, replacement counsel had been obliged to work up the case from scratch and if, as contended for by the Determining Officer, there had only been one trial, those counsel would receive a single fee, whereas, in his submission, there had been two separate trials. It had been no fault of Mr Shafi that he had been obliged to withdraw. There had been protests throughout the trial and for a reason unknown, the British National Party had been made aware of the verdicts before the Court itself. Such were the protests that counsel had been "bussed" by the police in a riot van to Court. When Mr Shafi had withdrawn, Mr Doran and Mr Chalalamabous had been instructed: Mr Doran had been paid for the second trial and his junior had not been paid at all. In Mr Khan's submission, Mr Doran payment should be made on the basis that Mr Doran received a fee for one trial and his junior advocates should also receive a fee for one trial to be divided between them. So far as Ms Langdale was concerned, she was not represented on the appeal.

Decision

The LAA has stated that the issue of whether or not one trial has concluded and te court has ordered a new trial is a matter of fact and that the Agency is bound by the facts of the specific case. There is no discretion to decide whether one or two fees are payable: it is all a matter of fact.

In the present appeals, I give weight to the following as factors in favour of a finding that there were two trials (6 to 14 February and 21 February for a further 52 hearing days) and not one, as the LAA has contended for.

First, there is the compelling fact that Mr Nichol had submitted to the Judge that the trial which had begun on 6 February should continue as soon as replacement counsel had worked up the case. Had that happened, the facts would have been similar to those in *R v Nettleton* (2013)1 Costs LR 186 in which Master Gordon-Saker held that the "second" trial was all part of the same process that had started at the "first" trial, and there was, accordingly, one trial not two. However, as I have said, Mr Nichol lost that point. HH Judge Clifton ruled against him. He accepted replacement counsels' submissions that they needed more time, he discharged the jury and he directed that a new trial should begin on 20 February 2012. These factors all militate in favour of the submission that this was not a continuation of the same process, but on the contrary, was a different process with changed counsel and a fresh jury.

Second there is the fact that the prosecution applied to the trial Judge for permission to introduce further forensic evidence (DNA evidence against Shabir Ahmed) and requested that the "second" trial be adjourned for a longer period so that the issue of admissibility could be revisited in order that that evidence could be relied on at the new trial. That eventuality had arisen because the Judge had ruled on 7 February 2012 that if the prosecution insisted upon calling Jemma Nealon as the first witness that would not give the defence sufficient time to obtain their own expert evidence in order to cross examine her on any of the issues arising out of the DNA evidence served via statements of Pauline Stevens and David Balding. After the end of the "first" trial, the prosecution had then served further evidence consisting of almost 2000 pages relating to DNA which changed the prosecution case, upon which instructions had to be taken. That did not happen in *R v Forsyth* or *R v Cato.*

Third (again contrast *Forsyth* and *Cato*), replacement barristers were appointed in place of those who had been professionally embarrassed by the racial taunts outside the court and whose safety could not be guaranteed by the police.

Fourth, the e mail dated 22 May 2012 written by the clerk of the court, is in terms that are unequivocal: "Trial 1....the Judge and all the parties discussed the matter of holding the jury over for another week and decided that it was best at this stage to discharge and start the trial again on 21 February with a new jury. The jury were therefore discharged on 14 February 2012. Trial 2- The cases were then listed *for a new trial* [emphasis added] on 20 February 2012...".

Lastly, in so far as the LAA has asserted or still relies on the proposition that the trial did not start on 6 February 2012, I disagree. It is clear that not only was the jury sworn but the trial was opened in a meaningful sense, even if the jury was later discharged (see judgment of Spencer J in *Ian Henerey Solicitors).* The point does not seriously arise however, given that HH Judge Clifton stated in open court that the trial had started on 6 February, a practice encouraged by Spencer J.

For all these reasons, I consider that the LAA erred in so far it paid any claims as a trial rather than as a trial and new/re-trial. The appeals all succeed on this point.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 40/14

Dated: 6 August 2014

ON APPEAL FROM REDETERMINATION

REGINA v GEELING

WOLVERHAMPTON CROWN COURT

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20097369

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 1 MAY 2013

DATE OF NOTICE OF APPEAL: 10 JANUARY 2014

APPLICANT: COUNSEL

WENDY MILLER
CITADEL CHAMBERS
DX 23503
BIRMINGHAM 3

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

The appropriate additional payment, to which should be added the sum of £200 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION

1. For the reasons given in the accompanying General Observations, the appeal against the decision of the Legal Aid Agency to recoup payments made following determination of the Appellant's claim is allowed.

TO: WENDY MILLER
CITADEL CHAMBERS
DX 23503
BIRMINGHAM 3

COPIES TO: LEGAL AID AGENCY
DX 10035
NOTTINGHAM 1

SENIOR COURTS
COSTS OFFICE

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

REGINA v GEELING
REGINA V GRAY
REGINA V PAGE
REGINA V LEWIS

APPEAL TO COSTS JUDGE CAMPBELL

Appellants:

GENERAL OBSERVATIONS

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1. These appeals have one factor in common. Was the Legal Aid Agency ("LAA") correct to recoup fees under Article 26 of the Criminal Defence Service (Funding) Order 2007 (as amended) ("the Funding Order") in respect of work undertaken by the Appellants in the Crown Court at Wolverhampton under the Advocates Graduated Fee Scheme ("the Scheme")? In each case, claims under the Scheme, had been submitted to the LAA for determination and, following completion of that process by the Determining Officer, all advocates were paid in accordance with the fee structure set out in the Funding Order under the Scheme. Subsequently, however, the LAA informed the Appellants that the claims ought to have been remunerated on the basis that there was one trial instead of, as had been paid, a trial and re-trial. It follows that the issue for decision on these appeals is to decide whether the Determining Officer's original determination should stand or whether the LAA has been correct to recoup under Article 26.

2. Paragraph 26 of the Funding Order provides as follows:-

"Recovery of Overpayments

(1) This article applies were a representative is entitled to be paid a certain sum ("the amount due") by virtue of the provisions of Schedules 1, 2 or 4, and, for whatever reason, he is paid an amount greater than that sum.

(2) Where this article applies, the appropriate officer may –

(a) require immediate payment of the amount in excess of the amount due ("the excess amount") and the representative must repay the excess amount to the appropriate officer; or

(b) deduct the excess amount from any other sum which is or becomes payable to the representative by virtue of the provisions of Schedules 1, 2 or 4.

(3) The appropriate officer may proceed under paragraph (2)(b) without first proceeding under 2(a).

3. The following are the relevant articles of the Funding Order which concern "trial" and "new trial". Schedule 1 provides as follows:-

"Application

2. –(3) Sub-paragraph (4) applies where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where –

(i) The Defendant is an assisted person at both trials; or
(ii) The Defendant is an assisted person at the new trial only; or
(iii) The new trial is a cracked trial or guilty plea.

(2) In respect of a new trial, or if he so elects, in respect of the first trial, the trial advocate will receive a graduated fee in accordance with part 2 or part 3, as appropriate, except that the fee would be reduced by –

(a) 30%, where the new trial has started within one month of the conclusion of the first trial;
(b) 20%, where the new trial did not start within one month of the conclusion of the first trial;
(c) 40%, where the new trial becomes a cracked trial or guilty plea within one month of the conclusion of the first trial; or
(d) 25%, where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial".

4. Although this appeal concerns the Advocates' Graduated Fee Scheme, for completeness, the equivalent provision in the Litigator Graduated Fee Scheme in Schedule 2 to the Funding Order provides as follows at paragraph 10:-

> "(1) Where following a trial, an order is made for a re-trial and the same litigator acts for the assisted person at both trials, that litigator will receive –
>
> (a) in respect of the first trial, a fee calculated in accordance with the provisions of this schedule; and
> (b) in respect of the re-trial, 25% of the fee as appropriate to the circumstances and timing of the re-trial, in accordance with the provisions of this schedule".

5. Periodically, the LAA provides guidance in order to provide help for litigators and advocates who undertake work under the Schemes. In the present cases, according to the LAA, the relevant guidance is the Advocates' Graduated Fee Guidance dated February 2011, which, in relation to the issues of trial and re-trial, provides as follows:-

> "B9. For graduated fee purposes, if a trial is aborted and another jury is sworn either the same day or the following working day, then the case is considered to be only one trial. If there was a gap of more than one working day, then it is considered to be a re-trial.
>
> B20(2)(4) If, following a trial, a new trial is ordered and the same advocate appears at both trials or at the main hearing following the first trial, he or she must be paid two graduated fees".

6. It is common ground in these appeals that the Guidance is just that, guidance, and is not a rule of law.

BACKGROUND

7. This was a multi-hander in which the Defendants had been charged with various offences arising out of the theft of beer kegs. Based upon the number of crushed kegs recovered, the prosecution stated that the replacement value was £2,240,650 and probably much more. For the recovered kegs (uncrushed), the figure was £234,390.

8. The following advocates who are appealing, represented the Defendants in the case:-

John Evans for Simon Gray
Simon Cadwaladr for Stephen Page
Andrew Jackson and heidi Kubik for Ian Lewis
Benjamin Nicholls and Wendy Miller for Anthony Geeling

9. The chronology was as follows:-

October 13 2009 - Preliminary hearing
December 7 2009 - Plea and Case management hearing
February 12, 30 April, 25 June 2010 - Directions
September 8 2010 – case called on before His Honour Judge Walsh (jury was not sworn until 20 September 2011 but the Judge stated on 21 September 2010 that the trial began on 8 September 2010).

September 10, 13, 14, 16, 20, 21, 22, 23 & 29 2010 – sitting days

29 September 2010, the case listed for trial to commence on 19 September 2011, reserved to His Honour Judge Walsh. Prosecution to reconsider its position. Order for PTR and the number of days to be set down for fresh applications to stay such indictments as the prosecution stated at that time, an intention to try .

September 19 2011 - Trial day
September 20 2011 – jury sworn
19 December 2011 - case concluded (this date may not be wholly accurate but for the purposes of these reasons, nothing turns on that)

10. As I have said, following the conclusion of the case, counsel lodged claims for payment under the Scheme and were paid for a trial and new trial.

NOTICE OF RECOUPMENT

11. On 19 November 2012, the Legal Services Commission ("LSC") (as the LAA then was) wrote to the Appellants in identical terms save in respect of the fees mentioned in each letter. In respect of Mr Nicholls QC, his letter said this:-

> "Dear Mr Nicholls
>
> **Re: R v Anthony Geeling – T20097369 Wolverhampton County Court**
>
> I am writing in relation to your claim in the above named case.
>
> You claimed a 62 day trial and an eleven day re-trial and these claims were assessed and paid accordingly (£54,440.62, and £16,166.90, plus VAT respectively).
>
> However, it is since come to light that this was incorrect, based on the Costs Judges' decisions in the cases of *R v Forsyth* and *R v Cato* (attached).
>
> Our view is now that the case should have been treated as only one trial, commencing on 8 September 2010 and resuming, after an adjournment, in September 2011.
>
> This results in an advocate fee payment of £58,961.62, plus VAT. I am writing to request a refund of the overpayment in the sum of

£11,645.90, plus VAT. If you disagree with this reassessment, please provide written representations, addressing the cases referred to above, which will constitute a request for a redetermination.

If we maintain our position, you will be entitled to appeal to a Costs Judge against this decision …"

12. For Ms Miller who acted as Mr Nicholls' junior, the claim was for a 37 day trial and twelve day re-trial. For Ms Kubik, the claim was for a 59 day trial and twelve day re-trial, and Mr Jackson, a 60 day trial and an eleven day re-trial.

13. Following counsels' objection to the recoupment, the LSC wrote again on 14 December 2012 in the following terms:-

"The logic of the Costs Judges' decisions in *Cato*, *Forsyth* and others, is very clear – that in order for there to be a new trial/re-trial, the first trial must have run its course (opened, closed and jury unable to reach a verdict) and a re-trial ordered by the court. If this does not happen and instead a trial starts and is then stopped for any reason, the jury discharged and a new jury empanelled and the trial starts – this is the same trial. Indeed, Costs Judge Campbell expressly states this to be the case in his decision in the *Cato* case. It is certainly not two trials as you seek to argue.

We have contacted Her Majesty's Courts and Tribunals Service to seek clarification as to the precise status of the hearings in September 2010, given that most, but not all, counsel have claimed them as trial days. The court logs were reviewed by a manager who has confirmed from the court log for 21 September 2010 that the Judge, in response to a query from counsel about fees, stated that the September 2010 hearing was not a preparatory hearing but a significant pre-trial hearing. The Judge also indicated that if there was any discretion and his view would assist, that in his opinion the trial started on 8 September 2010.

It is, therefore, quite clear that these days in September 2010 are not a trial in their own right. Applying the principles discerned from the judgment of Mr Justice Spencer in *Lord Chancellor v Ian Henery Solicitors Ltd* [2011] EWHC 3246 QB, and also the decision of various Costs Judges referred to therein, these days can, however, be considered as days of extended/substantial legal argument that count towards the length of the trial.

I am therefore of the opinion that Ms Cooper [of the LAA] is correct in her contention that there has been an overpayment to counsel which can be recovered from counsel. If counsel do not accept this argument, then they are at liberty to apply for a redetermination as Ms Cooper indicated in her letter. Failing receipt of such a request, counsel will be deemed to accept that there has been overpayment and the relevant recoupment will be made".

14. Dissatisfied at the decisions to recoup, counsel raised objection and sought written reasons. They have different dates, but in principal are in the same format and the main reasons justifying the recoupment are set out on page 7. It is convenient to summarise them as follows: Article 26 of the Funding Order allows the recovery of overpayments for whatever reason and there is no timescale within which such overpayments must be identified. Failure by the LAA to take steps to recover any repayment identified would be a failure in its duty towards the taxpayer and in its responsibility to administer the Legal Aid fund as efficiently and effectively as possible. No Human Rights legislation arises in relation to these decisions. All that has happened is that money which counsel has received should never have been paid and that the overpayments in question were made as a result of incorrect information having been provided when the claims were validated. Once it became known that the information provided was incorrect, the LAA reviewed the claims and initiated action to recover all overpayments identified. In the alternative, even if the 8-20 hearing was a trial, only a fee for a cracked trial is payable because " The *Ian Henery* decision as to whether or not a trial had started would indicate that no trial had started and in such circumstances, only a cracked trial fee would be payable as the situation would fall squarely within the situation outlined in paragraph (f) below ...f) , legal argument is heard on admissibility, abuse of process, or disclosure amounting to a voir dire (ie no evidence is called as part of legal argument, as a result of which no jury is sworn and no trial takes place- this is a cracked trial (r v Bullingham)" (see *Lord Chancellor v Ian Henery Solicitors* (2012) 1 Costs LR 205.

15. At the appeal, Mr Andrew Fisher QC appeared on behalf of all Appellants. He reminded me at the outset that the LSC had originally determined the claims on the basis that the trial which had begun on 8 September 2010 had been the main trial, with the re-trial beginning a year later, that being subject to the 20% reduction in fees, payable under the Funding Order. Whilst it was right that no jury had been empanelled for the case which had commenced on 8 September 2010, this had been because that day, and those that followed, had addressed abuse of process. That said, the fact that no jury had been sworn did not mean that the trial had been incapable of starting see judgment of Spencer J in *Lord Chancellor v Ian Henery Solicitors Ltd* [2012] 1 Costs LR 205 . So far as the proceedings in September 2010 were concerned, there had been ten days' argument, at the end of which that part of the hearing had concluded by the Judge stopping the hearing on abuse of process. That trial had, accordingly, run its course. The Judge had then ordered that there be a pre-trial review which had taken place on 17 December 2010. In Mr Fisher's submission, that pre-trial review had been in relation to a new trial in respect of which the prosecution had made an application to amend the indictment. Two of the Defendants had by then "gone" and the case had changed from being a "top down" conspiracy (with the Westwood brothers being the Defendants at the "top") to being a "bottom up" indictment. Moreover, one of the remaining Defendants (Fellows) was by then represented by fresh counsel. Thereafter, 18,000 pages of further material, mostly unused, had been served by the prosecution, the bulk of which was derived from Civil proceedings. A few hundred pages were then added to the pages of prosecution evidence ("PPE") via Notices of Additional Evidence. That additional material had

caused the prosecution to change the nature of the whole case. It followed that with new indictments, new counsel and a change in the number of Defendants, the September 2011 hearing simply could not have been a continuation of the trial which had started in September 2010.

16. So far as *Cato* is concerned, in that case the court had held that a hiatus of three months did not mean that there had been two trials. On the contrary, when the hearing had recommenced three months after it had opened, this was a continuation and the temporal and procedural matrix had not changed. The position here Mr Fisher submits is different. There is no reported case where there has been a gap of a year between the end of the first stage and the beginning of the second. The fact that the same Judge had, in fact, presided over both hearings made no difference. The trial had been reserved to His Honour Judge Walsh for convenience, not necessity, and the Judge had, in any case, stopped the first trial having found that the Defendants could not have a fair trial. What had then followed was a change in the indictment, with completely different arguments being advanced by the Crown. The case could not, either, be a cracked trial. If the proceeding in September 2010 were not part of a trial as the LAA appeared to contend, this could not be a cracked trial but a trial which cracked in the final third, in which case the fees would be higher than those claimed.

17. In relation to the reported cases, Mr Fisher observed that what was notable was the fact that the LSC/LAA had put forward the case for whatever paid the least under the claim. For all those reasons, in his submission, there had been two trials and accordingly the LAA had been wrong to recoup counsels' graduated fees as if payment should have been made for one trial.

18. In reaching my decision, I respectfully agree with the decision of Master Gordon-Saker in *R v Seivwright* [2011] 2 Costs LR 327, albeit on an appeal under the Litigator Graduated Fee Scheme, that a new trial cannot be part of the same procedural and temporal matrix as the first trial. In *R v Forsyth* [155/10], Master Gordon-Saker expanded upon the decision he had given in *Seivwright* as follows:-

> "23. A re-trial involves a new trial rather than a continuation of a trial with a new jury. That is what I was trying to convey in *Seivwright*:
>
> > ... a "re-trial" means a new trial which is not part of the same procedural and temporal matrix as the first trial.
>
> It will involve some further preparation and that is why the Funding Order makes provision for a further fee.
>
> 24. In this case, the gap between the discharge of the second jury and the empanelment of the third was three working days, and one day of which there was legal argument about disclosure. So in essence there was a stutter in the trial process. I accept that the empanelment of the third jury could not have happened without some direction from

the Judge. But to my mind such direction is not "an order" … for a re-trial. This was not a re-trial. It was a continuation of the trial with a different jury after a short break".

19. In *R v Cato*, the gap between first and second hearings had been three months. Nonetheless, I had held that this had been continuous trial, and in doing so, I accepted the following submissions advanced by the Ministry of Justice, albeit in a different appeal – *R v Bunga*. Those submissions made the following points:-

> "We submit that in the common situation where a jury is discharged for reasons such as a juror knowing someone involved in the case, or some other issue arising, that means the whole jury is discharged, but the trial resumes with a fresh jury, it is wholly artificial to say that this has occurred "following a trial" or that "an order has been made for a re-trial". Rather, we submit that this situation has arisen during the course of the trial and then no order is needed for a re-trial, because the empanelment of fresh jury is a logical consequence of the discharge of the original panel during the course of the trial. This can be distinguished from the situation where the trial has run its course and the jury has failed to reach verdicts, when it is by no means inevitable that there will be a re-trial, as the prosecution usually wish to consider their position in the light of the evidence in the original trial …"

20. In paragraph 10 of the my reasons in *Cato*, I went on to explain why the appeal would be allowed in that case:-

> "It is common ground that the original trial did not "run its course" leading to the discharge of the jury and an order for a re-trial. No order was needed for a re-trial because a fresh jury could be empanelled simply as a logical consequence of the discharge of the original panel during the June trial …"

21. In the present case, the interregnum was twelve months, so the first issue to decide is whether there can have been one continuous trial where the gap between the first and second hearings was a year, three times, in fact, the length of the hiatus in *Cato*.

22. The LAA's case is that there have been several decisions by Costs Judges which have determined that a gap of more than one working day does not prevent a determination that there is only one trial. In the specific circumstances of this case, the LSC submits that whilst the hearings between 8 September and 20 September might have constituted trial days, they were not a trial in their own right. The case did not open before the jury and there had been no *voire dire*.

23. I disagree. It is clear on the authorities that a trial can start without a jury having been empanelled, see judgment of Spencer J in *Lord Chancellor v Ian Henery Solicitors Ltd* in which the Learned Judge said this at paragraph 96:-

(1) Whether or not a jury has been sworn is not the conclusive factor in deciding whether a trial has begun.

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case and the leading of evidence.

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management, it may well be that the trial has begun in a meaningful sense.

(8) Where there is likely to be any difficultly in deciding whether a trial has begun and, if so, when it began, the Judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the Determining Officer, as Mitting J did in *R v Dean Smith*, in the light of the relevant principles explained in this judgment".

24. Here, the Judge gave the direction envisaged by Spencer J in paragraph (8) – see written reasons at paragraph 2 under "Facts of the Case". It follows, in my judgment, that the trial began on 8 September 2010 and that the issue which now arises is whether that same trial continued on 19 September 2011. In my judgment, it did not. Whilst I would not go so far as to say that a gap of a year would always mean that there could never be one trial, on the facts here, the weight of argument all favour a finding that the trial which began on 10 September 2010 did not continue on and after 19 September 2011. This was not a case such as *Forsyth* where the hiatus was a matter of days, nor in *Cato* where the period was three months. On the contrary, the gap was one year which militates heavily against a finding, on the temporal matrix basis, that this was a continuous trial.

25. I reach the same conclusion so far as the procedural matrix is concerned. The LAA's case is that a new/ re-trial must be ordered following the conclusion of the trial for a fee to be payable for that new trial and that without such an order, the wording of the funding order is such that only one trial fee is payable, not two. I disagree. On the facts, it is clear that the September 2010 trial ran its course. That trial, it will be recalled, dealt with abuse of process at the conclusion of which the Judge ruled that the Defendants could not have a fair trial. In these circumstances, the prosecution had been unable to proceed on the existing indictment which subsequently it applied to amend so that when the Judge sat in September 2011, the Defendants faced a different indictment. In these circumstances, I am satisfied that the first trial ran its course and the trial which began in September 2011 was not a continuation but a new trial.

26. The following further factors also militate in favour of the Appellants' case that there was a trial followed by a new trial. First, the indictment was amended so that, as I have said, it became a "bottom-up" and not "top-down"

conspiracy. Second, not all of the original Defendants remained on the amended indictment. Third, there had been changes in Counsel. Mr Vickers rather than Mr Barnett now represented Mr. Fellows. Fourth, between the end of the first trial and September 2011, the prosecution served 18,000 pages of further material, several hundred pages were subsequently served under the Notices of Additional Evidence and became PPE. Lastly, in so far as it is argued that the fact His Honour Judge Walsh presided both in September 2010 and September 2011 is supportive of there being only one continuous trial, I disagree. Whilst it is right that in *R v Nettleton* (2014) 2 Costs LR 387, the fact that different Judges presided was a factor which supported my conclusion that there had been a trial and a re-trial, here I accept Mr Fisher's submission that the presence of His Honour Judge Walsh was for convenience rather than necessity. For all these reasons, I am satisfied that the LAA was correct in its original determination of these claims.

27. So far as the suggestion that this could be a cracked trial is concerned, I do not understand the argument being made in the reasons. The extract entitled "I)" does not appear in Spencer J's judgment in *Ian Henery*. (see paragraph 96 for what he did say). So far as *R v Bullingham* is concerned, I said this "To conclude, it is my judgment that:

(i) the LSC's contention that as no jury was sworn, the trial could not have started, is wrong, since it is plain from the authorities that the swearing of the jury is not the conclusive factor in deciding under the Scheme when the trial begins.
(ii) Even if a jury is sworn, the trial will not start unless it begins "in a meaningful sense", that is to say, otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.
(iii) If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.
(iv) Where (as here), no jury is sworn, but the judge directs that there will be a *voir dire* involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction."

28. In respect of those findings, Spencer J said this – "Again, I accept and adopt this passage of Master Campbell's judgment as a correct analysis of the authorities and a correct exposition of the relevant principles". In these circumstances, where there was no change of plea, I do not consider the LAA is correct in its alternative submission and the point fails.

29. It follows that no sums fall to be recouped under Article 26. In so far as any recoupment has taken place, the LAA must repay to Counsel any sums taken back under Article 26. In so far as the LAA has suspended any recoupment pending the outcome of these appeals, that suspension must now become permanent.

30. Finally, in so far as the Appellants have contended that the LAA has no power to recoup under Article 26 as it is *"functus"*, I disagree. First, in *Lord*

Chancellor v Eddowes Perry & Osbourne Ltd [2011] 3 Costs LR 498, Spencer J expressed no such concern on hearing an appeal against recoupments made under Article 26. Secondly, there is no time limit in the Funding Order which limits the period in which recoupment must be carried out. Whilst I agree with the Appellants that it will often be unfortunate if powers of recoupment are exercised long after determination has taken place, the LAA has a duty to the public purse to ensure that correct payments are made under the Scheme. As in *R v Nettleton*, this may, on occasion, dictate that repayments of claims already determined and paid, must be requested.

31. Costs: very responsibly, the Appellants collectively instructed Mr Fisher to present their appeals. They did, however, attend court in order to instruct him during the course of the hearing for which they did not request payment. I consider that as the "*functus*" argument took little time, the appellants should have their costs of the appeal. The figure I have allowed for costs reflects Mr Fisher's brief fee and the travel expenses incurred.

SENIOR COURTS
COSTS OFFICE

SCCO Ref: 71/18

21 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v GHEORGHE

CROWN COURT AT SOUTHWARK

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

CASE NO: T20160648

LEGAL AID AGENCY CASE

DATE OF REASONS: 5 MARCH 2018

DATE OF NOTICE OF APPEAL: 29 MARCH 2018

APPLICANT:	COUNSEL	MATTHEW RADSTONE 25 BEDFORD ROW

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

The appropriate additional payment, to which should be added the sum of £450 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Matthew Radstone of counsel against the determining officer's decision on the claim for special preparation made under the Advocates Graduated Fee Scheme.

2. Paragraph 17 of schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013 says:

> **17.**—(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3—
> (a) it has been necessary for an advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue;
> (b) the number of pages of prosecution evidence, as defined in paragraph 1(2), exceeds 10,000 and the appropriate officer considers it reasonable to make a payment in excess of the graduated fee payable under this Schedule; or
> (c) a documentary or pictorial exhibit is served by the prosecution in electronic form
> where—
> (i) the exhibit has never existed in paper form; and
> (ii) the appropriate officer—
> (aa) does not consider it appropriate to include the exhibit in the pages of prosecution evidence; and
> (bb) considers it reasonable to make a payment in respect of the exhibit in excess of the graduated fee.
> (2) Where this paragraph applies, a special preparation fee may be paid, in addition to the graduated fee payable under Part 2 or Part 3.
>
> (3) The amount of the special preparation fee must be calculated—
>
> (a) where sub-paragraph (1)(a) applies, from the number of hours preparation in excess of the amount the appropriate officer considers reasonable for cases of the same type;
> (b) where sub-paragraph (1)(b) applies, from the number of hours which the appropriate officer considers reasonable to read the excess pages; and
> (c) where sub-paragraph (1)(c) applies, from the number of hours which the appropriate officer considers reasonable to view the prosecution evidence,

3. In this case, the prosecution served 39,000 pages of electronic evidence and 502 hours of CCTV footage. There were also 7,210 pages of witness statements and exhibits served on paper. Based on paragraph 17 of the Regulations, counsel made a claim under subparagraph (b) for the electronic evidence net of 2,790 pages used to make a graduated fee claim for the

maximum 10,000 pages of PPE. Counsel also made a claim for the time spent reviewing the CCTV footage under either of subparagraphs (a) or (c).

4. The total claim was for 239 hours. Of those hours, 88 hours were claimed in respect of the electronic evidence and they have been paid as claimed. The remaining 151 hours were claimed in relation to the CCTV footage and which has been disallowed in full.

5. I will deal with the claim under subparagraph (c) first. The determining officer disallowed the claim on the basis that CCTV images are not documentary or pictorial images under the regulations. In support of the position he cites the case of Penry Davey J in The Lord Chancellor v Michael J Reed Ltd [2009] EWHC 2981. That decision clearly takes the view that CCTV footage cannot be counted as a documentary or pictorial image and therefore cannot come within the definition of electronic evidence which might either be counted as PPE or allowed to be claimed by way of special preparation.

6. Counsel sought to distinguish this case from Reed based upon the nature and extent of the CCTV footage and the fact that Penry Davey J was considering a previous iteration of the regulations. I have considerable sympathy with counsel's arguments on this point but it seems clear to me that Penry Davey J was considering the nature of CCTV footage in principle rather than specifically the nature of the particular regulations. If there were any doubt in my mind however that the determining officer's decision should be upheld, such doubt is expunged by the case of the Lord Chancellor v McLarty & Co Solicitors [2011] EWHC 3182 (QB) where Burnett J, now the Lord Chief Justice, heard a similar appeal regarding audio footage and endorsed Penry-Davey J's view that self-evidently audio visual material did not come within the description of a documentary or pictorial exhibit unless it had been transcribed. Although the decision is only a year or so later than Reed Burnett J set his decision in the context of the digital age arriving and paperless trials becoming a reality. As such, I do not think there is any scope for seeking to distinguish what is broad guidance on the basis that it (narrowly) pre-dates the current regulations. Therefore, whilst it seems to me that moving images would intuitively fall within the description of a pictorial exhibit, I am clearly bound by High Court decisions to the contrary and the appeal must fail on this ground.

7. In order to succeed on the claim under subparagraph (a), counsel needs to show both that a substantial amount of work in excess of the usual amount has been carried out and also that the work related to a novel or unusual point of law or factual issue. There is no point of law in this case and every set of facts are novel in themselves. The slightly awkward wording of the regulation has been interpreted by Master Gordon-Saker in R v Ward-Allen to mean a factual issue which is "outwith the usual professional experience."

8. The case itself involved two separate conspiracies to control prostitution in brothels in central London. It was alleged that the profits from those enterprises ran into millions of pounds. Of the eight count indictment, Georghe faced two counts regarding brothels located at different premises as well as a separate

count regarding the concealing of a deposit box containing a large quantity of cash which was said to come from the controlling of the prosecution.

9. Counsel told me that although there were 12 women alleged to have been carrying out the prostitution, not one of them gave evidence for the prosecution. As such the prosecution was unable to demonstrate any victims of the alleged crime which was an unusual situation in itself. In the absence of witness evidence, the prosecution had to rely heavily on the CCTV footage that it had obtained. I was told that large excerpts of the footage were played to the jury as the prosecution contended that it showed Georghe coming and going from the brothel with three male co-defendants at various times of the night and into the early hours of the morning., The jury was told that it could infer that the defendant was the "madam" and was therefore controlling prostitution in the case.

10. The defence of Georghe was that she was in fact one of the prostitutes and was simply acting in the same way as the other working girls in the brothel. The defence alleged that there was no evidence to suggest that Georghe was involved in making the girls work, setting prices, telling them the services they had to provide or where and when they had to provide them.

11. In light of the defence, the defendant's team had to consider all of the 502 hours of CCTV footage to see whether there was anything incriminating in respect of the defendant's behaviour and, just as importantly, to see whether the evidence supported the defendant's case by showing that the other working girls carried out similar activities of inviting clients in, taking out the rubbish, opening the brothel and so on. In the absence of any live witnesses, the prosecution's case rested heavily if not entirely on the CCTV footage in respect of the counts against Georghe.

12. The determining officer accepts that a substantial amount of work in excess of the work normally done in cases of this type has been established. However, he did not accept that the test in Ward-Allen had been satisfied. He did not consider that either the volume of the CCTV footage or the fact that the prosecution could not rely upon any of the prostitutes as witnesses for their case were sufficiently unusual to be considered outwith the usual professional experience.

13. In relation to the volume of CCTV footage, the determining officer considered it to be normal practice in such cases for surveillance footage of the outside of the building to be considered. To the extent that the volume of such evidence was more than usual, he relied upon the decision of Master Rogers in R v Johnson (SCC ref: 062/2003). The determining officer states that authority as deciding that the "volume of unused material did not affect the unusual nature or novelty or otherwise of the point of law or factual issue." In essence, the determining officer says that CCTV footage in principle is contained within the graduated fee and the volume of it will be different in each case and is simply an example of the swings and roundabouts nature of the graduated fee scheme.

14. In respect of the lack of prosecution witnesses, the determining officer thought it to be unsurprising that prostitutes would not want to engage fully with the police or the legal process and did not believe that this would put an unusual amount of emphasis upon the CCTV footage. He pointed to the fact that there was other evidence against Georghe such as telephone evidence. That evidence was described as being a central plank of the prosecution case in relation to counsel's special preparation claim under subparagraph (b) and which had been paid in full separately. There was also financial evidence and documentation showing her connection to companies said to be involved.

15. Furthermore, the determining officer relied upon the advice written by Liam Walker, who also appeared as counsel for Georghe in this case, when seeking to extend legal aid to two counsel. When referring to the surveillance material he indicated that analysis and scheduling of it would be shared between the solicitors and junior counsel and goes on to say:

> "Those tasks alone will occupy almost all of the defence resources. It is of note that, under the current provisions, no remuneration is available for the viewing of surveillance material. In short neither those instructing nor junior counsel will be paid extra for viewing hundreds of hours of recordings."

16. The determining officer considered this comment to reflect the general view of the defence team that was there was a substantial amount of work to be done, but there was nothing novel or unusual about the task or the case itself which would require an additional special preparation payment to be made for considering this material.

17. Counsel has stated, as is often stated in appeals under this subparagraph, that he has never come across such a situation in his years of professional practice. Consequently, it ought to be regarded as being highly unusual. In this particular case however, counsel relates that all of the 10 barristers in the case took exactly the same view. Therefore, whilst the experience of counsel himself may be treated with caution as being determinative of anything in this appeal, it was clearly a substantial case and I accept counsel's assertion that his view was also held by the other barristers in the case.

18. The determining officer does not put forward any basis for his view that there was nothing unusual about this case. I have taken his comments to be based upon his experience in general as a determining officer. On the basis that a number of counsel considered this case to be outside their professional experience, I do not think it appropriate simply to accept the determining officer's view that there was nothing unusual about the lack of prosecution witnesses and the consequent reliance upon the CCTV footage.

19. It also seems to me to be quite possible for the extent of the CCTV footage to amount to an unusual factual issue. I do not accept Master Rogers' decision in Johnson is applicable here. That decision was made in respect of a previous regime and related to unused material rather than the served material here. I

do not think that this is a case which can be catered for by the swings and roundabouts argument.

20. Similarly, it seems to me that the unusual extent of the CCTV footage and the reliance placed upon it is the answer to the quotation from the two counsel advice relied upon by the determining officer. The advice is undoubtedly correct as a general proposition regarding claiming time for reviewing CCTV footage. But it is a brief comment at paragraph 32 of that advice and I do not think that it would be expected to go into detail including the potential for a claim under subparagraph 17(1)(a) of the Regulations. I certainly do not think that the determining officer can assume that it expresses a general view about whether the task was novel or unusual. The task was obviously sufficient for the defence team to seek to obtain extra representation to consider it which presumably is out of the norm in itself.

21. I have therefore come to the conclusion that the claim for special preparation satisfies the test in subparagraph 17(1)(a) since a substantial amount of extra work has been carried out in respect of the unusual factual issue of very extensive CCTV footage being relied upon by the prosecution to prove its case in the absence of live witnesses.

22. Accordingly, this appeal succeeds.

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*1031 R v Dunne

Case 71

Senior Courts Costs Office

28 October 2013

[2013] 6 Costs L.R. 1031

Before: J Simons , Costs Judge

28 October 2013

Editorial Note: The following are decisions of costs judges on criminal cases and therefore do not have the same authority as those at higher judicial level. However, they are included because it is thought they will be of use to the profession.

Headnote

When claiming "special preparation" under para 14 of the Criminal Defence Service (Funding) Order 2007 (as amended), the determining officer had been correct not to allow a claim for payment based upon a rate per page depending upon the number of pages considered. A contemporaneous work log was a requirement that it was incumbent upon a litigator or advocate to provide in support of a claim for fees under the graduated fee scheme. However, the absence of a log was not fatal and provided payment for special preparation was justified in principle, the determining officer could make a value judgment based upon the information provided and his or her experience. *1032 On the facts, in allowing 190 hours, the determining officer had undervalued the claim. 300 hours would be allowed.

Reasons For Decision

J Simons

1 Miss Louise Santamera of counsel appeals against the decision made by the determining officer at the Legal Aid Agency to reduce her claim for special preparation from 644 hours to 190 hours.

"Criminal Defence Service (Funding) Order 2007 – Schedule 1

14. Fees for Special Preparation

(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3 –

(a) …

(b) The number of pages of prosecution evidence, as defined in para 1(2), exceeds 10,000 and the appropriate officer considers it reasonable to make a payment in excess of the graduate fee payable under this schedule.

(3) The amount of the special preparation fee must be calculated –

(a) …

(b) where sub-paragraph (1)(b) applies, from the number of hours which the appropriate officer considers reasonable to read the excess pages;

and in each case using the rates of hourly fees set out in the table following para 19 as appropriate to the category of trial advocate."

2 Miss Santamera represented James Dunne who was one of twenty individuals being charged with the offence of conspiracy to cheat the public revenue. The case was named Operation Fluency and arose after a lengthy internal investigation rendered by HMRC into misallocations of large sums of money to taxpayers' accounts. The total loss of revenue by HMRC was in excess of £1 million.

3 Due to the large number of defendants, the court decided that three trials would be necessary with James Dunne's trial being the last. ***1033** Dunne faced an indictment containing one count of conspiracy to cheat the public revenue, with the main defendant, a senior tax inspector, Mr Michael Kitchen.

4 A considerable number of pages of prosecution evidence were served. According to Miss Santamera's original claim for special preparation, 22,606 pages of prosecution evidence were served. In written reasons dated 2 July 2013 there is reference to the number of pages in excess of 10,000 as being 9,944, and in Miss Santamera's Grounds of Appeal she states that the excess number of pages was 12,875. I am told that the number of excess pages is now agreed at 12,875.

5 Miss Santamera's claim for special preparation was based on claiming three minutes per page as a reasonable time to read the pages in excess of 10,000.

6 On 26 March 2013 the Advocate Graduated Fee Team rejected the claim for preparation stating:

"Work is ineligible within the criteria for special preparation as counsel has applied a x page calculation. This cannot be accepted – she must provide her actual work log scheduling the actual time spent on these pages."

7 Miss Santamera sought a review and submitted a seven page work log showing 644 hours. The outcome of the re-determination was a detailed response from the determining officer who concluded that 190 hours was sufficient time to consider the exhibits relevant to the client. The determining officer referred to the work log which she stated did not appear to be contemporaneous and that as counsel had not kept an accurate log of work actually completed, the determining officer could only assess the claim by examining the defendant's role within the case, his position on the indictment, and the nature of the exhibits as described by counsel. She noted:

"(i) The defendant appears only on count 4 of the six count indictments.

(ii) The defendant is sixteenth on an indictment of twenty.

(iii) The value of the fraud is £1,193,725.63, and the value attributed to the defendant is £22,160.09.

(iv) The fraud concerns 146 fraudulent payments of which 28 are attributed to the defendant.

1034 All these factors together indicate that 644 hours or indeed the requested three minutes per page is an unreasonable claim as the client's role is limited, and even in respect of a defendant with greater involvement, the exhibits themselves do not warrant 644 hours of consideration time."

8 Miss Santamera had sent with her request for re-determination discs of the evidence that had been served and it is clear that the determining officer had considered the contents of the discs when making her decision.

9 Still dissatisfied, Miss Santamera sought written reasons and those reasons confirmed the earlier re-determination made by the determining officer.

10 Miss Santamera now appeals. She states that the discs themselves were difficult to view and that, as a result of these difficulties (which had been acknowledged by the determining officer) more time was spent by counsel viewing the discs than may have been spent if the evidence had been served on paper. Switching between the different documents on the disc proved to be very time consuming, and even downloading the contents onto a hard drive did not speed up the process.

11 Miss Santamera challenges the statement made by the determining officer that she made no attempt to isolate the exhibits most relevant to her client, allowing her to focus on those and skim through the balance that did not directly concern her client. Miss Santamera states that it was necessary to scrutinise all the evidence against her client and the main defendant, Mr Kitchen, and failing to do so would put her at risk of failing in her duty to protect her client's interest. Miss Santamera states that none of the exhibits were repetitive or duplicated.

12 Counsel also refers to a lack of a contemporaneous work log. She states that this was the first case that she had been involved with which required a claim for special preparation and she simply consulted her colleagues at the Bar as to what was necessary. She refers to claims for special preparation made by counsel representing other defendants involved in the case. Five of these counsel were paid between 235 hours and 300 hours for special preparation, and in some cases no work log had been provided. Miss Santamera states that the Legal Aid Agency is not applying guidelines with any consistency in that some claims for special preparation are met with a ***1035*** contemporaneous work schedule and some are met without a work schedule.

13 Miss Santamera attended before me at the hearing of this appeal. She informed me that when the contents of the discs were served, it was not possible for the contents to be identifiable as being relevant to her client, and consequently it was necessary to view all of the discs. The contents of various schedules had to be cross-referenced with bank statements and then cross-referenced with other schedules and checked against what the client had said in his interviews in order that she could be satisfied not only about accuracy but also about continuity.

14 The appeal was also attended by the determining officer, Miss Burdett, as well as by a representative from the Legal Aid Agency. I gave permission for Miss Burdett to address me. She informed me that amongst other factors, she based her decision of 190 hours on the fact that counsel for the lead defendant, Mr Kitchen, had claimed and been paid 240 hours for special preparation. She also

informed me that she had been through the discs herself and she queried the necessity of the detailed analysis of every single document.

15 In response, Miss Santamera informed me that Mr Kitchen had in fact pleaded guilty at the plea and case management hearing which was before the second disc had been served, and on that basis it was unreasonable for her to be paid a lesser amount of special preparation time than counsel representing Mr Kitchen.

16 I agree with the determining officer that it is not the correct basis to formulate a claim for special preparation at a rate of three minutes per page. The regulations state that the fee must be calculated from the number of hours which the determining officer considers it reasonable to read the excess pages above 10,000. It is incumbent on any advocate to provide a contemporaneous work log. Failure to do so can lead to the rejection of the claim for special preparation. If the special preparation claim is not rejected, the determining officer must make a value judgment based on the information provided and upon his or her experience.

17 I accept Miss Santamera's submissions that the contents of the discs were not easily identifiable and that there was significant slowness in retrieving some data. In my judgment, the 190 hours allowed by the determining officer undervalues the amount of time reasonably spent by Miss Santamera. It seems to be significant that ***1036** 240 hours for special preparation was allowed for counsel for Michael Kitchen, notwithstanding the fact that Mr Kitchen pleaded guilty at an early stage and that a significant amount of further documentation was served following his plea. In my judgment, a reasonable number of hours necessary to read the excess pages is 300.

18 Accordingly, to that extent, this appeal succeeds and I direct the determining officer to increase the claim for special preparation from 190 hours to 300 hours.

***1037**

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