Ref: SC-2019-CRI-000058

Dated: 9 November 2020

APPEAL FROM REDETERMINATION

REGINA v BROWN AND HOWARD

THE CROWN COURT AT LEEDS

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

CASE NO: T20187755

LEGAL AID AGENCY CASE

DATE OF REASONS: 23 September 2019

DATE OF RECEIPT OF NOTICE OF APPEAL: 25 September 2019

APPELLANTS: Harris Solicitors Limited

This appeal is unsuccessful for the reasons set out below.

JENNIFER JAMES
COSTS JUDGE

REASONS FOR DECISION

1. The substantive issue arising in this appeal is as to the number of pages of Prosecution evidence ('PPE') for the purposes of the Graduated Fee claim submitted by the Appellants. There was a Hearing as long ago as 22 January 2020, attended by Mr McCarthy, Counsel for the Appellants and Michael Rimer (employed Barrister) for the Legal Aid Agency ('LAA'). In order to enable the parties to clarify their respective positions and to enable a lawyer at the LAA to consider the Appellants' submissions as to the relevant page count in this case, and possibly to narrow the issues, I had made Directions in November 2019 and both parties made written submissions ahead of the Hearing, for which I am grateful.

2. I apologise for the length of time taken to produce this Judgment; notwithstanding the Covid-19 pandemic, and notwithstanding the failure of this Appeal, both sides deserved certainty upon costs, by way of a decision, much faster than was the case here. That being said, it will be apparent that I have reached this decision on the facts in this case and that I have had to unpick the Appellants' mistaken version of the facts in order to do so.

3. The Appellants appealed a decision of the Determining Officer dated 23 September 2019 to pay a graduated fee on the basis that the PPE was 1,651 pages (resulting in a graduated fee of £11,875.49). The Appellants seek remuneration on the basis that the pages of prosecution evidence were 9,790 (which would result in a fee of £58,553.22). The difference between these page counts relates to whether a disc of electronic evidence, RAM1, should be included in the page count.

4. The Determining Officer exercised discretion not to include RAM1 in the PPE count, on the basis that it was served upon the Advocate at Court either before or just after Indictment 1 was stayed. There is no dispute that RAM1 was relevant to the calculation of PPE in Indictment 2 (under which the case continued after Indictment 1 was stayed). I have seen references to Indictment 1 being stayed or being quashed; it does not appear that the difference is material and therefore I use the former term in this decision.

5. I have not been told how many PPE were paid in respect of RAM1 under Indictment 2; the LAA noted that the raw data on exhibit KF2 would have been 1,341 pages if printed but allowed 1,184 pages under Indictment 1, a difference of 157 pages, and the Written Reasons justify this by giving the page count, "…taking away blank cells".

6. The Appellants' Notice asserts that, as the disc was served, it is simply payable as an exhibit in the case, in the usual way. Per the LAA, this argument fails to engage with the Determining Officer's statutory duty to take into account the nature of an electronic document and any other relevant circumstances before exercising discretion to include material within the PPE count. If such discretion is not exercised, the default position under the Regulations is that the electronic material is not included in the PPE count.

Background

7. The Defendants, Brown and Howard, were involved with other Defendants in carrying out burglaries in order to steal high value cars and property, or in handling stolen goods from those burglaries. The Appellants have not given a great deal of detail, and the main contemporaneous source is the Court Log provided by the LAA. It is worth setting out some of its contents as they are key to understanding the disagreement between the Appellants and the LAA, and my decision upon this Appeal.

8. On 12 March 2019, Indictment 1 was called on at 10:14. The Defendant Joseph Howard was not expected or required; the other Defendants were expected and listed to be produced but it was agreed that the hearing could go ahead without them. From the Court Log it is clear that there was some audio, the quality of which was said to be poor, but which apparently contained a confession (from the co-Defendant Thomas Connors) to having stolen two cars the night before that call. The recording quality would need to be enhanced, but due to the small number of Experts dealing with such work, it would be impossible to obtain an Expert Report until 2 May 2019. As such, the Crown said they would not be ready to proceed on 25 March 2019, and made an application to break the fixture, which was not allowed.

9. The learned Judge (His Honour Judge Khokhar) was reluctant to lose the forthcoming fixture, and the reasons given (in the Court Log) include the fact that, even if the Expert Report expressed an opinion as to what was on the recording, it would still be a matter for the Jury, and that if the audio quality was indeed poor, surely that was merely a detriment to the Crown. The Defence for Leon Brown indicated that their Expert wished to have access to all Defendants' call data and that the Crown should have it with them at Court today. It was stated that if this was served, Defendant Brown's Expert would be able to work within the existing timetable (with Trial listed for 25 and 26 March 2020). The Judge indicated that he was coming around to the view that the call data should be made available to the Expert, subject to the Crown's view, and the Defendant Howard thereafter adopted the same submissions.

10. There was further discussion of the timing for any Order and it was stated that the Defendant Thomas Connors would not be able to get an Expert's Report in time for the currently listed date. Directions were made for an unredacted Excel spreadsheet containing the call data between 11 September 2017 and 2 November 2017, by 4 p.m. on 13 March 2019 (i.e. the day after this Hearing). The Hearing then finished for Defendant Joseph Howard at 11:40, case listed for Trial on 25 March 2019.

11. The Court Log for 25 March 2019 shows that at 08:55 the Trial was cracked or ineffective: M1 Prosecution not ready: served late Notice of Additional Evidence on Defence. By 14:17, the Crown were still working on the case being clarified and reaching a practical resolution; the submission was that they would be able to open the case now but would need to amend it. There were queries from other Defence Advocates; the Defence for Thomas Connors requested cell site information, and for Stainsby the Defence asserted that attribution of at least one phone was outstanding.

12. At 14:21 Counsel for Defendant Howard said that they needed to know the cell site evidence to determine if they needed their own Expert and shortly thereafter the

learned Judge (His Honour Judge Mairs) stated that realistically the Court would not be in a position to swear in a Jury that afternoon, specifically referring to disclosure.

13. At 15:19 Indictment 2 was added to case T20180773 and at 15:24 Counts 1 and 2 on Indictment 2 were added to Defendant Leon Brown. At 15:44 the Crown addressed the Judge to say that service of the phone evidence was still an issue, and that the Crown's analysis of the cell site data was still not served, but hopefully could be served overnight. There was then some discussion with Counsel for co-Defendant Stainsby, about the phone evidence and attribution, and at 15:49 the Court Log records that the Judge discussed the missing evidence with the Advocate for Defendant Howard.

14. At 15:50 on 25 March 2019, the Advocate for Defendant Howard raised that he had been asking for [from the context, cell site] evidence for 4 months, and that it would take 4 weeks to get his own Expert. At 15:52 attribution was discussed, and it is stated that this was no problem for Defendants Brown and Howard. The learned Judge then stated (at 15:53) that he was not in a position to case manage today, and thereafter discussed amendments to indictments that needed doing, and arraignment of Brown. At 15:55 the Crown stated that it was in a position to serve the raw data and one minute later the case was adjourned until 10:30 on the following day.

15. At 10:59 on 26 March 2019, according to the Court Log, the case resumed and the Crown addressed the learned Judge, stating that some evidence had been uploaded but nothing further on cell site; at 11:06 the Advocate for Defendant Howard stated that the position was as yesterday and two minutes after that, his case was listed for trial on 2 December 2019. Directions were given in respect of phone evidence, including provision for Experts' Reports, at 11:08 and at 11:15 the learned Judge listed the case of Defendants Brown, Howard, Connors and Stainsby, for case management on 24 October 2019.

16. Two minutes after that, the learned Judge addressed the Advocate and after amending the Indictment, Defendant Brown entered Not Guilty pleas. The Prosecution addressed the learned Judge at 11:20 and the Hearing finished for Defendant Howard, five minutes after that.

17. The Determining Officer understood that Disc RAM1 was served on 26 March 2019, based upon a Notice of Additional Evidence dated that day, indicating that was the date the disc was served. However, the Appellants rely upon Counsel's note, which indicates instead that the disc was handed to him at court on 25 March 2019. Per the LAA, whichever is the case, this discrepancy would make no difference to the rationality of the Determining Officer's exercise of discretion in this case, and at the Hearing Mr Rimer stated that the LAA now accept that the disc was handed to Counsel at some point on 25 March 2019.

18. Hence the Appellants' submission, that the difference between 25 and 26 March is important in that it left sufficient time to consider the material before Indictment 1 was stayed, is not opposed on the facts (of which day it was served). It is however still challenged by the LAA on the grounds that paying it as PPE for however many hours it was considered, between the Hearing ending on 25 March 2019 at 15:55 and commencing on 26 March 2019 at 10:59, would generate an

astronomical hourly rate. There is something like 19 hours between those two times, but allowing for travel from and back to Court, to say nothing of eating, sleeping and so on, the time available can only have been a portion of that, and the PPE being claimed, would generate a fee of some £49,000.00.

19. As I understand it the Appellants assert that, even if they had not had time to consider the material, it should still be payable as the payment of a Graduated Fee is not (and never has been) dependent upon proof that the material was actually considered. It is a proxy for the difficulty of the case faced by the Defendants. It either fits the description of PPE or it does not, and if it does it is payable, even if it was served at the last minute.

20. Both sides agree that the proceedings under Indictment 1 concluded on 26 March 2019 which triggered the Appellants' right to claim a fee for that case. Indictment 2 began on 25 March and was listed for trial in December 2019, and does not concern this Appeal, other than that the court has been made aware that disc RAM1 was within the PPE count for Indictment 2. The question is simply whether the determining officer's exercise of discretion not to include it in Indictment 1 in these circumstances, was reasonable.

The Regulations and Case Law

21. 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." [my emphasis]

22. There was a dispute between the LAA and the Appellants, as to whether the material is to be treated as served under the scheme, given that the LAA's primary position was that it was not served until 26 March 2019. At the Hearing Mr Rimer confirmed that the LAA accepts that it was handed to Counsel on 25 March 2019. However, it is clear from the terms of Regulation 1 (5) that it is not of itself enough for the material to count as PPE that it be served. 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 *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045n(QB) (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.

23. In his judgment Holroyde J (as he then was) when dealing with the issue as to whether served material should count as PPE, said this:

"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.

If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".

24. 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*."

25. 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."

26. 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. 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]

27. Even if the material is not appropriately to be regarded as PPE then it may be remunerated by a special preparation fee, pursuant to Para. 17 Schedule 1 of the 2013 Regulations as amended which provides, so far as is relevant, as follows:

Fees for special preparation

> *(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*
> *…*
> *(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2.*
> *(3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—*
> *(a) where sub-paragraph (1)(a) applies, to view the prosecution evidence; and*

(4) A litigator claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.
(5) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case.

28. Such a fee would be based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence other than that allowed as PPE. I take the following passage from *R v Sana* [2016] 6 Cost LR 1143:

> "*A line has to be drawn as to what evidence can be considered as PPE and what evidence we considered the subject of a special preparation claim. Each case depends on its own facts. 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*."

29. To my mind this permits a Determining Officer, and a Costs Judge on appeal, to allow, for instance, checking of material for potential relevance by way of a special preparation fee.

The PPE Claim and the Court's decision

30. The LAA refers to the Regulations and to case law in support of its assertion that the Determining Officer has discretion to disallow even served material; they rely firstly upon its relevance to the case, which would have been considerable if it had been served when it should have been (on 13 March 2019). However, by the time it was served (and the Appellants had any opportunity to review its contents) Indictment 1 was defunct and Indictment 2 was already in place. Hence the material required the close scrutiny that would merit its being claimed and paid as PPE, in respect of Indictment 2, but did not require such in respect of Indictment 1.

31. The LAA also rely upon the timing, as there were barely nineteen hours between the two Hearings, and only a portion of that time could have been spent looking at this material. I did not have any evidence on the point but I do not understand the Appellants to allege that the Defence team stayed up all night looking at this material for the purposes of Indictment 1 and it would be an extraordinary course of action had they done so, given that Indictment 2 was preferred against Defendant Brown, on 25 March 2019.

32. The LAA has put together very lengthy and detailed submissions which, for reasons of space, are not repeated here but which in summary are that the Determining Officer has discretion to decide which electronic pages should be counted as PPE, and that this is a matter to be decided on a case-by-case basis, depending upon the substance, relevance, importance and context of the data in question.

33. Whether electronically served material should be included within the PPE depends upon its substance, relevance, importance and context. The fact that the Defence had very little time to consider this material before Indictment 1 was stayed, and were already on notice that Indictment 2 was in play before they looked at it, illustrates that it is a reasonable exercise of the Determining Officer's discretion not to include those pages within the PPE count for Indictment 1 as well.

34. The LAA commented upon the lack of detail in the Appeal and this is relevant because the Determining Officer can only base his decision upon what is put to him by the Appellants. Mr Rimer stated at the Hearing that he had to go online and look at this case in the local papers in order to find out more about how the case was put together.

35. The lack of detail point is significant in several respects. In written submissions for the Appeal Hearing, Counsel for the Appellants stated that the Defendant was indicted for Theft and Burglary along with others (Indictment number 1). He appeared in court on the 3rd January 2019 and entered a Not Guilty plea and a trial date was fixed for 25th March 2019. The hearing began on 25th March 2019. On the 26th March 2019, the original indictment to which the Defendant entered a Not Guilty plea (Indictment 1) was stayed and as a result the Prosecution preferred an entirely new indictment (Indictment 2) which indicted Conspiracy counts (Burglary and Theft). Other Defendants were added to the new indictment and the complexity of the case changed. As a result, it could not be sustained and the old indictment was stayed by order of the judge.

36. However, that timeline is lacking in several key respects. There is no mention of the Hearing on 12 March 2019 at which the Prosecution sought to vacate the forthcoming trial because they were not ready, nor of the fact that they were still not ready by the first day of Trial on 25 March 2019 and started that Hearing by indicating that the Prosecution could open the case but would need to amend.

37. According to the Court Log, at 15:24 on 25 March 2019 counts 1 and 2 on Indictment 2 were added to Defendant Leon Brown. Therefore the assertion that Indictment 2 was not in being until 26 March 2019, is factually inaccurate. The Court Log is not crystal clear as to when Indictment 2 was entered in respect of Defendant Joseph Howard (it appears to have been at 11:17 on 26 March 2019) but it matters not as the Appellants in this case assert that the Litigator was at Court and certainly Counsel Mr Shufqat Khan was in Court on 25 March 2019 (for Defendant Brown) as was Counsel Mr Jeremy Robert Hill-Baker (for Defendant Howard).

38. There was every opportunity for the Appellants to have ascertained that Indictment 1 was already gone as far as Defendant Brown was concerned, by the time the Court rose on 25 March 2019, and every opportunity for them to have ascertained that the same fate was set to befall Indictment 1 as far as Defendant Howard was concerned, at the Hearing the following morning. By the end of the Hearing on 25 March 2019 it was very clear that the first order of business on behalf of Defendants Brown and Howard was going to be dealing with Indictment 2 which would allege not merely Burglary and Theft, but Conspiracy to commit those offences.

39. The written submissions assert that whereas the LAA argued that there was no evidence before the DO to show that the Appellants received and considered the disc, such a submission is factually in error as the various letters sent to the LAA at the claim stage indicate the disc was served and considered.

40. However, that is itself factually in error, at least based upon what has been submitted by the Appellants for this Appeal. There is no evidence before this Court, and there was no evidence before the Determining Officer, that the Appellants even saw this material prior to Indictment 1 being stayed in respect of Defendant Howard on 26 March 2019 (and per the Court Log Indictment 1 was already stayed in respect of Defendant Brown before the end of the Hearing on 25 March 2019).

41. The Appellants were right to stand by the assertion that the disc was served by being handed over to Counsel, on the day before service was recorded in an NAE; the LAA now accepts that it was, as Mr Rimer stated at the Hearing. However, the Appellants have never submitted any evidence that they saw it (as opposed to Counsel seeing it) before Indictment 1 was stayed.

42. Counsel Mr McCarthy, at the Hearing of this Appeal, made a verbal statement to the effect that his instructions are that the Litigator was also at Court on 25 March 2019. However, this was not in evidence, and it was not put to the Determining Officer at the time the claim was submitted. It also sits very oddly alongside the email of 29 May 2019 sent by Mr Shufqat Khan of Park Square Barristers, which states:

"Further to your earlier communication, I can confirm that I was present at the Hearing of this case at Leeds Crown Court on 25th and 26th [March] *2019, when I was the instructed Advocate for the Defendant Leon Brown. I can confirm that on 25th* [March] *2019, the Prosecution Advocate served upon the Defence, by providing me with a copy of the electronic evidence (exhibit* [RAM1]*). As it was provided to me, it was made clear by the Prosecution Advocate, that it was being served as evidence at that point and that an NAE would be provided to formally serve it. The NAE was subsequently provided but the evidence had been served upon the Defence prior to the NAE being formally provided."*

43. The email does not say that Counsel then sat down with the Litigator at Court to look at the evidence on disc, nor does it give the name of the Litigator who was said to be at Court and nor does it say that the disc was copied or emailed to the Litigator to look at overnight. It says nothing of that sort, and that omission is all the more striking when Counsel's follow-up email of 20 January 2020, is considered.

44. In that email he corrects some typographical errors in his original email (corrected in square brackets above, e.g. he originally stated he was at Court on 25 and 26 April 2019) and he takes the opportunity to insert the name of Prosecution Counsel, Camille Morland. However, even in the follow-up email, which was drafted two days before the Appeal Hearing, Counsel does not say anything about a Litigator from the Appellant firm being at Court on that date, despite the question of what the Appellants saw and when they saw it, being a key issue in this Appeal.

45. The Written Reasons contain the standard reminder that, pursuant to Regulation 29(11) of the Remuneration Regulations, unless the Costs Judge otherwise directs, no further evidence shall be received on the Hearing of the Appeal and no grounds of objection shall be valid, which were not raised before the Determining Officer on redetermination.

46. Accordingly, I give no weight to Mr McCarthy's verbal description of his instructions that the Litigator was present at Court on 25 March 2019; that was said at the Hearing in this Appeal on 22 January 2020 for the first time. It was never reduced to writing with a Statement of Truth nor was it put in correspondence, and it contradicts the evidence from Trial Counsel Mr Shufqat Khan, that was put before the Determining Officer at the appropriate time.

47. I do not doubt Mr McCarthy's word as to what his instructions were, but that is not evidence and as the point was never in evidence before the Determining Officer, under Regulation 29(11) I would be entitled to disregard further evidence on this point if such had been provided at the Appeal Hearing. Since evidence of the Appellants having sight of the disc before Indictment 1 was stayed, was not produced at or prior to that Hearing, matters do not even reach that hurdle.

48. It is said, in the written submissions, that having considered the disc, it was apparent that there was an issue on the cell site evidence that placed the Defendant close to the scene of the crime and it is therefore asserted that the Defence analysis resulted in the determination that a Defence cell site expert was necessary, leading to the production of a cell site report over 140 pages that was served at the eventual trial.

49. There are several problems with that statement as well. First and foremost, it was not *"…having considered the disc…"* that it was apparent that there was an issue on the cell site evidence. On 25 March 2019 at 14:18, Defence for Thomas Connors requested cell site information and at 15:50 Counsel Mr Jeremy Robert Hill-Baker stated (for Defendant Howard) that the Defence had been asking for evidence for months and that it will take four weeks to get an Expert for the Defence. Hence cell site data was already an issue by close of business on 25 March 2019.

50. In addition, according to the Court Log on the morning of 26 March 2019 (at 10:59) the Prosecution addressed the learned Judge and stated that some further evidence has been uploaded, nothing further on cell site. A later entry (at 11:06) states that Counsel for Defendant Howard's position is as yesterday, and later still (at 11:08) the learned Judge gave Directions for the Trial, including a Direction that all phone evidence [must be served] by 7 May 2019, with provision thereafter for Expert Reports. There does not appear to be anything to make good the assertion that this Direction came about because of matters discovered by an overnight review of RAM1; it reads very much as if the cell site information was still to be served.

51. However, perhaps the biggest problem is that, even if the Defence analysis did result in the determination that a Defence cell site expert was necessary, leading to the production of a cell site report over 140 pages that was served at the eventual trial, that was the eventual trial on Indictment 2. The Appellants are entitled to claim RAM1 as PPE in respect of Indictment 2 as the LAA accepts.

52. There is no force in the statement that by poring over RAM1 between 15:55 on 25 March 2019 and 10:59 on 26 March 2019, the Appellants reached any conclusions of use and benefit in relation to cell site evidence, as it related to Indictment 1. Given that Indictment 1 was to do with Burglary and Theft, as opposed to Conspiracy to Commit Burglary and Theft, there is in contrast considerable force in Mr Rimer's submission at the Hearing that Indictment 1 never went into issues of cell site data or where that data put the Defendants relative to each other and to stolen or targeted property, in the way that Indictment 2 very clearly did.

53. I note the case of *R v Debenham* SCCO 10/12, in which Master Gordon-Saker said in relation to a PPE as follows:

"It seems to me that pages of prosecution evidence must mean pages served on the court during the course of the proceedings against the assisted person."

In practice, say the Appellants, this would entitle the lawyers to claim for material served up to the moment of the stay by the Judge. In relation to a disc of evidence which the lawyers seek to claim as PPE, if it was served before the conclusion of the proceedings and is relevant, it is then properly to be regarded as PPE. They go on to state that in a conspiracy case where telephones are an important feature, the evidence is routinely paid as PPE because its relevance is easily established.

54. That is correct and is an excellent argument to deploy in the claim for RAM1 in respect of Indictment 2, as that was a Conspiracy case. However, I do not accept that it assists in relation to Indictment 1 which was not a Conspiracy case. I also take the view that the Appellants have misunderstood the issue; they are entitled to claim RAM1, but the Determining Officer has discretion not to allow it as PPE unless he 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.

55. I note the case of *R v Idris Khan* 218/18 in which Master Rowley had to decide a case concerning electronic PPE on a disc served on the day of the Newton hearing and said at paragraph 22 that the PPE is a proxy for the weight of the case; however, the quote given in the written submissions cuts off that part of Master Rowley's decision that asserts that he does not doubt that it was considered because that is why Counsel for the Defendant asked for time to take instructions upon its contents and (it appears) was able successfully to argue that, for the purpose of sentencing, his client's role was that of courier rather than director.

56. According to the Appellants' written submissions, the LAA has not properly considered *R v Khan* and the submission that timing is important is against that decision. Whilst I note the learned Judge's decision in *R v Khan* that was clearly made on the facts in that case, which are quite different to the facts in this case, so that the (non-binding) decision in that case does not assist the Appellants here.

57. As to their submission that the LAA also ignores the reality, namely that the Appellant Solicitors and Counsel had the disc the day preceding the stay and hence had more than sufficient time to consider the content and did so, as shown

above, that is not 'the reality' insofar as it was never put to the Determining Officer and was not in evidence before this Court either.

58. I note the case of *R v Zameer* SCCO 145/18 which (per the Appellants) makes the point that in an electronic PPE case such as this, the fact payment is potentially made twice is irrelevant. However, the facts in that case are very different to the facts here. Zameer was charged with two separate assaults based upon unwanted sexual touching of two co-workers; the case does not descend into details but the defence was one of banter and horseplay in the workplace. Zameer was originally due to stand Trial for both assaults together, but at some point the Prosecution decided to sever the two cases and hear them separately. After Zameer was tried and convicted at the first Trial, the second was not proceeded with so that there was a claim for PPE in respect of the evidence on Zameer's phone in the Trial that did proceed, as well as in the Trial that cracked.

59. That is quite different from this case, as is the fact that in Zameer the Determining Officer originally allowed PPE on both the Trial and the cracked Trial claims, and Mr Rimer for the LAA endeavoured to argue at the Hearing that that was overly generous. Master Rowley had no difficulty in rejecting that argument on the basis that the information was clearly relevant to both cases and I respectfully agree entirely with how the learned Judge dealt with duplication in Zameer. Here, however, the circumstances are entirely different. The LAA asserts that the material on the disc was not relevant on Indictment 1; they accept that it was relevant on Indictment 2 and that PPE can be claimed in that case accordingly.

60. Per the Appellants, Mr. Rimer's suggestion that there was insufficient time to consider the material on disc and that this was a relevant circumstance that the Determining Officer was entitled to take into account in disallowing this disc on Indictment 1, fails when the facts show the disc was served well before the stay. However, on unpicking the facts as I have now done, it is clear that the disc was not served well before the stay; it was served after the stay in relation to Defendant Brown and at a time when it was or should have been clear to the Appellants that a stay would follow in respect of Defendant Howard in short order.

61. The assertion that the Determining Officer has failed to fully appreciate and apply the facts in coming to the conclusion that the discretion should be exercised against payment of the disc as PPE, is simply not correct. There is not, and never has been, any evidence before this Court or before the Determining Officer, to show that the Appellants ever saw the disc before Indictment 1 was stayed.

62. If, as their instructions to Counsel apparently state, they did spend time between the end of Day 1 and the beginning of Day 2, reviewing RAM1 then that was against a background of knowing that Indictment 1 was being dropped in favour of Indictment 2 on the charge of Conspiracy to commit Burglary and Theft, arising out of the same incidents and likewise based upon RAM1 amongst other evidence. As such, the Determining Officer's ruling that the work on those pages is recoverable in relation to Indictment 2 but is not recoverable in relation to Indictment 1 as PPE is in my view entirely correct.

63. Remuneration can (if appropriate) be claimed on an hourly rates basis under the Special Preparation scheme for time spent reviewing this material, which is in my view not 'applying hindsight', but is applying para 1(5) of Schedule 2 correctly. By reference to the substance, relevance, importance and context of this data, it was clearly a reasonable exercise of discretion by the Determining Officer, to disallow this material as PPE.

64. Given the lack of any evidence to show that the Appellants even saw the material before Indictment 1 was stayed, it is a matter for the LAA as to whether they would allow some time, by way of Special Preparation, for considering it. Given the very short time frame in which to do I would anticipate something in the order of 10 hours would be appropriate but I leave that to the parties.

65. In my judgement, and based upon the facts in this case, the allowance now made for the 'electronic' PPE under Indictment 1, which excludes RAM1 entirely, is reasonable and should not be increased. I allow no increase to the assessed figure and no costs for the Appeal accordingly.

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