Neutral Citation No. [2022] EWHC 2355 (SCCO)

Case No: SCCO JJ/41/10

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 14/09/2022

Before:

COSTS JUDGE JAMES

- -

Between:

REGINA
-v-
CLAUDIA WINKLER

and

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

HARRIS & CO, SOLICITORS

Appellant

-and-

THE LORD CHANCELLOR

Respondent

Mr Martin McCarthy (instructed by Harris & Co., Solicitors) for the Appellant
Mr Rimer (instructed by The Legal Aid Agency) for the Respondent

Hearing dates: 20 August 2020

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Approved Judgment

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

Costs Judge James:

1. This is an appeal by Harris & Co., Solicitors against the fees allowed in respect of PPE by the determining officer in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013.

2. These are the reasons for my decision to allow the appeal (in part) and to direct that the determining officer is to pay a further 50 pages of prosecution evidence ('PPE') together with the costs of this appeal which I have allowed in the sum of £500 including the appeal fee of £100.

3. The issue arising in this Appeal is as to the correct assessment of the number of PPE when determining the Litigator's fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detailed 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, and the length of the trial.

4. The Appellants were represented at the hearing, which took place as long ago as 20 August 2020, by Counsel, Mr Martin McCarthy. The Legal Aid Authority (the LAA) were represented by Mr. Rimer, who is an employed lawyer; I also had the benefit of written submissions from both sides. I owe both parties a sincere apology for the lengthy delay in producing this Judgment, which has been due to a variety of factors including the pandemic, but even so, clearly, they deserved the certainty of a decision much sooner than this. There was at one time a delay due to the parties reviewing the material on the discs between themselves, but the delay since August 2020 is my own.

5. The Respondent has conceded an additional 72 pages as part of the appeal process. The pages now agreed by the Respondent are a total of 7,077 (1,918 paper PPE, 5,159 electronic PPE). The dispute focuses on the balance of the claim capped at 10,000 pages (hence the dispute has crystallised to a claim for a further 2,923 pages).

6. Per the Appellant, the original telephone data was all served/used evidence, which was served as a result of vigorous pursuit of the telephone evidence by the defence in the lead up to the trial. The data was provided on 8 discs and presented in XRY format (it had to be converted to PDF in order for it to be fully considered). There is no dispute that the data was served nor that converting to PDF is an appropriate method of viewing the data.

The background facts in the case against Ms Winkler

7. The defendant and her co-accused (Mr Mustafa) were indicted in three separate conspiracies to supply drugs of Class A, B and C; those charges were subsequently amended to reflect substantive offences of possession with intent to supply, in circumstances that Mr Mustafa indicated that he would plead Guilty to substantive offences in that form (which in due course he did). Hence Ms Winkler's defence proceeded in the shadow of Mr Mustafa's Guilty pleas.

8. On 8 February 2017, Ms Winkler was seen by Police to enter a garage. A taxi driver (Mr Karim) had also been seen to enter the garage and place a box inside. Ms Winkler exited the garage and walked towards her car. Police stopped her and she was searched. She was carrying a bag with drugs inside. She had keys to the garage unit as well. A search of her car revealed yet more drugs. She had two mobile telephones. A full search of the garage revealed more drugs and paraphernalia for weighing and mixing drugs. A search of Winkler's home revealed notebooks with "tick lists" inside. There was a search of a further property linked to the co-accused Mr Mustafa, which revealed drugs, cash and telephones. Two lockup units linked to Mr Mustafa were then searched and yet further drugs and mixing paraphernalia were found. All three individuals (including Mr Karim) were arrested and interviewed.

9. Ms Winkler maintained the drugs found on her, were for her personal use. The garage was used, she said, to store furniture items and personal items. Any cash found was derived from her work as a beautician and manicurist. A friend used the garage to store some of his own items. Mr Mustafa made no comment in interview. Mr Karim said a friend ('Tom') had asked him to take some items to the garage for £10. He did so but did not know anything about the drugs found there.

10. Police undertook analysis of all the phones seized and the Appellant asserts that the data was important to establish attribution, contact and association and whether text messages related to drug sales activity. The Crown produced (J606) a 27-page contact schedule as between Ms Winkler and Mr Mustafa which the Crown maintained related to drug dealing activities and which I have read. By an NAE, the Crown served a series of extracts of handset downloads going to the issue of attribution of handsets and as to drug activity on those handsets between the co-accused (J639 onwards).

11. At an early stage of the case, the defence were considering an application to dismiss. The defence pursued service of all billing data and handset downloads from which extracts were served and a skeleton argument in support of service (or exclusion in default) was served on 19 May 2017 (and refined on 2nd June 2017 Q45). Not Guilty pleas were entered (and dismissal abandoned) on 2 June 2017. Mr Mustafa pleaded Guilty (2 June 2017). I have not been told (and it appears the Appellant does not know) what occurred with Mr Karim.

12. The defence served a variety of defence statements in the lead up to the trial. Ms Winkler initially maintained that all drugs found with her were hers and for her personal use but that she was not responsible for the drugs at the garage (DCS D1 4/6/17). She said those drugs belonged to an ex-boyfriend whom she could not name. In November 2017 she updated the DCS to give her boyfriend's name (Mr Oliveira – at D5). She updated the DCS further on 17 September 2018 (D8) to say that the drugs in the car belonged to Mr Oliveira too.

13. Per the Appellant, as a result of their pursuit of the telephone data, the Crown served the 8 discs of evidence by NAE dated 6 June 2017. The Prosecution conceded the merits of the defence application for the data. The Appellant asserts that the data was pivotal evidence in the case against the defendant in linking her to drug supply and to the co-accused Mr Mustafa.

14. A trial began on 5 February 2018 but was aborted after 2 days due to a health and safety issue at Court. The new trial began in September 2018. The case concluded with Guilty verdicts with the defendant receiving a suspended sentence of imprisonment. At the trial, both sides deployed telephone data; the Crown used it to establish links to drugs supply activity, links to Mr Mustafa and to show cell site locations of each of the defendants at particular times.

15. The defence considered and deployed the data to show innocent contact and to distance Ms Winkler from Mr Mustafa and from drug dealing activity. The purpose of using the data on her behalf was essentially to show she had a legitimate business and that while she was a user of drugs, she did not supply them to anyone else. The additional point was to show the involvement of Mr Oliveira in her past and to establish his involvement with her and to distance her from drugs by, in effect, blaming him for the drugs found.

The legal framework

16. 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."

17. As is clear from the provisions set out above, that determination is not conclusive as to the amount of PPE which is properly to be allowed. Subpara. 1 (5) set out above makes it clear that even if evidence has been served it is a matter for the Determining Officer ('DO') and hence for me to consider whether it is appropriate that such evidence counts towards the PPE. I have considered the judgement of Nicola Davies J (as she then was) in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) (including in particular para. 20) and the judgement of Holroyde J in *SVS* (including in particular para. 44 to 48) which, although principally directed to the issue of service, are relevant in determining how the DO or Costs Judge should exercise his or her discretion under this provision. When dealing with the issue as to whether served material should be regarded 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".

18. At paragraph 20(1)(a) of Schedule 2, a Litigator may claim special preparation as set out below. Such a fee would be based on time actually spent; that is to say, the number of hours the DO considers reasonable to view the evidence not allowed as PPE. The Respondent says that the remaining disputed pages should be compensated by such a fee.

"20.—(1) This paragraph applies in any case on indictment in the Crown Court—

(a)where a documentary or pictorial exhibit is served by the prosecution in electronic form and—
(i)the exhibit has never existed in paper form; and

(ii)the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence; or
(b)in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000, and the appropriate officer considers it reasonable to make a payment in excess of the fee payable under Part 2.

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2."

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

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

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

20. 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."

21. 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]

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

23. Costs Judge Rowley has also pointed out in *R v Mooney* (SCCO Ref, 99/18) that the task is to be undertaken without hindsight, The exercise should not generally be carried out on a page-by-page basis as such an approach would put an excessive burden on the practitioner, the Respondent and the Court and would undermine the effective working of the scheme. Thus, what may be required may be relatively broad bush in nature. I respectfully agree with this approach and I did not understand it be substantially if at all disputed in the Hearing, however it is notable that *R v Mooney* relates to a different scheme than that in this case, and that Costs Judge Rowley was ruling against any attempt by the LAA to cherry-pick items from a given category so as to bring a claim below a certain set threshold. That is different to the main issue here, namely claiming per page for reams of material that, according to the Respondent, simply has no relevance.

Application to the facts in this case

24. When presenting the claim to remuneration, the Appellant submitted a claim for the maximum PPE (capped at 10,000 pages). No claim was made to special preparation. In preparing for this appeal, data was provided to the Respondent and Counsel for the Appellant audited the PDF pages at 9,422 pages (in addition to the paper PPE). The total pages therefore well exceed 10,000. The Respondent initially paid 7,005 PPE, as to 1,918 paper pages (on the NAE) and 5,087 pages on the discs; regarding the discs, the Respondent stated that it had allowed contacts, calls and messages and that it has had to convert XRY files to PDF and only allowed contact data from the SIM card, memory card and handset reports, asserting in every case that the relevant data is significantly less than the total data on each disc. The further 72 pages now conceded by the Respondent have been included in the below tables.

Description	**Claim**
Disc 18 5 PDF files (84, 2, 6852, 2 and 2 pages respectively)	6,942
Disc 19 3 PDF files (30, 2 and 2 pages respectively)	34
Disc 20 3 PDF files (29, 2 and 2 pages respectively)	33
Disc 21 5 PDF files (61, 2, 207, 2 and 2 pages respectively)	274
Disc 22 5 PDF files (61, 2, 663, 2 and 2 pages respectively)	730
Disc 23 19 text doc files, 4 excel files, 1 PDF file and 1 folder	1,786
Disc 26 5 PDF files (122, 2, 99, 2 and 2 pages respectively)	227
Disc 27 5 PDF files (190, 2, 305, 2 and 2 files respectively)	501
Total pages (maximum 10,000 PPE Claimed to include paper pages):	**10,527**

25. The page counts in the Scott Schedule submitted ahead of the hearing, differed from these totals (for example the Scott Schedule indicates a page total for disc 18 of 7,607 rather than 6,942). Given that the page total was already over the 10,000 PPE 'cap' and given that the amounts allowed are unaffected it does not appear to me that anything hinges upon this discrepancy, especially since there is clearly still some disagreement between the Appellant and the Respondent as to the correct page count, but it would be remiss not to acknowledge it here. In effect, the Appellant asserts that every

electronic page on every disc had to be considered and the Respondent disagrees, allowing something under half of the electronic PPE.

Description	**Allowed**
Disc 18 only allowed contacts, calls and messages	4,548
Disc 19 no relevant data	0
Disc 20 no relevant data	0
Disc 21 only allowed contacts	2
Disc 22 only allowed contacts and calls	35
Disc 23 only allowed contacts and messages; 4pp Excel, 74pp PDF	78
Disc 26 only allowed contacts and messages (a further 72 conceded)	115
Disc 27 only allowed contacts, calls and messages	381
Total electronic pages allowed	**5159**

Description	**Allowed**	**Actual**	**Shortfall**
Disc 18	4,548	6,942	2,394
Disc 19	0	34	34
Disc 20	0	33	33
Disc 21	2	274	272
Disc 22	35	730	695
Disc 23	78	1,786	1,708
Disc 26	115	227	112
Disc 27	381	501	120
Total	**5159**	**10,527**	**5368**

26. The 5,368 "shortfall" total needs to be adjusted for the 1,918 paper PPE and the 527 electronic pages never claimed because they would take the total over 10,000. Deducting those, this dispute has crystallised to a disputed payment of 2,923 PPE in respect of which the Respondent asserts that they are irrelevant and also that the XRY viewer mode should not be used because it counts "items" not pages, which unreasonably increases the total.

27. The Appellant asserts that it justified the claim to the electronic data in its LF1 and 2 and asserts that the documents submitted with this appeal demonstrate that the issue of relevance was specifically addressed in the letter to the Respondent on 14th March 2018. The Appellant also provided a detailed note and accompanying breakdown of the data on disc and addressed the issue of relevance disc by disc, as set out in paragraph 29 below.

28. In the written reasons of 16 January 2019, the DO makes plain that the XRY data on disc had been converted to PDF. In making the assessment and applying the appropriate discretion to the data, only calls, messages and contacts were allowed across all of the data on disc. A series of decisions were then referred to by the DO in what the Appellant characterises as a rather "cut and paste" response to the submissions. In exercising the discretion not to remunerate the balance of the data on disc, the DO appears (per the Appellant) to have paid little if any real regard to the submissions made. The DO's short concluding remarks suggest that the work undertaken (in reviewing the remaining, 'irrelevant' pages) should be remunerated as special preparation.

29. The Appellant asserts that the case was serious and complex, the Defendant was of good character and was vulnerable (both as a drug user and as someone with fragile mental health) and that each and every page was therefore carefully considered; in a document headed "Breakdown of Telephonic Disc Contents" they assert that, *"…it was important that each and every page on the discs was carefully considered regardless of whether it contained relevant information or not."* Thus, it appears that the Appellant accepts and asserts that it applied anxious scrutiny to at least some irrelevant pages.

30. In its grounds of response (submissions of Mr. Rimer dated 4th August 2020) the Respondent concedes a further 72 pages, which were omitted by oversight. It is said that it was unnecessary to lodge an appeal on that point, but the Appellant says that the Respondent had issued final written reasons rejecting the claim to any further pages of PPE and so this appeal was the only route open to the Applicant to pursue matters further, even to the extent of 72 extra pages. As I have (below) allowed a further 50 pages nothing hinges upon this; the Appellant may not have succeeded in all its aims but it has improved its position, if only slightly.

31. Both parties made lengthy and detailed submissions, but the issue itself was quite narrow, namely did the circumstances of this case (and of this defendant) render it necessary to view each and every page, even if irrelevant, or was it appropriate to treat the matter as the DO has in this case and hive off the relevant material, disallowing the remainder but leaving the door ajar to claim special preparation for that material? As such, and for reasons of space, I do not recite all of the parties' submissions here but I have of course considered all of them very carefully.

32. The Appellant stated that the Respondent's submissions were predicated on only a snapshot of the factual background and that relevance as an issue could not be appropriately addressed by the Respondent because Mr. Rimer had not had access to the fuller factual details; the Respondent maintained that the DO had carefully reviewed the discs and explained why certain pages were allowed (or disallowed). The Appellant accepted that the Respondent had correctly identified the appropriate regulations and that, through the DO, it is plainly entitled to exercise discretion as to whether to remunerate pages as PPE. No issue is taken with the principle and general approach. However, in this case the Appellant submitted that the DO failed to exercise that discretion fairly and appropriately and in particular, failed to have full and proper regard to the submissions on relevance and the factual background when performing their task.

33. I have seen both sides' submissions in the form of a Scott schedule. In every instance, the Applicant maintains that relevance is established sufficiently to remunerate the balance of the material within the PDF report to take the total PDF pages to the 10,000 cap. They assert that, in assessing relevance, it is important to see the data in its fullest context. In showing a single page or two pages from a longer report, as Mr. Rimer has, the Court is unable to see how the full report presents.

34. The Appellant asserts that conversion of XRY to PDF has produced a PDF report that appears as a single string document with no hyperlinks or tabulation/index and is unlike many PDF reports that allows for easy navigation. The process of reviewing such reports is burdensome and time consuming and the Appellants assert that it is not possible to search the report as one might do in Excel. I find that surprising as software exists to manipulate PDF documents very much as one would do with Excel, including searching for a specific name, date or telephone number.

35. The Appellant cites a number of recent costs decisions in cases where the PDF report is effectively a single string, as here, stating that the recent approach is to accept that the Appellant cannot be expected to apply hindsight. With such randomised folders and documents, the fair approach (recognising the difficulty) is to remunerate for the entire document. They assert that this approach found favour in *R v King* SCCO Ref: 170/19 (15/11/19), where Costs Judge Nagalingham had to consider a Litigator's claim to electronic PPE in a case involving a single PDF report. Absent

explanation or sub-division of the report, the total report was payable as electronic PPE up to the 10,000 cap.

36. This approach has (says the Appellant) echoes of the decision by Costs Judge Rowley in *R v Mooney* SCCO Ref: 99/18 (28/5/19) where the Court also concluded that a page-by-page approach was not appropriate. Not all pages of a document need to be important to be considered and counted as PPE (para.11) and hindsight had to be guarded against (para.14). Where a category is allowed, the correct approach is to allow all of those entries. Litigators should not have to spend inordinate amounts of time justifying individual pages (para.15).

37. On the question of images, the Appellant accepted that plainly not every image served in a report is going to be central. However, it is not necessary to demonstrate the significance of each image. A broader approach is called for. In *R v Figueredu* SCCO Ref: 164/19 (4/11/19), Costs Judge Whalan allowed the images claimed in a case where only a very small fraction were used in the trial (4 of over 4000). Given the way the images were randomly organised, it was necessary for the defence to look through all the images. An even broader approach was taken by Senior Costs Judge Gordon Saker in *R v Sereika* 168/13 (12/12/18) in allowing a significant proportion of a very large section of images where the Litigator was unable to demonstrate the relevance of each image.

38. Per the Respondent, the basic position under the Regulations is that electronically served evidence is not included in the number of pages of prosecution evidence. However, the DO can decide to include this evidence taking into account the nature of the document and any other relevant circumstances. The range of factors that the DO may take into account when determining whether to include electronically served material within the pages of prosecution evidence is not limited. However, generally, the DO will consider whether the material was of pivotal importance to the case and the amount and nature of the work required to be done, including whether the evidence required a similar degree of consideration as a page of evidence served in paper format.

39. The Respondent submitted that as the disputed material had not existed in paper form the DO was bound to undertake a qualitative assessment of the electronically served material under paragraph 1(5) of the Remuneration Regulations. Such an assessment by the DO is a fundamental feature of both the Funding Order and the Remuneration Regulations. As is made clear at paragraph 50(ix) of *SVS* this assessment by the DO is *"an important and valuable control mechanism which ensures that public funds are not expended inappropriately."*

40. Per the Respondent the fact that the material was served is an insufficient basis to include material within the pages of prosecution evidence. If the fact that material was served was sufficient to automatically make it PPE there would be no need for paragraph 1(5) of Schedule 2 to the Remuneration Regulations. As is set out at paragraph 10 of *R v Sana*: *"The regulations do not state that every piece of electronically served evidence, whether relevant or not should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances."*

41. In this case, the Respondent submits that the DO has exercised her discretion appropriately by including the call, contacts and message data from the reports. The DO's assessment has effectively allowed all of the material data from the reports and excluded the material which concerns the configuration of the phones and metadata. Per Mr Rimer, it is clear when the Advocate's claim in the same proceedings is matched with the Schedule of material provided by the Appellant Litigator, the DO in the Appellant's claim has been generous in her allowance as a greater number of pages of evidence were allowed in respect of the Appellant Litigator's claim than were allowed to the Advocate.

Decision

42. I note the Advocate's position; to an extent that comparison assists as invariably when Litigators assert that Advocates have received more PPE the LAA tends to respond by reducing the Advocates' allowance to match. However, the two schemes are not identical and I do not understand that Mr Rimer was suggesting that the Appellant's PPE should be tied to what the Advocate has received, so this is interesting rather than helpful.

43. This case, which turns on its own facts, can in my view be distinguished from the cases relied upon by the Appellant. For example, in *R v King* Costs Judge Nagalingam referred to *"…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…"*

44. That is in quite stark contrast to this case; here the contact in question was covered in a 27-page contact schedule between Ms Winkler and Mr Mustafa, and conspiracy was no longer charged. There were 8 discs, each with several reports on it; this simply was not a lumpen mass of thousands of pages to be waded through without any guidance, in the way that Costs Judge Nagalingam appears to have found to be the case in *R v King.*

45. Similarly, the case of *R v Mooney* was dealing with a different situation to this case; in *R v Mooney* the Appellant was dealing with staged PPE claims and the point of the decision is that the LAA should not be astute to reduce items by a few pages here and there in an endeavour to reach a lower stage. If the relevant items add up to a higher stage, that should be allowed. That does not, and was not intended to, remove the requirement for the DO to consider the nature of the material and its relevance in calculating the page count in a case where the PPE is being paid by the page (not by the stage).

46. It seems to me clear in exercising the discretion described by Holroyde J and in particular having regard to the nature of the documents and relevant circumstances that (with one exception) the disputed material was likely to have been of limited or no relevance – even if it needed to be checked – and would not have required the degree of consideration that is ordinarily appropriate to PPE.

47. It is material that the person charged with considering these pages, should have been able to check them with considerable speed; there are reams and reams of meta data that convey nothing of pith, which could have been scanned fairly rapidly. Refusing to allow such material as PPE does not mean that the Litigator is not paid for such work or that the work did not have to be undertaken, but the appropriate way of compensating the Litigator for such work may be by way of a special preparation fee. The alternative approach advanced by Mr. McCarthy in seeking the full 10,000 PPE would not in my judgement achieve the underlying intention of the provisions as interpreted in *Jalibaghodelezh*i, nor the balance required between ensuring that practitioners are properly paid and safeguarding the public purse (see para 11 above *SVS*). His approach would, in my view distort the operation of the fees scheme (*R.v Napper [2014] 5 Costs LR 947,* para. 11).

48. I accept, and I did not understand that it was in dispute, that telephone evidence was used to attribute the phones to the defendants and it was on the basis of this attribution that cell site evidence could be used to trace the location of the defendants at the material time. However, it is also clear from the facts that two telephones were seized from the person of Ms Winkler, which was again evidence that those phones were connected to her. She was caught with drugs on her person, with keys to a garage where there were more drugs and there was a car linked to her (which she subsequently said belonged to Mr Oliveira) which had yet more drugs in it. Attribution was important in determining

the issue arising in this case as to whether there was any (and if so what) guilty association between the co-defendants which was relevant to whether Ms Winkler could be linked to drug dealing rather than merely possession for personal use, but there was significant evidence including eyewitness evidence as well.

49. The allowance of PPE should extend to surrounding material which it will often be necessary to consider where the Prosecution seek to rely upon a sub-set of data obtained from a particular source. In such circumstances it may be necessary to include all of the data from that source. Material may need to be checked to ensure that the material relied upon by the Prosecution presented a fair summary of the evidence. This may be of particular importance where some telephone evidence is used; it may be important to consider what other use was made of the phone at the time of the calls relied upon.

50. However, I do not understand the Appellant to disagree that all of the communications information, as well as contacts on the phones which were shared by the two defendants which could or might be used by the Prosecution to show association between them, are already included within the 7,077 pages which are not in dispute. In other words, any perceived lack of fairness in 'cherry picking' messages et cetera, simply does not apply here as they have all been allowed within the electronic PPE (and to the extent that they were exhibited to Witness Statements, in the paper pages as well).

51. The one area where I consider it is appropriate to diverge from the DO's decisions, is that in my view some of the photographs in the images section did require such consideration as to make it appropriate for them to be included within the PPE. Samples of photographs were considered by me and the impression left was that there was a proportion of the photographs which would require consideration, as either tending to show that Ms Winkler led a fairly modest lifestyle and earned and could account for cash money through her beauty business, or as tending to show that her co-defendant (Mr Mustafa) had a lavish lifestyle possibly more in keeping with a drug dealer.

52. Neither side was able to assist me with submissions as to how many photographs were relevant and it therefore seems to me that I should carry out the assessment on a broad-brush basis. It does not in my view follow that just because some potentially relevant material has been identified within a section of the served material, that all of that section would then necessarily count as PPE (see my comments on *R v Mooney* above). I was not satisfied that this was directly analogous to situations which are considered in *SVS* (para. 44 and 47). Just a handful of images were identified as relevant, even on the Appellant's analysis. I saw a couple of pictures of Mr Mustafa in an expensive-looking Audi convertible, plus pictures of Ms Winkler in more humble domestic settings, and pictures of beauty products, but I do not think that a significant number of the photographs would have to be considered. The defendant was herself able to give instructions, the images span a significant period, and some are clearly irrelevant; having further considered the material and doing the best that I can, I will allow 50 pages of photographs as PPE, in addition to the pages already allowed.

53. As to the remainder, much of the material served in the case was duplicative in nature, both of material included in the NAE and of itself. The reports were the product of separate attempts to extract the same material using different extraction tools. Much of the disallowed material was indecipherable meta data. I do not accept that the rest of the material required the degree of consideration appropriate to inclusion in the PPE and nor did Mr. McCarthy put before me any cogent grounds for thinking otherwise.

54. Submissions to the effect that material had to be considered to check if it was relevant to the defendant's case are tantamount to an admission that it was not. Submissions that long strings of meta data and so forth had to be considered because of the seriousness and complexity of the case as well as taking into account Ms Winkler's good character and vulnerability, do not assist the Appellant either. Whilst hindsight should be guarded against, a reasonable approach to pages upon pages of incomprehensible meta data, would have been to skim through that material before turning

closer attention to the main event, the calls, messages and contacts, especially those between Ms Winkler and her co-accused. The remuneration for skimming through the remaining material 'just in case' is a matter for Special Preparation, not PPE and I leave the parties to attend to that issue.

55. Some small improvement has been made on the figures contended for by the Respondent in this Appeal and to that extent there has been a success. But the Appellants have lost on the majority of what was argued and have barely succeeded in persuading me to increase the figures allowed by the DO. It seems to me that the correct order is that a proportion of the costs incurred on this Appeal should be allowed and I consider the appropriate amount to be £500 including the fee for the Notice of Appeal.